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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 13 December 1974

relating to a proceeding under Article 85 of the EEC Treaty (IV/14.650 —
Bayerische Motoren Werke AG)

(Only the German text is authentic)

(75/73/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the European
Economic Community, and in particular Article 85
thereof;

Having regard to Council Regulation No 17⁽¹⁾ of 6
February 1962, and in particular Articles 4 and 5
thereof;

Having regard to the notification which the
Bayerische Motoren Werke Aktiengesellschaft,
Munich, submitted on 31 January 1963, pursuant to
Regulation No 17, concerning the standard forms of
contract in use for the sale of their products in
Germany;

Having regard to the publication of the essential
content of that notification pursuant to Article 19 (3)
of Regulation No 17, in *Official Journal of the Euro-
pean Communities* No C 98 of 16 November 1973;

Having regard to the Opinion delivered on 26
September 1974 by the Advisory Committee on
Restrictive Practices and Dominant Positions pursuant
to Article 10 of Regulation No 17;

Whereas :

I

1. The Bayerische Motoren Werke Aktiengesell-
schaft (BMW) had entered into distribution agree-
ments with selected German wholesalers and main
dealers who buy directly from BMW, which conform

to the standard form of contract notified to the
Commission. BMW had obliged such wholesalers and
main dealers to base their agreements with BMW
retail dealers on standard forms which BMW had also
notified to the Commission. The purpose of these
agreements was to promote sales of BMW motor vehi-
cles and motor cycles, spare parts, accessories, and
after-sales service in respect thereof, and to concen-
trate efforts in the fields of sales and after-sales service
on the goods covered by the agreements, in the parti-
cular territory within Germany assigned under the
agreements. Within such territories, dealers, whether
wholesalers, main dealers or retail dealers, were given
some protection against sales of BMW products by
BMW or a third party. BMW dealers in Germany, as
was the case with all BMW dealers in other countries,
were prohibited from delivering new BMW vehicles to
countries other than their own. On 3 March 1972,
BMW was sent a statement of the Commission's objec-
tions in respect of this prohibition on exports within
the common market and has no longer practised such
a prohibition.

2. BMW is in the course of revising all its distribu-
tion agreements throughout the common market. In
Germany revised distribution agreements for German
BMW dealers came into force on 1 January 1973. At
that time BMW introduced one standard form of
agreement for main dealers and in turn required these
main dealers to use a new standard form of agreement
when appointing retail dealers (see clause 12 of the
standard main dealer's agreement). These agreements
are worded almost identically. Following the publica-
tion of the essential content of the notification on 16

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

November 1973 ⁽¹⁾ pursuant to Article 19 (3) of Regulation No 17, observations on these standard agreements were submitted to the Commission (see 9 below). On the basis of these observations and the related intervention by the Commission, BMW made statements supplementing the notification with regard to the interpretation and application of certain clauses in the standard agreements and informed all BMW main dealers and retail dealers in Germany of the content of these statements by circular letter.

The following provisions containing obligations are to be found in the new agreements concluded with German dealers:

3. Each BMW dealer (main dealer or retail dealer) is to represent the interests of BMW within the territory assigned to him under his agreement, but conducts business under his own name, on his own account and at his own risk (see clauses 2 and 3.1, and the first sentence of clause 3.2 of the standard agreements; save where otherwise stated, further references are references to the standard agreements).

Each dealer undertakes *vis-à-vis* the other party to the contract (the principal, i.e. BMW or a BMW main dealer):

- i. to endeavour, within the territory covered by the agreement, to sell at least such quantity of the goods covered by the agreement as is specified by BMW in agreement with the main dealer on the basis of an estimate of demand and sales potential in the territory and of after-service potential (annual sales targets — clauses 1, 3.1 and 6); and further to place his orders monthly and give an estimate of his requirements for the following months (clause 5.1);
- ii. not to sell goods covered by the agreement to dealers not authorized by BMW, unless such sales are of genuine BMW parts for repair (second sentence of clause 1.1);
- iii. not to operate branches or distribution depots or use intermediaries outside his own territory, nor to advertise or canvass in any other way, outside his territory, unless the principal obligation under the agreement is fulfilled, namely the diligent promotion of sales and after-sales service within his territory (clauses 1, 3.1 and 6); in any event he is free to advertise in publications having a circulation outside his territory and to sell goods covered by the agreement in territories outside his own (second sentence of clause 3.2);

- iv. not without the consent of BMW, to sell, directly or indirectly, products of competing makes as specified below:

- new vehicles of another make;
- spare parts, exchange parts and accessories of other makes to other dealers;
- parts of other makes, which are not of the BMW standard of quality, to the customer for repair purposes; this does not apply to parts which are of no particular importance for the safety of BMW vehicles;

the consent of BMW may not be withheld if reasonable cause is shown, and in this respect the economic circumstances of the BMW dealer are to be taken into consideration; and

not, without the consent of BMW, to become an agent in any way for any other motor vehicle manufacturer or to have any direct or indirect interest in such an agency; such consent may not be withheld if reasonable cause is shown, and the grounds for the decision to withhold consent must be set out in writing and state the extent to which the attainment of the commercial objectives of BMW is hindered by the acceptance of another agency (clauses 3.6 and 13 (c) of the main dealer's agreement, 3.6 and 12 (c) of the retail dealer's agreement, and the BMW circular);

- v. to follow instructions given by BMW regarding advertising and to discontinue immediately any advertising to which BMW objects; in this respect BMW's authority extends only to advertising designed to draw attention to BMW products and their properties, but not to the advertising by BMW dealers of prices and conditions of sale (clause 3 (v) and the BMW circular);
- vi. to obtain the consent of BMW before participating in exhibitions or fairs; BMW may withhold its consent if such participation:
 - were to jeopardize the success of BMW's participation in the exhibition or fair, or
 - is in breach of obligations undertaken by BMW under the rules of the Bureau permanent international des constructeurs d'automobiles (B.P.I.C.A.) (clauses 6.3.2 and 13 (c) or 12 (e) and the BMW circular);

⁽¹⁾ OJ No 98, 16. 11. 1973, pp. 5 and 6.

- vii. to operate a business the layout of whose premises, equipment and technical and commercial management satisfy BMW's requirements (clauses 9 to 11, 13 and 12 (a) (b) and (d) respectively; instructions relating to spare parts service under the BMW dealer's agreement and the after-sales service instructions under BMW agreements);
 - viii. to operate a service department and workshop in accordance with BMW's requirements, to employ properly qualified staff and to ensure that they receive further training as required (clauses 6.2 and 7.2 and the servicing instructions referred to in vii above);
 - ix. to provide after-sales service in accordance with the instructions laid down by BMW (clauses 1.2 and 7), including taking delivery of BMW vehicles from car delivery firms, storage and delivery to customers, servicing and maintenance, repair, modifications, work under guarantee and extended free service (clause 7.1; after-sales service instructions under BMW agreements); to carry out the free pre-delivery check on the supply of a new BMW vehicle to a customer (clause 3.3 of the after-sales service instructions);
 - x. to maintain a stock of goods sufficient to satisfy expected demand in the territory (clauses 6.1 and 7.1 and the after-sales service instructions);
 - xi. to grant, on sale to the customer, a guarantee in the terms of the guarantee granted by BMW (clauses 5.3, 5.3.1 and 5.3.2; clause 4 of the after-sales service instructions for BMW dealers); to carry out work under guarantee for the customer free of charge, whether or not the customer has purchased the BMW product from a different BMW dealer whether in Germany or abroad (clause 4.6 of the guarantee instructions for BMW dealers);
 - xii. to use BMW trade marks without additions or alterations and only in such manner as is justified by the method and scope of business (clause 6.4);
 - xiii. to supply BMW with any information required on his trading situation and sales trends, market situation, stocks and expected demand (second sentence of clause 8, clauses 8.1 and 8.2; after-sales service instructions for BMW dealers).
4. Every main dealer further undertakes *vis-à-vis* BMW :
- i. not to conclude any standard agreements with BMW retail sellers or to modify or terminate existing agreements with BMW retail dealers without the consent of BMW (first sentence of clause 12 and second sentence of clause 12.3 of the main dealer's agreement);
 - ii. to conclude agreements at BMW's request with retail dealers selected by BMW (second sentence of clause 12) and to determine their field of activity (clause 12.1);
 - iii. to terminate at BMW's request any standard agreements concluded with appointed retail dealers (first sentence of clause 12.3);
 - iv. to ensure that appointed retail dealers keep adequate stocks and provide proper after-sales service (clause 12.2 (a) and (b));
 - v. to see that appointed retail dealers have the plant, equipment and staff required to cope with the volume of business (clause 12.2 (c)).
5. BMW undertakes *vis-à-vis* BMW main dealers and the latter *vis-à-vis* BMW retail dealers :
- i. to deliver goods in accordance with the conditions of sale and delivery published by BMW and under the terms and conditions of delivery as regards the sales of parts (clause 5);
 - ii. to set up no branches and appoint no further dealers in the territory and not to change the territory without giving the BMW main dealer or retail dealer at least 60 days' notice and giving him the opportunity of commenting on the planned reorganization (clause 3.3).
6. BMW undertakes *vis-à-vis* BMW main dealers :
- i. not to sell or deliver goods whether directly or indirectly to persons other than fleet operators, public authorities, racing drivers, foreign tourists, and staff of BMW or its subsidiaries (clause 3.4);
 - ii. to guarantee goods both towards main dealers and retail dealers in accordance with the conditions of sale and delivery (clause 5.3); to give effect to the guarantee by repairing or replacing defective parts (clause 6.2 of the conditions of sale and delivery) and to bear the reasonable costs of dismantling and fitting and the costs of the cheapest means of delivery (clause 6.3 of the conditions of sale and delivery); to reimburse BMW dealers for their expenditure on services provided under guarantee and extended free service, broken down into expenditure on labour, BMW replacement parts and goods and services supplied by third parties (clauses 4.7 to 4.9 of the guarantee instructions for BMW dealers).
7. The standard agreements are of five years' duration but may be terminated on six months' notice at any time by the party other than the principal; the principal (BMW or the main dealer) may terminate the agreements immediately, but only for a substantial breach; for less substantial breaches the agreements may be terminated on three months' notice, such notice to run from a date six months after a warning is given (clauses 14 to 17).

8. The rules governing selective distribution (clauses 3 (ii), (v) to (viii), 4 and 5 (ii) appear to have the following application in practice. BMW's qualitative requirements of BMW dealers for their selection and retention for the duration of the agreement are applied uniformly. Furthermore, in making the quantitative decision whether to increase the number of dealers in the German network or to conclude a new agreement to replace one that has expired, BMW will in each case need to consider whether turnover and service will be improved. Particular factors to be taken into account are whether the applicant has sufficient personnel and equipment to fulfil BMW's requirements as to sales promotion, and whether, having regard to sales expectations and the presence of existing BMW dealers, he can achieve the minimum income necessary to fulfil his obligations.

BMW further stated that its right under the agreement to obtain information from dealers (see 3 (xiii) above) would not be used to prevent goods being sold outside their territory.

9. After publication of the essential content of the notification pursuant to Article 19 (3) of Regulation No 17 (see 2 above), the Commission received observations from two national associations of wholesalers, from an international association of motor vehicle traders, from a national motoring association and from a BMW general importer. The observations may be summarized as follows:

Wholesale trade in spare parts and accessories is in competition with BMW, so that a restriction on dealing in competing products imposed on BMW dealers which was too extensive would limit excessively a wholesaler's selling outlets, to the disadvantage of both the consumer and the supplier of such a wholesaler. Moreover many suppliers, since they also supply vehicle manufacturers with original equipment and spare parts, are often in a position of considerable economic dependence. Dealers appointed by BMW should at least be allowed to deal in competing products through subsidiaries; their obligation to supply BMW with information should not be too extensive; advertising and participation in fairs or exhibitions should be a matter for cooperation between the two parties to the agreement, and not depend merely upon the wishes of BMW; the discretion enjoyed by BMW in selecting BMW main dealers and retail dealers is too wide. As far as the sale of BMW products in other countries of the Community is concerned, many of the clauses cannot be enforced in the way that BMW applies them in Germany, this is particularly true of the prohibition on dealing in competing products.

10. Agreements affecting BMW dealers in the other countries of the common market outside Germany are not the subject of these proceedings. In some countries of the common market, in which BMW distributes its products through its own subsidiaries and not through independent importers, standard agreements similar to those in Germany are applied as far as market and regional conditions and national law permit.

II

11. The agreements notified to the Commission by BMW (which were applied until 1972) between BMW and German BMW-wholesalers and main dealers (who bought direct from BMW) and between the latter and appointed BMW retail dealers (see 1 and 2 above) were agreements falling within Article 85 (1) of the EEC Treaty. The prohibition contained in those agreements on the export of new BMW vehicles by BMW dealers to other Member States was one of the principal measures which had as its object and effect the restriction and distortion of competition within the common market, and was likely to affect trade between Member States.

12. The condition laid down in Article 85 (3) of the EEC Treaty, under which the provisions of Article 85 (1) may be declared inapplicable, were not satisfied in the case of these agreements. Because of the export prohibition, consumers were not guaranteed a fair share of the benefits which might otherwise result from exclusive dealing agreements, as the export prohibitions led to a form of territorial protection enabling different retail prices to be charged in the various countries of the common market. The export prohibitions were not indispensable to the improvement of distribution and protection of the goods. Such improvements are possible with less restrictive provisions.

III

The use by BMW of the new forms of both main dealer and retail dealer agreements (see 2 to 8 above) leads to agreements between undertakings, produces several forms of restriction and distortion of competition within the common market, and is likely to affect trade between Member States.

13. The obligations imposed on BMW dealers to operate a business of a certain scale (see 3 (vii) and (viii) above), to provide an after-sale service complying with instructions laid down by BMW (see 3 (ix) above), to maintain a certain stock of goods (see 3 (x) above) and to provide a guarantee on sale to a customer in the terms of the guarantee granted by BMW (see 3 (xi) above) specify objective criteria and constitute minimum requirements which BMW applies

uniformly to the selection of BMW main dealers and retail dealers in Germany. These criteria and requirements do not preclude the offer of more extensive services of greater advantage to the customer. They do, however, lead to the exclusion of those undertakings which are prepared to sell BMW products but which are not prepared to provide the additional service required by BMW for the distribution of its products or to provide the service depots mentioned above. The combined effect of the objective criteria and obligations is to prevent, to an appreciable extent, the appointment of undertakings as BMW dealers and their admission to the trade in BMW products.

As in any particular case BMW can exclude from recognition as a BMW dealer even those undertakings which satisfy all the objective criteria and are prepared to fulfil the minimum obligations (see 8 above), the BMW distribution system has an even more restrictive effect on competition in BMW products, and leads to the quantitative selection of dealers.

The obligations of BMW main dealers *vis-à-vis* BMW as regards selecting BMW retail dealers, placing them under contract, terminating or modifying their standard form of agreement and determining and supervising their activities (see 4 above) result in main dealers having little scope, when appointing retail dealers to follow their own views on sales policy where these differ from those of BMW. Selection depends, not on various individual decisions by BMW main dealers based on their respective sales policies, but on the wishes of BMW.

The result is to enable BMW to restrict access to trade in BMW products at all levels of distribution.

14. Since neither BMW main dealers nor BMW retail dealers are allowed to sell goods other than original BMW parts for repair purposes to dealers not authorized by BMW (see 3 (ii) above), all independent dealers who are not part of the BMW distribution system are denied the opportunity of selling new BMW vehicles, and similarly denied the opportunity of trading in BMW parts except where they themselves use such parts in repairs rather than reselling them. This exclusion affects all independent dealers throughout the common market.

15. In so far as BMW has undertaken *vis-à-vis* its main dealers, and the latter *vis-à-vis* their retail dealers, to appoint further dealers in the territory and to change the territory only on certain conditions (prior notification and opportunity of commenting)

(see 5 (ii) above), potential dealers of BMW products are prevented from concluding standard agreements for the acquisition and sale of BMW products without first consulting the authorized BMW dealer in that territory; it is also made difficult for BMW simply to establish subsidiaries (see 5 (ii) above) through which to deliver products directly to customers and to provide them with service.

16. Because of BMW's undertaking to sell only in specified cases, whether by itself or through its subsidiaries, to consumers (see 6 (i) above), direct sources of supply are denied to the consumer in that he may not approach the manufacturer or its subsidiaries in the common market, except in the abovementioned cases.

17. The prohibitions, affecting all BMW dealers, on operating branches or distribution depots or using intermediaries in any other territory, and on advertising and otherwise canvassing in another territory, unless they fulfil their obligation under the agreement to promote diligently sales and after-sales service in their own territory (see 3 (iii) above), restrict their freedom to promote sales outside their territory, even in respect of customers and BMW dealers appointed in countries other than Germany.

18. Since BMW dealers may not, without the consent of BMW, become the agents for any other motor vehicle manufacturers nor sell competing products for resale, and since they are allowed to use and to sell to the customers parts of other makes which are of particular importance for the safety of BMW vehicles only where they satisfy BMW standards of quality (see 3 (iv) above), other manufacturers and suppliers of motor vehicles and parts cannot to that extent use these German dealers as sales intermediaries.

19. All the clauses mentioned (13 to 18) are also likely to have an appreciable effect on trade between Member States. Owing to the selective system (see 13 to 15 above), those German undertakings which are prepared to deliver BMW products to other Member States but have not been authorized by BMW are thereby prevented from delivering to purchasers in such countries. As BMW is also to ensure that its own subsidiaries in other Member States will deliver only in the agreed exceptional cases to consumers in Germany (see 16 above), trade between Member States is to that extent affected. The intensity of trade with

Member States is also diminished in that BMW dealers are prevented from promoting sales outside their territory to consumers or selected BMW dealers in other Member States (see 17 above). Finally, even the restricted scope of the prohibition on dealing in competing products (see 18 above) has a diminishing effect on the exchange of goods between Member States, because German BMW dealers are largely excluded from becoming distributors of competing products emanating from other Member States and from selling such parts as are essential to safety and do not satisfy BMW standards of quality.

Article 85 (1) is therefore applicable to the BMW standard forms of agreement.

IV

The standard forms of agreement contain further obligations which, normally applied, place no restrictions on competition within the meaning of Article 85 (1) (see also Article 2 (2) of Commission Regulation No 67/67/EEC⁽¹⁾).

20. The obligation undertaken by BMW dealers to follow instructions given by BMW regarding advertising does not amount to an appreciable restriction of competition, provided it is confined only to advertising designed to draw attention to BMW products and their properties. The Commission has no evidence which might suggest that BMW is operating these provisions in a restrictive manner, especially as BMW expressly stated in the circular to BMW dealers that its authority did not extend to advertising by BMW dealers concerning prices and conditions of sale (see 3 (v) above).

In so far as BMW is entitled to refuse to consent to BMW dealers participating in an exhibition or fair under the conditions mentioned in the circular (see 3 (vi) above), the Commission's decision on the scope of this clause remains subject to the proceedings concerning decisions on the participation at exhibitions and fairs notified by the 'Bureau permanent international des constructeurs d'automobiles' (IV/417).

21. The obligation to use BMW trade marks in a specified manner (see 3 (xii) above) does not come within the scope of Article 85 (1), as the resulting prohibition on using these trade marks in any other way is an incident of the protection under the law of trade marks to which BMW is entitled.

22. Furthermore it is not to be assumed that the obligation undertaken by BMW dealers to supply

BMW with information on their trading position, sales trends, the market situation, stocks and expected demand (see 3 (xiii) above) amounts to a restriction of competition simply because BMW thereby learns of all the ways in which BMW dealers compete among themselves, and in which competing products are sold. A final question to be considered was whether the power possessed by BMW or the BMW main dealer as principal to terminate a BMW contract for substantial breach (see 7 above), or their power to alter the territory or instal further dealers in such a territory (see 4 and 5 (ii) above), amounted to an economic sanction which could be used to impose more extensive restrictions of competition on BMW dealers than those apparent from the wording of the agreement. Provided BMW does not recommend BMW dealers not to sell BMW products outside the territory or not to sell competing products, or does not maintain resale prices, and offers neither incentives nor disincentives in order to attain these objectives, it cannot be assumed that the opportunities afforded to the principal to collect information, to terminate the agreement and to alter the territory have a restrictive effect on competition (see 8 above). At the present time, the Commission has no evidence to suggest that the BMW distribution system would be operated in such a manner.

V

23. The Commission has to decide whether the selective distribution system operated by BMW, containing a partial prohibition on dealing in competing products, can be exempted under Article 85 (3) from the prohibition contained in Article 85 (1) of the EEC Treaty.

In considering the selective distribution system operated by BMW in Germany, the Commission is prepared to accept that such a system may contribute both to improving the production and distribution of goods and to promoting technical progress.

24. Limiting the number of dealers can be regarded as more beneficial, so far as it is based on the requirement by BMW of minimum standards for selection and continued employment of dealers. By such means the following can in particular be ensured:

- that BMW motor vehicles are received and stored in technically perfect condition and are delivered to customers after a pre-delivery check carried out in accordance with BMW's instructions (see 3 (vii) to (ix) and 13 above);
- that both maintenance and preparation and also services carried out under guarantee and extended free service are not only sufficiently available but

⁽¹⁾ OJ No 57, 25. 3. 1967, p. 849/67.

are also of an adequate quality for the consumer (see 3 (ix) and (xi) and 13 above);

- that any modifications to vehicles which become necessary may be carried out (see 3 (ix) and 13 above);
- that sufficient plant, equipment and BMW-trained personnel are available for the provision of the above services (see 3 (vii) and (viii) and 13 above);
- that the store of spare parts is adequate in range and quality (see 3 (x) and 13 above); and
- that BMW may rapidly and fully inform its appointed dealers of technical problems as they arise (see 3 (xiii) and 22 above).

BMW has in addition reserved the right to make individual appointments from those applicants satisfying the objective requirements for BMW dealers, on the basis of considerations for which there are no universally predictable and objective criteria (see 8 and 13 above). The reservation of such a right is to be accepted in the present case, in so far as it relates to the selection by BMW of its main dealers. The restrictive influence which BMW has over the selection of BMW retail dealers by BMW main dealers facilitates rationalization, because BMW also cooperates directly with BMW retail dealers with the aim of improving service. The cooperation between BMW and its dealers, which goes beyond the mere marketing of products, provides, in the view of the Commission in this particular case, a major factor justifying the BMW selective distribution system. It can be considered to be a method of rationalizing the sale and servicing of BMW vehicles and parts and thereby provides a better service to the consumer than a system of free marketing to which such cooperation is not attached. Motor vehicles, being products of limited life, high cost and complex technology, require regular maintenance by specially equipped garages or service depots, because their use can be dangerous to life, health and property and can have a harmful effect on the environment. It is therefore of importance that those responsible for the maintenance of vehicles are made aware of the latest technical knowledge which the manufacturer has acquired in the development and construction of the vehicle. Moreover, continual cooperation between BMW and its main dealers and retail dealers may assist BMW in the preparation of its maintenance instructions and training programmes, and may also lead indirectly to improvements in the design of vehicles.

25. The restrictions imposed by BMW on its main dealers and by the latter on retail dealers as regards the appointment of further dealers or changing the territory (see 5) (ii) and 15 above) do not preclude the conclusion of main dealer or retail dealer agreements, but only delay the conclusion of such agreements in the interests of main dealers or retail dealers already appointed. The latter are thus given an opportunity to remedy any poor performance which has become apparent, so that BMW or a main dealer may consider whether the addition of further main dealers or retail dealers to the group already selected, or a change in the territory covered remains necessary. The above provision is closely connected with the clauses on selection and finds its justification in the same considerations as justify the latter (see 24 above).

26. The obligation undertaken by BMW not to sell vehicles directly to consumers (see 6 (i) and 16 above) provides a line of demarcation between the activities of BMW and its dealers, allows BMW to concentrate its marketing activity, and relieves BMW of the need to maintain a multitude of business relationships. It is accepted that the obligation leads to an improvement of sales promotion by the appointed dealers and thus rationalizes distribution.

27. The restrictions imposed on BMW dealers from taking certain measures to promote sales outside their territory (see 3 (i), 3 (iii) and 17 above) may be similarly conducive to concentration of efforts in selling BMW products and to rationalization in that they channel dealers' activities primarily towards potential purchasers in their own territory without impeding sales to consumers and other BMW dealers outside the territory.

28. The fact that BMW dealers may not deal in competing products, should BMW withhold its consent, does mean that suppliers of motor vehicles, parts and accessories of makes other than BMW cannot normally use BMW dealers as sales intermediaries (see 3 (iv) and 18 above). Nevertheless the advantages of this clause outweigh its disadvantages. Since in principle appointed BMW dealers have to concentrate their efforts in selling vehicles and parts on BMW products, it may be expected that technical expertise and advice are provided for BMW vehicles and parts and that competition between the products of the different manufacturers of motor vehicles and parts is strengthened at the different levels of distribution.

29. In the present case it can also be accepted that consumers receive a fair share of the benefit resulting from the improvements and progress achieved through the standard forms of agreement used by BMW. The measures which are restrictive of competition (see 24 to 28 above) not only have direct advantages for the consumer in the form of improved service, but also allow adequate competition at the distribution level, so that there remains a pressure to pass on to consumers the benefits resulting from rationalization. Such competition is assured by the fact that not only are consumers free to purchase goods and request service wherever they wish within the common market, but also that BMW dealers are free to purchase BMW products not only from the BMW dealer for their territory but also from any other BMW dealer anywhere in the common market (see 27 above). A corresponding freedom is enjoyed by the consumer, who may choose parts of other makes from BMW dealers, unless they are such as are of particular importance for the safety of BMW vehicles and do not satisfy the standards of quality of BMW parts (see 28 above).

30. The restrictions imposed on parties to the standard agreements are considered to be indispensable to the attainment of the improvements and technical progress mentioned.

The provisions on selective distribution (see 24 and 25 above) are indispensable, because on economic grounds a continuing cooperation between BMW and dealers would be subject to a limitation if BMW had to cooperate with all dealers prepared to sell BMW goods and provide pre- and after-sales service to customers. The minimum requirements placed by BMW on the provision of service could not be met if BMW were only to issue service instructions to each main dealer or retail dealer on delivery of its products. Moreover, BMW has left untouched the option of every customer to have his vehicle serviced at an independent establishment, the latter being able to purchase all its requirements of BMW parts from any BMW main dealer or retail dealer.

The creation by BMW, with the assistance of appointed dealers, of a BMW service network does not prevent third parties from servicing BMW vehicles. In operating the selective system, BMW is doing no more than ensure that, in addition and parallel to servicing by third parties, there is a service network which, because of the cooperation between BMW,

BMW main dealers and BMW retail dealers, can provide the kind of service which BMW considers necessary for the maintenance and safety of its vehicles. Since consumers have complete freedom in purchasing BMW products within the common market and can take delivery from any undertaking they wish to act on their behalf, the restrictions concerned with selective distribution are in this respect limited to their essential content.

The obligation undertaken by BMW not to sell to consumers (see 26 above) and the restrictions imposed on BMW dealers on taking certain measures to promote sales outside their territory (see 27 above) are similarly indispensable; for only restrictions of this nature can provide a more effective encouragement to promote sales within the territory. The obligation undertaken by BMW dealers to sell minimum quantities within their territories, such minimum quantities being agreed by BMW with the main dealer on the basis of estimates (see 3 (i), 17 and 27 above), is also no more restrictive than is essential. By comparing the estimated and actual sales figures, an account can be taken of goods covered by the agreement which the BMW dealer did not obtain from his principal. Figures for goods required and for which payment is due, must be declared to the principal at monthly intervals and at the same time an estimate given of requirements for the following month (see 3 (i) above). In giving such estimates, the BMW dealer can provide for those quantities of goods which he expects to sell outside his territory.

The prohibition against dealing in competing products (see 28 above) is also confined to its essential content. BMW dealers are indeed prohibited, where BMW withholds consent, from selling new motor vehicles of other makes, from selling parts of other makes to dealers, and from selling to consumers such parts as are particularly important for the safety of BMW vehicles and which do not comply with the standard of quality of BMW parts. But BMW dealers may ask their principal to relax this prohibition against dealing in competing products, where they can show reasonable cause (see 3 (iv) above). In such cases they are entitled to be allowed to sell such competing products as least interfere with the sale of BMW products. Moreover, the prohibition against dealing in competing products does not apply to the sale to the consumer of accessories of other makes which are of no particular importance for the safety of BMW vehicles. Furthermore, the sale to the consumer of parts of other makes and their use for repair purposes is in any case not restricted where they comply with the standard of quality of BMW parts. A prohibition against dealing in competing products which is restricted in this way allows sellers of accessories and parts of other makes

adequate sales opportunities without impairing the quality of the BMW dealer's service.

31. The BMW standard agreements provide the parties with no opportunity to eliminate competition in respect of a substantial part of the goods concerned. In the first instance, they concern BMW vehicles, which compete with a range of other vehicles throughout the common market; in the second, as has already been stated (see 29 and 30 above) competition between BMW and competing products is maintained at the various levels of distribution within the BMW network.

For none of its motor cars — even with a narrow definition of the market — does BMW have a share of the German market which would exclude competition in respect of a substantial part of the products concerned. In that respect the Commission had to consider whether the fact that in Germany BMW has a considerable share of the market in motor cycles of 250 cc capacity and above militated against the granting of an exemption. The BMW share of motor cycles of 250 cc capacity and above registered in Germany in 1972 was approximately 32 %. In 1973 BMW produced 197 446 cars and 20 856 motor cycles and sold 193 378 cars and 19 918 motor cycles; its turnover for motor cars was DM 1 040 000 000 and for motor cycles DM 79 035 000. Bearing in mind the lesser importance of the trade in motor cycles when compared with that in motor cars and the great similarity in sales and service methods for the two products, it would be unreasonable to impose on BMW a different method of distribution for motor cycles; moreover, BMW is subject to effective competition in the motor cycle market in Germany and even more so in the other countries of the common market.

All the conditions laid down in Article 85 (3) have therefore been fulfilled.

VI

32. Pursuant to Article 6 (1) of Regulation No 17, the date of operation of the exemption under Article 85 (3) is to be 1 January 1973, since it was on that date that BMW began to use their new standard forms of agreement, which were covered by the previous notification.

33. The new standard forms of agreement are valid until 31 December 1977. It is considered appropriate to limit the period of validity of the exemption under Article 85 (3) in accordance with Article 8 (1) of Regulation No 17 to 31 December 1977, so that the Commission may thereafter reexamine the operation of the BMW distribution system.

34. BMW had notified the Commission of the earlier agreements, pursuant to the second sentence of

Article 5 (1) of Regulation No 17, before 1 February 1963. These agreements did not satisfy the conditions laid down in Article 85 (3) (see 11 and 12 above). However, BMW has amended the new standard forms of agreement (see 1 and 2 above) in such a way that they do now satisfy the conditions laid down in Article 85 (3). Under Article 7 (1) of Regulation No 17, the Commission may fix the period during which the prohibition contained in Article 85 (1) shall apply. As BMW ended the export prohibition when it became clear that an exemption for such restriction could not be granted in the automobile sector, the necessary conditions prevail for the Commission to state that the prohibition shall not apply from 13 March 1962, the date of entry into force of Regulation No 17, to 1 January 1973, the date on which the old standard agreements were replaced by the new.

35. Conditions are to be attached to the Decision so that the Commission may be in a position to examine whether access to trade in motor vehicles, spare parts and accessories is being unreasonably restricted by the BMW distribution system, and whether the cooperation between BMW and its dealers is being used to restrict competition to an extent greater than is apparent from the content of the distribution agreements. Annual reports are to be submitted to the Commission giving details of any cases where BMW has refused to conclude distribution agreements or has terminated or amended such agreements, or where BMW has refused permission to its dealers to sell competing products. These requirements are based on Article 8 (1) of Regulation No 17,

HAS ADOPTED THIS DECISION :

Article 1

The provisions of Article 85 (1) of the Treaty establishing the European Economic Community are, pursuant to Article 85 (3), declared inapplicable to the standard forms of main and retail dealership agreement made by the Bayerische Motoren Werke Aktiengesellschaft and used by them in Germany since 1 January 1973.

This Decision shall have effect from 1 January 1973 to 31 December 1977.

Article 2

The prohibition contained in Article 85 (1) shall not be applicable to the standard forms of wholesaler, main dealer and retail dealer agreement made and used in Germany by the Bayerische Motoren Werke

Aktiengesellschaft during the period 13 March 1962 to 1 January 1973.

Article 3

The Bayerische Motoren Werke Aktiengesellschaft is hereby required to submit an annual report to the Commission, the first to be prepared by 31 December 1975, setting out:

- any cases of refusal to conclude distribution agreements in Germany, and any termination or modification of such agreements,
- any cases where BMW dealers in Germany are refused permission to sell competing products.

Article 4

This Decision is addressed to the Bayerische Motoren Werke Aktiengesellschaft, 8 München 40, Petuelring 130.

Done at Brussels, 13 December 1974.

For the Commission

The President

François-Xavier ORTOLI

COMMISSION DECISION

of 19 December 1974

relating to a proceeding under Article 85 of the EEC Treaty (IV/560 — Duro-Dyne — Europair)

(Only the English and French texts are authentic)

(75/74/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof;

Having regard to Regulation No 17 ⁽¹⁾ of 6 February 1962, and in particular Articles 5 to 8 thereof;

Having regard to the notification submitted on 31 October 1962 pursuant to Article 5 (1) of Regulation No 17 by Societe Van Den Bosch S.P.R.L., of Ixelles, Belgium, part of whose business, and in particular that covered by the agreement in question, was transferred on 11 January 1968 to Europair International SA of Ixelles (hereinafter called 'Europair'), relating to an agreement concluded on 24 September 1956 with Duro-Dyne Corporation of New York, USA, hereinafter called Duro-Dyne;

Having regard to the publication in *Official Journal of the European Communities* No C 73 of 29 June 1974 of a summary of the notification, as required by Article 19 (3) of Regulation No 17;

Having regard to the Opinion obtained of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17 on 16 October 1974;

Whereas:

I

The current version of the agreement notified contains the following provisions:

Duro-Dyne, which is engaged in the manufacture and distribution of highly specialized products designed mainly for use in heating and air-conditioning installations, has appointed Europair to be the exclusive general distributor of products bearing the Duro-Dyne trademark in Belgium, the Netherlands, Luxembourg, the Federal Republic of Germany, Switzerland, France, Italy, the United Kingdom, Denmark, Ireland and South Africa. The appointment therefore covers, in addition to South Africa and Switzerland, all the Member States of the EEC.

The range of products which Europair has agreed to market consists of several hundred varied articles, including valves, screws, flexible couplings and electric welding machines.

Europair buys and sells on its own account and is free to fix its resale prices; it undertakes to maintain an adequate stock of Duro-Dyne products and to provide a satisfactory technical service and to promote sales in the different territories assigned to it; every six months it is to provide Duro-Dyne with information concerning sales, the number of customers and quantities purchased.

Duro-Dyne undertakes to assist Europair in the promotion of sales in all the territories covered by the agreement. It provides a one-year guarantee against faults in construction.

Europair is engaged both in the manufacture and importation and the exportation of heating and air-conditioning equipment. It markets a wide range of products of its own manufacture supplemented by those which are covered by the contract with Duro-Dyne. Its total turnover exceeds Bfrs 500 million.

With the exception of France where it markets directly, Europair entrusts the distribution of its products to an exclusive dealer in each country of the common market. It offers its products to these dealers at identical prices. The agreements concluded with them satisfy the conditions laid down in Commission Regulation No 67/67/EEC ⁽²⁾ of 22 March 1967 for the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements, as amended by Regulation (EEC) No 2591/72 ⁽³⁾ of 8 December 1972, so that the prohibition in Article 85 (1) will not apply to them until 31 December 1982. In particular, under these agreements each dealer is free to resell outside the territory assigned to him.

There have been no objections from third parties following publication of the notification, pursuant to Article 19 (3) of Regulation No 17, in the *Official Journal of the European Communities*.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 57, 25. 3. 1967, p. 849/67.

⁽³⁾ OJ No L 276, 9. 12. 1972, p. 15.

II

Under Article 85 (1) of the Treaty, all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited as incompatible therewith.

The agreement in question is an agreement between undertakings under which Duro-Dyne has bound itself to deliver only to Europair in the territory concerned, thus preventing all other undertakings in the common market from buying the products covered by the agreement direct from Duro-Dyne. This undertaking for exclusive supply not only restricts the freedom of the parties to the agreement but also affects the position of those third parties, particularly other retailers established in the EEC, who might wish to obtain supplies of the products covered by the agreement direct from Duro-Dyne.

This restriction of competition has an appreciable effect on many of the individual products covered by the agreement; for example, it is estimated that Duro-Dyne has between 20 % and 30 % of the EEC market in ready-made flexible couplings, about 10 % of the market share in valves, and only few direct competitors in the market for electric welding machines.

This agreement is capable of affecting trade between Member States. Duro-Dyne products have an appreciable share of the EEC market. But for the agreement other dealers in the EEC would have been able to buy, and would have bought, directly from Duro-Dyne for resale in their own or in another Member State. As a result of the agreement Duro-Dyne products can only be imported into the EEC for resale in the various Member States either directly through Europair and its distributors or indirectly through a distributor outside the EEC. The flow of inter-state trade in the products in question will therefore develop on lines other than those which would have prevailed without the restrictions caused by the agreement.

This agreement accordingly comes within the scope of Article 85 (1).

III

Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable to the agreement if it 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.

1. Commission Regulation No 67/67/EEC does not apply to the agreement in question since the latter relates not to resale within a specific part of the territory of the common market but to resale within the whole of that territory.

Nevertheless, in the present case the existence of a single exclusive distributor responsible for importing an extensive range of American products into the whole territory of the EEC does contribute to improving the distribution of these products within the common market.

For in this way Duro-Dyne can consolidate the distribution of its production. It is not obliged to maintain numerous business contacts with distributors in the various Member States and the fact that it entrusts the organization of the sale of its products within the EEC to one general distributor makes it easier to overcome difficulties resulting from linguistic, legal or technical differences. This is particularly advantageous since the products concerned, which are mostly small accessories for heating and air-conditioning installations, consist of a large number of varied articles which have to conform to the various systems existing in the common market and comply with the necessary technical specifications.

The agreement notified therefore makes the promotion of the sale of the products concerned easier and permits more intensive marketing to be undertaken and ensures continuity of supplies while at the same time rationalizing distribution.

Furthermore, it is because Europair has undertaken on Duro-Dyne's behalf, in return for exclusive rights, not only to promote sales of the products covered by the agreement within the EEC, but to maintain an adequate stock of such products and to provide satisfactory technical service, that the products of Duro-Dyne are able to be competitive in the market.

In addition, by channelling through Europair the import into the EEC of a large range of fairly low-priced products from a relatively distant third country, the agreement enables import formalities to be streamlined and the incidence of transport costs on unit prices to be reduced.

Finally, since the agreement in question relates to products which complement and supplement those of Europair's own manufacture, the latter is thus in a position to offer a greater selection of heating and air-conditioning components to consumers within the common market.

It can, therefore, properly be concluded from the foregoing appraisal of the facts that the existence of the exclusive dealing agreement between Duro-Dyne and Europair produces a better system of distribution than would otherwise be the case if there were no agreement for exclusive dealing.

2. The agreement allows consumers a fair share of the resulting benefit. Given the pressure of competition both on the markets in the various components concerned and on the market in the whole range of products, Europair must pass on the advantages described above in the terms it offers to its own dealers in the Member States of the EEC.

Each of these dealers must in turn take into account in its sales policy not only the competition of similar products to those of Duro-Dyne but also, since there is no export prohibition in the sub-distribution contracts, the competition of Duro-Dyne products coming directly or indirectly from other Europair dealers. It is, therefore, in the interest of dealers to offer the products concerned to consumers on the most favourable terms.

3. The advantages indicated in point 1 of this Section could only be obtained at the price of a restriction of competition, that is by the grant to Europair of exclusive rights in respect of the whole territory of the EEC. The Commission believes, on the facts available, that in the present case the improvement of distribution could not be as well achieved by any other sales system.

The agreement notified does not contain any other restrictions of competition.

4. Duro-Dyne products are in direct competition with comparable products offered for sale in the common market by a number of other undertakings. Moreover, Europair, as principal exclusive distributor, does not enjoy absolute territorial protection. In particular, Duro-Dyne has not undertaken to refrain from making indirect deliveries to the area covered by the agreement; thus undertakings other than Europair

may acquire the products covered by the agreement through dealers other than Duro-Dyne situated outside the territory;

Furthermore, competition is maintained at the final distribution stage, since Europair applies a single price list for transactions with its own dealers and the distribution system set up by it permits parallel imports as between the various territories of the common market.

Consequently, the agreement does not give the undertakings concerned the opportunity to eliminate competition in respect of a substantial part of the products in question.

All the requirements of Article 85 (3) are therefore satisfied.

IV

The Decision is made retroactive to 13 March 1962, as is permitted under Article 6 (2) and is issued for a specified period, as is required under Article 8 (1) of Regulation No 17. For the purpose of fixing this period, it can be assumed that the main grounds on which the Decision is based will not change as long as the sub-distribution agreements fulfil the requirements of Regulation No 67/67/EEC,

HAS ADOPTED THIS DECISION :

Article 1

The provisions of Article 85 (1) of the Treaty establishing the European Economic Community is hereby declared pursuant to Article 85 (3) thereof to be inapplicable to the exclusive distribution agreement at present in force between Duro-Dyne Corporation of New York and Europair International SA of Ixelles, Belgium.

Article 2

This Decision shall take effect from 13 March 1962 and shall apply until 31 December 1982.

It is addressed to Europair International SA of Ixelles (Belgium), and to Duro-Dyne Corporation of New York (USA).

Done at Brussels, 19 December 1974.

For the Commission

The President

François-Xavier ORTOLI

COMMISSION DECISION

of 19 December 1974

relating to a proceeding under Article 86 of the EEC Treaty (IV/28.851 —
General Motors Continental)

(Only the Dutch text is authentic)

(75/75/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 86 thereof;

Having regard to Council Regulation No 17⁽¹⁾ of 6 February 1962, and in particular Articles 3 and 15 (2) (a) thereof;

Having regard to the Commission Decision of 26 July 1974, taken under Article 9 (2) and (3) of Regulation No 17, to take proceedings against General Motors Continental NV, Antwerp;

Having regard to the Opinion of the Advisory Committee on Restrictive Practices and Monopolies, delivered under Article 10 of Regulation No 17 on 28 November 1974;

Whereas :

I

1. Only those vehicles or trailers which satisfy the requirements of the royal decree of 15 March 1968 on technical standards (*arrêté royal* of 15 March 1968 published in the *moniteur belge* of 28 March 1968 as amended by *arrêts royaux* of 14 June and 4 August 1968, 5 January 1970, 14 January 1971 and 9 August 1971) may be used on the public highway in Belgium. To this end, every type of chassis or unit-construction vehicle, manufactured or assembled in Belgium, or imported for use in that country must be approved by the Minister for Transport or his representative, according to the procedure laid down in the above-mentioned decree (*agrément du type*). As soon as a particular type of vehicle has been the subject of an approval (*procès-verbal d'agrément*, PVA), the manufacturer or his sole authorized agent is obliged to issue a certificate of conformity (*certificat de conformité*) in respect of each vehicle of that type in use on the road, to show that the vehicle complies with the standard of that type. The manufacturer or his sole authorized

agent must affix a type-shield (*plaque d'identification*) to each vehicle.

Where the manufacturer is established abroad, an application for recognition as a qualified manufacturer must be accompanied by proof that the manufacturer has authorized a person established in Belgium to undertake the obligations arising from the regulations on the approval of types of chassis or (unit-construction) vehicles. Only one agent may be authorized for each category of vehicle.

These provisions apply to new vehicles. Following instructions from the Belgian Minister of Transport, since 15 March 1973 the state testing stations have no longer accepted vehicles which have been registered abroad for less than six months for the issue of a certificate of conformity (*certificat de conformité*) so that since that time the manufacturer's agent has had the sole responsibility for delivering a certificate of conformity in respect of such vehicles.

2. For the purposes of the abovementioned decree, General Motors Continental NV (GMC), a company incorporated under Belgian law, is the sole authorized agent for Adam Opel Aktiengesellschaft, passenger car manufacturers, and for the other manufacturers belonging to the General Motors group. Whenever a firm belonging to the General Motors Group outside Belgium decides to market one of its vehicles in Belgium, GMC accepts responsibility for applying for type approval (PVA). It obtains general approval for Opel and Vauxhall models. For American models it applies either for low-volume type approval, valid for up to 10 units per year, or for a general type approval. In respect of the costs incurred in granting type approval and in issuing certificates of conformity and typeshields, GMC and its Belgian dealers charge their customers a price which, in relation to the purchase price of vehicles supplied through GMC, is not particularly excessive. Private customers and dealers importing vehicles manufactured within the General Motors group into Belgium otherwise than through GMC's standard distribution system (parallel imports) were obliged by the abovementioned Belgian decrees

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

to resort to GMC for the approval procedures where new vehicles were concerned. This is still the case at present. As regards used vehicles of whatever age, the national testing stations dealt with these matters until 14 March 1973. Since 15 March 1973 this has no longer been possible for vehicles registered abroad for less than six months. Since then, only GMC has been carrying out the procedure in respect of such vehicles.

3. In 1972, GMC made no charges for inspection procedure in respect of parallel imports. In October 1972, following the raising of national requirements for the approval of vehicles, involving increased technical and administrative costs, GMC made its 'Product Engineering' department responsible for this work and for testing conformity. Although for an initial period GMC charged Bfrs 2 500, plus Bfrs 450 VAT, for inspecting parallel imports of GMC vehicles, the rate was raised to Bfrs 5 000 plus Bfrs 900 VAT for all vehicles in respect of which the application for inspection was received later than 1 September 1972. From January to August 1972, 12 applications were received by GMC in respect of Opel vehicles and dealt with free of charge; from September 1972 to 14 March 1973 GMC received no such applications. After GMC acquired sole responsibility for the extended inspection procedure after 15 March 1973, the number of applications rose to 36 by the end of 1973. From then until 20 August 1974, 30 applications were received. There were 24 applications in respect of American models in 1972 and 760 in 1973. Between 1 September 1972 and 14 March 1973 GMC received a considerable number of applications in respect of Opel vehicles from parallel importers of American General Motors models.

4. Between 15 March and 31 July 1973, GMC charged the same rates for the issue of certificates of conformity and typeshields in five cases of parallel Opel imports as it had previously charged exclusively for inspecting particular American models. In these cases GMC charged Bfrs 5 000 plus Bfrs 900 VAT for the issue of certificates and shields. In June and July 1973, GMC charged only Bfrs 1 000 (tax included) for other parallel imports of Opel vehicles. With effect from 1 August 1973 it implemented its new scale of charges of 27 July 1973, in which a difference between vehicles of American and of European manufacture again appeared. Since that time GMC has charged:

(a) for a passenger car manufactured in Europe by an undertaking of the General Motors group and

already type-approved in Belgium ('European passenger car'): Bfrs 1 250, of which Bfrs 123 is regarded by GMC as a proportion of type approval costs and the remainder as a sum for the expenditure incurred in the examination of each vehicle (cost of checking, inspection, typeshield, certificate of conformity, administration cost, 15 % profit);

(b) for a passenger car manufactured in the USA by a General Motors group (US passenger car):

(i) which is already type-approved in Belgium (PVA):

(aa) if GMC expects sales of more than ten vehicles in Belgium ('general type'):

Bfrs 5 300,
of which Bfrs 3 654 is regarded by GMC as a proportion of type approval costs and the remainder as a sum for the expenditure incurred in the examination of each vehicle;

(bb) if GMC expects a smaller volume of sales in Belgium ('low volume type'):

Bfrs 7 000,
of which Bfrs 5 080 is regarded by GMC as a proportion of type approval costs and the remainder as a sum for the expenditure incurred in the examination of each vehicle;

(ii) which is not type approved in Belgium:

Bfrs 30 000.

On 3 August 1973, GMC took action to reimburse part of the amounts charged in the five cases mentioned above. In two cases Bfrs 4 900 and in three cases Bfrs 4 425 were returned.

5. 12 Belgian undertakings which, as authorized agents, have carried out the same inspections as GMC, in reply to questions by the Commission, have stated that they have never charged more than Bfrs 2 500 for inspecting passenger cars manufactured within the common market and arriving in Belgium as parallel imports.

6. The findings in this Decision are based on information supplied by GMC, the results of the investigation into GMC pursuant to Article 14 of Regulation No 17, and on the letter from GMC of 6 September 1974, in which GMC replied to the statement of objections notified to it by letter of 1 August 1974 and to which reference was made.

II

The first paragraph of Article 86 of the EEC Treaty prohibits, as incompatible with the common market, any abuse by one or more undertakings of a dominant position within the common market or any substantial part of it in so far as it may affect trade between Member States.

7. By virtue of Belgian law and of the authorization granted to it by Opel, GMC has a dominant position with regard to applications for general type approval and the issue of certificates of conformity and type-shields in Belgium, both for new Opel vehicles and those registered abroad for no longer than six months in a substantial part of the common market. Purchasers of such Opel vehicles are obliged to avail themselves of GMC's services before using the vehicles on the public highways in Belgium if:

- the relevant model has not yet received type approval, or
- no certificate of conformity or typeshield has been issued for the relevant vehicle.

Thus whenever a consumer or dealer in Belgium decides to purchase an Opel vehicle outside Belgium, he becomes completely dependent on GMC.

8. GMC has abused this dominant position, within the meaning of Article 86, in that during the period from 15 March to 31 July 1973, it charged substantially excessive prices to applicants for the issue of certificates of conformity and typeshields for new Opel vehicles.

The fact that the charging of excessive prices was abusive is shown by a number of circumstances:

It should first be borne in mind that in the price which was raised from Bfrs 2 500 to Bfrs 5 000 (excluding tax) on 1 September 1972 and applied throughout the relevant period, GMC incorporated not only cost elements relating to the conformity inspections but also elements relating to non-recurring expenditure on type approval. The average apportioned cost incurred by type approval which determined the Bfrs 5 000 charge, was at that time based exclusively on expenditure relating to General Motors American models. However, the cost of type approving an Opel vehicle was lower than that of type approving an American General Motors vehicle. Indeed, since GMC could expect to sell in Belgium a considerably greater number of Opel vehicles than American General Motors vehicles, the average apportioned cost of type approving Opel vehicles was appreciably lower than that for American vehicles.

If GMC had taken this into account when fixing its charges for the inspection of Opel vehicles, a cost benefit per unit would have resulted amounting to at least half the total inspection fee of Bfrs 5 000. So much is apparent from the cost analysis which GMC itself later carried out, showing that type approval costs for Opel vehicles were only Bfrs 123 as against Bfrs 3 654 for American vehicles, (cf. I (4) (a) and (b)).

GMC could only, if at all, have justified the scale of the inspection fee in the five relevant cases if it had subsequently recalculated the costs and reimbursed part of the sum charged. Only in June and July 1973 was GMC prepared, in a few cases of parallel imports of Opel vehicles, to charge only Bfrs 1 000 (tax included), because a number of applicants had been unwilling to pay Bfrs 5 000 plus Bfrs 900 tax. The new scale of inspection charges, which distinguishes between American and European vehicles, was finally put into operation only on 1 August 1973.

In this regard it should further be borne in mind that at least 12 Belgian firms acting as authorized agents of other manufacturers carried out inspections similar to those provided by GMC but charged on Bfrs 2 500 or less. GMC's situation cannot be regarded as having been so different as to warrant the charging of inspection fees twice as high as those of other Belgian agents for foreign vehicles.

It should finally be observed that, in the period from January to August 1972, GMC carried out 12 inspections of Opel vehicles free of charge, which suggests that the calculation of the high rates for American vehicles after 15 March 1973 and the sudden increase in the inspection charge for Opel vehicles amounted to abusive behaviour. An abuse is further indicated by the fact that government testing stations charged Bfrs 1 140 plus Bfrs 100 on every subsequent and necessary inspection.

The above circumstances demonstrate that, as is evidenced by the extraordinary disparity between actual costs incurred and prices actually charged in the five cases concerned, GMC abused its dominant position within the meaning of the first paragraph of Article 86 and applied unfair prices within the meaning of heading (a) of the second paragraph of Article 86.

The first paragraph of Article 86 is applicable on an additional ground. The difference between the then imposed charge of Bfrs 5 000 and the charge which would show a reasonable and not abusive relationship

between cost and price, was, as shown above, extraordinarily large. The charging of Bfrs 5 000 acts to the detriment and unfairly discriminates against, those dealers who import, or are in a position to import, new Opel vehicles into Belgium as parallel imports and who are able to compete for custom in Belgium with Opel dealers appointed by GMC. Such independent importers are disadvantaged to a disproportionately greater extent than are appointed dealers, since the purchase prices for new Opel vehicles incurred by the latter included only the very low unit cost factor (Bfrs 123 at most) arising from expenditure on the approval of Opel vehicles. The same is true of a comparison between the purchase prices paid by consumers to Belgian appointed dealers, and those which consumers paid for Opel vehicles the subject of parallel imports. Even these prices were differently weighted according to the cost of type approval.

9. The abuse constituted by GMC's inspection charges has in fact affected trade between Member States and furthermore is likely to affect inter-State trade in future cases. The reciprocal economic interpenetration of markets sought under the EEC Treaty by means of the free flow of goods, has in fact been impeded by the abusive inspection charges imposed in the above five cases. The abuse contained in the imposition of excessive charges was further likely to deter consumers and independent dealers in other countries of the common market from purchasing Opel vehicles, or noticeably to impede such sales.

III

Article 15 (2) (a) of Regulation No 17 empowers the Commission to inflict fines of between 1 000 and 1 000 000 units of account upon undertakings which intentionally or negligently infringe Article 86 of the EEC Treaty.

10. GMC knew that persons and undertakings seeking inspection were obliged to apply to it (cf. II (7)). Despite this, it knowingly charged Bfrs 5 000 plus Bfrs 900 tax for inspecting Opel vehicles which had been the subject of parallel imports. It also knew that the essential content of this charge was based on the cost of inspecting an American General Motors vehicle and that this was an excessive amount to charge for the inspection of Opel vehicles (cf. II (8)). In the period from January to August 1972 when GMC had been requested to carry out inspections in respect of 12 parallel imports of Opel vehicles, it had done so free of charge. Since 15 March 1973 on the other hand, it proceeded directly to charge the increased price of Bfrs 5 000, which in fact was only

appropriate for the inspection of American General Motors vehicles. It calculated this price without making allowance for any variations although at that time it had still not assessed the cost of inspecting Opel vehicles. The fact that in June and July 1973, when certain customers were not prepared to pay Bfrs 5 000 for the inspection of Opel vehicles they had imported, GMC charged only Bfrs 1 000 without a prior cost analysis, demonstrates that it had been previously apparent to GMC that the charging of Bfrs 5 000 was excessive and amounted to an abuse. GMC was at the same time aware that the prices charged by state testing stations were far less than the Bfrs 5 000 charged by GMC and that most authorized Belgian agents of other foreign vehicle manufacturers themselves only charged Bfrs 2 500 or even less (cf. II (8)).

11. Finally, GMC, at the very least knowingly accepted the possibility that the parallel import of new Opel vehicles, i.e. a flow of certain goods in trade between Member States during the time in question, was impeded by an inspection charge of abusive proportions which was, moreover, discriminatory. This was at any event the case for the five instances in which trade was actually affected by abusive behaviour. GMC had also made allowance for the fact that dealers and consumers would have been impeded by the excessive charges, had they undertaken such imports from other countries of the common market. GMC furthermore, was not unwilling that consumers and dealers should refrain from making such imports because of the additional burden contained in the inspection charges (cf. II (9)).

It is to be concluded that GMC intentionally and continually infringed Article 86 during the period from 15 March 1973 to 31 July 1973.

IV

12. Following the communication of the statement of objections, GMC stated that, having regard to the market share it held for sales of motor vehicles in Belgium, it could not see on what grounds GMC could be said to have a dominant position. However as we have seen (cf. II (7)), the question in this case is not whether GMC holds a dominant position in a substantial part of the common market for the sale of motor vehicles but whether it has a dominant position in relation to conformity inspections for new Opel vehicles which have been the subject of parallel imports. The facts establishing this dominant position have also been well known to GMC. It is therefore quite irrelevant that receipts for such inspections accounted for less than 0.1 % of the proceeds of sales of motor vehicles to its dealers.

13. GMC further alleges that in 1973 it would not have been worthwhile for dealers and private customers to purchase Opel vehicles in Germany, even allowing for inspection charges, since prices were said to be lower in Belgium than in Germany. However, abusive price fixing for conformity inspections has in fact affected imports in five cases, so that to that extent it remains an open question whether the imports were undertaken in order to benefit from lower prices or for other reasons (e.g. change of residence, preference for foreign dealers and their service). That trade between States was apt to be affected is further evidenced by the fact that GMC, whilst protecting itself and its authorized dealers from parallel imports by imposing high inspection charges, protected its own and their conduct against competition to an even greater extent and thus assumed greater freedom in fixing the price of Opel vehicles.

14. GMC further states that after 15 March 1973, when the state testing stations were relieved of their responsibility for inspecting vehicles which had been registered abroad for less than six months, it very soon realized that its inspection system would have to be reorganized. It also states that at that time it had to review the costs occasioned by such work because applications were once again involving European General Motors vehicles. The above does not, however, answer the objection that between 15 March and 31 July 1973 the abusive price of Bfrs 5 000 was on five occasions charged for conformity inspections; indeed in the circumstances, GMC should in any event only have imposed the charges, based on the inspection of American General Motors vehicles subject to a subsequent internal cost review, which GMC itself recognized as necessary (cf. II (8)).

15. GMC raises the further point that from June 1973, pending an internal financial decision, it charged all applicants Bfrs 1 000 inclusive of tax, with the exception of one of the five cases where it erroneously charged Bfrs 5 000 plus Bfrs 900 tax. It may well be that during the months of June and July 1973 GMC charged all applicants Bfrs 1 000 only. But at any rate in the five cases dealt with here, it fixed and charged the abusive and excessive price. This means the act of infringement was completed. The partial reimbursements which began on 3 August 1973 could not alter the nature of the act. GMC was not able to offer any explanation for its statement that, in the one case where it claims that the Bfrs 5 900 charge was a pure error, the mistake was simply an organizational matter for which it was not responsible and cannot be held liable.

16. GMC further considers Article 86 to be inapplicable because the Bfrs 5 900 charge (inclusive of tax) was never published. But this argument is not tenable because any purchaser of a new Opel vehicle wishing to register it in Belgium would have discovered that GMC charged Bfrs 5 900 for inspection, at least when applying for the certificate of conformity and the type-shield between 15 March and June 1973.

17. The final matter raised by GMC is that none of the requests for inspection received between 15 March and 31 July 1973 was received from dealers not appointed by GMC and who sold new Opel vehicles. Even if these five cases concern only inspections carried out on behalf of final consumers, this in no way excludes the application of Article 86. Indeed the protection provided by Article 86 extends also to purchases made by consumers in inter-state trade.

V

18. The second sentence of Article 15 (2) of Regulation No 17 requires the Commission, when fixing the amount of the fine, to have regard both to the gravity and to the duration of the infringement.

An important factor in the fixing of the fine was the fact that the Commission has regularly made clear that it regards parallel imports as particularly deserving of protection in the interests of competition and of consumers in the common market. From the point of view of the law of competition, measures which have the effect of impeding parallel imports are just as objectionable as contractual export prohibition in distribution agreements.

The Commission has taken account of the following matter in GMC's favour.

The infringement was only of a short duration. GMC rapidly altered its scale of charges; in three of the five cases it reimbursed the difference between the actual charge and the new scale, while in two cases it even reimbursed the excess of Bfrs 1 000. Finally GMC's new scale provides for a much lower price for inspecting European passenger vehicles than for American passenger vehicles. Its calculations of inspection charges are now based on the cost of general type approval (calculated separately for American and European vehicles) in such a way that the number of vehicles used as a reference is determined on the basis of estimates derived from the number of vehicles registered in Belgium in the past and from total sales forecasts for such vehicles, so that parallel imports are

included and the scale is no longer restricted to vehicles sold through the GMC network. Accordingly, GMC has terminated the infringement established by this Decision,

HAS ADOPTED THIS DECISION :

Article 1

It is hereby established that between 15 March and 31 July 1973, General Motors Continental NV intentionally infringed Article 86 by charging a price that was abusive for the issue of certificates and shields which it was required to issue under Belgian law after inspecting Opel vehicles to check their conformity with the generally approved type and after determining the identification of the vehicles.

Article 2

A fine of 100 000 (one hundred thousand) units of account, that is 5 000 000 (five million) Belgian francs,

is imposed on General Motors Continental NV in respect of the abovementioned infringement.

This Decision is enforceable against General Motors Continental NV in accordance with the provisions of Article 192 of the EEC Treaty.

Article 3

This Decision is addressed to General Motors Continental NV, Norderlaan 75, 2000 Antwerp 1, Belgium.

Done at Brussels, 19 December 1974.

For the Commission

The President

François-Xavier ORTOLI

COMMISSION DECISION

of 20 December 1974

relating to a proceeding under Article 85 of the EEC Treaty (IV/26.603 — Rank/
Sopelem)

(Only the English and French texts are authentic)

(75/76/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof;

Having regard to Council Regulation No 17⁽¹⁾ of 6 February 1962, and in particular Articles 4, 6 and 8 thereof;

Having regard to the notifications submitted on 9 February 1968, 30 December 1968 and 11 October 1971 pursuant to Article 4 of Regulation No 17 by 'Société d'optique, précision, électronique et mécanique (Sopelem)', Paris, of four contracts concluded by it on 1 September 1967, 17 December 1968 and 1 August 1971 with Rank Precision Industries Ltd (Rank), London.

Having regard to the communication to the Commission on 20 December 1973 of changes made to their agreement by the parties, taking the form of a new contract which entered into force on 1 December 1973, revoking and replacing the four earlier contracts;

Having regard to the publication in *Official Journal of the European Communities* No C 94 of 10 August 1974 of a summary of the notification, as required by Article 19 (3) of Regulation No 17;

Having regard to the Opinion obtained of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17 on 14 November 1974;

Whereas :

I

1. The products covered by the agreement are lenses and lens controls used in the motion picture industry and in television cameras which are developed and manufactured by the two parties and in which they hold or will hold, jointly or separately as may be appropriate, industrial property rights.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

2. The object of the arrangements set up under the agreement was to establish close cooperation between the two parties in the fields of research and development, manufacture and distribution of the relevant products. The main provisions of the agreement as it stands are as follows :

A. Research, development and manufacture

- (a) The parties coordinate their activities by continuing contact between their respective teams; they share research and development programmes and manufacturing projects by joint agreement as appropriate; they are to do all in their power to ensure that information exchanged for this purpose is kept secret, even after the expiry of the agreement.
- (b) 'Joint products', that is to say products obtained as a result of development work in which both partners have had a considerable share, are protected by jointly owned patents ('joint patents') to be applied for and maintained (e.g. by bringing actions for infringement) by agreement and jointly in the names of both companies, which share the costs equally. Each party is free to file applications for and protect at its own expense, but jointly in the name of both companies, any of the joint patents in any country it wishes if the other party has no interest in that market. After the expiry of the agreement the two companies may use freely all the joint patents. Third parties are allowed to manufacture joint products only where there has been prior agreement between Rank and Sopelem.
- (c) Each party carries out concurrently its own research, development and manufacturing activities in the same field, thereby giving rise to applications for patents in its own name which it undertakes to maintain in force and protect; such patents may be the subject of manufacturing licences between the parties, in respect of which royalties may be payable, or of sales under the conditions laid down in the agreement.

- (d) Each party may carry out on behalf of the other special research and development work against payment; each is free to carry out such work with or on behalf of third parties, provided that no confidential information received from the other party is communicated to those third parties.

B. Distribution

- (a) Both parties concurrently offer the entire range of joint products and their own products existing before or after the agreement, of which there is a non-exhaustive list in the agreement; for this purpose, the agreement distinguishes between 'Sopelem products' (that is, those products the patent rights in which belong exclusively to Sopelem, which are marketed by both parties under the specially created trade name Monital, which belongs exclusively to Rank) and 'Rank products' (the rights in which belong exclusively to Rank and which are marketed under its trade name Varotal and finally 'joint products' (which are marketed under the names Monital or Varotal, or any other name to be agreed on, depending on whether Sopelem or Rank manufactures these products). In practice, Rank sells Monital products with an indication as appropriate that they are developed or manufactured by Sopelem, and in all cases each party indicates their origin on the products it manufactures; on the termination of the Agreement Sopelem may purchase the trade name Monital for a reasonable price and Rank will be entitled to use it for a further two years only.
- (b) The relationship between the two parties is that of buyer and seller; each is free to make subdistribution arrangements and to determine selling and resale prices and conditions; during the currency of the agreement, however, information is to be exchanged systematically on the state of the market, the level of stocks and sales forecasts in order to align production with demand; each party must provide for all users in its own territory the same after-sales service, at no cost or for a fee as the case may be, on the same conditions in respect of products sold originally by the other party.
- (c) Sopelem is appointed the exclusive distributor of Monital products in the common market countries (except Denmark, Ireland and the United Kingdom) and in 21 other countries, and of Varotal products in France and in six African countries. Rank is appointed the exclusive distributor of Monital products in Denmark, Ireland and the

United Kingdom and elsewhere in the world (except North America, Brazil, China and the Comecon countries, where both partners are free to sell) and also of Varotal products in the common market countries (except France) and in the rest of the world (except the six African countries referred to above).

- (d) Neither party may maintain stocks nor promote the sale of Monital or Varotal products in any country in which the other party has been appointed exclusive distributor. Each party must forward to the other all inquiries for prices or orders from third countries in which that other party is exclusive distributor or relating to a delivery in those third countries; within the common market countries, each party is free to fulfil, at the prices and on the conditions it applies in its own territory, any unsolicited order coming from or intended for a country where the other party is exclusive distributor; in such cases the exporter must pay the other party a sum to cover the actual expense of free after-sales service incurred by the other party in its own territory.

3. The other main points emerging from the investigation are as follows:

- (a) The products covered by the agreement are technically advanced and highly specialized, and sales are determined as much by technical features as by price; the cost of producing them is mainly determined by that of the highly skilled manpower which is needed for design, checking and finishing; these products are usually supplied by the producer direct or through his sales network, chiefly to manufacturers of cinema and television equipment, who are fully aware of the identity and nature of the few major producers operating in the market; although there are in the common market about 40 manufacturers of optical instruments for photography, cinema and television broadcasting, there are relatively few large manufacturers of these specialist products, but between them there is active competition; the main manufacturers are:

- in France, Angénieux and Sopelem,
- in the United Kingdom, Rank,
- in Germany, Schneider and Zeiss,
- elsewhere, Canon and Nikon (Japan) and a few American companies.

Moreover, these products are aimed primarily at a market, namely the camera manufacturers, which is itself specialized. As there is no intermediate

trading stage, these manufacturers are in direct contact with their suppliers or the latter's networks. This means that they are particularly well placed as regards scope for choice and bargaining power *vis-à-vis* Rank, Sopelem and their competitors.

Rank's and Sopelem's sales together account for approximately 20 % of all sales of the products concerned within the territory of the common market.

- (b) Sopelem has always maintained extensive research facilities; it concentrates on high-quality products and has extensive know-how at its command; its work on optical equipment for the cinema and for photography was formerly centred on small- and medium-sized lenses for amateur cinematography, but its biggest customers, the French manufacturers of ciné cameras, have seen their sales fall sharply in the past few years as a result of the influx of low-price products from third countries; Sopelem has therefore been using its technology to manufacture lenses for use in the professional motion picture industry, and the agreement with Rank was concluded with a view to expanding the market for these products, particularly through Rank's extensive distribution network. The products covered by the agreement do not account for a great part of Sopelem's sales (5 % in 1968, 6 % in 1973); the company has four other lines of business — laboratory equipment (metrological, optomechanical and refractometric), large apparatus (special apparatus designed and built to specification), optical instruments for military use, and hydraulic equipment; in 1973, its sales totalled FF 110 million, representing 25 % of total French production of the products concerned.

- (c) Before the agreement with Sopelem the Rank Organization Ltd already had a division specializing in the study, manufacture and sale of large lenses; it is the leading British undertaking in the professional motion picture industry (production, distribution and cinemas throughout the world) and its range of operations includes the production of radio and television sets, high-fidelity systems, audio-visual educational equipment, precision instruments, copying machines (Rank-Xerox) and photographic equipment, while it is also active in the leisure industry (bowling alleys, restaurants, hotels, etc.); it has a worldwide distribution network and its total annual sales exceed £ 200 million (about 10 % of this is accounted for by the relevant products, for which it controls some 70 % of the UK market).

4. After studying the notification and the terms and manner of application of the contracts concluded

between Sopelem and Rank, as those contracts were at the time, the Commission on 26 June 1972 sent both parties a statement of objections to the agreement; the statement concerned the following provisions which were contrary to Article 85 (1) and did not satisfy all the tests for exemption under Article 85 (3):

- clauses absolutely prohibiting either party from exporting directly or indirectly the relevant products outside its sales territory, which raised an artificial barrier to trade in those products between France and the other common market countries;
- clauses restricting the freedom of the parties to administer their industrial property rights (application for, maintenance in force and protection against third parties of patents) and virtually preventing third parties from working with either of the parties in research and development programmes;
- clauses which involved either party being placed in appreciable danger of being put out of business in the event of termination of the agreement, and particularly that obliging them to refrain from using the trade marks and company name that they already used prior to the agreement.

5. Following this statement from the Commission, the parties concluded on 1 December 1973 a fifth contract revoking and replacing their earlier contracts.

6. The parties at the same time withdrew a proposal to replace the general prohibition on exports to one another's territories by a requirement that the exporting party must make a lump-sum payment to the other by way of indemnification, the amount and principle of such payment being in the opinion of the Commission incompatible with the rules on competition in the Treaty; the prohibition on exports is now replaced by a requirement that the exporting party must reimburse the other party; on production of the relevant invoices, for the actual expense of free after-sales service incurred.

7. The Commission has received no comments from third parties following publication of the summary of the notification.

II

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

1. During the negotiations preceding the signing on 1 September 1967 of the first contract between Rank and Sopelem, neither undertaking was manufacturing the entire range of relevant products which are currently being supplied by both parties; on the contrary, Rank specialized mainly in large lenses and Sopelem in small and medium lenses. However, their experience in this field, the extent and quality of their research and development work, their skill in producing optical and precision instruments generally and the natural growth of their respective activities might well have led them to extend their ranges of products, making them direct competitors in the relevant product market. They must therefore be assumed to be potential competitors and the agreement to have been concluded between competing manufacturers.

2. The object and effect of the agreement is, through certain of its provisions, to restrict competition within the common market. Such restrictions have an appreciable effect on the market in the relevant products within the common market in that there is a limited number of large manufacturers operating in it, that two of them are closely coordinating their activities in the fields of research and development, manufacturing and distribution, and that in certain cases this coordination leads to specialization by the parties. These restrictive provisions are as follows:

- (a) the introduction of specialization, whereby each party allows the other to take over research and development work or manufacturing of certain categories of products under the agreement, eliminates that party as a developer or of those products;
- (b) the exclusive rights exchanged by the parties both as regards sales of their own products and of joint products within the territories allocated to them and as regards supplies of these products to be sold in their own territories tend to compel purchasers to seek products bearing the trade

names of the two undertakings from a single supplier, either Rank or Sopelem, depending on circumstances or their distribution network; this reduces the customer's range of choice and bargaining power; similarly, each party refrains from canvassing customers in the countries in which the other is exclusive distributor, and thus ceases to be an active competitor in such countries.

3. The agreement covers the development, production and sale of the products of two undertakings with headquarters in two Member States. The undertakings share between them the development, production and sale of the various products covered by the contracts; the reciprocal exclusive distribution arrangements prevent Sopelem from marketing Monital products freely in Denmark, Ireland and the United Kingdom and Varotal products in common market countries other than France; likewise, Rank is prevented from marketing Varotal products in France and Monital products in Germany, Benelux, France and Italy. Thus, the agreement affects trade between Member States for it has a direct impact on trade between them in such a way as could impede the attainment of the objectives of a single market.

4. The agreement comes within the terms of Article 85 (1) of the Treaty.

III

Under Article 85 (3) of the Treaty the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement or concerted practice 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.

1. The coordination set in train between Rank and Sopelem, and especially the specialization of their respective manufacturing operations, has enabled both of them to secure economies of scale by improving productivity and profitability in these fields; furthermore, in the absence of the agreement, the two firms were unlikely to develop a product range as wide as they are now both able to offer; the agreement there-

fore helps to improve production. Moreover, the obligation to buy from and sell to each other has enabled each party to increase its sales in the other's territory by allowing access to each other's distribution network — mainly because of the experience and reputation of each party's network in its own territory; in particular in this case Sopelem was immediately able to use Rank's worldwide sales network. The agreement thus helps to improve distribution. Coordination and allocation of research and development work between the two undertakings have also enabled them to rationalize their activities in these fields, particularly by concentrating on projects suited to their equipment and experience and by making the other party responsible for certain types of work. The agreement thus helps to promote technical progress.

2. Since 1968 the agreement has been instrumental in increasing Rank's sales in France and Sopelem's export sales and in improving the quality of the products, service and service conditions to consumers. Each party offers customers a more extensive and technically more advanced range of products — a very important point where precision instruments are concerned. The presence of other big manufacturers and of effective competition on this market suggests that the improvements flowing from the agreement and the benefits accruing to consumers will be maintained.

3. In this case, the agreement contains no restrictions which are not indispensable to the attainment of the above objectives. The exclusive nature of the parties' reciprocal buying and selling commitments cannot be separated from other aspects of their cooperation, and it provides the best method of distribution, particularly as regards the storage, installation, display, after-sales service and guaranteeing of this highly specialized equipment. The fact that each party must refrain from manufacturing certain products entrusted to the other flows from that very specialization which is the reason for their increased productivity and satisfactory profits.

4. The fact that other large manufacturers are operating in France, the United Kingdom and throughout the common market and effectively competing with Sopelem and Rank (who are also in direct competition with each other on a large number of world markets) prevents a situation arising in which

Sopelem and Rank could eliminate competition in respect of a substantial part of the relevant products.

5. Accordingly, all the conditions necessary for a Decision pursuant to Article 85 (3) are fulfilled.

IV

1. The terms and manner of application by the parties of the four contracts concluded between 1 September 1967 and 1 August 1971, as contained in the various notifications submitted since 9 February 1968 and dealt with in the aftermentioned statement of objections by the Commission (cf. I (4)), were such that exemption could not be granted under Article 85 (3). The restrictive clauses contained in the four contracts then in force were not indispensable to the attainment of the benefits resulting from the agreement.

2. As stated in I (5) and I (6) above, the parties have removed all the restrictions preventing the application of Article 85 (3). The various contracts concluded between Rank and Sopelem between 1 September 1967 and 1 August 1971, which had been notified in accordance with Article 4 of Regulation No 17, were revoked and replaced by a new contract on 1 December 1973. This new contract, which was notified on 20 December 1973, was drawn up and is applied in such a way that the agreement satisfies all the tests of Article 85 (3), in accordance with the Commission's observations and within a reasonable length of time. Accordingly it is possible, under Article 6 (1) of Regulation No 17, to provide for the Decision pursuant to Article 85 (3) to have effect from 20 December 1973.

3. The period of validity of the Decision, to be fixed pursuant to Article 8 (1) of Regulation No 17, must be long enough to enable the agreement to produce results; a period of 10 years seems reasonable in this respect.

4. In view of the market share of the undertakings, their long-standing position as leaders in technological progress in a highly specialized industry and the recent opening up of markets following the accession of the United Kingdom to the EEC, the Commission should be enabled to assess, whenever necessary, the way the situation is developing in the market for the

relevant products as a result of the agreement. Rank and Sopelem should therefore be placed under obligation to report to the Commission on their activities every three years, the first three-year period to begin on 20 December 1973. The report should set forth all that is required to enable the Commission to appraise the way the agreement is operating and its effects on the relevant market, with particular reference to the maintenance of effective competition within the EEC,

HAS ADOPTED THIS DECISION :

Article 1

The provisions of Article 85 (1) of the Treaty establishing the European Economic Community are hereby declared pursuant to Article 85 (3) thereof to be inapplicable to the agreement concluded on 1 December 1973 between Sopelem, Paris, and Rank, London.

Article 2

This Decision shall have effect from 20 December 1973 and shall apply until 20 December 1983.

Article 3

The undertakings named in Article 1 shall, before 1 March 1977, 1 March 1980 and 1 March 1983 respectively, send a report to the Commission covering the preceding three-year period, the first of such periods

to run from 20 December 1973. These reports shall be such as to enable the Commission to assess the way the relevant market in the EEC is developing as a result of the agreement specified in Article 1, with particular reference to :

- (a) developments in the sales and market share of each undertaking in each Member State of the EEC ;
- (b) the development of trade between the Member States ;
- (c) price movements.

Article 4

This Decision is addressed to the following undertakings :

- Rank Precision Industries Ltd,
Millbank Tower, Millbank,
London SW1P 4QR ;
- Société d'optique, précision, électronique et mécanique,
125 Boulevard Davout,
75 Paris (20ème).

Done at Brussels, 20 December 1974.

For the Commission

The President

François-Xavier ORTOLI

COMMISSION DECISION

of 8 January 1975

relating to a proceeding under Article 85 of the EEC Treaty (IV/27.039 — preserved mushrooms)

(Only the English and French texts are authentic)

(75/77/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof;

Having regard to Regulation No 17 of 6 February 1962⁽¹⁾, and in particular Articles 1, 3 and 15 thereof;

Having regard to the application submitted to the Commission on 19 September 1972 by the 'Groupe-ment européen des maisons d'alimentation à succursales multiples' (GEMAS) of Brussels for the initiation of proceedings to determine whether Article 85(1) of the Treaty was being infringed by an agreement relating to the German market entered into by the principal French manufacturers of preserved mushrooms;

Having regard to the Commission Decision of 29 April 1974 to initiate proceedings under Article 3 of Regulation No 17, following investigations carried out pursuant to Article 14 of that Regulation in respect of an agreement concluded on 8 January 1973 in Taipei (Taiwan) between five of the principal French producers and all Taiwanese producers of preserved mushrooms;

Having given the undertakings and associations of undertakings involved the opportunity pursuant to Article 19(1) of Regulation No 17, and to Regulation No 99/63/EEC (OJ No 127, 20. 8. 1963, p. 2268/63); of being heard on the matters to which the Commission has taken objection;

Having regard to the Opinion obtained of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17 on 28 November 1974;

Whereas:

I

1. The products concerned are preserved mushrooms produced and sold by the following undertakings and associations of undertakings:

(a) Five of the principal French producers:

- Blanchaud SA, Chacé (Maine-et-Loire), which combines several different production undertak-

ings: preserved vegetables, mushrooms, freeze dried products, and foods for children. Preserved mushrooms account for roughly half its total turnover (or approximately FF 115 million in 1973, a third of which represents exports to Germany);

- Euroconserves, Beaufort-en-Vallée (Maine-et-Loire), an 'economic interest group' (groupe-ment d'intérêt économique) set up in 1970 and involving among others, the 'Coopérative agricole des champignonistes du Saumurois'; the turnover of this undertaking in preserved mushrooms in 1973 was FF 114 million, of which FF 50 million represented exports to Germany;

- Champifrance, Bagneaux/Saumur (Maine-et-Loire), also an 'economic interest group' which markets preserves produced by the Royal Champignons Group which in turn consists of the following agricultural cooperatives:

ROYAL
CHAMPIROC
BORDELAISE
CATS
CHAMPEUROP
CLAIRFIN

(the turnover of the group in preserved mushrooms in 1973 was FF 93 million, of which FF 19 million represented exports to Germany);

- Faval SA, Chinon (Indre-et-Loire), whose sole business is the preservation of mushrooms (with a turnover of almost FF 8 million in 1973); and
- Champex-Centre, Tours (Indre-et-Loire), also an agricultural cooperative, having a turnover of about FF 28 million in 1973, FF 21 million of which represented exports to Germany.

- (b) The Taiwan Mushroom Packers United Export Corporation (TMPUEC), Taipei, the national trade association representing all Taiwan exporters.

2. In Germany each of the French producers markets its products through a sales subsidiary or exclusive agent, and the Taiwanese also make use of exclusive agents in that country. The French producers above account together for almost all French production (85 % in both 1972 and 1973). French and Taiwanese producers have traditionally

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

between them produced most of the tinned mushrooms consumed in Germany; in particular, in the 1972/73 marketing year, they accounted for 60 % of the total of preserved mushrooms sold in that country and virtually all sales of the better qualities.

3. On 19 September 1972, GEMAS submitted to the Commission a complaint, requesting that it should find Article 85(1) was being infringed by an agreement between French producers with respect to selling prices in Germany. In the course of the inquiry which followed the complaint, the Commission, acting under Article 14 of Regulation No 17, made on the spot investigations into certain French producers. As a result the existence was discovered of a wider agreement, which had not been notified to the Commission, concluded between the Taiwanese producers (TMPUEC) and the French producers listed in paragraph 1 (who were associated for this purpose in a group called Major French Mushroom Packers (MFMP)). The Commission accordingly initiated under Article 3 of Regulation No 17 *ex officio* proceedings concerning the whole case on 29 April 1974.

4. The agreement between the French and Taiwanese producers was a written agreement which had been signed in Taipeh on 8 January 1973, by, or on behalf of the individual French producers of the one part and by TMPUEC as the representative and sole exporter for producers, of the other. It had been preceded during the previous year by a series of meetings. The agreement was deemed to have entered into force on 15 December 1972. The main points of the agreement are as follows:

- (a) cooperation is established between TMPUEC and MFMP with a view to programming production and sales in Germany, and to enable the parties to fix their selling prices 'to meet the requirement of the market' (Article 1);
- (b) the two parties undertake, to inform each other in advance of sales forecast for the German market, and they agree to share their market on the following basis for 1973:
 - approximately 1 402 500 standard cartons for MFMP,
 - approximately 1 350 000 standard cartons for TMPUEC,
 MFMP are to make monthly deliveries of 116 875 standard cartons from January to December; whilst TMPUEC is to deliver 112 500. In subsequent years these quantities will be increased in line with what the German market can absorb (Article 2);
- (c) selling prices in Germany shall always be so fixed that:
 - consumption is promoted; and
 - the quantities specified in Article 2 can be sold each season 'without the parties competing with each other excessively' (Article 3);

- (d) to initiate the cooperation, the two parties are to adjust their respective selling prices upward by 3 % as from 1 May 1973 (Article 4);
- (e) on request either party will allow the other to check sales, production and dispatch documents; a joint accounting organization will be appointed to collect such data for the common information of the parties (Article 5);
- (f) MFMP will help to open up the French market to Taiwan preserved asparagus and to further a complete liberalization of such imports within four years; the parties will develop a joint strategy against competitors and cooperate in general terms on both technical and economic matters (Article 6);
- (g) any clause of the agreement may be reviewed at any time at the request of either of the parties since the relevant circumstances are always subject to modification as a result of action by other French producers and by Dutch and Korean producers, who not being parties to the agreement will be acting freely in the market (Article 7).

5. Taiwan is the largest producer of first quality preserved mushrooms in the world. The second largest producer is France. France is the largest producer in the enlarged Community, producing 100 000 metric tons for the year 1972/73 out of a total Community production of 150 000 metric tons. Of these 100 000 metric tons, 60 % is consumed in France and the balance exported — mainly to Germany. The second largest producer of preserved mushrooms in the Community is the Netherlands, producing 35 000 metric tons in 1972/73, of which approximately 26 000 metric tons were exported to Germany. The mushrooms produced by the Netherlands are 'grade 3' mushrooms and are regarded as being of different quality to first quality mushrooms. Thus the mushrooms produced by the Netherlands do not substantially compete with those produced in France and Taiwan.

The consumption of preserved mushrooms in Germany has been rising steadily and the German market represented a consumption of approximately 100 000 metric tons in 1972/73. The greater part was imported from Taiwan, France and the Netherlands, local production being negligible.

6. On 8 August 1974, the Commission took urgent measures against imports into the EEC from all non-member countries. Commission Regulation (EEC) No 2107/74 of 8 August 1974⁽¹⁾, laid down protective measures applicable to imports of preserved mush-

⁽¹⁾ OJ No L 218, 9. 8. 1974, p. 54.

rooms. The main grounds for these measures were the scale of the imports, their growth rate, the volume of stocks piling up in France and the prices at which preserved products from certain non-member countries new to the market were being offered. In the Regulation the Commission noted that at that time the Community market in the relevant sector was experiencing serious disturbances likely to jeopardize the attainment of the objectives of Article 39 of the Treaty.

7. On 10 June 1974, the Commission sent each of the relevant French undertakings and TMPUEC a statement of objections to their agreement which it claimed was contrary to Article 85 (1) and did not meet the test for exemption under Article 85 (3). In addition it contemplated imposing fines, pursuant to Article 15 of Regulation No 17, on all those involved. Each of the firms involved replied to the statement of objections; they did not deny the facts in the statement of objections, the main points of which have been set forth in this Decision, the French firms, in their written reply, pointed out however, that the agreement had in fact been hardly implemented; they recalled that as far as they were concerned its sole purpose was to forestall difficulties of the kind whose existence the Commission was obliged to recognize in its Regulation of 8 August 1974 and of which they had already realized the threat.

II

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

1. The agreement concluded in Taipei on 8 January 1973 between the five French producers listed in I (1) (a) and the Taiwan Mushroom Packers United Export Corporation, representing all the producers in Taiwan constitutes an agreement within the meaning of Article 85.

2. The sole object of the agreement was to restrict competition within the common market, through the following means:

(a) the obligation entered into by each of the parties (Articles 1, 2, 3 and 4 of the agreement) to coordi-

nate their production and sales programmes in Germany by:

- observing an annual export quota, and
- observing a pricing policy adopted by them jointly with the object of eliminating competition between them;

An obligation of this nature is indeed likely to eliminate all effective competition between the parties once competition in prices is excluded while at the same time each party is obliged to refrain from new deliveries on the relevant market when it has exhausted its quota; similarly it is likely to deprive purchasers of all freedom of choice or discussion;

(b) the obligation (Article 5 of the agreement) on each party to provide the other with all particulars which would enable sales quotas for Germany to be specified and enforced, and the production, sales, prices and conditions of sales applied by each party to be monitored; an obligation of this type is in itself such as to strengthen the restrictions established in point (a) above, in that in particular it goes a long way towards enabling each party to know exactly what the other is going to do.

3. The agreement has as its object the allocation of outlets within the common market, one of its particular concerns being with French exports to Germany. It is likely to affect trade perceptibly between Member States by exerting a direct influence on trade flowing between these States in such a way as to jeopardize the attainment of the aim of a single market.

4. This agreement, which concerns an agricultural product in the list in Annex II to the Treaty, falls under Article 1 of Council Regulation No 26 (OJ No 30, 20. 4. 1962). However, it does not meet the tests for exemption under Article 2 (1) of that Regulation for the following reasons:

the agreement does not form an integral part of a national market organization and is not necessary for the attainment of the objectives set out in Article 39 of the Treaty. It is to be seen from the third recital in Regulation No 26 that the second ground for exemption can apply only where the application of Article 85 (1) of the Treaty would jeopardize the attainment of the objectives of the common agricultural policy as regards the product concerned. Council Regulation

(EEC) No 1427/71⁽¹⁾ of 2 July 1971 introducing protective measures for products processed from fruit and vegetables states the methods which are regarded as necessary with regard to imports from non-member countries. Article 1 states that if by reason of imports the Community market in one or more of the products concerned experiences or is threatened with serious disturbances which may endanger the objectives of Article 39 of the Treaty, appropriate measures may be applied until such disturbances or threat of disturbance has ceased. The necessary means to attain these objectives are thus provided for in the Regulation and its implementing Regulations. The agreement being dealt cannot be regarded as such a measure, from whatever angle it is considered.

5. Accordingly, the agreement is prohibited by Article 85 (1) of the Treaty.

III

Under Article 85 (3) of the Treaty, Article 85 (1) may be declared inapplicable to any agreement between undertakings, any decision by associations of undertakings and any concerted practice which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

1. The agreement concluded in Taipeh on 8 January 1973 between the French and Taiwanese producers has not been notified to the Commission under Article 4 or 5 of Regulation No 17.

2. In any event such market sharing and concerted price fixing, as in this case, within the common market involving the main firms in this particular branch of the food industry are inappropriate and indeed could not produce the improvements required by Article 85 (3). Nor could they make a valid contribution to promoting technical or economic progress; they can only harm the interests of consumers.

3. No grounds therefore exist for granting exemption under Article 85 (3).

IV

Under Article 15 (2) of Regulation No 17 the Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings

participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) or Article 86 of the Treaty. In fixing the amount of the fine regard is to be had both to the gravity and to the duration of the infringement.

1. The agreement of 8 January 1973 constitutes an infringement of the rules of competition of the Treaty. The gravity of this infringement lies in the fact that it is completely contrary to the object of creating a single market, that it constitutes a sharing of the market accompanied by a fixing of sales prices in which virtually all the producers or suppliers in business on the relevant market at the time were involved.

2. Even if the French producers concerned here had had good reason to believe at the end of 1972 that there would be a serious disturbance of the market such as was recognized in Commission Regulation (EEC) No 2107/74 of 8 August 1974, it was not permissible for them, in order to alleviate this situation, to take the initiative by infringing the Treaty or even to participate in an infringement thereof. As far as the Taiwanese producers are concerned, the Commission considers their blameworthiness to be less in view of the fact that in this particular case it is hardly likely that, during the course of the negotiations for the conclusion of the agreement of 8 January 1973, they could have had knowledge of the Opinion of the Commission relating to the import into the Community of products from third countries. This Opinion, published in *Official Journal of the European Communities* No C 111 of 21 October 1972, page 13, made it clear that agreements entered into by enterprises having their seat outside the Community fall equally within the field of application of Article 85 to the extent that the effects of the agreement extend to the territory of the common market, and must be notified to the Commission as prescribed by Regulation No 17.

3. The agreement has now however, been implemented with respect to all its provisions. The selling prices applied by French and Taiwanese producers in Germany, although not identical, were very similar at the time the agreement of January 1973 was prepared and signed; a number of contracts on that market were still being concluded at very similar average net prices by French manufacturers until at least May 1973. At the same time, the simultaneous increase of 3 % provided for in the agreement for 1 May 1973 was never put into effect; on the contrary a downward trend in net selling prices in Germany, which had begun during the summer of 1972, was restarted by virtue of the fluctuations in exchange rates in 1973. The devaluation of the US dollar and the revaluation of the DM in that year reduced the selling price obtained in Germany by the Taiwanese (expressed in US dollars) to 23 % below that obtained by the

⁽¹⁾ OJ No L 151, 7. 7. 1971.

French (expressed in DM), thus largely preventing the Common Customs Tariff from having any effect. Then, under pressure from the French, TMPUEC agreed not to keep strictly to the letter of the agreement (i.e. to let their selling prices in Germany fall in line with the currency in which they were expressed) and they made two unilateral increases — amounting in all to about 10% — one in March and one in April 1973. From the last quarter of 1973 the agreement has in any event been rendered completely inoperative by reason of the inflow into Germany of large quantities of preserved mushrooms from the People's Republic of China. Moreover, the agreement did not in fact reverse the movement towards reduction of prices on the German market which had been observed since 1960.

4. Notwithstanding the fact that the agreement has not produced significant effects on the market, the parties to the agreement had the intention of dividing their market in infringement of Article 85 of the EEC Treaty and for this reason the Commission has decided to impose fines.

5. The Commission has fixed the amount of the fines as set out in Article 3 below by reference also to the degree to which each of the firms concerned were involved in the infringement, their respective positions on the relevant market and their respective size,

- (a) on the *société anonyme* Blanchaud, 32 000 (thirty-two thousand) units of account, that is 177 734 (one hundred and seventy-seven thousand, seven hundred and thirty-four) French francs ;
- (b) on the *groupement d'intérêt économique* Euroconserves, 32 000 (thirty-two thousand) units of account, that is 177 734 (one hundred and seventy-seven thousand, seven hundred and thirty-four) French francs ;
- (c) on the *groupement d'intérêt économique* Champifrance, 26 000 (twenty-six thousand) units of account, that is 144 408 (one hundred and forty-four thousand, four hundred and eight) French francs ;
- (d) on the *société anonyme* Faval, 2 000 (two thousand) units of account, that is 11 108 (eleven thousand one hundred and eight) French francs ;
- (e) on the *société d'intérêt collectif agricole* Champex-Centre, 8 000 (eight thousand) units of account, that is 44 433 (forty-four thousand, four hundred and thirty-three) French francs.

2. This Decision shall be enforceable against the abovementioned undertakings or associations of undertakings in the manner provided by Article 192 of the EEC Treaty.

HAS ADOPTED THIS DECISION :

Article 1

The agreement entered into in Taipeh on 8 January 1973 between the following undertakings and associations of undertakings :

- Blanchaud SA,
- Euroconserves,
- Champifrance,
- Faval SA,
- Champex-Centre,
- Taiwan Mushroom Packers United, Export Corporation,

to share the German market amongst themselves and to apply concerted sales prices constitutes a breach of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The undertakings referred to in Article 1 shall terminate the agreement of 8 January 1973.

Article 3

1. The following fines are imposed in respect of this infringement :

Article 4

This Decision is addressed to the following undertakings :

Blanchaud SA,
BP No 4, F 49580 Chacé.

Euroconserves,
BP No 4, F 49250 Beaufort-en-Vallée.

Champifrance,
BP No 159, F 49400 Saumur.

Faval SA,
BP No 44, F 37500 Chinon.

Champex-Centre,
avenue Charles Bedaux, F 37000 Tours.

Taiwan Mushroom Packers United Export Corporation,
PO Box 1634, Taipeh (Taiwan).

Done at Brussels, 8 January 1975.

For the Commission

The President

François-Xavier ORTOLI