

Official Journal

of the European Communities

Volume 20 No L 117

9 May 1977

English Edition

Legislation

Contents

I *Acts whose publication is obligatory*

.....

II *Acts whose publication is not obligatory*

Commission

77/327/EEC:

- ★ Commission Decision of 19 April 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 — ABG oil companies operating in the Netherlands) 1

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 April 1977

relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 — ABG oil companies operating in the Netherlands)

(77/327/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 of 6 February 1962⁽¹⁾, and in particular Article 3 thereof,

Having regard to the application received by the Commission on 4 January 1974 from Aardolie Belangen Gemeenschap BV and Avia Nederland CV for initiation of proceedings for a Decision finding that Articles 85 and 86 of the Treaty had been infringed by several companies, including Esso Nederland BV, Shell Nederland Raffinaderij BV, Shell Nederland Verkoopmaatschappij BV, Shell Nederland BV, British Petroleum Raffinaderij Nederland NV, Benzine en Petroleum Handelmaatschappij BV, British Petroleum Maatschappij Nederland BV, Mobiloil BV, Chevron Petroleum Maatschappij (Nederland) BV, Texaco Olie Maatschappij NV, Gulfoil (Nederland) BV,

Having heard these companies in accordance with Article 19 of Regulation No 17 and with Regulation No 99/63/EEC⁽²⁾,

Having regard to the opinion delivered on 10 December 1976 by the Advisory Committee on Restrictive Practices

and Dominant Positions in accordance with Article 10 of Regulation No 17,

Whereas:

The facts are as follows:

I

A. The crisis

The crisis originated in the limitation of production which occurred in November 1973 in many producing countries. This limitation was the cause of much confusion in the international oil market.

The equilibrium between the supply of and demand for petroleum products collapsed at that time.

The supply crisis was rendered particularly acute in the Netherlands by the embargo on shipments to Rotterdam imposed in December 1973, which brought imports of crude down by nearly 50% of their October level.

By January 1974, however, supplies at Rotterdam picked up again as the major oil companies made arrangements to divert to their Rotterdam refineries certain quantities transiting through other countries, notably the United Kingdom.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

The supply crisis in the Netherlands was mastered fairly quickly, but the fear of a scarcity of petroleum products led to a veritable shortage-scare.

The term 'crisis' has to be interpreted in the light of these facts.

B. The companies concerned

At the time of the crisis, the seven companies which were directly engaged in the production of premium and regular motor spirit in the Netherlands were:

1. Esso Nederland BV, 99% subsidiary of Exxon Corporation (consolidated share), hereinafter referred to as 'Esso'.
2. Shell Nederland Raffinaderij BV, fully owned subsidiary of Shell Nederland BV
(Motor spirit was marketed by Shell Nederland Verkoopmaatschappij BV, also a fully owned subsidiary of Shell Nederland BV.)
These companies are hereinafter together referred to as 'Shell'.
3. British Petroleum Raffinaderij NV, fully owned subsidiary of British Petroleum Maatschappij Nederland BV.
(Motor spirit was marketed by Benzine and Petroleum Handelmaatschappij BV, fully owned subsidiary of British Petroleum Maatschappij Nederland BV.)
These firms are hereinafter together referred to as 'BP'.
4. Mobil Oil BV, fully owned subsidiary of the Mobil Oil Corporation, hereinafter referred to as 'Mobil'.
5. Chevron Petroleum Maatschappij Nederland BV, fully owned subsidiary of the Standard Oil Company of California, hereinafter referred to as 'Chevron'.
6. Texaco Olie Maatschappij NV, fully owned subsidiary of the Texaco group, hereinafter referred to as 'Texaco'.
(Chevron and Texaco jointly control the former Caltex refinery at Rotterdam, with respective shares of 68.40 and 31.60%.)
7. Gulf Oil Raffinaderij BV, fully owned subsidiary of Gulf Oil (Nederland) BV, itself a fully owned sales subsidiary of the Gulf Group.

These firms are hereinafter together referred to as 'Gulf'.

Two companies had large quantities of motor spirit produced for them in Dutch refineries; they are:

- Petrofina, and its subsidiary Fina Nederland BV,
- Compagnie française des pétroles, and its subsidiary Total Nederland NV.

At the time of the crisis, the Vlissingen refinery of the Compagnie française des pétroles was going operational.

C. Relations between the oil companies which refine or have refining done for them in the Netherlands and the Olie Contact Commissie and the Rijksbureau

(a) *The Olie Contact Commissie*

The oil companies have formed in the Olie Contact Commissie (OCC) a discussion group to facilitate contacts with the Government.

OCC maintained contacts with the Rijksbureau voor Aardolie Producten (RBAP) on supply questions.

All the companies which refine or have refining done for them in the Netherlands are represented in the OCC. They are Shell, Esso, BP, Chevron, Texaco, Mobil and Gulf.

Members also include Petrofina and its Dutch subsidiary (Fina Nederland BV) which holds 50% of the shares — BP holds the other 50% — in the SIBP refinery at Antwerp and obtains its supplies under processing contract from Shell Nederland Raffinaderij BV.

Since 10 December 1970, the Compagnie française des pétroles and its Dutch subsidiary Total Nederland NV have also been members following the commencement of work on the Vlissingen refinery.

The Ministry for Economic Affairs receives from the members of OCC information which is relevant to the fixing of maximum prices by the Ministry.

On 20 December 1973, while the oil crisis was on, the OCC members, in agreement with the traders' organizations, also set minimum margins on motor spirit (premium and standard grades) supplied to traders through the RBAP. Under the agreement it was provided that, for wholesalers, the filling station margin would be shared out between the wholesaler and the retailer; this meant

that the filling station margin would have to be reduced or the wholesaler would be left with no margin to cover his distribution costs. Subsequently one of the two wholesalers' organizations disassociated itself from this agreement.

The OCC also advises the Ministry for Economic Affairs on the location of motorway (Rijkswegen) service stations.

(b) The Rijksbureau voor Aardolie Produkten

The Rijksbureau voor Aardolie Produkten (RBAP) was set up under the Distributiewet (Law on distribution) 1939 by Ministerial Decision 573/814/VD/MP/EVV of 13 November 1973.

The function of RBAP was to organize and carry out the distribution of oil and petroleum products. In addition this bureau acted as an intermediary when independent traders and buyers encountered supply difficulties. The RBAP consisted of civil servants among whom were individuals seconded by the oil companies on account of their expert knowledge who had entered the contractual public service on a temporary basis.

The oil companies and the Commission had extensive discussions during the hearings on the ABG case on the role effectively played by the RBAP.

Here the Commission will do no more than reproduce the description given by representatives of the Dutch Government at the hearings:

'During the period 12 January to 4 February 1974, the RBAP was responsible for carrying out distribution. In addition, both during that period and outside it, the RBAP helped consumers or traders which found themselves in difficulties.'

In normal times ABG required 15 000 m³ per month. The RBAP ceased its activities as an intermediary on 1 April 1974 and was dissolved on that date. On 4 April 1974, the Ministry of Economic Affairs took an emergency decision under the Law concerning economic competition (Official Journal of the Netherlands 1974, No 67) whereby the nine companies refining in the Netherlands were obliged to deliver to ABG 3 000 m³ of petrol a week, a quantity which took into account the Government's recommendation that consumption should be reduced to 80 or 85% during the crisis period. The normal consumption of ABG was therefore reduced by 20%.

In fact, from 1 April 1974, ABG found itself threatened with a total lack of product owing to the behaviour of those companies which were refusing (in effect) to deliver to this central buying organization.

D. The relevant market

The relevant market is that of premium and standard grade motor spirit for carburation in four-stroke engines; following the national terminology for petroleum products used in Annex IV of the European Communities Statistical Year Book (Energy), premium and standard grade petrol appear together under the heading 'motor spirit' (motor benzine).

The market in motor spirit is a single market: premium and standard grade motor spirit differ only in their octane ratings (premium grade: 98/99 octane; standard grade: 90 octane). Engines with a high compression ratio are adjusted for premium grade but, for example when there is a fuel crisis, standard grade can be used. All that is required is an adjustment.

The relevant geographical market is that of the Netherlands, where ABG members do all their distribution business (the sales-structure of ABG is described in heading G).

E. Importance in the national supply of motor spirit of companies which refine or have refining done for them in the Netherlands

The following table sets out production, domestic consumption and imports of motor spirit in the Netherlands:

	<i>(in 1 000 tonnes)</i>		
	1971	1972	1973
Production	4 833	5 240	5 776
Domestic Supplies	3 242	3 418	3 557
Imports	309	300	352
Imports as percentage of domestic supplies	9.53	8.77	9.89

Source: Statistical Office of the European Communities:

- Production: Eurostat, 1. 2. 1973, p. 67.
- Domestic supplies: Eurostat, 1. 2. 1973, p. 71.
- Imports: SOEC Luxembourg.
- 12-month figures for 1973: SOEC Luxembourg (production, domestic supplies, imports).

In the last quarter of 1973, when the oil crisis began, national motor spirit production rose slightly in compari-

son with the corresponding quarter of 1972, while domestic deliveries fell slightly and imports fell by some 25%.

	1973	1972	1973 as % of 1972
	in tonnes		
Production:			
October	484 000	505 000	95.8
November	494 000	441 000	112.0
December	418 000	395 000	105.8
Quarterly total	1 396 000	1 341 000	104.1
Domestic supplies:			
October	336 000	300 000	112.0
November	258 000	290 000	89.0
December	268 000	292 000	91.8
Quarterly total	862 000	882 000	97.7
Imports:			
October	23 000	30 000	76.7
November	31 000	45 000	68.9
December	25 000	31 000	80.6
Quarterly total	79 000	106 000	74.5
Imports as percentage of domestic supplies:			
October	6.8	10.0	
November	12.0	15.5	
December	9.3	10.6	
Quarterly total	9.2	12.0	

Source: SOEC.

These tables show that during the last quarter of 1973 refiners were responsible for some 90% of national motor spirit supplies, as imports accounted on average for only 9.2% of domestic supplies.

The following table shows total capacity for all products in the various refineries in the Netherlands. The percentages by company give an approximate indication for petrol alone:

Capacity of refineries (all products) in the Netherlands	(in 1 000 tonnes)	
	1972	% of total
1. Asphalt en chemische Fabrieken Amsterdam ⁽¹⁾	200	0.2
2. Mobil Oil NV	6 500	6.5
3. Chevron Petroleum (Caltex) Pernis-Rotterdam	15 900	16.1
4. Esso Nederland Rotterdam-Botlek	16 000	16.2
5. Shell Nederland Pernis-Rotterdam	30 000	30.3
6. Gulf Rotterdam-Europort	4 730	4.7
7. BP Rotterdam	25 800	26.0
	99 130	100.0

⁽¹⁾ Only produces asphalt and chemical products.

The Total refinery (CFP) at Vlissingen began production towards the end of 1973.

F. The system of maximum prices

Prices in the Netherlands are governed by the Law of 24 March 1961 (Prijzenwet), as last amended by the Law of 10 January 1974 (Official Journal of the Netherlands 1974, No 1).

Under this Law, three decrees relating to the oil crisis were in force during the crisis period so far as petroleum products are concerned, i.e. those of:

- 28 September 1973 (amended several times),
- 22 January 1974,
- 28 February 1974.

The first decree concerned the method of calculation and provided that only certain specified costs could be taken into account in the manner defined by the decree.

The second and third decrees absolutely prohibit the sale to consumers on the domestic market of motor spirit at prices exceeding the maximum prices set in the decrees.

Before 22 January 1974 the maximum prices were set periodically by the Minister for Economic Affairs after consultation with the oil companies.

From the beginning of the crisis, maximum prices set by the Dutch authorities were below world prices; this made sales of petrol bought on these terms very difficult in the Netherlands, since such sales entailed losses.

G. ABG's sales structure

ABG is a purchasing cooperative of the 19 members of the Avia Group in the Netherlands.

At the time of the crisis, ABG's sales could be broken down as follows:

- 49% through the AVIA network,

— 32 % of regular purchasers, being:

- 12 % by other persons under firm contracts,
- 20 % by regular purchasers, although without contract,
- $\pm$ 20% by spot deliveries.

H. The volume of ABG's motor spirit supplies (see table in Annex 1)

Following the November 1973 crisis, ABG's situation became very difficult as regards both the volume of supplies and the terms on which it was able to obtain them.

(a) *The situation before the crisis*

Up to 1968, BP supplied ABG on the basis of a short-term contract under which the two sides annually set the price, quantities and other terms.

Thereafter, supplies were no longer governed by contracts of specified duration. The new contracts were of indefinite duration, subject to six months' notice of cancellation by one or other party.

When reorganizing its operational departments (which was necessary because of the nationalization of large parts of its production business and the taking of participation in oil extraction by the producer states) BP terminated the agreement with ABG on 21 November 1972 which had existed since 1968. The termination of the agreement was confirmed in two letters dated 17 January 1973 from BP and ABG. BP and ABG then agreed that BP would make refining capacity available to ABG.

On the advice of, among others, the Dutch Government, ABG then attempted to acquire crude petroleum on the world and have it refined itself.

However, according to documents supplied by BP, ABG informed BP by letter dated 9 August 1973 that no assurance of having crude petroleum could be obtained until the end of September of that year.

A second draft processing agreement dated 1 October 1973 provided that the agreement would not enter into force until 1 January 1974.

The quantities supplied by BP to ABG between 1 June and 1 October 1973 (30 746 m³) were supplied by way of advance on processing for ABG.

Although there was no certainty as to whether ABG would be able to obtain crude petroleum to repay these advances, BP continued supplying normal quantities before the crisis.

BP's deliveries to ABG from June to October 1973 were as follows⁽¹⁾:

(in cubic metres)		
	According to BP	According to ABG
June 1973	10 778	11 225
July 1973	7 350	7 014
August 1973	2 921	2 649
September 1973	9 697	9 697
October 1973	12 861	12 276
Total	43 607	42 861

During the 12 months before the crisis BP was ABG's principal supplier, and accounted on average for 81% of its inputs, and for 100% in October 1973, the month immediately preceding the beginning of the crisis.

Apart from BP, Gulf supplied 8% of ABG's input during that 12-month period. The rest was supplied in small quantities by Shell, Chevron and a number of independent dealers.

(b) *The situation during the crisis*

From 1 November 1973 both the quantities and the origin of the products supplied to ABG changed radically.

The Dutch authorities recommended a reduction of 15 to 20% of consumption in the Netherlands.

BP cut its supplies of motor spirit to ABG even more appreciably.

If one takes the average of the 12 months preceding the crisis⁽²⁾, it is clear that BP's supplies to ABG were substantially reduced:

⁽¹⁾ The difference between these figures lies in technical and accounting factors and in no way affects the rest of the document.

⁽²⁾ For the reasons set out on page 9, fifth paragraph of B.

BP delivered 4 721 m³ in November 1973, 3 646 m³ in December 1973, 2 179 m³ in January 1974, 2 040 m³ in February 1974, 3 224 m³ in March 1974 in comparison with a monthly average of 12 083 m³, reduced to 9 666 m³ after the reduction of 20% recommended by the Dutch authorities.

On 2 January 1974 Gulf, like the other companies in OCC, received a telex from ABG requesting deliveries of motor spirit. This Gulf did, but in an insufficient quantity:

Gulf delivered 187 tonnes in January 1974, 187 tonnes in February 1974 and 120 tonnes in March 1974, in comparison with an average for the 12 months prior to the crisis of 885 tonnes, reduced to 708 tonnes after the reduction of 20% recommended by the Dutch authorities⁽³⁾.

Shell delivered 1 864 m³ in January 1974, 2 122 m³ in February 1974 and 1 972 m³ in March 1974, in comparison with an average for the 12 months prior to the crisis of 619 m³, reduced to 495 m³ after the reduction of 20% recommended by the Dutch authorities.

Chevron delivered to ABG 250 m³ in January 1974, 250 m³ in February 1974 and 160 m³ in March 1974, in comparison with an average for the 12 months prior to the crisis of 245 m³, reduced to 196 m³ after the reduction of 20% recommended by the Dutch authorities.

To sum up, of the four refiners in the Netherlands who supplied ABG during the 12 months preceding the crisis, two companies continued with normal supplies or even increased their supplies during the crisis period by comparison with the earlier periods, and the two other companies reduced their supplies.

If one chooses as the reference period the 12 months preceding the crisis, which provides a sufficiently representative view of the relations between buyers and sellers, and which sufficiently diminishes the influence of seasonal variations, one finds that BP and Gulf had made reductions during the crisis in their deliveries to ABG greater than to their other customers. By comparison with the monthly average preceding the crisis the reductions (or increases) were as follows:

⁽³⁾ Gulf's business is recorded in tonnes and not in cubic metres.

(in%)

Month	BP		Gulf	
	Other customers	ABG	Other customers	ABG
1973:				
November	+ 4.2	— 60.9	— 21	—
December	— 4.0	— 69.8	— 26.3	—
1974:				
January	— 23.4	— 82.0	— 35.4	— 78.8
February	— 24.6	— 83.1	— 35.2	— 78.8
March	— 15.5	— 73.3	— 41.7	— 86.4
Total for five months	— 12.7	— 73.8	— 31.9	— 88.8

Similarly, if one compares, using the same method, the reductions made by BP for non-contractual customers, including ABG, one finds that the reductions made for ABG were greater than for other customers.

Month	Wholesalers non-contractual other than ABG		ABG	
	m³	% of reduction or increase ⁽¹⁾	m³	% of reduction ⁽²⁾
1973:				
November	4 715	+ 8.9	4 721	— 60.9
December	3 626	— 16.2	3 646	— 69.8
1974:				
January	2 844	— 34.3	2 179	— 82.0
February	1 831	— 57.7	2 040	— 83.1
March	2 438	— 43.7	3 223	— 73.3
Total for five months	15 454	— 28.6	15 809	— 73.8

⁽¹⁾ By comparison with the average of the 12 months preceding the crisis, $\frac{51\,935}{12} = 4\,328 \text{ m}^3$.

⁽²⁾ By comparison with the average of the 12 months preceding the crisis, $\frac{144\,982}{12} = 12\,082 \text{ m}^3$.

This comparison is not possible in the case of Gulf as all the customers during the 12 months preceding the crisis had contracts with the exception of ABG.

From 13 November 1973 to 1 April 1974, ABG received supplies of motor spirit either by buying from companies in the OCC through the RBAP or by buying on the free market.

The following table gives the breakdown for the two sources:

Month	Total purchase (m ³)	Purchase through RBAP (m ³)	% bought through RBAP
1973:			
13 to 30 November inclusive	7 437	5 170	69.5
December	10 761	7 265	68
1974:			
January	9 968	6 594	66
February	6 877	6 877	100
March	6 989	6 584	94

Taking its suppliers as a whole, ABG was unable to obtain the quantities required to supply all its members; in view of the shortage and of the Government's recommendations ⁽¹⁾, it needed 80 or 85% of the amounts purchased in the corresponding months of the previous year.

Motor spirit supplies to ABG

				(m ³)
				% of corresponding month of preceding year
November 1973:	10 812	November 1972:	15 691	69
December 1973:	10 761	December 1972:	15 265	70
January 1974:	9 968	January 1973:	17 189	58
February 1974:	6 877	February 1973:	15 908	43
March 1974:	6 989	March 1973:	19 205	36

To sum up, despite the intervention of the RBAP and despite the satisfactory conduct of two of its suppliers and its attempts to buy on the free market, ABG had great difficulty in obtaining supplies; indeed the attempts to buy on the free market were doomed to failure by the difference between Dutch domestic prices and world prices, which made imports virtually impossible.

During the crisis period ABG's stocks fell to the equivalent of three days' supply and, at certain times, were simply non-existent.

II

Under Article 86 of the Treaty establishing the EEC, any abuse by one or more undertakings of a dominant posi-

tion within the common market or in a substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between Member States.

A. The dominant position

Firms hold a dominant position where they are able to act fully independently — in other words where they may conduct their business without regard for the reactions of competitors and customers. This can happen when general economic circumstances and particular market conditions combine so that firms with an established market position, access to raw materials and adequate industrial capacity and capital resources find themselves in a position to control production and distribution in a substantial proportion of the market.

The market under consideration is that of motor spirit.

⁽¹⁾ See the letter dated 6 December 1973 from the Ministry of Economic Affairs to the OCC and the campaign organized by the Ministry of Transport, Water Control and Public Works.

The general economic scene was set towards 1 November 1973 with the outbreak of the oil crisis, which was caused by a simultaneous reduction in the supply of oil offered on the world market combined with a substantial increase in the price demanded for it.

In this situation, the only people who still had access to oil supplies at economically viable prices were the large international oil companies refining or having oil refined in the Netherlands. This was because of their special relationships with the oil-producing countries of the Middle East, their integrated structures and the multinational nature of their installations and organizations.

Such a sudden shortage, especially one that was not brought about by economic considerations, led to a restriction of both actual and potential competition among the small group of companies concerned, a restriction that was particularly marked at the level of distribution.

The general fear of shortage, the sudden reduction in supplies of oil offered and the fact that the maximum prices for motor spirit fixed by the Dutch Government were below international prices meant that the independent firms in the Netherlands could only obtain supplies from the world market at prices giving rise to losses; hence they could no longer import petroleum products in large quantities without endangering their longer-term survival. Imports were no longer available on the Dutch market and the independent buyers could only obtain their supplies from companies with refineries in the Netherlands. Thus the relevant market for this case is the Netherlands, which constitutes a substantial part of the common market.

Economic restrictions such as existed in the Netherlands during the oil crisis can substantially alter existing commercial relations between suppliers who have a substantial share of the market and quantities available and their customers. For reasons completely outside the control of the normal suppliers, their customers can become completely dependent on them for the supply of scarce products. Thus, while the situation continues, the suppliers are placed in a dominant position in respect of their normal customers.

With the general shortage of supplies all the oil companies were faced with the same problem, that of maintaining supplies to their regular customers. Thus they were not able to make up the deficiencies of the other companies with substantial market shares and they were in no way in

competition with each other to supply each others customers.

In the prevailing circumstances each of these companies found itself in a dominant position relative to its customers.

B. Abuse of a dominant position

It is necessary to look at the behaviour of each company separately to see whether there have been any individual cases of abuse of a dominant position in respect of ABG.

For this purpose, abuse within the meaning of Article 86 of the Treaty may be defined as any action of an undertaking in a dominant position which reduces supplies to comparable purchasers in different ways without objective justification, and thereby puts certain of them at a competitive disadvantage to others, particularly where such action can result in changes in the structures of the particular market.

If it is to be safe from the accusation of abuse under Article 86, a dominant undertaking must allocate any available quantities to its several buyers on an equitable basis.

When there is a general supply crisis, an independent company depends primarily on its regular suppliers.

In order to calculate the cuts made in supplies to each buyer during the period of scarcity, the same reference period must be chosen for all buyers; it must be a recent period, yet long enough to reflect seasonal variations on the market. It should also take account of the latest changes in dealings between buyers and sellers in the petrol market.

Reference back to the preceding year satisfies these requirements.

Of the companies refining or having oil refined in the Netherlands, only BP, Chevron, Shell and Gulf supplied ABG with motor spirit during the pre-crisis 12-month period.

British Petroleum Raffinaderij Nederland NV, Benzine en Petroleum Handelmaatschappij BV and British Petroleum Maatschappij Nederland BV, together with other subsidiary companies, constitute the single economic entity

known as the BP Group, which is an undertaking for the purposes of Article 86 of the EEC Treaty.

For several years before the crisis BP had been ABG's chief supplier of motor spirit, and this gave it the advantage of having a major customer for its motor spirit during a period when production was in surplus.

During the 12-month period prior to 1 November 1973, BP accounted on average for more than 80% of ABG's total purchases of motor spirit. That trading relations between BP and ABG were close is illustrated by the fact that BP even supplied ABG with motor spirit by way of an advance against the prospect of receiving quantities of crude oil which ABG was to deliver later to BP's installations for refining. When the oil crisis began, ABG was thus in the position of being one of BP's regular and long-standing customers whose deliveries were substantially reduced by its chief supplier.

Further, supplies from BP to ABG were proportionately cut back far more sharply than supplies to BP's other customers. During the five months of the crisis, by comparison with the average of the 12 months preceding the crisis, BP on average reduced its deliveries during the crisis, to 'contractual' customers other than ABG by 13 %; to 'non-contractual' customers by 29%; and to ABG by 74%.

Also, the Dutch authorities accepted that during the period of the crisis there might have to be a reduction of about 20% per month in supplies to customers by comparison with supplies delivered during the corresponding month in the preceding year but in so doing they made no distinction between 'contractual' and 'non-contractual' customers.

Undertakings cannot avail themselves of criteria based on the law of contract in order to prevent the realization of the objectives of competition law in the Community, in particular, in a situation such as that found to exist in the Netherlands where their behaviour jeopardized the continuance of a system of free competition.

From the Community law point of view, it is the extent, regularity and continuity of commercial relationships which ought to be taken into consideration. If it were otherwise, the availability of supplies during a shortage such as that which occurred in the Netherlands could be influenced by firms which are in a dominant position for reasons which may be casual, artificial or arbitrary. In

particular, supply reductions imposed on a purchaser, in a period of crisis, could depend on the expiry date of his supply contract.

This is not to say that in a period of crisis dominant firms are not entitled to take into consideration particularities or differences which may exist in the commercial situation of their customers. In particular, they are free to apply the prices and other conditions grounded for in the supply contracts and to choose a reference period which corresponds and is appropriate to the period of constraint. However, any differences in treatment which may result ought to be objectively based and their choice may not have a discriminatory effect. In any event, it is abusive to treat a regular, long-standing and substantial customer in a way which is clearly discriminatory by comparison with other customers.

BP had available a specific quantity of motor spirit, which it put onto the Dutch market during the period of crisis from November 1973 to the end of March 1974.

This motor spirit ought to have been distributed fairly by BP among all its customers.

On the hypothesis of an equal sharing of supplies to BP's various customers, the details of which are given in Annex 2, BP ought to have supplied ABG with a further 27 000 m³ during the five-month period of crisis, not taking into account the possible 20 % reduction in overall deliveries in accordance with the recommendations of the Dutch authorities.

Even supposing that BP might have had grounds for supplying contractual and non-contractual customers in different ways, it should have treated ABG without discrimination relative to its other non-contractual customers.

The advances on crude oil made with motor spirit agreed by BP with ABG do not justify a different treatment of ABG in comparison with other customers, either contractual or non-contractual, having regard to the impossibility encountered by ABG in finding similar quantities of oil on the dates agreed.

BP's cut in supplies to ABG must be assessed in aggregate terms and not in terms of an artificial breakdown between ABG's different types of customer as described in heading G of part I.

BP had no right whatsoever to act for ABG in deciding whether or not this or that ABG customer should be supplied.

It follows therefore that BP abused its dominant position during the period of shortage by reducing its supplies to ABG not only substantially but also proportionately to a much greater extent than in relation to its other clients. BP has been unable to provide any objective reasons for its behaviour. It has thus applied dissimilar conditions to ABG in imposing on that company an obvious, immediate and substantial competitive disadvantage. This unfair behaviour of BP could have jeopardized ABG's continued existence; ABG was, moreover, a competitor of BP in the motor spirit distribution market.

Turning to Gulf, during the reference period ending on 31 October 1973, that company also supplied ABG with appreciable quantities which, during two months, represented the following percentages of ABG's total purchases:

- in July 1973: 33.4%,
- in August 1973: 78.1%

Even if these supplies were made by a Gulf Group company other than NedGulf they were still made by part of the same group, which forms a single entity; and in any case the sales were made by NedGulf.

Gulf's supplies to its other customers were better than those to ABG from 2 January 1974, which is the date on which ABG requested Gulf, like the other oil companies operating in the Netherlands, to supply it with motor spirit.

The additional quantities which Gulf should have supplied to ABG according to the calculations in Annex 3, based on the average for the 12 months before the crisis, amount to 1 198 tonnes from 2 January to the end of March 1974, not taking into account the possible 20% reduction in overall deliveries in accordance with the recommendations of the Dutch authorities.

Gulf supplied ABG with relatively small quantities and on an occasional basis; these supplies had during the 12-month reference period been concentrated in only two months. ABG had been the only non-contractual client of Gulf during this period.

ABG did not ask Gulf for deliveries of motor spirit before 2 January 1974 and on this date supplies from Gulf to ABG, although small, were resumed.

Gulf accounted for only a small percentage of ABG's total purchases during the 12 months preceding the crises.

For all these reasons it follows that Gulf did not abuse a dominant position.

Acting through the RBAP, Shell delivered to ABG quantities which were proportionally higher during the crisis than before the crisis, thus helping to compensate the loss suffered by ABG as a result of the inadequate supplies delivered by BP, its regular supplier.

During the crisis, Chevron supplied ABG in the same proportions as during the 12 months before the crisis, subject only to the 20% reduction recommended by the Dutch authorities.

The other oil companies refining or having oil refined in the Netherlands — Esso, Texaco, Mobil, Total and Fina — never supplied ABG during the 12 months before the crisis and ABG could therefore not count on supplies from them.

It was principally the failure of BP to supply ABG which led to serious supply difficulties. Consequently ABG were supplied, through the RBAP, from a 'petrol pool' established by OCC members to cover cases of supply difficulties. A portion of this 'pool' was reserved for ABG from the beginning of the period of distribution (12 January 1974).

The RBAP was restricted to playing an intermediary role, since the Dutch Government did not make it responsible for imposing on refiners any duty to make deliveries to a particular category of purchaser.

C. Effect on trade between Member States

The abuse of a dominant position may affect trade between Member States where, from an objective viewpoint, it is likely to exert an influence direct or indirect, actual or potential, on the flow of trade between Member States.

ABG accounts for 5% of the consumption of motor spirit in the Netherlands; this company acts as a wholesaler and as a central purchasing organization for its various members, distributors using the AVIA trade mark; it is well

known that ABG is the only independent wholesaler of any importance in the Dutch motor spirit market facing the integrated companies established in the Netherlands, which have refining capacity and storage facilities which account for some 90% of the supply of motor spirit.

ABG and the AVIA members have storage capacity in the Netherlands close to the Rotterdam market, which is the most important free market for supply within the Community; the Avia name is an international trade mark found in most Member States. In the Netherlands sales under the name account for 2% of motor spirit sales.

ABG bought some of its motor spirit requirements on the free market, both in the Netherlands and other Member States.

The purchases of motor spirit which ABG is able to make on the free market, whether from within or outside the Community, could be significant as regards the quantities imported from other Member States, and indeed, ABG is the only wholesaler in this position in the Netherlands.

The Members of ABG which distribute motor spirit under the AVIA brand and the other customers of ABG could only with difficulty obtain supplies individually on the free market because, in particular, of the minimum quantities needed for a spot purchase. Therefore, if ABG had had to reduce or cease its activities, its customers would have found themselves solely dependent upon integrated oil companies based in the Netherlands to cover their needs.

Therefore, had ABG disappeared from the motor spirit market in the Netherlands, it would have been to the disadvantage of consumers by affecting the structure of the market and the competitive conditions in the Netherlands. This disappearance of a network and the Avia mark in one of the Member States would have led to the reinforcement of the position of the large oil companies established in the Netherlands and could have hampered the economic integration called for by the Treaty and thereby might have affected trade among Member States.

The contributions made by the other oil companies through RBAP as intermediary undoubtedly enabled ABG partially to meet its obligations and to continue in business.

This, however, in no way affects the conclusion that the default of BP, principal and traditional supplier to ABG,

would, had the latter not found other sources of supply, have been liable to jeopardize its existence as a central purchasing organization and thus to affect trade between Member States.

III

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, whether intentionally or negligently, they infringe Article 85 (1) or 86 of the Treaty.

Although the intervention of the RBAP was not compulsory and worked only through voluntary contributions by the companies, it may nevertheless have created doubts on the part of those companies as to the obligations which they owed their customers.

BP might well feel that the advances on crude oil made with motor spirit (for processing in BP installations) could free them in part from the obligation to supply ABG during the crisis.

The confusion which reigned on the Dutch petroleum market, because of the uncertainty as to how the crisis might develop, made it difficult to assess the reductions in delivery that were needed.

In view of all the factors operating during this difficult period it would not be appropriate to impose a fine upon BP under Article 15 (2) of Regulation No 17,

HAS ADOPTED THIS DECISION:

Article 1

The application by BP to ABG during the period November 1973 to March 1974 of a degree of reduction significantly greater than those made by this company in its deliveries to its other customers in the present case constituted an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty on the part of Benzine en Petroleum Handelmaatschappij BV, British Petroleum Raffinaderij Nederland NV and British Petroleum Maatschappij BV.

Article 2

This Decision is addressed to:

- Benzine en Petroleum Handelmaatschappij BV,
Frederiksplein 42,
Amsterdam;
- British Petroleum Raffinaderij Nederland NV,
D'Arcy Weg,
Rozenburg;

- British Petroleum Maatschappij Nederland BV,
Frederiksplein 42,
Amsterdam.

Done at Brussels, 19 April 1977.

For the Commission

Raymond VOUEL

Member of the Commission

ANNEX 1

BREAKDOWN BY SUPPLIER OF PURCHASES BY ABG

Motor spirit

(m³ — %)

Year and month	BP		Chevron		Shell		Esso		Texaco		Gulf	
	m³	%	m³	%	m³	%	m³	%	m³	%	m³	%
1972 November	15 374	98.0	317	2.0	—	—	—	—	—	—	—	—
December	14 949	97.9	316	2.1	—	—	—	—	—	—	—	—
1973 January	16 788	97.7	401	2.3	—	—	—	—	—	—	—	—
February	12 777	80.3	173	1.1	2 013	12.7	—	—	—	—	—	—
March	15 555	81.0	1 395	7.3	2 255	11.7	—	—	—	—	—	—
April	14 557	84.6	339	2.0	1 008	5.9	—	—	—	—	—	—
May	12 121	91.5	22	0.2	1 100	8.3	—	—	—	—	—	—
June	11 225	76.0	373	2.5	1 057	7.2	—	—	—	—	—	—
July	7 014	41.6	—	—	—	—	—	—	—	—	5 622	33.4
August	2 649	25.8	(*) 1 395	7.3	—	—	—	—	—	—	8 021	78.0
September	9 697	82.9	—	—	—	—	—	—	—	—	713	6.1
October	12 276	100	—	—	—	—	—	—	—	—	—	—
Aggregate for 12 months	144 982	80.7	2 941	1.6	7 433	4.2	—	—	—	—	14 356	8.0
Monthly average	12 082	80.7	245	1.6	619	4.2	—	—	—	—	1 196	8.0
1973 November	4 721	43.7	—	—	2 091	19.3	—	—	—	—	—	—
December	3 646	33.9	300	2.8	3 319	30.8	—	—	—	—	—	—
1974 January	2 179	21.9	250	2.5	1 864	18.7	1 744	17.5	254	2.5	253	2.5
February	2 040	29.7	250	3.6	2 122	30.9	962	14.0	252	3.7	253	3.7
March	3 223	46.1	160	2.3	1 972	28.2	738	10.6	164	2.4	163	2.3
Aggregate for five months	15 809	34.8	960	2.1	11 368	25.0	3 444	7.6	670	1.5	669	1.5
Monthly average	3 162	34.8	192	2.1	2 274	25.0	689	7.6	134	1.5	134	1.5

(*) Quantity returned by ABG.

(continued)

Year and month	Mobil		Total		Fina		Aggregate of the nine companies		Other 13 companies		General aggregate	
	m³	%	m³	%	m³	%	m³	%	m³	%	m³	%
1972 November	—	—	—	—	—	—	15 691	100	—	—	15 691	100
December	—	—	—	—	—	—	15 265	100	—	—	15 265	100
1973 January	—	—	—	—	—	—	17 189	100	—	—	17 189	100
February	—	—	—	—	—	—	14 963	94.1	945	5.9	15 908	100
March	—	—	—	—	—	—	19 205	100	—	—	19 205	100
April	—	—	—	—	—	—	15 904	92.5	1 302	7.5	17 206	100
May	—	—	—	—	—	—	13 243	100	5	0.0	13 248	100
June	—	—	—	—	—	—	12 655	85.7	2 116	14.3	14 771	100
July	—	—	—	—	—	—	12 636	75.0	4 215	25.0	16 851	100
August	—	—	—	—	—	—	10 275	100	—	—	10 275	100
September	—	—	—	—	—	—	10 410	89.0	1 287	11.0	11 697	100
October	—	—	—	—	—	—	12 276	100	—	—	12 276	100
Aggregate for 12 months	—	—	—	—	—	—	169 712	94.5	9 870	5.5	179 582	100
Monthly average	—	—	—	—	—	—	14 142	94.5	823	5.5	14 965	100
1973 November	—	—	—	—	—	—	6 812	63.0	4 000	37.0	10 812	100
December	—	—	—	—	—	—	7 265	67.5	3 496	32.5	10 761	100
1974 January	—	—	50	0.5	—	—	6 594	66.1	3 374	33.9	9 968	100
February	506	7.3	—	—	492	7.1	6 877	100	—	—	6 877	100
March	—	—	—	—	164	2.3	6 584	94.2	405	5.8	6 989	100
Aggregate for five months	506	1.1	50	0.1	656	1.5	34 132	75.2	11 275	24.8	45 407	100
Monthly average	101	1.1	10	0.1	131	1.5	6 827	75.2	2 255	24.8	9 082	100

ANNEX 2

A: Total deliveries by BP to ABG in the year ending 31 October 1973 = 144 982 m³
(monthly average = 12 082 m³)

B: Total deliveries by BP to other customers (b) in same period = 406 546 m³ (a)
(monthly average = 33 879 m³)

$$\text{Ratio: } \frac{A}{B} = \text{approximately } \frac{1}{2.8}$$

Month	Deliveries by BP			Part of total deliveries (1) due to ABG by applying the ratio $\frac{1}{2.8}$ (m ³)	Shortage of delivery to ABG (4) — (3) (m ³)	Percentage reduction of monthly average of the year ending 31 October 1973 represented by quantities delivered during period of crisis (%)	
	Total (m ³)	to customers other than ABG (m ³)	to ABG (m ³)			to other customers (c)	to ABG (d)
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
1973							
November	40 018	35 297	4 721	10 520	5 799	+ 4.2	— 60.9
December	36 172	32 526	3 646	9 509	5 863	— 4.0	— 69.8
1974							
January	28 116	25 937	2 179	7 391	5 212	— 23.4	— 82.0
February	27 601	25 561	2 040	7 255	5 215	— 24.6	— 83.1
March	31 835	28 612	3 223	8 368	5 145	— 15.5	— 73.3
Total	163 742	147 933	15 809	43 043	27 234	— 12.7	— 73.8

(a) Total deliveries of BP (551 528 m³ from Annex VI of BP's letter of 15 May 1975) less deliveries of BP to ABG (from data obtained from ABG).

(b) Including BP's own brand outlets.

(c) Example: November 1973: $35\,297 - 33\,879 \rightarrow \frac{1\,418 \times 100}{33\,879} = + 4.2\%$.

(d) Example: November 1973: $4\,721 - 12\,082 \rightarrow -\frac{7\,361 \times 100}{12\,082} = -60.9\%$.

ANNEX 3

A: Total deliveries by NedGulf to ABG in the year ending 31 October 1973 = 10 626 tonnes
(monthly average = 885 tonnes)

B: Total deliveries by NedGulf to other customers (a) in same period = 167 709 tonnes
(monthly average = 13 976 tonnes)

$$\text{Ratio: } \frac{A}{B} = \text{approximately } \frac{1}{15.8}$$

Month	Deliveries by NedGulf			Part of total deliveries (1) due to ABG by applying the ratio $\frac{1}{15.8}$ (tonnes)	Shortage of delivery to ABG (4) — (3) (tonnes)	Percentage reduction of monthly average of the year ending 31 October 1973 represented by quantities delivered during period of crisis (%)	
	Total (tonnes)	to customers other than ABG (tonnes)	to ABG (tonnes)			to other customers (c)	to ABG
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
1973							
November	11 041	11 041	—	700	(700)	— 21	—
December	10 294	10 294	—	652	(652)	— 26.3	—
1974							
January	9 221	9 034	187	583	396	— 35.4	— 78.8
February	9 238	9 051	187	585	398	— 35.2	— 78.8
March	8 274	8 154	120	524	404	— 41.7	— 86.4
Total	48 068	47 574	494	3 044	2 550 (1 198) (*)	— 31.9	— 88.8

(a) Including NedGulf's own brand outlets.

(b) Total deliveries of NedGulf (178 335 m³ from your letter of 22 May 1975) less deliveries of NedGulf to ABG (from data obtained from ABG).

(c) Example: November 1973: $11\,041 - 13\,976 \rightarrow \frac{-2\,935 \times 100}{13\,976} = -21\%$

(*) Total, January to March 1974.