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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 December 1982

relating to a proceeding under Article 85 of EEC Treaty (IV/29.883 — AROW/BNIC)

(82/896/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 of 6 February 1962: first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Greece, and in particular Article 3 thereof,

Having regard to the application made to the Commission on 11 June 1979 by the Association of Retailer-Owned Wholesalers in Foodstuffs, Brussels, pursuant to Article 3 of Regulation No 17,

Having regard to the Commission's decision to initiate proceedings, taken on 21 January 1982,

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

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

Whereas:

I. THE FACTS

A. The product

- (1) Cognac is a brandy distilled in the region of Cognac in France, defined in a decree enacted

on 1 May 1909. Brandies from this region are entitled to the registered designation of origin 'cognac' provided they comply with legal requirements for the vine varieties to be used and for wine-making, distillation, ageing and marketing. The brandy must be matured in 'Jaune d'Or' wine-sheds, entitling it to 'Jaune d'Or' movement papers, showing that duty has or has not been paid, which were introduced by the Law of 4 August 1929.

In 1981 sales of cognac amounted to about 470 000 hectolitres of pure alcohol, of which about 88 % was in bottle and 12 % in cask. Of total sales some 20 % were in France and 80 % abroad.

A breakdown showing sales in 1981 in the individual Member States of the Community is given in Annex I. This table shows that the common market as a whole accounted for about 52 % of total sales of cognac, and that exports to the nine other Member States in 1981 represented 40 % of total exports (by volume).

B. The Bureau National Interprofessionnel du Cognac

- (2) The Bureau National Interprofessionnel du Cognac, or national cognac industry board (BNIC), began as a board for the apportionment of Cognac wines and spirits set up by an order (*arrêté*) made on 5 January 1941 ⁽³⁾.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

⁽³⁾ Journal officiel de la République française (6. 1. 1941, p. 105).

That text has been amended and supplemented in a number of later ministerial orders defining the BNIC's powers and composition. The BNIC's working methods are laid down in its internal rules, which were approved by an order made on 2 August 1978.

- (3) The object of the BNIC, laid down in an order of 9 July 1946 ⁽¹⁾, is to consider and draft regulations of any kind concerning the acquisition, distillation, distribution, stocking and sale of wines and spirits produced in the region defined in the Decree of 1 May 1909.

In addition, the BNIC may:

1. require declarations of quantities produced or stocked, and in general any information of a commercial nature which it judges useful;
2. monitor the manufacture and distribution of cognac to ensure that local and established usages are strictly applied;
3. monitor the quantity of spirits produced or offered for sale by wine-growers in the defined region and by shippers;
4. carry out technical study and promotion of any measures which might improve conditions for the production and sale of cognac.

The BNIC is in particular responsible for keeping accounts and carrying out checks in connection with the ageing process, and for issuing certificates of origin.

- (4) The composition of the BNIC, laid down by the Order of 15 October 1981 ⁽²⁾, is as follows:
1. four persons, two representing wine-growers and two representing shippers ⁽³⁾ from the region defined in the Decree of 1 May 1909, nominated by the Minister for Agriculture;
 2. 12 delegates representing the growers, two delegates representing cooperative distilleries, 11 delegates representing the cognac

shippers, and 10 other delegates representing respectively Pineau des Charentes producers, the shippers of the same aperitif, the professional distillers' association, the association for fortified wines for distillation, the cognac wholesalers' association, brokers, management and supervisory staff, wine-shed workers, skilled wine-growing staff and vineyard workers; the last five groups have a consultative vote only. All delegates are nominated by the Minister for Agriculture from lists submitted by the appropriate professional and trade associations.

The chairman is an *ingénieur général de l'agriculture* and is nominated by the Minister for Agriculture. A standing committee consisting of the chairman and eight members, four growers and four shippers, is empowered to handle routine business.

A Government commissioner (*commissaire du Gouvernement*) nominated by the Minister is present at all meetings of the board and of the standing committee; he may agree to the decisions taken or may require that they be submitted to the Minister for approval.

Ministry of Agriculture and excise department staff also attend meetings in a consultative capacity.

- (5) Those within the scope of the BNIC comprise 48 300 wine-growers — including 30 400 who produce distillable white wines — 205 distillers, 215 shippers and 16 cooperatives. Of this number the professional and trade associations which are members of the BNIC account for 27 900 wine-growers, 168 distillers, 68 shippers and 16 cooperatives (1979 figures).

C. The Association of Retailer-Owned Wholesalers in Foodstuffs

- (6) The Association of Retailer-Owned Wholesalers in Foodstuffs (AROW) is a non-profit-making association with its headquarters in Brussels; it aims to provide a central organization for purchasing associations, as legally constituted in accordance with the laws and usages of their countries of origin, which act at wholesale level on behalf of self-employed food retailers or their associations. Among other objects it seeks to represent the interests of its members in dealings with international organizations and associations, and especially the European Communities.

D. The commercial context

- (7) The BNIC states that the 10 main cognac producers between them account for four-fifths

⁽¹⁾ Journal officiel de la République française (17. 7. 1946, p. 6426).

⁽²⁾ Journal officiel de la République française (18. 10. 1981, p. 9263).

⁽³⁾ 'Wine-growers' (*viticulteurs, viticulture* or *famille de la viticulture*) are those who produce the distillable white wines which carry entitlement to the registered designation of origin 'cognac'; 'shippers' (*négociants, négoce, commerce* or *famille du commerce*) denotes merchants who produce or market cognac brandies.

of total turnover in the product. However, it considers that 'the competition which exists between them leaves the conditions of commercial competition intact, as can be seen from the narrow margins and the low level of after-tax profit when one considers the considerable investment required by the stocking and raising of a prestigious product such as cognac'.

- (8) According to the information supplied by the BNIC, 'after the beginning of the world crisis in 1973 to 1976 (...) the Cognac region found itself facing (and still does face) imbalance between potential output (which had been increased to take account of export requirements) and the movement of sales, which was beginning again from a level 25 % below the previous one, because of the economic and financial difficulties affecting international trade'. Stocks rose drastically as a result (see Annex II), and the importance of this increase 'still weighs on the regional economy'. From 1975 onward, therefore, rules were established to reduce the scope for production and marketing, and to dispose of certain surplus quantities through other channels: fortified wines, state distilling, private consumption, etc. It may be noted that the increase in stocks held by growers distilling their own brandy was a great deal sharper in the case of the least expensive growths, 'Bons Bois', 'Fins Bois' and 'Bois Ordinaires' (see Annex III).
- (9) The BNIC states that 'with stocks currently out of proportion to immediate needs, and financial burdens growing steadily heavier, it appeared indispensable if the traditional quality and reputation of cognac were to be preserved to establish a price limit below which it would be beyond doubt that the quality (which forms the basis of the registered designation of origin) could not be respected'.
- (10) The BNIC also refers to the intense international competition facing cognac in a report on the present position and prospects for the cognac market in 1978/79; in the case of the United Kingdom it speaks of 'competition from ordinary brandies, whose prices are frequently more than £ 2 a bottle below those of standard quality cognac'; in the case of Germany it states that 'the prices applied (...) constitute (...) a brake on the development of sales (...)

While specialized vintners sell *weinbrand* (German brandy) at less than DM 20 a bottle and the large supermarkets invariably at less than DM 15 a bottle, with foreign brandies a little above, the price of cognac varies from DM 20 to DM 25 according to the kind of outlet, for standard qualities, and for VSOP and similar qualities approaches DM 30 a bottle (...). It is thus more than ever necessary to give careful consideration to the prices applied if we want cognac to be able to face up to the extremely stiff competition on the German market, whose importance among the primary outlets of the Cognac region is beyond doubt.'

E. Price-fixing measures

- (11) Price-fixing measures have been taken in respect of wines for distillation and of new and maturing spirit carrying entitlement to the registered designation of origin 'cognac', purchased by shippers from wine-growers, on the one hand, and in respect of retail sales of mature brandy ('the distribution price'), on the other.
1. *Fixing of shippers' buying prices*
- (12) For transactions between shippers and growers, since the harvest of 1957 prices have been fixed each year through an industry agreement negotiated between growers and shippers. Until 1978 these agreements had contractual force only and did not receive any approval of a public nature; the BNIC states that they were generally respected in the industry.
- (13) From 1978 onwards, purchase prices have been fixed by the industry agreements referred to in points 18 to 20 below.
- (14) The provisions referred to above which fix prices for transactions between shippers and growers were not the subject of the AROW's complaint and are not the subject of this proceeding.

2. *Fixing of retail prices*

- (15) As regards prices for sales of the finished product, the BNIC states that minimum selling prices for exports of cognac were formerly fixed by the public authorities in notices issued to exporters, notably after 1945. These

measures became unnecessary after 1967, as from then until 1973 and 1974 demand far outstripped supply. Minimum prices were reintroduced in 1976 by decision of the Government commissioner, and, from 1978/79 onwards, by industry agreements.

- (16) On 9 April 1976, a decision by the Government commissioner to the BNIC fixed minimum prices for sales of cognac in cask and in bottle. The terms of the decision state that its object is 'to maintain the traditional quality of cognac, to guarantee to the consumer a quality corresponding to the price of the purchased product, and to avoid any manipulation with the aim of artificially reducing prices'. Minimum prices are laid down by age count, the lowest prices being for consignments with an age count of two (the minimum age at which cognac may be sold for consumption: two and a half years), as follows:

- cognac in bottle: FF 3 750 per hectolitre of pure alcohol, for cognac fully put up for retail sale,
- cognac in cask: FF 3 095 per hectolitre of pure alcohol, including the price of any appropriate labels supplied.

These prices are net of duty and taxes and of any commission or discounts whatsoever, the terms being fob, free-at-frontier or point of dispatch. The decision does not state any fixed period in which the prices are to apply. The BNIC is to check that they are respected, acting in liaison with Government departments.

- (17) The decision provides that 'any consignor who does not comply with these provisions shall be required (independently of the measures provided for by the internal rules, which may extend to the withdrawal of sales vouchers and consequently of movement papers) to request that a sample be taken by the inspection department of the BNIC before dispatching any consignment. The goods may be dispatched only after the sample has been tasted and a favourable report delivered by the quality committee set up by Article 13 of the Order of 25 February 1954.'

- (18) In the wine-growing year 1978/79 the industry agreement on the price of cognac brandies and white wines for distillation, which was concluded in the BNIC framework and ratified

on 12 December 1978 by its member organizations, set a minimum retail price for cognac. It is the rules on this minimum price which form the direct subject-matter of the AROW's complaint. This agreement was the subject of an inter-ministerial order made on 1 February 1979; under this order the provisions of the agreement were 'extended to the growers, cooperative cellars, distillers and wholesale shippers who produce in the area defined by the Decree of 1 May 1909 or sell in or from that area, or from "jaune d'or" wine-sheds outside that area, white wines intended for the production of spirits or of the spirits qualifying for that registered designation of origin'.

- (19) That order was made pursuant to the Law No 75.600 of 10 July 1975 on the organization of agriculture ⁽¹⁾, supplemented and amended by Law No 80.502 of 4 July 1980. Article 2 of the latter Law provides as follows:

'Agreements concluded within the framework of a recognized trade organization may be extended in whole or in part for a stated period by the competent administrative authority, where through standard contracts, annual agreements and joint action in the general interest and compatible with the rules of the European Economic Community, they would improve in particular:

- the information available in respect of supply and demand,
- the adjustment and regularization of supply,
- the application, subject to state control, of rules on marketing, prices and terms of payment,
- product quality,
- relations between the various sections of the industry concerned (...).'

The same Article states that 'where an extension of this kind is ordered, the (...) measures taken by the trade organizations (by unanimous decision or following arbitration) shall be binding in the stated geographical area on all members of the trades forming that organization'.

⁽¹⁾ Journal officiel de la République française (11. 7. 1975).

Article 4 of the Law lays down the penalties which may be imposed in the event of failure to respect an extended agreement:

- contracts for the supply of goods concluded between persons bound by an extended agreement which do not comply with the terms of that agreement are automatically void,
- in the event of infringement of rules laid down by an extended agreement the ordinary court (the *juge d'instance*) may at the request of the trade organization award it a certain sum of money by way of compensation,
- where a supply contract which is void in this way relates to a product which must be accompanied by movement papers, the competent administrative department may, on a proposal by the relevant trade organization, suspend the issue of such papers.

- (20) The industry agreement on the price of cognac brandies and distillable white wines for distillation covering the year 1979/80, which was ratified on 18 October 1979 by the trade members of the BNIC, was also extended in an order made on 2 January 1980, which reproduced the terms of the Order of 1 February 1979 referred to above. A similar agreement for the year 1980/81 was ratified on 7 November 1980 and extended by an order made on 27 November 1980 ⁽¹⁾. For the year 1981/82 the industry-wide agreement ratified on 10 November 1981 was extended by an order made on 30 November 1981 ⁽²⁾.

- (21) Article 1 of the agreement, entitled 'Scope', states that Articles 7 and 8 deal with sales of cognac. Article 7, entitled 'Minimum selling price to guarantee a minimum quality of cognac' provides:

'In order to maintain the traditional quality of cognac, and to assure the consumer that there will be no artificial reduction in prices

to the detriment of the characteristics of the product, a minimum distribution price is hereby laid down, fixed as follows for the period 1 February to 31 December 1979:

1. cognac in case: FF 12 per 70 cl bottle, 40 % alcohol by volume, fully put up for retail sale; (...)
2. cognac in cask: FF 3 500 per hectolitre of pure alcohol, not including containers but including any appropriate labels supplied.

For cognac in cask or in bottle a total discount covering all forms of commission, or rebate is authorized up to a maximum of 10 %. The net minimum price is net of duty and tax, the terms to be fob or free-at-frontier. In case of sales free at point of dispatch, a further reduction is authorized, up to FF 0.40 per bottle for sales in case and FF 55 per hectolitre of pure alcohol for sales in bulk.'

The minimum prices ex Cognac, after all commissions or discounts whatsoever have been deducted, are thus FF 10.40 a bottle (equal to FF 3 714 per hectolitre of pure alcohol), or FF 3 095 per hectolitre of pure alcohol for sales in cask. Article 8 provides that 'selling prices shall be checked by the BNIC:

- for exports: on the basis of the customs declarations (...),
- for sales on the home market: on the basis of the invoice price which must be entered on duty-unpaid sales vouchers and on the monthly lists of duty-paid consignments sent to the BNIC by those within the scope of the agreement.'

The same Article lays down that infringements shall be subject to the penalties provided for in Article 4 of the Law of 10 July 1975, to be applied in accordance with the BNIC's internal rules; these penalties make provision in particular for the suspension of the issue of movement documents.

- (22) For the year 1979/80 the industry agreement of 18 October 1979, referred to above, contains provisions identical to those of the agreement of 12 December 1978; Article 7 fixes the following minimum selling prices applicable between 1 January and 31 December 1980:

- cognac in case: FF 13.50 per bottle,
- cognac in cask: FF 4 000 per hectolitre of pure alcohol.

⁽¹⁾ Journal officiel de la République française (3. 12. 1980).

⁽²⁾ Journal officiel de la République française (2. 12. 1981).

Deducting the maximum discount of 10 % to cover various rebates, and the reduction of FF 0.40 per bottle or FF 55 per hectolitre of pure alcohol for sales ex Cognac, we obtain a minimum price of FF 11.75 per bottle (equal to FF 4 196 per hectolitre of pure alcohol) and FF 3 545 per hectolitre of pure alcohol for sales in cask.

- (23) By letter of 4 September 1979 the Commission asked the BNIC to supply to it the new prices which were to enter into force on 1 September 1979 for wine for distillation, on 1 October 1979 for brandy, and on 1 January 1980 for finished cognac (distribution prices). The BNIC replied on 20 November 1979: 'the BNIC has considered the mechanisms and the price levels for the next agreement. The price brackets have not yet been decided'. The BNIC indicated ranges of variation for white wines and for brandy, describing them as 'a proposal by the general meeting held on 18 October 1979'. On 26 January 1980, in reply to a Commission letter asking it to substantiate this reply, in view of the fact that the prices referred to had in fact been fixed by the BNIC general meeting on 18 October 1979, the BNIC said:

'The general meeting held on 18 October 1979 did indeed draw up a price agreement which at that time had contractual force only and had not received any approval of a public nature. The agreement has since been approved by a ministerial order made on 2 January 1980. For the same reasons the distribution price for mature cognac, on which an agreement had been concluded at the same meeting, was not published by us before it was extended by the same order.'

- (24) For the year 1980/81 Article 8 of the agreement of 7 November 1980 fixes the following minimum prices for consignments dispatched between 1 January and 31 December 1981:

— cognac in case: prices per hectolitre of pure alcohol fully put up for retail sale in 70 cl bottles, 40 % alcohol by volume:

- age counts 2 and 3: FF 5 304,
- age counts 4 and 5: FF 5 893,
- age count 6: FF 6 429;

— cognac in cask: prices per hectolitre of pure alcohol, not including containers, but including any appropriate labels supplied:

- age counts 2 and 3: FF 4 400,
- age counts 4 and 5: FF 4 840,
- age count 6: FF 5 320.

Subtracting the maximum discount of 10 % which the agreement provides for to cover the various rebates, and the deduction of FF 143 per hectolitre of pure alcohol for sales in case or FF 55 per hectolitre of pure alcohol for sales in cask, the minimum ex Cognac prices are as follows, per hectolitre of pure alcohol:

- cognac in case:
 - age counts 2 and 3: FF 4 630,
 - age counts 4 and 5: FF 5 160,
 - age counts 6: FF 5 643;
- cognac in cask:
 - age counts 2 and 3: FF 3 905,
 - age counts 4 and 5: FF 4 301,
 - age count 6: FF 4 733.

- (25) For the year 1981/82, the agreement of 10 November 1981 referred to above, which was sent to the Commission by the BNIC on 8 December 1981, did not provide for any minimum distribution price for mature cognac. Subsequently, however, the BNIC's information bulletin No 929, dated 4 January 1982, came to the Commission's notice. This document included a section entitled 'Control of quality of cognac — threshold selling price', which fixes the following threshold prices for sales for distribution and consumption:

- cognac in case: per bottle, free at point of dispatch, duty unpaid, net FF 14.60,
- cognac in case: per bottle, free-at-frontier, duty unpaid, net FF 15.50,
- cognac in cask: per hectolitre of pure alcohol, not including containers, net FF 4 200.

The bulletin states that 'it has been decided to draw the attention of all those in the industry to the level of the threshold prices; any sales below these thresholds will automatically entail quality control inspections on the premises of both the buyer and the seller (...). These pricing practices will also be considered as presumptive evidence of failure to respect the industry quotation made obligatory by the interministerial order of 30 November 1981' (see above, point 20).

- (26) In a letter to the Commission, dated 23 March 1982, the Director of the BNIC said on this subject, 'as soon as I received your statement of

objections on 8 February 1982, I immediately gave my staff the necessary instructions to ensure that inspections would not systematically be carried out solely on considerations of the threshold price in question'. On 8 April 1982 the BNIC supplied the Commission with its information bulletin No 936, dated 31 March 1982, which stated: 'The notice published in information bulletin No 929, of 4 January 1982, prescribing automatic inspection of quality on the basis of the threshold prices indicated, is cancelled.'

The agreement appears to us to be in complete conformity with the objectives set out in that paragraph: it produces a qualitative improvement in production, distribution without abnormal distortion, and the promotion of technical and economic progress, from which consumers benefit directly, notably because of longer ageing in all grades of quality.

For all these reasons our board is preparing (as you suggest) to supply the official notification provided for by the Community rules in order to qualify for a declaration of inapplicability.'

- (27) In discussions in the BNIC's standing committee and its committee on production, the problem of compatibility of the minimum price with Community rules was repeatedly raised. On 12 September 1978, for example, the Director of the BNIC told a meeting of the production committee, 'we can try (to fix a minimum distribution price), but we may run into conflict on exports. We can fix prices applying in France.' On 10 March 1980, at a meeting of the same committee, there was raised the question of 'whether from the point of view of Brussels and Paris the legal structure we have built up' (i.e. the industry quotation and the minimum distribution price, based on the 1975 Law) 'can be maintained in the years to come'.

The BNIC's declaration of intent here was not carried out.

F. Application of the agreements

- (29) In support of its complaint, the AROW states that in 1979 its members noted major increases (up to about 10 %) in the price of cognac sold for distribution and consumption in various common market countries, notably the Federal Republic of Germany and Italy.
- (30) By letter of 20 November 1979 the BNIC informed the Commission that no penalties had been imposed for failure to respect the agreements which are the subject of these proceedings, but that inquiries were regularly conducted, and several were then in progress. In the same letter, the BNIC supplied the Commission with export prices for cognac calculated from customs statistics and the price lists of certain cognac producers.
- (31) The customs statistics assembled by the BNIC show the following variations in the average price of exported cognac:
- (28) Lastly, in 20 November 1979, replying to the Commission's request for information of 4 September 1979, which informed him that on preliminary study the industry agreement in question appeared to be caught by the prohibition in Article 85 (1) of the Treaty, and that it was at their own risk that the parties maintained it in force without notifying it, the Director of the BNIC stated:
- '... as regards Article 85 (3) of the Rome Treaty, to which you refer, I can confirm that the BNIC envisages notifying the agreement in question to the Commission.

	Bottle		Cask	
	Average price per hectolitre of pure alcohol (FF)	Variation on preceeding year (%)	Average price per hectolitre of pure alcohol (FF)	Variation on preceeding year (%)
1975	6 795	+ 3.0	3 206	- 5.1
1976	7 092	+ 4.4	3 079	- 4.0
1977	8 084	+ 14.0	3 655	+ 18.7
1978	8 789	+ 8.7	3 835	+ 4.9
1979	9 660	+ 9.9	3 648	- 4.9
1980	10 561	+ 9.3	3 944	+ 8.1
1981	12 771	+ 20.9	4 288	+ 8.7

Sources: 1975 to 1978, table supplied by BNIC.

1979 to 1981, BNIC reports for 1978/79, 1979/80 and 1980/81.

- (32) According to the BNIC, 'these papers show that selling prices are infinitely higher than the minima laid down by the brackets set in the extended industry agreement'. It argued that 'the price guaranteeing the minimum quality may go lower for consignments in case at FF 10.40 per 70 cl bottle, 40 % by volume (equal to FF 3 714 ⁽¹⁾ per hectolitre of pure alcohol), while the average price declared at customs in 1978 was FF 8 789 per hectolitre of pure alcohol, or more than double'.

As regards cognac in cask, the BNIC states, 'likewise, the customs statistics (...) give a very accurate reflection of a substantial gap between the floor price for bulk consignments (in cask), FF 3 095, and the price applied on export, which amounts to FF 3 835 per hectolitre of pure alcohol' ⁽²⁾.

- (33) From these data the BNIC concludes: 'thus we can clearly see the way in which the prices which are the subject of the agreement act as a guarantee of quality. The agreement aims only to provide a protective barrier, a sort of floor below which it is not possible to offer customers a cognac up to cognac's traditional quality and corresponding to its reputation as a product bearing a registered designation of origin.'

- (34) The price lists supplied by the BNIC, which were those of very well-known houses (Rémy Martin, Martell, Hennessy, Courvoisier, etc.)

showed that the price (net of duty and tax) of a 70 cl bottle of three-star brandy was always higher than FF 20, tending to confirm the BNIC's conclusion.

- (35) On 26 January 1980, at the Commission's request, the BNIC supplied further price lists relating this time to less well-known firms, which showed that the price net of tax and duty for a 70 cl bottle of three-star cognac could be as low as FF 11.48.

- (36) The Commission also studied the prices of other cognac houses; it emerged that prices are regularly charged which are equal to or only slightly above the minimum prices fixed by the BNIC. In 1979, for example, André Dorbert three-star cognac was sold at FF 10.75 for a 70 cl bottle, and Henry de Brière and Chandelac cognac were sold at FF 10.40, when the minimum price was FF 10.40; and again in 1980, Comte Joseph cognac was sold by Grands Chais de France at FF 11.95 for a 70 cl bottle, and Beausoleil three-star cognac was sold at FF 11.75 for a 70 cl bottle, when the minimum price was FF 11.75. The BNIC must necessarily have been informed of the prices, as the movement papers which state the selling price have to be supplied to it.

- (37) In the case of cognac in cask it emerges from the replies to the requests for information addressed by the Commission to the shippers in the Cognac region that for a three-star cognac the purchase price of the spirits represents about 90 % of the cost price of the product sold by the shipper. Given the quotation fixing the purchase prices for new and maturing

⁽¹⁾ FF 3 750 according to the BNIC.

⁽²⁾ The BNIC compared the floor price in force from 1 February 1979 with the average price in 1978.

spirit, therefore, the minimum cost price of a three-star cognac in cask, would seem to be substantially below the floor price fixed by the BNIC, using 'Fins Bois', 'Bons Bois' and 'Bois Ordinaires' grading (see Annex IV); these cognacs could thus have been sold below the floor prices.

(38) Several German cognac importers have told the Commission that in 1979 and 1980 they bought cognac in cask from shippers in the Cognac region at prices close to the floor prices set by the BNIC, and even in some cases below them. This was made possible in particular by giving discounts separately. A German wholesale merchant, the firm⁽¹⁾ stated in particular that the floor price set by the BNIC 'is acceptable only to firms which have a very large advertising budget and their own sales network. In order to conclude the contracts necessary for the sale of their crop (...) our suppliers have been forced to sell for export below that floor price.'

(39) At an inspection carried out on his premises on 5 October 1981 by Commission officials, pursuant to Article 14 of Regulation No 17, a shipper stated: 'It is true that I have been subjected to checks and inspections on the part of the BNIC in recent years, aimed particularly at checking that the minimum export prices imposed by the industry agreements were respected. As regards my selling offer of 7 April 1981 to Germany (of which you have taken a photocopy), I proposed prices which I was unable to maintain because of pressure brought to bear by the BNIC. I regret not being able to develop my sales, which would have been necessary for the proper operation of my business. I could have developed my sales in Germany and Belgium.' The prices quoted to for consignments in cask, were FF 2 900 per hectolitre of pure alcohol for three-star cognac, where the minimum price was FF 3 905, and FF 3 900 per hectolitre of pure alcohol for VSOP cognac, where the minimum price was FF 4 301.

(40) The papers supplied by the BNIC in the course of an inspection carried out by Commission officials, pursuant to Article 14 of Regulation No 17, showed that BNIC repeatedly took

steps to enforce the minimum distribution prices for cognac.

(41) On 27 March 1979 the Director of the BNIC wrote to the chairman of on the subject of an offer made by that undertaking at a price below the minimum. The letter ended:

'I must (...) inform you that if the (industry) agreements are not respected I will be forced, to my great regret, to refer the matter to the authorities, and to request the application of the penalties provided for by Article 4 of the Law of 10 July 1975, notably suspension of the issue of any movement papers by the tax departments.'

(42) On 13 May 1980 the same undertaking was the subject of an inquiry by the BNIC, which concluded that its prices were FF 0.16 below the minimum price for bottled cognac sold in France, and FF 0.90 per bottle for export; for bulk sales the difference was FF 89.15 and FF 449 per hectolitre of pure alcohol for sales in France, and FF 450 per hectolitre of pure alcohol for export sales. On 23 June 1980 this matter was discussed at the meeting of the enlarged standing committee, which envisaged taking penalties. In a letter of 24 September 1980 the Director of the BNIC informed the undertaking of the standing committee's decision in these terms:

'The consignments in question were dispatched during the currency of the industry agreement and after publication of the extending order, and (...) consequently constitute infringements of the industry agreement.

Your company previously received a warning of the same kind for similar infringements, and the standing committee is giving you a final warning; obviously if the infringement is repeated legal steps will have to be taken against you, which would certainly damage the good reputation of your house.'

(43) On 23 June 1980 the enlarged standing committee also considered the case of a shipper outside the defined Cognac region who was not observing the minimum price. He complained that he was losing his customers because he was forced to set his prices too high. The case of a shipper who had dispatched bottled cognac at a price below the minimum mainly to the Netherlands was studied, and steps against him discussed.

(44) On 21 January 1981 a meeting of the enlarged standing committee considered two cases of failure to observe minimum prices. A

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

wholesaler who had sold cognac at a lower price stated that if he respected the minimum price he would lose his small market. It was decided to apply the rules to him and to threaten legal action if he repeated the infringement. In the case of a distiller who was selling cognac in bottle at FF 0.69 below the minimum price it was remarked:

'It would be a bad thing psychologically to take action against this grower when very many firms are continually selling below the quotation, but we have no proof.'

The Director of the BNIC was instructed to see the person concerned and to tell him that the matter would not be pursued, but that his case would be reconsidered if he continued.

(45) When the BNIC observes from the tax unpaid documents supplied to it that spirits are being dispatched at below-minimum prices, it sends the firm concerned a standard letter indicating the consignments in question and informing it that the matter will be referred to the industry committee. The firm is asked to submit its comments as rapidly as possible. Letters of this kind were sent for example to on 15 September 1980, to on 30 October 1980, to on 4 November 1980, and to on 1 September 1981. These cases were dropped without any penalties being imposed after the firms agreed to change their prices, or, in the case, showed that the sales contract preceded the conclusion of the industry agreement.

(46) Where a firm refuses to raise its prices to bring them into line with the minimum price, the BNIC withdraws the books of vouchers for the removal and sale of cognac which it had issued to it. It also asks the tax departments to refuse the firm any movement papers for cognac. Such measures were taken for example against; the request was made to the director of the tax departments at La Rochelle in a letter from the Director of the BNIC dated 24 February 1981. The consequence of these measures is to prevent the undertaking from engaging in any transaction involving cognac.

(47) The BNIC did not contest the facts referred to in points 36 to 46 above in its reply of 8 April 1982 to the statement of objections; nor did it do so at the hearing on 19 April 1982. Rather, it submitted that the BNIC was not an association of undertakings within the meaning of Article 85 of the EEC Treaty and that the rules which were the subject of the statement of objections did not fall within the scope of Article 85, since they were acts of the French State.

II. LEGAL ASSESSMENT

A. Article 85 (1) of the EEC Treaty

(48) The decision taken on 9 April 1976 by the Government commissioner to the BNIC, laying down minimum prices for sales of cognac, both in cask and in bottle is a decision taken by a public authority; it does not constitute an agreement between undertakings or a decision by an association of undertakings, within the meaning of Article 85 of the EEC Treaty.

(49) As regards the fixing of minimum prices for 1979, 1980 and 1981, a distinction must be drawn between the industry agreements deciding these measures and the orders extending them. The industry agreements concluded in the BNIC framework do constitute decisions of an association of undertakings within the meaning of Article 85, as will be shown below.

(50) The fact that the members of the BNIC are nominated by the Minister for Agriculture cannot disguise the fact that they are nominated on the proposal of the relevant trade associations and in the capacity of delegates of the professional or trade organization association to which they belong; they thus represent these organizations which are themselves composed of undertakings.

(51) The BNIC is thus an association of associations of undertakings, and constitutes an association of undertakings for the purpose of the application of Article 85.

(52) The way in which the BNIC is financed, the fact that it has legal personality, and the fact that quality control functions are conferred on it by law, do not prevent its being considered an association of undertakings. At all events the industry agreements at issue do not fall within the duties conferred on the BNIC by the legal provisions determining its competence.

Although the agreements state that it is 'in order to maintain the traditional quality of cognac, and to assure the consumer that there will be no artificial reduction in prices to the detriment of the characteristics of the product' that a minimum distribution price has been instituted, the decisions fixing minimum prices were in reality taken on grounds of the sales policy of the producers, cooperatives, distillers and shippers of cognac represented through their professional and trade organizations by the BNIC. The objective of quality control cannot justify such measures, as will be seen below (points 69 to 71).

- (53) The measures in question were not required by the public authorities. They were not taken under the regulatory powers conferred on the Government commissioner, and the Government commissioner played no part in the proceedings leading to their adoption. The industry agreements were adopted by the general meeting of the BNIC after they had been discussed and approved by both sections of the trade, the wine-growers and the shippers. The general meeting at the same time asked that the agreement be extended to the Act of 10 July 1975 (see above, point 19). The decision was thus a decision of the BNIC, represented by its general meeting.
- (54) That decision constitutes an act separate from the subsequent extending order made by the public authorities, which is intended to make the provisions of the industry agreements binding member undertakings of the trade organizations represented in the BNIC obligatory for all those in the industry. Each year since 1978 the industry agreements have been concluded before the extending orders. Each year there has been a period of between three weeks and two-and-a-half months during which the agreements concluded within the BNIC were binding only on the firms which are members of the professional and trade organizations of the BNIC. The BNIC has explicitly confirmed this, stating that before its extension the agreement fixing prices 'had contractual force only and had not received any approval of a public nature' (see above, point 23).
- (55) Furthermore, from 1957 to 1978 an industry price-fixing agreement, which thus had contractual force only, was concluded each year, and was applied and respected without any subsequent extending order (see above, point 12).
- (56) Lastly, the notion of an extending order implies that there are rules to extend which are binding on their signatories. The effect of the extending order is only to make these rules binding on parties other than the signatories. Article 2 of the Law of 10 July 1975 (see above, point 19) explicitly states that an agreement must first of all be concluded, that there is no obligation to extend it, and that the extension may relate to part of its provisions only.
- (57) As regards the establishment of a threshold selling price between 4 January and 31 March 1982, this too is a decision of the BNIC which was not required by the public authorities and was not extended by them, and which may thus be caught by Article 85 of the Treaty.
- (58) The fixing of a minimum selling price for cognac exerts a direct influence on the prices for cognac sold by the various producers. This measure applies to sales both in France and for export. It may appreciably affect trade between Member States in either case, as products sold in France by those subject to the agreement may subsequently be exported. These measures may divert the flow of trade from the natural course it would have followed if price formation had been free. The maintenance of high prices also tends artificially to divert demand towards other spirits, and particularly other brandies.
- (59) Trade between Member States is thus appreciably affected, given the scale of sales of cognac in the various common market countries (see above, point 1).
- (60) Although presented as having the sole object of guaranteeing the quality of cognac, the measures at issue fixing minimum prices for cognac have as their object and effect the restriction of competition within the common market. The measures prevent free individual price formation by cognac producers, and thus

tend to restrict competition between them, by preventing them from offering their products at prices below the minimum rates fixed.

- (61) The statements by the BNIC according to which the introduction of the minimum price was justified by the increase in stocks (see above, point 9) show that the object pursued was to prevent or at least to restrict free competition: it was to avoid or to limit the fall in prices which would otherwise have resulted from an expansion in supply, due to an increase in stocks in the face of stable or falling demand, that a binding minimum was introduced. This meant that selling prices for cognac could no longer be freely determined by producers on the basis of market conditions.
- (62) These price-fixing measures had the effect of restricting competition appreciably. Despite the statements made by the BNIC in its letter of 20 November 1981 (see above, points 32 and 33), prices equal to or only slightly above the minimum prices are regularly applied (see above, points 35 to 38); furthermore, the BNIC many times had to take steps to force shippers who wanted to charge less to raise their prices. In one case, indeed, the BNIC withdrew from a shipper the vouchers for the removal and sale of cognac which had been issued to him, thus preventing him from continuing his business (see above, points 39 to 46). Thus the agreements were indeed enforced by the BNIC.
- (63) By artificially maintaining high prices the BNIC limited the growth in demand which might have taken place. This helped to bring about a large increase in cognac stocks; stocks became more stable only after public measures had been taken to limit production and sale (see above, point 8).
- (64) The restrictions were particularly noticeable in the case of cognac from the *Fin Bois*, *Bons Bois* and *Bois Ordinaires*. Study of statistics for cognac stocks shows that it was in these growths that stocks increased most (see above, point 8).
- (65) The fixing of a threshold selling price in the information bulletin of 4 January 1982 had as its object the restriction of competition by making it very difficult to sell cognac at prices below the threshold, by requiring a quality

control inspection to be carried out on the premises both of the seller and of his purchaser. The systematic and automatic character of these inspections, and thus the inconvenience they implied for sellers and buyers, were liable to discourage customers wishing to buy cognac from shippers applying prices below these threshold prices. Although presented as having the object of guaranteeing quality, these measures in reality had the object of dissuading cognac producers from offering their products at prices below the threshold price. This restriction was an appreciable one, as it forced shippers to sell their cognac at a price substantially above their cost price (see point 37 and Annex IV). The measure was liable appreciably to affect trade between Member States, for the reasons set out in points 58 and 59 above.

B. Article 85 (3) of the EEC Treaty

- (66) A decision granting an exemption under Article 85 (3) of the EEC Treaty may be taken only where the agreement has been notified to the Commission in accordance with Article 4 (1) of Regulation No 17, unless that obligation is lifted by Article 4 (2) of the Regulation. The industry agreements which are the subject of this decision are not among the restrictive practices referred to in Article 4 (2), because they relate to exports between Member States and more than two undertakings are party to them; they were not notified to the Commission, despite the BNIC's statement in its letter of 20 November 1979 that notification was envisaged. In any event, even had they been notified, the agreements could not have been declared exempt pursuant to Article 85 (3), for the reasons set out below.
- (67) In its letter of 20 November 1979 the BNIC stated that the agreement had as its object 'a qualitative improvement in production, distribution without abnormal distortion, and the promotion of technical and economic progress, from which consumers benefit directly, notably because of longer ageing in all grades of quality'.
- (68) It should be noted, first of all, that this argument rests essentially on the statement that the prices charged are infinitely or substantially

higher than the minimum prices set, although the facts show that prices close to or equal to the minimum prices are in fact charged.

(69) The imposition of minimum prices can in no way be justified by reference to an alleged object of guaranteeing quality. Such a measure is both pointless and ineffective for that purpose. It is pointless because the legal requirements for the production, stocking, ageing and distributions of cognac allow sufficient policing of fraud. It is ineffective because it introduces no extra check on products sold at prices above the minimum imposed; if it were accepted that the legal requirements protecting the use of the registered designation of origin 'cognac' were ineffective, the imposition of a minimum price would not prevent products which failed to meet the quality criteria laid down by those legal requirements from being sold with impunity at prices above the minimum imposed.

(70) Furthermore, the measures at issue are in any event out of proportion to the object referred to, as they completely prevent the sale of spirits qualifying for the registered designation of origin 'cognac' at prices below the minimum set by the industry agreement. There is no provision for proving that a product sold at a price below the minimum imposed nevertheless meets the quality criteria laid down by the legal requirements⁽¹⁾.

(71) The consumer does not receive the benefit of an improvement in quality, as has been shown above. Neither does he benefit from the other hypothetical advantages alleged by the BNIC (see above, point 67), as the measures at issue have the consequence that prices are at a higher level than that which would result from the free interplay of supply and demand.

⁽¹⁾ The decision of the Government commissioner of 9 April 1976 (see above, points 16 and 17) provided that in that case sale would be possible after a sample had been tasted and a favourable report delivered by the quality committee.

C. Article 15 (2) of Regulation No 17

(72) It follows from what has been said that the BNIC has infringed Article 85 of the EEC Treaty. The BNIC infringed that provision deliberately or at least negligently. It could not have been unaware of the decisions of the Commission and the judgments of the Court of Justice in this field. In particular, it is well known that agreements or decisions by which undertakings or associations of undertakings agree prices or terms to be applied in the contracts they conclude with third parties are regularly investigated and condemned by the Community authorities where they are liable to affect trade between Member States. The BNIC must have known that it was an association of undertakings within the meaning of Article 85 (1) since the Commission had already reached the same conclusion in Decision 76/684/EEC⁽²⁾ concerning the Bureau National Interprofessionnel de l'Armagnac (BNIA).

(73) It is noteworthy that the problem of the compatibility of the price-fixing measures with Community law was raised at meetings of the standing committee (see above, point 27). On 4 September 1979, the BNIC's attention was drawn by the Commission to the fact that the industry agreement seemed to be caught by Article 85 (1). In reply, the Director of the BNIC informed the Commission that the members of the BNIC intended to notify the agreement with a view to seeking exemption under Article 85 (3).

(74) A fine should therefore be imposed on the BNIC in accordance with Article 15 (2) of Regulation No 17. In determining the amount of the fine, the Commission has had regard to the following factors.

(75) The fixing of minimum prices by agreement or decision of an association of undertakings is a serious infringement of the Community's competition rules. The fixing of selling prices is mentioned expressly in Article 85 (1) (a) of the Treaty as a measure which prevents, restricts or

⁽²⁾ OJ No L 231, 21. 8. 1976, p. 24.

distorts competition. The Commission has already held price agreements to be contrary to Article 85 (1) by decision and the Court of Justice has confirmed this view.

- (76) Minimum selling prices for white wines for distillation and cognac brandies laid down in the industry agreements concluded on 12 December 1978, 18 October 1979 and 7 November 1980 were applied from 1 February 1979 to 31 December 1981. The BNIC committed a further infringement from 4 January to 31 March 1982 by introducing a threshold selling price. The BNIC did not communicate this measure to the Commission and it was withdrawn only after the Commission had again intervened. The infringement therefore lasted more than three years.
- (77) The anti-competitive measures referred to above were adopted in a specific legal context in which, in particular, the industry agreements were annually extended by a later Ministerial order. Therefore some of the restrictive effects flow from the compulsory application of the industry agreements by undertakings which are not members of professional organizations represented in the BNIC,

HAS ADOPTED THIS DECISION:

Article 1

From 1 February 1979 to 31 December 1981 the provisions fixing minimum selling prices for cognac set out in the industry agreement on the prices of Cognac brandies and white wines for distillation concluded in the framework of the BNIC for the years 1978/79, 1979/80 and 1980/81, constituted infringements of Article 85 (1) of the Treaty establishing the European Economic Community.

This applies in particular to Article 7 of the industry agreement concluded on 12 December 1978, Article 7 of the industry agreement concluded on 18 October 1979 and Article 8 of the industry agreement concluded on 7 November 1980.

Article 2

The fixing of a threshold price for the sale of cognac under the decision of the BNIC published under the title 'Control of quality of cognac — threshold selling price' in BNIC information bulletin No 929, dated 4 January 1982, and cancelled on 31 March 1982, constituted an infringement of Article 85 of the Treaty establishing the European Economic Community.

Article 3

1. A fine of 160 000 (one hundred and sixty thousand) ECU, that is FF 1 049 144, is imposed on the Bureau National Interprofessionnel du Cognac.
2. This fine shall be paid, within three months of the date of notification of this Decision, to the Commission of the European Communities, Account No 5.770.006.5, at the Société Générale, Agence Internationale, 23, rue de la Paix, F-75002 Paris.

Article 4

This Decision is enforceable in accordance with Article 192 of the Treaty establishing the European Economic Community.

Article 5

This Decision is addressed to the Bureau National Interprofessionnel du Cognac, 3, rue Georges Briand, F-16100 Cognac.

Done at Brussels, 15 December 1982.

For the Commission

Frans ANDRIESEN

Member of the Commission

BILAG I — ANHANG I — ΠΑΡΑΡΤΗΜΑ I — ANNEX I — ANNEXE I — ALLEGATO I — BIJLAGE I

Salget af cognac (hl ren alkohol)
 Cognac-Verkäufe (hl reiner Alkohol)
 Πωλήσεις κονιάκ (hl καθαρού οινοπνεύματος)
 Cognac sales (hl pure alcohol)
 Ventes de cognac (hl d'alcool pur)
 Vendite di cognac (hl alcole puro)
 Cognacverkopen (hl zuivere alcohol)

	Hellas Ελλάς	United Kingdom	Danmark	Ireland	Deutsch- land	Italia	Belgique België	Luxem- bourg	Nederland	France	I CEE-EEC EWG-EEG ΕΟΦ-ΕΟΚ	II Total Totaal Totale Σύνολο	I/II (%)
1958					4 470	1 522	2 537	495	1 166	26 968	41 847	114 011	36,70
1959					8 889	2 298	2 317	519	1 430	24 000	45 431	126 060	36,04
1960					8 187	2 987	3 251	568	1 783	31 960	58 600	148 227	39,53
1961					9 666	3 653	3 239	612	2 249	37 322	67 011	161 111	41,59
1962					11 609	3 937	3 721	628	2 812	41 583	79 582	177 115	44,93
1963					11 815	4 963	4 169	682	3 629	43 584	85 210	196 296	43,41
1964					12 394	3 618	4 502	766	4 277	45 527	88 572	200 220	44,24
1965					18 492	3 177	5 326	769	6 033	45 240	93 652	202 545	46,24
1966					15 801	3 716	5 363	799	5 047	50 284	99 842	218 210	45,76
1967					14 593	4 502	5 719	771	5 806	54 092	96 062	228 433	42,05
1968					20 381	5 156	5 670	770	6 549	58 949	105 325	249 987	42,13
1969					26 304	6 668	7 017	924	7 482	59 526	119 605	258 685	46,24
1970					33 723	5 745	6 455	998	8 745	63 255	139 341	288 777	48,25
1971					43 597	9 407	7 587	1 096	9 761	73 068	164 297	337 701	48,65
1972					33 488	8 128	9 414	1 162	10 120	68 455	153 983	347 124	44,36
1973		64 998	4 704	5 312	21 234	8 470	9 238	917	10 204	67 827	208 893	334 046	62,53
1974		50 352	3 816	4 707	17 918	5 282	8 800	890	9 018	61 525	173 977	274 277	63,43
1975		42 823	3 810	4 027	24 122	3 900	9 625	879	10 515	77 476	188 281	290 435	64,83
1976		44 542	4 978	4 808	29 939	5 122	10 966	952	12 564	75 601	198 036	329 212	60,15
1977		46 148	4 059	5 427	24 968	4 549	13 332	1 001	13 278	76 432	201 055	324 009	62,05
1978		49 861	3 922	6 848	30 307	5 044	14 309	1 108	15 393	85 749	226 658	381 065	59,48
1979		57 491	3 633	7 163	33 326	6 377	16 122	1 243	16 931	86 981	247 721	424 729	58,32
1980		44 785	3 493	6 815	32 108	5 801	15 650	1 676	11 513	77 848	219 510	406 307	54,03
1981	423	40 546	3 903	5 652	33 432	4 744	12 999	1 649	11 399	87 338	222 087	423 679	52,42

*BILAG II — ANHANG II — ΠΑΡΑΡΤΗΜΑ II — ANNEX II — ANNEXE II —
ALLEGATO II — BIJLAGE II*

Cognac (hl ren alkohol)
Cognac (hl reiner Alkohol)
Κονιάκ (hl καθαρού οινοπνεύματος)
Cognac (hl pure alcohol)
Cognac (hl d'alcool pur)
Cognac (hl alcole puro)
Cognac (hl zuivere alcohol)

	Produktion Produktion Παραγωγή Production Production Produzione Produktie	Salg Verkauf Πώληση Sale Vente Vendita Verkoop	Lagerbeholdning Lagerbestand Απόθεμα Stock Stock Riserve Stock
1972	421 942	381 134	1 607 822
1973	406 708	375 579	1 638 951
1974	740 355	330 163	2 049 143
1975	544 364	331 592	2 261 916
1976	720 196	374 554	2 606 145
1977	447 214	372 374	2 680 985
1978	354 494	412 938	2 622 541
1979	503 211	454 517	2 671 235
1980	655 394	478 727	2 847 941
1981	451 716	469 652	2 830 005

*BILAG III — ANHANG III — ΠΑΡΑΡΤΗΜΑ ΙΙΙ — ANNEX III — ANNEXE III —
ALLEGATO III — BIJLAGE III*

BOUILLEURS DE CRU

Lagerbeholdning (hl ren alkohol)
Lagerbestand (hl reiner Alkohol)
Απόθεμα (hl καθαρού οινοπνεύματος)
Stock (hl pure alcohol)
Stock (hl d'alcool pur)
Riserie (hl alcole puro)
Stock (hl zuivere alcohol)

	Grande Champ.	Petite Champ.	Bord.	Fins Bois	Bons Bois	Bois Ordin.	Total Totaal Totale Σύνολο
1972	141 104	93 099	30 812	137 725	40 514	2 745	445 999
1973	149 002	99 069	30 190	143 190	43 102	2 248	466 801
1974	180 719	125 307	37 104	188 177	61 723	2 719	595 749
1975	186 350	139 074	39 365	211 058	76 786	2 820	655 453
1976	246 651	203 778	52 106	346 700	130 423	3 988	983 646
1977	260 653	219 783	55 766	375 566	148 896	4 113	1 064 777
1978	253 140	220 407	57 040	377 640	143 528	4 138	1 055 893
1979	255 774	220 945	57 974	385 942	139 491	13 368	1 073 494
1980	281 355	244 113	60 667	401 746	149 804	15 592	1 153 277
1981	266 688	239 023	54 039	378 012	144 466	13 818	1 096 046

BILAG IV — ANHANG IV — ΠΑΡΑΡΤΗΜΑ IV — ANNEX IV — ANNEXE IV —
ALLEGATO IV — BIJLAGE IV

Cognac ***, i fade (ffr./hl ren alkohol)
Cognac ***, in Fässern (ffrs./hl reiner Alkohol)
Κονιάκ ***, σε βαρέλια (FF/hl καθαρού αλκοόλ)
Cognac ***, in casks (FF/hl pure alcohol)
Cognac ***, en fûts (FF/hl d'alcool pur)
Cognac ***, in fusti (FF/hl alcole puro)
Cognac ***, in fusten (Ffr./hl zuivere alcohol)

	I	II	II/I
Mindste indkøbspris for brændevine		Mindste salgspris for cognac	
Mindesteinkaufspreis für Branntwein		Mindestverkaufspreis für Cognac	
Κατώτερη τιμή αγοράς αποσταγμάτων		Κατώτερη τιμή αγοράς κονιάκ	
Minimum buying price for spirit		Minimum selling price for cognac	
Prix minimal d'achat des eaux-de vie		Prix minimal de vente du cognac	
Prezzo minimo d'acquisto per le acquaviti		Prezzo minimo di vendita di cognac	
Minimuminkoopprijs voor brandewijnen		Minimumverkoopprijs voor cognac	
1. 4. 1979—30. 9. 1979			
Fins Bois	2 959	3 095	+ 4,6 %
Bons Bois	2 687	3 095	+ 15,18 %
Bois Ordinaires	2 415	3 095	+ 28 %
1. 4. 1980—31. 10. 1980			
Fins Bois	2 988	3 545	+ 19 %
Bons Bois	2 641	3 545	+ 34 %
Bois Ordinaires	2 356	3 545	+ 50 %
1. 4. 1981—30. 11. 1981			
Fins Bois	3 135	3 905	+ 25 %
Bons Bois	2 660	3 905	+ 47 %
Bois Ordinaires	2 365	3 905	+ 65 %

COMMISSION DECISION

of 15 December 1982

relating to a proceeding under Article 85 of the EEC Treaty
(IV/C-30.128 — Toltecs/Dorcet)

(Only the Dutch and German texts are authentic)

(82/897/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the
European Economic Community,

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

Having regard to the complaint filed by Mr Antonius
Segers (hereinafter referred to as 'Mr Segers')
pursuant to Article 3 of Regulation No 17 on 12 June
1980,

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

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

Whereas:

I. The facts

1. The family firm, P. L. Segers & Zonen, was
established in the Netherlands in 1896 for the purpose
of processing and selling coffee, tea and tobacco. In
1969, the firm began manufacturing tobacco
products, partly for third parties under their own
brands and partly for direct sale through a new firm
set up that same year, Tabaksindustrie Toltecs. Both
firms have their headquarters in Roosendaal and are
at present owned and run by Mr Segers.

Mr Segers used the trade mark Toltecs Special for the
first time in 1969 and had it registered internationally
for the Federal Republic of Germany and for other
countries. On 31 January 1973 he applied to have the
trade mark Toltecs Special (device and word as
reproduced below) registered internationally in Class
34, for raw tobacco and tobacco products, as No

395 536 for, among others, Benelux, France, the
Federal Republic of Germany and Italy.

In accordance with the agreement entered into by Mr
Segers and BAT Cigaretten-Fabriken GmbH on 16
January 1975 the latter, on 21 January 1975,
withdrew its opposition in the Federal Republic of
Germany, so that registration could then be
completed there too. The trade mark Toltecs Special
(hereinafter referred to as 'Toltecs') is an expression
derived from the name of an Indian tribe which lived
in Mexico, the Toltecs. Over the last five years it has
been used only in the Netherlands and the Federal
Republic of Germany.

As far as tobacco products are concerned, up to now
Mr Segers has produced only fine cut — mild,
medium and strong tobacco for which, in recent
years, there has been a steady increase in demand.
The question as to whether the firm will also manu-
facture pipe tobacco in the future depends on how
the market develops. Since 1978 Mr Segers has been
selling his fine cut almost exclusively in the
Netherlands, and his sales doubled in 1981; they are
somewhat below 1 % of total fine cut sales in the
Netherlands, which amounted to 14 353 tonnes in
1981.

Smoking tobacco is made up of fine cut (shag) and
curly cut; the former is used for cigarettes hand-
rolled by the consumer, the latter for pipe smoking
only. The main manufacturers of smoking tobacco in
the Netherlands are Douwe Egberts BV, Van Nelle
Lassie BV, Niemeyer BV and Gruno-Van Rossem
BV. The Netherlands is one of the main exporters of
smoking tobacco worldwide.

2. BAT Cigaretten-Fabriken GmbH (hereinafter
referred to as 'BAT'), Hamburg, is a subsidiary of
one of the world's biggest cigarette producers, British
American Tobacco Company, UK-London (turnover
in 1980: some £ 7 600 million); its business consists in
the manufacture and distribution of tobacco products.
On 18 December 1968 it applied to enter the name
Dorcet on the German trade mark register: on 15
January 1970 this was registered in Class 34, for raw
tobacco, tobacco products and cigarette paper, as No
865 058. The Dorcet trade mark has never been used.

In 1981 BAT once again maintained its position as
Germany's second-largest cigarette manufacturer.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

With domestic sales of 35 600 million cigarettes the firm attained a 27.4 % market share; HB, the leading German filter cigarette for the past 20 years, contributed 18.1 %. BAT's total sales in 1981 rose to almost DM 4 200 million (including excise duty but excluding value added tax).

In 1981 BAT systematically expanded further in the field of smoking tobacco, concentrating on light fine cut tobacco. According to the trade press ⁽¹⁾ BAT is market leader in this field with its Gold Dollar fine cut (sales: 711 000 kg). In comparison with the previous year sales by all suppliers on the German market rose by 14 % to some 11 700 tonnes, while BAT's sales of fine cut totalled 863 000 kg. It held fifth place with a market share of over 7 %, following Martin Brinkmann AG, Theodorus Niemeyer Holland-Tabak GmbH, Douwe Egberts Agio GmbH and Alois Pöschl GmbH & Co KG (with respective market shares of 30, 23, 18 and 7.4 % for the first quarter of 1982). These five suppliers of fine cut together account for more than 85 % of the German market. The remaining 15 % is shared between some 25 other manufacturers and importers ⁽²⁾.

German imports of fine cut from other Member States have also gone up in the past few years: in 1976 they amounted to 2 500 tonnes; in 1981, 5 500 tonnes. Most of these imports came from the Netherlands.

There has been constant growth in the number of smokers rolling their own cigarettes over recent years in the Federal Republic of Germany. The progress made by fine cut tobacco, which accounts in the main for the expansion of the German market in smoking tobacco, stems on the one hand from the acquisition of a new category of purchasers, intellectuals and students, and on the other from the rise in retail prices of manufactured cigarettes due to increased value added tax and excise duty. According to the abovementioned trade press ⁽³⁾ over 12 000 million cigarettes were hand-rolled in the Federal Republic of Germany in 1981. This figure is barely 10 % of manufactured cigarette sales. On account of the increase in tobacco tax which came into force on 1 June 1982, the industry estimates that there will be further increase of at least between 1 500 million and 2 000 million in the number of cigarettes rolled by hand, for they cost roughly half the price of manufactured cigarettes, despite the fact that the tax on fine cut was increased by up to 130 % as against some 39 % for manufactured cigarettes. The same sources believe that in the near future light fine cut

will gain ground in the increasing trend towards substitution of manufactured cigarettes by hand-rolled ones. At present light fine cut accounts for 37.18 % and medium tobacco for 33.77 % of sales.

In 1980 BAT sold 61 500 kg of pipe tobacco; in 1981, 64 400 kg, accounting for some 3.7 % of total pipe tobacco sales in the Federal Republic of Germany of 1 740 tonnes. Specialized retailers have a particularly important role to play in the selling of smoking tobacco. BAT has stated in its 1980 annual report that the range of smoking tobacco it offers is well established in this respect and that this has contributed to the rise in sales.

3. On 25 July 1973 BAT, on the basis of its trade mark Dorcet, opposed the application for registration of the mark Toltecs. Although in a letter from his trade mark lawyer, dated 25 January 1974, Mr Segers expressly left open the question of the possible confusion of the trade marks Dorcet and Toltecs, he submitted to BAT the scheme of arrangement outlined below, with the aim of inducing the latter to withdraw its opposition.

'If your client (BAT) withdraws its opposition, my client (Mr Segers) gives a firm undertaking in respect of himself and any assignees or licensees to restrict the goods covered by his IR mark 395 536 in the Federal Republic of Germany to "curly cut tobacco (shag)", to use the word/device mark Toltecs after grant of protection in the Federal Republic of Germany for this specific product only, and to claim no rights as against your client arising from the registration and use of this mark, in particular to raise no objection if your client should again apply for registration of or use his mark Dorcet or a similar mark (with the exception of Toltecs) for the same or similar products, as listed under mark 865 058 in the Federal Republic of Germany.'

On the basis of this proposal and subsequent correspondence, notably the further exchange of letters dated 30 October 1974 and 7 January 1975, the following agreement was entered into and signed by BAT on 16 January 1975:

Article 1

"BAT" is the owner of the German trade mark 865 058 "Dorcet".

Article 2

"Mr Segers" is the owner of the internationally registered trade mark 395 536 (word/device mark) "Toltecs Special".

⁽¹⁾ Die Tabak Zeitung (2. 7. 1982).

⁽²⁾ Die Tabak Zeitung Dokumentation, Rauchtabak 1982 (20. 8. 1982).

⁽³⁾ Die Tabak Zeitung (16 and 23. 4. 1982).

Article 3

"Mr Segers" undertakes to restrict the products listed under the IR mark 395 536 in the Federal Republic of Germany to "curly cut tobacco (shag)" and after protection is granted in the Federal Republic of Germany, to use the word/device mark "Toltecs Special" for this special product only, to claim no right as against "BAT" arising from registration and use of the mark Toltecs Special, not even if the latter does not use its 865 058 "Dorcet" mark for more than five years or if it applies again for registration of the mark or a mark other than Toltecs Special that could be confused with it within the meaning of Section 31 of the German trade mark law.

Article 4

"Mr Segers" further undertakes to refrain from publicizing in any description of the tobacco sold under the IR mark 395 536 that it is suitable or recommended for rolling cigarettes. "Mr Segers" may use the designation "fine cut tobacco" or "Dutch shag".

Article 5

"BAT" undertakes on signature by "Mr Segers" of the agreement, to withdraw its opposition to the grant of protection for the IR mark 395 536 and to raise no objection to use of the IR mark 395 536 for "curly cut tobacco" in the Federal Republic of Germany.

4. Although the wording of the agreement is ambiguous and even, in part, contradictory, since the designations curly cut tobacco and shag are not synonymous, the former being used only for pipe tobacco and the latter only for fine cut tobacco, both in the Federal Republic of Germany and in the Netherlands, the manner in which the parties applied the agreement reveals that Segers was to be prohibited from any marketing of fine cut in the Federal Republic of Germany under the Toltecs mark without BAT's approval.

(a) Following a first attempt at exporting in 1973, when 5 500 kg of Toltecs fine cut was sold in the Federal Republic of Germany, Mr Segers began selling this product again in January 1977 through an exclusive distributor, the importer Müller-Broders. Before then, by letter dated 12 July 1976, BAT had notified this importer that, until further notice, it would assert no claim arising from the agreement of 16 January 1975 with Mr Segers to prohibit use of the Toltecs mark, provided that Müller-Broders used the name Toltecs for fine cut. In 1977 17 302 kg of Toltecs fine cut was imported through this distributor.

(b) In the course of 1978 difficulties arose between Mr Segers and Müller-Broders, apparently

because the latter's sales drive was inadequate. When the business links were severed BAT reiterated its view in a letter to Mr Segers dated 23 August 1978 that the agreement authorized only the marketing of pipe tobacco under the Toltecs mark and not of fine cut tobacco. It stated that it has also granted Müller-Broders the right to use this mark for fine cut and demanded that Mr Segers should give the names of any new importers. Following a short period of cooperation with Müller-Broders' successor, Peter Grassmann GmbH, Hamburg, which was, however, soon to be wound up, Mr Segers requested BAT's approval to distribute through Planta GmbH & Co., Berlin. BAT then declared its willingness to extend the agreement to fine cut, but imposed the further condition that Mr Segers buy up the stock of Toltecs tobacco remaining with Peter Grassmann GmbH. Since Mr Segers did not comply, BAT stated in its letter of 14 December 1979 that it would prohibit further distribution through third parties of Toltecs fine cut on the German market and that it had forwarded a copy of its letter to Planta GmbH & Co. On account of these differences between Mr Segers and BAT, Planta GmbH & Co. withdrew from the talks on taking over the distribution of Toltecs fine cut in the Federal Republic of Germany. In reply to a letter dated 21 May 1980 from Mr Segers's lawyer containing a request to terminate the agreement, BAT repeated its offer of extending the contract to fine cut provided that Mr Segers take on the stocks remaining with Peter Grassmann GmbH.

Mr Segers had stopped exporting Toltecs fine cut to the Federal Republic in 1978 on account of his dispute with BAT (in early 1978 sales in the Federal Republic still amounted to 3 750 kg). Since then Mr Segers has been endeavouring to sell his fine cut in the Federal Republic under his new trade mark, Wigwam, but with little success: 400 kg was sold in 1981.

5. In its written replies to the Commission's requests for information and statement of objections, as well as at the oral hearing on 1 April 1982 BAT gave the following explanations:

(a) There appeared to be no infringement of Articles 85 and 86 in the trade mark 'delimitation' agreement with Mr Segers, for it reflected national trade mark law which governed exclusively assessment of the risk of possible confusion. The precedence of national trade mark law in relation to confusability was clear from the judgment of the Court of Justice of 22 June 1976 in Case 119/75 (*Terranova v. Terrapin*)⁽¹⁾ whereby it is compatible with the provisions of

⁽¹⁾ [1976] ECR 1039.

the EEC Treaty relating to the free movement of goods for an undertaking established in a Member State, by virtue of a right to a trade mark and a right to a commercial name which are protected by the legislation of that State, to prevent import of products of an undertaking established in another Member State and bearing, by virtue of the legislation of that State, a name giving rise to confusion with the trade mark and commercial name of the first undertaking.

There were no economic or legal ties between BAT and Mr Segers. The respective marks 'Dorcet' and 'Toltecs' had been established independently. They sounded similar, which according to the broad concepts of confusability defined under German trade mark law was sufficient to establish the risk of confusion. The two marks sounded similar because the vowel sequence was the same, the consonants were of a like nature and the last three letters 'CET' and 'TEC' were simple inversions of each other. The obligation imposed on Mr Segers therefore fell within the scope of the exclusive rights of the owner of the trade mark Dorcet which has priority over the trade mark Toltecs. Moreover, it was not necessary to go into the question of the likelihood of confusion for both parties had assumed that confusion was possible. Mr Segers shared this view, as emerged from the fact that he initiated the proposal for the agreement in the abovementioned letter of 25 January 1974.

Finally, the agreement between the two firms was apt to promote competition. Without it Mr Segers might not have entered the German market at all, or at least there would have been protracted litigation, for purely on the basis of its capital resources it would have been easier for BAT to hold out than for a small firm like Mr Segers's, which was new to the market.

- (b) Leaving aside the above considerations of principle on the question of delimitation under trade mark law, objective interpretation of the agreement reveals that it does not comprise a general ban on the marketing of Toltecs fine cut, but only the obligation imposed on Mr Segers in Clause 4 to refrain from publicizing the product's suitability for rolling cigarettes. In Clause 3 the agreement does incorrectly equate curly cut with shag — though this definition can be traced back to the letter from Mr Segers's lawyer — but in the light of Clause 4 it must refer to fine cut, for pipe tobacco cannot be used for rolling cigarettes. In addition, Clause 4 authorized Mr Segers to use the designation 'fine cut' on account of the designation on the tax band required under tax law.

On conclusion of the agreement there was in fact no doubt in the minds of the parties that it entitled Mr Segers to use the Toltecs mark for fine cut. Later, however, on the occasion of the dispute between Mr Segers and Müller-Broders and only to help the latter to assert his claims on account of their long-standing good business relations — BAT's representative deliberately put forward the erroneous point of view that the agreement prohibited the marketing of Toltecs fine cut. Surprisingly Mr Segers did not then insist further on his contractual rights, which were substantial. However, for the purposes of Article 85, no further contractual arrangement can be inferred from the manner in which the agreement was actually applied.

- (c) BAT has never used the Dorcet mark. It takes the view, however, that the situation regarding the use of Dorcet is irrelevant, since the complainant himself raised no objection regarding failure to use. Besides, the agreement contained no general no-challenge clause preventing Mr Segers from applying for cancellation of the Dorcet mark for non-use. Despite several inconsistencies, the text of the agreement is to be interpreted as meaning that, regardless of any non-use, the only challenges by Mr Segers which are prohibited are those founded on the legal status acquired through registration and use of the Toltecs mark. A number of cases are conceivable in which this ban could come into play, e.g. loss of priority by the Dorcet mark, possibly by commencing use after expiry of the five-year period laid down by German law or by a new application for registration of this mark or of a mark that could be confused with it.
- (d) Moreover, the wording disputed by the Commission, namely the withdrawal of opposition to the registration of the mark together with the no-challenge clause, i.e. not to take action against the prior mark, even after expiry of the five-year period, was not only customarily used by BAT, but in the German branded goods sector in general. It was even contained in the automatic printout used by the trade mark departments of major undertakings.
- (e) Article 85 (1) had not been infringed intentionally since Commission Decision 78/193/EEC ⁽¹⁾ on the sole relevant precedent (Penneys) was taken only on 23 December 1977 and published on 2 March 1978. Even if conclusion of the agreement on 16 January 1975 had infringed Article 85 (1),

⁽¹⁾ OJ No L 60, 2. 3. 1978, p. 19.

the five-year limitation period for proceedings had run out.

importance to its continuing and was quite prepared to terminate it without delay.

(f) Whatever the precise content of the agreement may have been, BAT attached no further

6. The two trade marks which form the subject of the agreement are reproduced below:

(a) As appearing in registration No 865 058 of 15 January 1970:

DORCET

(b) As appearing on the packaging used by Mr Segers:

50 GRAM AMERIKAANSE SHAG



**TOLTECS
SPECIAL**

AMERIKAANSE SHAG
50 GRAM

TOLTECS

(c) As appearing under Mr Segers's IR mark 395 536:



**TOLTECS
SPECIAL**

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

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

2. The agreement between Mr Segers and BAT is an agreement between undertakings within the meaning of Article 85 (1).

3. The agreement contains clauses which have as their object and effect the restriction of competition within the common market.

A. By virtue of the first half of Clauses 3, 4 and 5 of the agreement, as applied by the parties from the outset onwards, Mr Segers may not without BAT's consent import fine cut tobacco under the Toltecs trade mark into the Federal Republic of Germany nor market it there.

- (a) The agreement thus keeps Mr Segers's fine cut out of the German market or at least so restricts his freedom to compete that his products can be distributed only through an importer acceptable to BAT or subject to further conditions imposed by BAT, e.g. taking over the remaining Toltecs tobacco stocked by Peter Grassmann GmbH. The object of the agreement is therefore a restriction of competition within the meaning of Article 85 (1).

This is not refuted by BAT's argument that the agreement must objectively be construed as merely restricting Mr Segers's freedom to advertise and that no other further restrictions on Mr Segers can be inferred from the erroneous legal position adopted by BAT after conclusion of the agreement.

BAT took up this legal position as early as 1976 when Müller-Broder began to distribute Toltecs fine cut. As a result, and in conjunction with the admittedly ambiguous wording of the agreement, Mr Segers was constrained to behave as if the agreement contained the sales ban alleged by BAT. He accordingly had to discontinue the marketing of his fine cut in the Federal Republic of Germany, if he did not want to submit to BAT's conditions or run the risk of becoming involved in costly litigation — which he could

not afford — with a firm in a strong financial position like BAT.

Even if in future the contract were to be applied only with the meaning that BAT now seeks to attach to it, i.e. that it imposed on Mr Segers only the obligation to refrain from publicizing the suitability of his Toltecs fine cut for rolling cigarettes, this would constitute a restriction of Mr Segers's freedom to make use of a feature of importance to competition and would be caught by Article 85.

- (b) The agreement also results in a restriction of competition between BAT and third parties. It is not only Mr Segers who is precluded from the unhampered marketing of his product in the Federal Republic of Germany; the restrictions of competition also affect independent trading companies that may wish to sell products bearing the Toltecs mark in the Federal Republic of Germany. This applies in particular to Planta GmbH and Co., Berlin; BAT prevailed upon Planta to forgo distribution of Toltecs fine cut by drawing attention to the agreement with Mr Segers and the alleged confusion between the Dorcet and Toltecs marks.
- (c) It cannot be argued that Article 85 (1) does not apply because the exclusion effected by the agreement could also be achieved by BAT through unilateral assertion of the rights arising from the Dorcet mark with the result that there is no relationship of cause and effect between the agreement and the restriction of competition.

In its judgment in *Terrapin v. Terranova*, the Court of Justice made it clear that in the present state of Community law claims may be asserted under trade mark law to prevent the import of a product bearing a mark giving rise to confusion, despite the restrictive effect on competition, provided that the respective rights have arisen independently of one another and that the undertakings concerned have no economic or legal ties.

BAT maintains that this principle, which applies to a right arising under legislation, is also applicable to a 'delimitation' agreement under which such a right is in part exercised and in part waived in favour of the other party. BAT did no more, it alleges, than to reserve to itself the right, to which it was entitled in the Federal Republic of Germany

where it held the prior mark, to oppose the import of fine cut tobacco under the Toltecs mark in certain cases. The agreement was thus in all respects advantageous to Mr Segers, for he could still use the Toltecs mark in the Federal Republic of Germany in certain circumstances; in the final result it promoted competition. In concept this legal assessment is well founded, but is inapplicable here in the light of the particular facts of the case.

- (d) In the present state of Community law, in cases where the products are similar, there is a serious likelihood of confusion and the owner of the prior mark is therefore more likely to be in a position to prevent registration and use of the later mark, restrictions on the use of a later mark do not restrict competition within the meaning of Article 85 (1), for in accordance with the case law of the Court of Justice the right to prevent marketing relates to the existence of the prior mark.
- (e) However, the greater the difference in the products or the less likely the risk of confusion, the more the agreement must take account of the overriding goal of common market unity. Of all the possible solutions to the conflict, the parties therefore have to adopt that which least restricts the use of both marks throughout the whole of the common market. This includes agreements to reproduce the disputed mark only in a certain way (colour, form of lettering, inclusion of trade name, etc.) or possibly to use it for certain products only.

The Commission recognizes the latitude that may exist in the appreciation of such cases both as concerns the relevant national law and as concerns the parties; this is a further factor that must be taken into account when Article 85 (1) is applied.

- (f) In this case, however, in its scrutiny of the agreement pursuant to Article 85, the Commission cannot find any serious risk of confusion between the word mark Dorcet and the word/device mark Toltecs. There is still no serious risk of visual or phonetic confusion if the pictorial component registered and used by Mr Segers (a wooden shovel lying across four tobacco leaves depicted within a distinctively-shaped gold ground) is disregarded, and the words Dorcet and Toltecs are compared. BAT's assertion that the marks sound similar and are therefore likely to be confused does not change this finding.

Contrary to BAT's viewpoint it is not merely national trade mark law that underlies the question whether two marks of different origin are likely to be confused. As the Court of Justice stated in *Terrapin v. Terranova*, the application of Community law (*viz.* the rules on the free movement of goods and on competition) may be involved. The greater the scope of the protection which national law affords to the Dorcet mark, the greater the restriction on the import into the Federal Republic of Germany of goods bearing the Toltecs mark.

- B. In second half of Clause 3, Mr Segers undertakes to claim no rights as against BAT arising from his registration and use of the Toltecs mark, not even if BAT does not use its Dorcet mark for more than five years or if it applies again for registration of this mark or a mark capable of being confused with it within the meaning of Section 31 of the German trade mark law (other than Toltecs Special).

- (a) BAT first put forward the view, in its letter to the Commission dated 9 September 1980, that this clause put Mr Segers under a fully comprehensive obligation, admissible in law, to refrain from challenging the Dorcet mark, even after expiry of the five-year period. After receiving the Commission's statement of objections, however, BAT amended its view to concede that the clause would not prevent Mr Segers from having the Dorcet mark cancelled on grounds of non-use.

- (b) Yet even under BAT's amended view, the clause serves to reinforce an agreement which restricts competition (see II (3) A)) and is caught by Article 85 (1). The clause prevents Mr Segers from freely asserting as against BAT the rights which have arisen in the meantime from his Toltecs mark in the event of the Dorcet mark being cancelled on grounds of non-use. This clause would also restrict Segers rights if Dorcet were in fact to lose priority over Toltecs as a result of BAT's using the Dorcet mark for the first time after expiry of the five-year period or of a new application for registration. The clause prevents Mr Segers from invoking the priority of his mark Toltecs against the Dorcet mark in the event of the coming into use or being registered again at a later date. Mr Segers has thus abandoned a ground for defence which is much easier to rely upon than a contestation

of confusability. Finally, it was made difficult for Mr Segers to release himself from contractual restrictions on registration and use of his Toltecs mark and thus to eliminate a barrier to his economic activity in the Federal Republic.

In conjunction with the contractual restriction on the registration and use of the Toltecs mark the object of the no-challenge clause is to prevent for all time legitimate extension of the mark's field of application, thereby strengthening BAT's position under trade mark law.

Contrary to the view expressed in BAT's abovementioned letter of 9 September 1980, Mr Segers's contractual renunciation of his right to attack non-use of the Dorcet mark must be disregarded for the purposes of the application of Article 85. The overriding public interest in the cancellation of trade marks that are not used or that can be challenged on other grounds requires that neither Mr Segers nor any third party should be prevented from taking steps to obtain such a cancellation with all its repercussions.

- (c) BAT's objection that the user requirement, as for example in the Federal Republic of Germany pursuant to the Law of 4 December 1967 ⁽¹⁾, is not yet a concept acknowledged by Community law since it was first provided for in the draft Council Regulation on Community trade marks and is unknown in Danish law, is on factual ground irrelevant. The object of the user requirement is to avoid overloading the trade mark register with unused prior marks, in order to facilitate the registration of new marks for new products and their entry into the market. This reflects the fact that there is a mathematical limit to possible combinations of letters of the alphabet for word marks and even then not all the possible combinations are made up of syllables that can be pronounced. As a result of the unlimited maintenance of unused prior marks in many countries, including several Member States, new marks based on letters are no longer available. Within the Community this is true in particular for France, with 301 711 marks registered, for the Federal Republic of Germany with 285 317 marks and for the United Kingdom with 244 100 marks. In contrast, there are only 86 753 registered marks in Denmark ⁽²⁾. In the light of these

circumstances it follows that agreements which hinder the registration and use of new marks in a Member State with a large number of marks are more serious infringements of Article 85 than in Member States with a small number of marks.

4. The abovementioned clauses of the agreement are also apt to affect trade between Member States. They impede free import and export of the goods covered by the agreement from the Netherlands to the Federal Republic of Germany by raising artificial barriers to trade in a manner which jeopardizes attainment of the goal of a single market.

The restriction of competition and its direct effect on intra-Community trade are also appreciable. In its Decision 75/297/EEC ⁽³⁾ (Sirdar/Phildar), the Commission has already pointed out that it is problematical, if not impossible on economic grounds, to replace an established mark by another mark, because of the consequent loss of the advertising impact of the established mark and other practical difficulties. In this case the mark Toltecs has been in use for a number of years and almost one third of Mr Segers's export of tobacco products to the Federal Republic of Germany have borne this mark. Since then Mr Segers's production has increased considerably, while his exports to the Federal Republic of Germany have fallen to almost nil, although demand for Dutch fine cut in the Federal Republic of Germany continues to expand.

In view of the structure of the German tobacco market, which is dominated by a few large undertakings, even the restriction of a small supplier from another Member State is particularly serious, all the more so since BAT has entered into numerous similar agreements.

III. Inapplicability of Article 85 (3) of the EEC Treaty

Under Article 85 (3) the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement 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:

⁽¹⁾ Bundesgesetzblatt 1967 I, p. 853.

⁽²⁾ Organisation Mondiale de la Propriété Intellectuelle, Statistique de propriété industrielle, 1980, p. 30.

⁽³⁾ OJ No L 125, 16. 5. 1975, p. 27.

- (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 agreement was not notified to the Commission, so that already on procedural grounds it cannot qualify for a grant of exemption.

2. The agreement does not fall within Article 4 (2) (b) of Regulation No 17.

- (a) As owner of the Toltecs trade mark, Mr Segers is neither assignee nor user of a mark belonging to BAT.
- (b) Mr Segers cannot be regarded as an assignee or a user within the meaning of this provision, for the assignment and use of his Toltecs mark do not require BAT's approval since there is no serious risk of confusion with the Dorcet mark.

- (c) Moreover the restrictions of competition established above (II (3) (A) (a)), namely:

- distribution only through an importer approved by BAT,
- taking over the remaining stocks of Peter Grassmann GmbH,

do not constitute restrictions on the exploitation of a licensed trade mark.

3. The Commission is careful to point out that agreements which contain restrictions of competition that extend beyond the latitude in appreciation of national law and the parties (referred to in II (3) (A) (e) above) and that are accordingly caught by Article 85 (1), may be exempted where they satisfy the tests of Article 85 (3). But there is no indication in this case of how the agreement contributes to improving the production or distribution of goods, for its object and effect is that fine cut bearing the Toltecs mark cannot be distributed in the Federal Republic of Germany or can be so distributed only under onerous conditions. It is not clear why the correct description of Toltecs fine cut — that it is suitable for rolling cigarettes by hand — should be withheld from German consumers. The agreement therefore fails to benefit the consumer. Finally, it imposes restrictions on the undertakings which are not indispensable within the meaning of the third condition of Article

85 (3). Even if the object of the no-challenge clause were to eliminate the most extreme risk of confusion imaginable, this could not justify Mr Segers forgoing his rights, where BAT refrained for more than five years from using the Dorcet mark.

4. Article 85 (3) is not, therefore, applicable to this agreement.

IV. Applicability of Articles 3 (1) and 15 (2) of Regulation No 17

1. Article 3

It is clear from the foregoing that the firms concerned have infringed Article 85. In accordance with Article 3 of Regulation No 17 they must be required to bring that infringement to an end forthwith, by putting an end to the clauses in their agreement which restrict competition. Furthermore, BAT may not replace this restriction of competition with economic pressure on Mr Segers or on importers in order to prevent or impede the import and marketing of Toltecs tobacco in the Federal Republic of Germany.

2. Article 15 (2)

The Commission may impose, in accordance with Article 15 (2), 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 they intentionally or negligently infringe Article 85 (1) of the EEC Treaty.

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

- (a) The Commission is not imposing a fine in respect of the obligation taken over by Mr Segers to refrain from putting fine cut tobacco bearing the Toltecs mark in circulation in the Federal Republic of Germany, even though on several previous occasions it has indicated its objections to territorial restrictions in trade mark delimitation agreements, e.g.:

- in the Decisions 75/297/EEC (Sirdar-Phildar) and 78/193/EEC (Penneys), and the cases involving Persil ⁽¹⁾ and Bayer/Tanabe ⁽²⁾. The Commission considers it sufficient to confirm its point of view by its finding at IV (1) above that Article 85 (1) has been infringed.

⁽¹⁾ Seventh report on competition policy, points 138 to 140.

⁽²⁾ Eighth report on competition policy, points 125 to 127.

- (b) However, it appears appropriate to impose a fine on BAT in respect of the extension of the no-challenge clause to the case where the Dorcet mark remains unused for more than five years.

When the user requirement was introduced in the Federal Republic of Germany by the law of 4 December 1967 it was plain to BAT that the agreement, which prohibited Mr Segers from relying on his acquired rights even if the Dorcet mark is unused for more than five years, was contrary to the meaning and purpose of the statutory requirement, which was to remove unused marks from the register and facilitate entry by new applicants.

In this connection, it is particularly serious that the Dorcet mark was registered on 15 January 1970 and that BAT signed the agreement on 16 January 1975, one day after expiry of the period of protection accorded by German trade mark law. BAT was aware that by the agreement it has secured a legal position which by then could not be defended in law.

BAT acted intentionally as regards Community law also. In its Decision 78/193/EEC (Penneys) the Commission objected to a no-challenge clause concerning trade marks, where its effects extended beyond five years. As a firm dealing in branded goods BAT was not unaware of this Decision, which was published on 2 March 1978 and reprinted by the major specialized legal journals. Finally, by letter dated 21 May 1980 from Mr Segers's Dutch lawyer, BAT's attention was drawn to the fact that the agreement was incompatible with Community law. Notwithstanding this, and even though it never has used the Dorcet mark, BAT adhered to the agreement until the oral hearing on 1 April 1982.

In establishing the amount of the fine the Commission is taking account of the fact that this fine concerns only the no-challenge clause in so far as it is extended to the case where the Dorcet mark remains unused for more than five years and also that this is the first Decision imposing a fine in the field of industrial property rights.

However, the Commission is not imposing a fine on Mr Segers despite the fact that he has also committed an infringement of Article 85 (1). Mr Segers is the owner of a small Dutch firm, who at the beginning of his dispute with BAT was not adequately informed about the German legal position and Community law. Mr Segers's lack of legal experience is also clear from the course his dispute with BAT took, since he apparently let an erroneously worded agreement be used against him.

V. Limitation periods

The limitation period has not run out. The limitation period in respect of infringements covering a period of time, as in this case, begins to run when the agreement is terminated, not when it is entered into (Article 1 (2) of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition ⁽¹⁾).

In its letter to the Commission, dated 9 September 1980, BAT still referred to the existence of the no-challenge clause. In this case the earliest date for termination of the infringement must be taken as 1 April 1982, when BAT declared at the oral hearing that it attached no further importance to the continuation of the agreement.

HAS ADOPTED THIS DECISION:

Article 1

The provisions of the agreement of 16 January 1975 between the undertakings named in Article 5 and the application thereof constitute infringements of Article 85 (1) of the Treaty establishing the European Economic Community in so far as:

1. Mr Segers is under an obligation not to market fine cut under the Toltecs Special mark (IR mark 395 536) in the Federal Republic of Germany or not to undertake such marketing except through importers approved by BAT or on the fulfilment of certain other conditions;
2. Mr Segers is under an obligation to claim no rights as against BAT arising from his registration and use of the mark Toltecs Special, even where BAT does not use its Dorcet mark for more than five years or where it applies again for registration of this mark or a mark capable of being confused with it within the meaning of Section 31 of the German trade mark law (other than Toltecs Special).

Article 2

The undertakings named in Article 5 of this Decision shall terminate forthwith the infringements referred to in Article 1. In particular, BAT shall refrain from exercising any economic pressure on Mr Segers or on importers aimed at preventing or impeding the import and marketing of Toltecs tobacco in the Federal Republic of Germany.

⁽¹⁾ OJ No L 319, 29. 11. 1974, p. 1.

Article 3

A fine of 50 000 (fifty thousand) ECU or DM 115 635 (one hundred and fifteen thousand six hundred and thirty five German marks) is hereby imposed on BAT Cigaretten-Fabriken GmbH for the infringement referred to at Article 1 (2) in respect of the extension of the no-challenge clause to the case where the Dorcet mark remains unused for more than five years.

Article 4

The fine imposed at Article 3 shall be paid, within three months of the date of notification of this Decision, to the following account in the name of the Commission of the European Communities:

Bankhaus, Sal. Oppenheimer,
D-5000 Köln, Konto Nr. 260/00/64910.

Article 5

This Decision is addressed to:

1. BAT Cigaretten-Fabriken GmbH,
Alsterufer 4,
D-2000 Hamburg 36.
2. Antonius Segers,
Raadhuisstraat 41,
NL-4701 PL Roosendaal.

This Decision shall be enforceable in accordance with Article 192 of the EEC Treaty.

Done at Brussels, 15 December 1982.

For the Commission
Frans ANDRIESEN
Member of the Commission