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Legislation

Contents

I *Acts whose publication is obligatory*

.....

II *Acts whose publication is not obligatory*

Commission

84/387/EEC:

- * **Commission Decision of 19 July 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.863 — BPCL/ICI) 1**

84/388/EEC:

- * **Commission Decision of 23 July 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.988 — Agreements and concerted practices in the flat-glass sector in the Benelux countries) 13**

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 July 1984

relating to a proceeding under Article 85 of the EEC Treaty
(IV/30.863 — BPCL/ICI)

(Only the English text is authentic)

(84/387/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European
Economic Community,

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

Having regard to the application and notification
submitted pursuant to Articles 2 and 4 of Regulation
No 17 on 28 January 1983 by Imperial Chemical
Industries plc, London, United Kingdom (hereinafter
'ICI'), and on 8 February 1983 by BP Chemicals Limited,
London, United Kingdom (hereinafter 'BPCL'),
concerning a set of agreements which were made
effective as of 1 August 1982,

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

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

I. THE FACTS

A. Subject of the Decision

- (1) This Decision concerns the agreements between
BPCL and ICI for the mutual sale of certain
production units, technical know-how and
goodwill for polyvinyl chloride (hereinafter
'PVC') and low-density polyethylene (hereinafter
'LDPE'). It also concerns the decision of BPCL to
close down its PVC and chlorine wedge
production units not involved in the agreements,
and the decision of ICI to close down certain of
its LDPE and ethylene production units not
involved in the agreements. Finally, it concerns
the agreements to change the capacity rights in a
jointly owned ethylene cracker and of supply
agreements between BPCL and ICI for
polyethylene and ethylene.

B. The undertakings

- (2) BPCL, a member of the BP group, is a UK
company with worldwide interests in several
industrial areas. BP activities are concentrated
mainly in oil and gas exploration and

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 20, 27. 1. 1984, p. 9.

production, and petroleum products, but through BPCL it also has interests in chemicals (including PVC and LDPE), which in 1980 were 7 % of BP's turnover of £ 20 656 million. Its chemical interests are concentrated in the United Kingdom and the EEC, having had PVC plants in the United Kingdom only, but having LDPE plants located in the United Kingdom and in other Member States. BPCL also has a joint venture (Erdölchemie) with Bayer for the production of LDPE.

- (3) ICI is a UK company with worldwide interests in several industrial areas. Its activities are concentrated primarily in chemicals (87 % of turnover of £ 7 358 million) of which it produces a wide range. Of the turnover in chemicals, 58 % is in western Europe (35 % in the United Kingdom and 23 % in the rest of western Europe). Petro-chemicals and plastics were 26 % of group turnover. ICI has PVC and LDPE plants in both the United Kingdom and the remainder of the EEC.

C. The products

- (4) Both PVC and LDPE are petro-chemical plastics, based on the transformation of derivatives of crude oil like naphtha into ethylene. (It should be noted that ethane — a gas often previously flared during oil production — can also be used as a feedstock to replace naphtha). In addition to ethylene, PVC uses vinylchloride monomer which is based on chlorine (brine).
- (5) 75 % of LDPE is used for packaging (plastic films and bags, etc.) and 50 % of PVC is used in building and construction materials (pipes, tubings, cables, wires, etc.). The remaining uses cover a very wide range of plastics products manufactured by plastics transformers. Some of the plastics transformers are subsidiaries of the large petro-chemical and plastics producers.

D. The agreements

The main provisions of the agreements which took effect on 1 August 1982 are as follows:

- (6) ICI transferred to BPCL its No 5 LDPE plant to Wilton, United Kingdom, together with all

necessary associated plant, equipment and facilities and granted BPCL a licence to occupy the LDPE site and to have access necessary in connection with the operation of the LDPE plant. In addition, ICI transferred all the loose plant and equipment associated with the LDPE plant and granted on a non-exclusive basis all necessary rights under ICI's patent rights and technical information to enable BPCL to exploit fully the plant. ICI also transferred the goodwill of all its UK LDPE business.

- (7) ICI, for a consideration, agreed to act as the sole and exclusive agent of BPCL for the operational life of No 5 LDPE plant for its operation, care and maintenance. BPCL agrees to operate the plant for three years. For the first three years after the agreement, ICI is to have the right to veto any sale of the plant by BPCL. This veto will not be unreasonably used. Any eventual shutdown or closure costs of the plant will be the responsibility of BPCL.
- (8) For a period of five years, ICI will purchase at fair market price from BPCL a large part ⁽¹⁾ of its requirements of polyethylene suitable for its 'Visqueen' UK polyethylene sack and bag business.
- (9) BPCL transferred to ICI its No 3 PVC resins plant at Barry, United Kingdom, together with all the necessary associated plant, equipment and facilities and granted ICI sub-leases for the PVC site and granted rights of access necessary in connection with the operation of the PVC plant. In addition, BPCL transferred all the loose plant and equipment associated with the PVC plant and granted on a non-exclusive basis all necessary rights under BPCL's patent rights, and technical information to enable ICI to exploit fully the plant. BPCL also transferred the goodwill of all its PVC business.
- (10) ICI is to operate the PVC plant and agrees that it will be operated for at least three years. Any eventual shutdown or closure costs of the plant will be the responsibility of ICI. BPCL, for a consideration, agreed to provide, for not less than three years, such services as ICI may reasonably require for the proper safe and efficient operation of the No 3 PVC resins plant.
- (11) The ownership and capacity rights in the No 6 ethylene plant (and its associated gasoline treatment plant) and the No 3 butadiene plant, all

⁽¹⁾ The quantities are specified in the agreements notified. For reasons of business secrecy, these quantities have not been published, pursuant to the provisions of Article 21 (2) of Regulation No 17.

at Wilton, have changed from ICI 50 % : BPCL 50 % to ICI 80 % : BPCL 20 %.

- (12) For a period of five years, BPCL is to purchase from ICI at Wilton a fixed tonnage per annum ⁽¹⁾ of ethylene at fair market prices.

E. Economic effect of the agreements

- (13) The western European producers of bulk petro-chemicals are currently facing considerable over-capacity. In addition, the manufacturers will face and are facing increasing competition from producers outside western Europe who have access to cheap feedstocks. Until recently, this resulted in most manufacturers making a loss on petro-chemicals. These losses and over-capacity constitute an incentive for producers to reduce capacity or in certain extreme cases even completely withdraw from certain lines where they have a comparative disadvantage. Reducing capacity allows a producer to run the remaining plants at a higher capacity utilization, thereby reducing costs. In general, but particularly for ethylene, it should be noted that to run petro-chemical plants below capacity or to start up/close down production temporarily, increases unit production costs. In order to stem their particular losses in petro-chemicals, both BPCL and ICI had been developing long-term strategies.

(14) BPCL's strategy

In its long-term strategy BPCL saw itself as having a comparative disadvantage for the production of both PVC and the chlorine wedge inputs, and a comparative advantage for polyethylene (including LDPE).

- (14.1) BPCL saw the possibility of its eventual total withdrawal from PVC and in fact had already closed one PVC plant before the agreements with ICI. However, total immediate withdrawal from the loss-making PVC sector would only have led to increased losses. Such a withdrawal would have reduced internal demand for ethylene and so increased unit production costs for the remaining production. This increase in costs of ethylene would have outweighed savings stemming from any PVC closures.

- (14.2) BPCL was looking to acquire additional modern LDPE capacity such that it could convert one of its older LDPE plants to linear LDPE production. Such a strategy meant it could offer a full range of polyethylenes to its customers without disruption of supplies.

- (14.3) The agreements with ICI allowed BPCL to realize immediately this long-term strategy. The acquisition of a modern LDPE plant and the goodwill for all of ICI's UK LDPE business allowed BPCL to increase plant loading in modern plant and convert an older LDPE to linear LDPE. It also increased internal demand for ethylene. After the sale of its most-modern PVC plant to ICI along with its reduced share of the jointly owned ethylene cracker, BPCL closed down all its remaining PVC plants and chlorine wedge plants thus totally withdrawing from the production of PVC (these closures were not part of the agreements themselves). By disposing of ethylene capacity and increasing demand for ethylene through the acquisition of LDPE capacity, BPCL was able to close down its remaining loss-making PVC plants and chlorine wedge plants without incurring the cost penalties described above.

- (14.4) The agreements with ICI were therefore consistent with BPCL's long-term strategy. However, in the absence of any such agreements BPCL would have continued to produce PVC at least in the short and medium term even if only with reduced capacity. Only the overall deal with ICI which gave BPCL simultaneously extra LDPE capacity and reduced its ethylene capacity allowed it to withdraw from PVC production. In fact, the sale of the PVC and chlorine plants to Norsk Hydro which was originally contemplated was dropped when it was realized that this would not solve the problems of its ethylene balance, for which a solution could only be found by a deal involving ICI and the three products in question (PVC, LDPE and ethylene).

(15) ICI's strategy

In contrast to BPCL, ICI in its long-term strategy saw itself as having a comparative advantage for the production of PVC and a comparative disadvantage for LDPE.

- (15.1) ICI wanted to build up its PVC capacity. In fact ICI had recently acquired or constructed before

⁽¹⁾ The quantities are specified in the agreements notified. For reasons of business secrecy, these quantities have not been published, pursuant to the provisions of Article 21 (2) of Regulation No 17.

the agreements with BPCL other PVC capacity. This would allow it both to increase loading of its chlorine wedge plants and of its ethylene plants, and so exploit its advanced technologies.

(15.2) ICI was looking for ways to run down its LDPE capacity with possible eventual withdrawal if closures which would allow increased plant loading did not stem the losses. In fact ICI had already before the agreements with BPCL closed down some older LDPE capacity. However, disposal of LDPE capacity by reducing internal demand would have aggravated its ethylene balance.

(15.3) The agreements with BPCL allowed ICI to realize immediately part of this long-term strategy. The acquisition of a modern PVC plant and the goodwill for all BPCL's PVC business allowed ICI to increase plant loading in PVC and chlorine wedge plants. It also increased demand for ethylene. ICI's acquisition of increased capacity in the modern jointly owned ethylene plant meant that it could now satisfy its total internal demand for ethylene from this plant at a higher capacity loading and was thus able to close down its other older and now surplus to requirements ethylene plant. Similarly, the sale of its most-modern UK LDPE plant and the above-described solution to the problem of its ethylene balance allowed it to close all its remaining UK LDPE plants. ICI still had several LDPE plants on the Continent, one of which was closed subsequent to the agreements. None of the abovementioned closures were part of the agreements themselves.

(15.4) The agreements with BPCL were therefore consistent with ICI's long-term strategy. However, in the absence of any such agreements ICI would have continued to produce LDPE in the United Kingdom at least in the short and medium term even if only with reduced capacity. Only the overall deal with BPCL involving the capacities of the three products concerned (LDPE, PVC and ethylene) allowed ICI to make its partial withdrawal from LDPE production and close down an ethylene plant.

(16) The result of the agreements and subsequent plant closures (which did not form part of the agreements themselves) was a specialization of production in the United Kingdom. ICI abandoned the production of LDPE in the United Kingdom, specializing instead in PVC, and BPCL totally abandoned the production of PVC, specializing instead in LDPE.

(17) Both ICI and BPCL claim that the plant closures carried out subsequent to the agreements were not a result of the agreements. Both maintain that these closures were an inevitable consequence of the industry-wide excess capacity and the long-term strategies which were worked out independently to deal with the problem. In the absence of any agreements, these plants, together with the plants which were sold, would have had to be closed sooner or later.

F. The position of the parties on the market

(18) *Ethylene*

(18.1) It is difficult to define a market for ethylene because the bulk of production is consumed internally within the producing company. This is due largely to the difficulties and cost of transport, except by pipeline. It is for the products derived from ethylene, which are traded, that a market can be defined. Notwithstanding this reserve, the following capacity figures are given. In 1981, before the agreements and associated closures, BPCL had 47 % of UK capacity and ICI 40 %. After the deal BPCL has 47 % and ICI 35 %. Esso and Shell are the other UK producers, whose relative importance will be increased once their joint venture at Mossmorrone comes into production (foreseen 1985/86).

(18.2) At the level of the EEC, BPCL, as a result of the agreements and associated closures, has 11 % of capacity and ICI 4 %. Even after the agreements, there remain in addition to BPCL and ICI 10 other important producers (i.e. having more than 5 % of EEC capacity) two of which also have production facilities in the United Kingdom. The closure of the ethylene production plant accounts for slightly less than 4 % of EEC ethylene capacity and 23 % of current UK capacity.

(19) LDPE

(19.1) Unlike ethylene, LDPE is traded readily between companies (only 11,5 % of sales are for internal use) and imports/exports constitute an important part of sales/production in each Member State — in the United Kingdom 37 % of sales are imports.

(19.2) At the level of the EEC, as a result of the agreements and associated closures, BPCL's share of capacity increases from 7,9 to 10,2 % and ICI's declines from 8,6 to 4 %. Nevertheless, there remain 12 producers with four having larger capacity than BPCL. In 1981 there were 16 producers. In the decrease to 12 producers, capacity has been cut by 14 %.

(19.3) At the level of the United Kingdom, only two producers remain, BPCL and Shell, with 62,5 and 37,5 % respectively of the new, reduced capacity.

(19.4) The reduction in capacity made by ICI in the United Kingdom represents 23 % of UK capacity and 2,5 % of EEC capacity. In addition, ICI's cut of its EEC capacity represents 1,7 % of total EEC capacity.

(20) PVC

(20.1) As with LDPE, PVC is traded readily between companies (only 20 % of sales are for internal use) and imports/exports constitute an important part of sales/production in each Member State — in the United Kingdom 30 % of sales are imports.

(20.2) At the level of the EEC, as a result of the agreements and associated closures, ICI's share of capacity increases from 9,8 to 11,1 % and BPCL's share disappears from 3,8 % in 1981 (this includes the closures which were started in 1980). Nevertheless, there remain 13 producers with four having larger capacity than ICI (in 1981, there were 21 producers; in the decrease to 13 producers, capacity has been cut by 3 %).

(20.3) At the level of the United Kingdom, only two producers remain, ICI and Norsk Hydro, with 80 and 20 % respectively of the new, reduced

capacity. Previous to the deal, in 1981, ICI had 45 % and BPCL 31 %.

(20.4) The reduction in capacity made by BPCL from 1981 represents 3,3 % of EEC capacity and, excluding the plant mothballed by Norsk Hydro from UK capacity, the reductions represent 23 % of UK capacity.

G. Observations of third parties

(21) No comments were received from third parties in response to the Commission's notice pursuant to Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(22) The agreements in question fall within the scope of the prohibition of Article 85 (1), since they constitute agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object and effect the restriction of competition. The negative clearance requested by ICI and BPCL may not therefore be granted. The agreements may, however, be exempted under Article 85 (3), since its requirements are satisfied.

(23) BPCL and ICI constitute undertakings within the meaning of Article 85 (1).

(24) The agreements in question, in particular the sale both of the most-modern plants and of all of the parties' goodwill on the respective markets with the implied obligation not to compete and the subsequent closures of the plants not specifically included in the same agreements, constitute agreements and concerted practices within the meaning of Article 85 (1).

(25) These agreements and concerted practices have as their object and effect the restriction of competition within the common market.

The anti-competitive effects and object of the agreements and concerted practices

(26) The agreements in question plus the associated closure of PVC, LDPE and ethylene plants must

be seen as a whole, and their economic effect examined. The final result is equivalent to both a production specialization agreement and agreement to limit capacity on the UK market in that BPCL withdraws from the production and distribution of PVC, and ICI from LDPE. Competition is as a consequence restricted appreciably for both products since each party was an important and active competitor before the agreements.

- (26.1.) BPCL's sale, both of its most-modern PVC plant and of the goodwill of all its PVC business (which prohibits the seller from canvassing his former customers for a reasonable period), effectively precluded BPCL from competing with the purchaser — ICI — thus implicitly forcing BPCL to close all its remaining PVC plants (and associated chlorine wedge plants) not specifically involved in the deal. Once the most-modern plant had been sold, together with all the goodwill, the subsequent closures were immediately inevitable. BPCL could not in practice have sold the output of the older PVC plants which it retained to purchasers who previously were not customers because production costs would have been higher on the remaining older and less-efficient plants, because BPCL's previous penetration of the UK market (where its sales had been concentrated) and the dual or multiple sourcing of most purchasers effectively meant BPCL could not canvass any customers in the United Kingdom and because, in view of the general industry-wide over-capacity, penetration of a new market from such a weak production base was impossible. However, and most importantly, it was the overall agreements with ICI allowing BPCL to solve the problem of its ethylene balance which permitted the latter to close its PVC plant and specialize in the production of LDPE. Without the agreement with ICI involving all these products (ethylene, PVC and LDPE) BPCL's strategy would have been to continue PVC production even if only at a reduced level of capacity. The agreements thus brought about an immediate specialization in the production of LDPE by BPCL by stopping production of PVC which at least in the short term would not otherwise have taken place.

- (26.2) In the same way, as a result of its sale both of its most-modern LDPE plant and of the goodwill

from all its UK LDPE business, ICI is effectively precluded from competing with the purchaser and had no practical alternative but to close immediately its remaining UK LDPE plants. ICI could not have sold the output of the older LDPE plants it retained on non-UK markets because ICI's non-UK LDPE plants were not themselves running at full capacity, because there was industry-wide surplus capacity and because the LDPE plants in the United Kingdom were the older, less-efficient plants. However, in the absence of any agreements with BPCL, ICI would probably have continued, in line with its long-term strategy, to run down gradually its LDPE business. The agreements thus brought about an immediate partial specialization by ICI in stopping the production of LDPE in the United Kingdom which would not otherwise have taken place, at least in the short term.

- (26.3) Because of the sale of the goodwill of its UK LDPE business, ICI's LDPE plants on the Continent are implicitly precluded from competing on the UK market. By the sale of all their UK LDPE goodwill, ICI is prohibited from canvassing its former UK LDPE customers for a reasonable period of time. Given the nature of the UK LDPE market and ICI's former market penetration, this effectively amounts to a prohibition of competition.
- (26.4) It should be noted that the sale of all the parties' goodwill on the respective markets, which prohibits the seller from canvassing his former customers for a reasonable period and which in the circumstances of the present case amounts implicitly to an obligation not to compete, is not simply ancillary to the transfer of the assets, because of the fact that goodwill is being transferred without the plant to which it belongs and of the reciprocal nature of these transfers.
- (27) In addition, both parties still constitute potential competitors, even though not for the moment in the areas in question, because of the agreements and concerted practices they are precluded from being active competitors.

- (27.1) ICI has not completely abandoned business in the field of LDPE since it still possesses plants in the EEC outside the United Kingdom.

(27.2) Both parties are major petro-chemical companies with large financial resources who, in view of the know-how available to them, could relatively easily re-enter the production of PVC or LDPE. In fact, one producer often manufactures both PVC and LDPE (as the parties did before the agreements) since both products are derived from ethylene. Ethylene producers thus have the possibility in general to enter both markets. Even after the agreements both parties will remain ethylene producers.

(27.3) It is not clear that the abandonment of the business in the United Kingdom is irreversible. ICI will continue to run on a day-to-day basis the LDPE plant acquired by BPCL, and BPCL will continue to supply certain services essential for the running of the PVC plant acquired by ICI. Both plants which were sold are still in effect integrated into large sites owned and managed by the sellers. Similarly, there are no problems of reversing the ownership rights as far as the agreement on ethylene is concerned. Nevertheless, even though it may be technically feasible to reverse the decision, it can be assumed that the parties do not envisage such a reversal for the moment.

(28) Further anti-competitive effects of the agreements stem from ICI's right for three years to veto any sale of the plant sold to BPCL since this restricts BPCL's rights to dispose of the plant as it thinks fit. In addition both BPCL and ICI agree to operate their newly acquired LDPE and PVC plants for three years, thus preventing either from closing these plants during this period. These conditions constitute restrictions on competition, since they limit the freedom of the purchaser to operate his productive capacity as he thinks fit.

(29) Finally, the agreement whereby ICI will obtain for five years a large part of its polyethylene for its UK 'Visqueen' business from BPCL at fair market prices constitutes in effect a quasi-exclusive supply agreement. This quasi-exclusive supply agreement precludes other producers from supplying a large part of ICI's requirement and thus constitutes a restriction of competition.

(30) The parties maintain as a reason for excluding the agreement from the scope of Article 85 (1) that the decisions to withdraw from the UK market by ICI and BPCL in LDPE and PVC respectively were inevitable since these decisions

were in line with their respective long-term strategies. It is true that competition on the respective markets seemed to be forcing ICI and BPCL to run down their activities but this run-down would not have amounted in the short and medium term to a total withdrawal. In the absence of the agreements, each party would have continued operation even if only on a reduced scale in the areas which it was obliged to abandon. The sale both of the most-modern plant and of the goodwill were the instruments that determined the actual closures and their timing. Therefore it may be concluded that the agreements entailed as an immediate and inevitable consequence a specialization of production and a closure of capacity, and as such fall within the scope of Article 85 (1).

(31) The parties have further argued that the agreements constitute a partial concentration/merger and as such do not fall within the scope of Article 85 (1). Whilst the sale of physical assets may involve elements of partial concentration (see Commission Decision 75/95/EEC — SHV/Chevron⁽¹⁾), the agreements, and particularly the sale of both the most-modern plant and of all of the parties' goodwill and its reciprocal nature on the respective markets with the implied obligation not to compete and the subsequent closures, go far beyond a simple partial concentration and cannot be considered as such. The foregoing is without prejudice to the question whether such a concentration would justify the non-application of Article 85 (1).

The effect on trade between Member States

(32) Trade between Member States will also be appreciably affected since both PVC and LDPE are traded readily between Member States and both ICI and BPCL were active importers and exporters of both products. Furthermore, ICI's remaining continental LDPE plants are precluded from competing on the UK market. Finally, competitors of ICI and BPCL for both PVC and LDPE are situated in other Member States as well as in the United Kingdom, and these competitors (both those established outside the United Kingdom and trying to sell within that Member State and those UK producers selling on the

⁽¹⁾ OJ No L 38, 12. 2. 1975, p. 14.

Continent in competition with the parties) are likely to be confronted in the future with different trading conditions.

B. Article 85 (3)

- (33) The agreements and associated closures discussed above satisfy the conditions for an exemption under Article 85 (3) since they contribute to improving the production or distribution of goods and to promoting technical and economic progress, while allowing consumers a fair share of the resulting benefits and they do not:

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

Weighing of the advantages and disadvantages

- (34) In view of the industry-wide structural over-capacity for the products in question and the fact that the agreements and associated plant closures reduced this surplus capacity and improved plant loading without eliminating effective competition, the advantages resulting from these agreements and associated plant closures outweigh harmful effects they may entail. The question whether the various conditions for the application of an exemption under Article 85 (3) are fulfilled is examined in detail below.

Improvement of production and distribution, promotion of technical and economic progress

- (35) The implicit and reciprocal obligation not to compete enabled ICI and BPCL to close their respective LDPE, PVC, chlorine wedge and ethylene plants, thereby both reducing immediately the industry-wide surplus capacity existing in the EEC and also leading to more-efficient production.

If ICI and BPCL by renouncing competition with each other, and by specializing, thereby manage to keep each other's customers in PVC and LDPE respectively, it will allow them to increase loading capacity both in the production of the product in which they are specializing and in

ethylene. This increased loading will reduce unit costs and lead to more-efficient production. In addition, the closures stemmed a loss-making activity for both ICI and BPCL, thus releasing resources for investment which will help promote technical progress. Finally, ICI and BPCL acquired each other's most-modern and efficient plant along with the technology in PVC and LDPE, respectively. This allowed ICI and BPCL to concentrate their production of PVC and LDPE, respectively, in the most-modern plants which, along with the increased loading, should lead to more-efficient production. Given that the over-capacity in the industry is of a structural nature, market forces would have been too slow at bringing about the necessary radical changes. These agreements by their immediate closure of plants, accelerate the tendency to re-establish the equilibrium in supply and demand.

Benefit to consumers

- (36) Consumers will benefit from the agreements since supplies will be on a more-secure basis. By the planned transfer of the respective businesses and know-how consumers can rely on continuity of equivalent quality supplies. However, if plants had been subjects to the threat of unilateral closure by the producers, which was a possibility in view of the losses being made, individual customers would not have had this certainty. There would have been an inevitable disruption before supplies of equivalent continuity and quality could have been found.

Moreover, by permitting each party to (partially) withdraw from a loss-making product line, the agreement will permit consumers to benefit in the long run since this will allow the specializing party to be able to liberate resources to finance long-term investment and research and development rather to cover operating costs.

- (36.1) Since in this case the potential for effective competition is maintained (see below) and this is a necessary prerequisite, consumers will similarly obtain benefits which will stem from the increased loading of plant and which will bring about reduced unit costs. This increased plant-loading is particularly important as in the present case where there are high fixed costs such that under-utilization of capacity leads to large increases in unit costs. Furthermore, the

maintenance of effective competition is particularly important in industries such as the present case where barriers to entry to firms who have neither produced the products in question nor produce ethylene are high. However, despite the capacity cutbacks, consumers can rely on what is a potentially competitive and economically healthy structure of supply in the Community without having been deprived of their freedom of choice or the benefit of continued competition between the remaining participating firms.

- (36.2) The structural over-capacity that has been found in the products in question and the technological constraints on production (mentioned above in point 13) resulted in a market price that was not sufficient to ensure profitability. These short-term losses could not have been sustained in the medium or long term. The price rises for the products in question that have been seen subsequent to the agreements and plant closures were, despite the decrease in unit cost stemming from increased plant loadings, both necessary and inevitable. It must be stressed that these price rises, seen since the agreements and plant closures, are not a result of the agreements and plant closures. They are rather the result of market forces which BPCL and ICI have merely followed. These rises have allowed all producers to re-establish normal levels of profitability from the previous loss-making situation. However, the maintenance of effective competition will ensure that these rises are no more than necessary to establish market prices that are competitive in the medium and long term, and which at the same time will guarantee a healthy industrial structure in the medium and long term. As long as effective competition is maintained, consumers are better served over the medium and long term by a stronger industry, able both to run at efficient capacity loadings and to earn sufficient profits to finance future investments and research and development, even if this implies some short-term price rises.

Indispensability

- (37) The restrictions in the agreements for the reciprocal sale of LDPE and PVC plants, and the restrictions implied both by the sale of the most-modern plant and by the sale of the goodwill for all the plants (which brought about

a specialization of production and the closure of the remaining plants) were necessary to achieve the beneficial objectives.

Such arrangements allowed the purchaser to have the best chance of improving loading capacities in the most-modern plant. In effect, the specialization by each party in the UK market is a better means of reducing capacity and improving loading than competition itself, since its beneficial effects are felt immediately.

- (38) ICI's and BPCL's undertakings to operate for three years their purchased plants are equally necessary to achieve the beneficial objectives. The plants in question are fully integrated into larger sites owned and operated by the seller, and in order to be able to plan with some certainty both the supply of services and other inputs, and its personnel policy, the seller needs, for a limited time after the sale, to know whether the plant will be kept operational. In addition, ICI's right to veto during those years any sale of the plant acquired by BPCL is also indispensable. ICI is to act as the sole and exclusive agent of BPCL in the operation of the LDPE plant acquired by BPCL. In order for ICI to continue effectively the operation of the LDPE plant, it needs to develop a working relationship with the undertaking for whom it is operating this plant. To prevent too many disruptions and allow a stable relationship to develop, for a short period ICI needs a veto over any sale. The fact that this veto will not be unreasonably used means that ICI must have objective reasons before this veto can be applied.

- (39) Finally, the agreement whereby ICI will obtain for five years a large part of its polyethylene for its UK 'Visqueen' business from BPCL is an integral part of the overall arrangement and necessary to achieve its objectives. Before the agreements, ICI produced from its own LDPE plants its requirements of polyethylene. As a result of the agreements and closures ICI has no remaining UK capacity and, as a consequence, needs suddenly to be able to find a reliable supplier able to ensure the delivery of the appropriate quantities and grades of polyethylene. By acquiring ICI's plant, BPCL is in the best position to ensure continuation of such supplies. The limiting of this agreement to five

years is sufficient to allow ICI to make a transition from supplying its own polyethylene to being a purchaser. The requirement that only a large part (and not total exclusivity) must be purchased is sufficient to ensure that ICI obtains reliable and adequate supplies from BPCL whilst at the same time allowing it to start purchases from other producers, thus developing alternative sources of supply for the medium and long term.

The agreements in question therefore do not go beyond that which is necessary for the achievement of the beneficial objectives. The parties could not have used less-restrictive means to realize the aforesaid objectives of their arrangement. As such, any restrictions may be considered indispensable.

The elimination of competition

- (40) The agreements and associated closures do not afford the parties the possibility of eliminating competition in respect of a substantial part of the relevant market for ethylene, PVC and LDPE.

Ethylene

- (40.1) Given the difficulties and costs of transport for ethylene plus the fact that the bulk of it is used for internal use by the producers, the volume of the relevant market is rather small. However, given the number of producers on the market, the potential for effective competition is not eliminated.

PVC and LDPE

- (40.2) As a result of the agreements and associated closures, there has been a marked increase in concentration amongst UK producers of PVC and LDPE. In each case only two UK producers remain, with ICI and BPCL for PVC and LDPE, respectively, being by far the most important producers in the United Kingdom. An active and important competitor has been eliminated for each product. However, given the relatively low costs of transportation of these products, it would be exaggerated to define the United Kingdom as the relevant market for both PVC and LDPE. This conclusion is reinforced by the fact that, for both products, imports form an important part of sales. Furthermore, these imports come principally from important European producers of PVC and LDPE other than BPCL and ICI. In the past only a very small

percentage of imports was sold to BPCL and ICI. The vast bulk went either directly to the customers (i.e. plastics processors) for PVC and LDPE or to UK marketing subsidiaries of the non-UK based LDPE and PVC producers. Given the distribution network for PVC and LDPE and the active involvement of several important non-UK based producers in the UK market, then the EEC (or wider) could be considered as the relevant market. Thus, on the relevant market for both products, even though there has been some concentration recently in addition to the agreements under discussion, a sufficient number of important producers are still actively involved to ensure that effective competition could potentially be maintained. Furthermore, since BPCL and ICI are not the most-important EEC producers, the agreements and associated closures do not allow them the possibility of eliminating competition in respect of a substantial part of the products in question.

Duration of the exemption and obligations

- (41) Pursuant to Article 8 (1) of Regulation No 17, conditions and obligations may be attached to a decision granting exemption under Article 85 (3).

- (41.1) In order that the vendor of the plant and goodwill respects his obligation to transfer the full value of the assets which he sells he is prohibited from canvassing his former customers. In the circumstances of this case the seller is implicitly precluded from competing with the purchaser on the markets to which the goodwill relates (see point 26.4 above). However, this restriction on competition should be limited to what is essential for the preservation of the value of the transferred asset and should not exceed a period necessary for this purpose.

- (41.2) In this case the purchaser, even though already operating similar plants to those purchased, had difficulties lasting well over 12 months in fully assimilating the transferred technology. In ICI's case the difficulty was to achieve full operational capacity at optimum cost-competitiveness and in BPCL's case to comprehend the new technology and produce grades previously produced on the closed plants. Thus, although the value of the

goodwill was considered not to be a valuable asset relative to the value of the physical plant (there are no long-term supply contracts, customers use multiple sourcing for supplies and middlemen play an active role in the market), because of the technical difficulties described above a period of around four years is warranted when restrictions on competition can be justified.

(41.3) It follows that the LDPE plants which ICI still owns outside the United Kingdom (in the EEC) should not be restricted from competing on the UK market for LDPE beyond the period necessary to transfer the value of the goodwill and assimilate the technology. In order to assist the Commission in ensuring that competition is not being unduly restricted, ICI should transmit a report every three years to the Commission. This report should give the sales of LDPE by ICI or any associated company or subsidiary in the United Kingdom and a breakdown of sales by status of purchaser (i.e. line of business of purchaser and whether it is a wholly or partially owned subsidiary of ICI). It should also give the total production for a similar period of ICI's European and other interests in LDPE. Each report must arrive not later than three months after the end of the period which it covers. The first report should cover the period 1 January 1987 to 31 December 1989.

(41.4) As far as BPCL is concerned, a similar report should be provided if BPCL or any associated company or subsidiary ever acquires any PVC production facilities in Europe or any other area from which imports into the United Kingdom could be viably made.

(41.5) The Commission however reserves the right to ask for any further information that it may consider necessary to assure itself that competition is not being unnecessarily restricted.

(41.6) So that the Commission can perform its supervisory duties pursuant to Article 8 (2) of Regulation No 17, the undertakings to whom this Decision is addressed must be under an obligation to notify to it any amendment or addition to the agreements.

(42) Pursuant to Article 8 (1) of Regulation No 17, a Commission decision in application of Article 85

(3) of the Treaty shall be issued for a specified period.

In order that both BPCL and ICI can exploit fully the specialization of production in the United Kingdom, which is the result of both the acquisition of plants and technology and of the plant closure, within the framework of their respective long-term strategies — strategies which are necessary for any integrated petro-chemical manufacturer — an exemption of 15 years from the date of the notification of the agreement, that is until 27 January 1998, is deemed sufficiently long. Furthermore the aspects of restructuring and capacity reduction involved are developments which must take place within this same long-term strategy framework,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3), the provisions of Article 85 (1) of the EEC Treaty are hereby declared inapplicable for the period 28 January 1983 to 27 January 1998 to the agreements which became effective on 1 August 1982 between Imperial Chemical Industries plc (hereinafter ICI) and BP Chemicals Limited (hereinafter BPCL) concerning the sale of PVC and LDPE business, and the agreements and behaviour associated with and dependent on these aforesaid agreements implying both plant closures and specialization of production in the United Kingdom.

Article 2

The declaration of exemption contained in Article 1 shall be subject to the following obligations:

1. ICI shall transmit during the period of the exemption a report every three years to the Commission, arriving not later than three months after the end of the period which it covers. The first report shall cover the period 1 January 1987 to 31 December 1989 and shall contain the production by ICI (including any associated companies and any partly or wholly owned subsidiaries) of LDPE in Europe or in any other area from which imports into the United Kingdom could be viably made. It shall also contain sales of LDPE in the United Kingdom and a breakdown of these sales by status of the purchaser (that is, line of business of purchaser and whether it is a wholly or partly owned subsidiary of ICI).

2. If during the period of the exemption BPCL (including any associated companies and any partly or wholly owned subsidiaries) acquires any PVC production facilities in Europe or in any other area from which imports into the United Kingdom could be viably made, it shall inform the Commission without delay and transmit a report every three years to the Commission, arriving not later than three months after the end of the period which it covers. This report shall contain production by BPCL (including any associated companies and any partly or wholly owned subsidiaries) of PVC in Europe or in any other area from which imports into the United Kingdom could be viably made, sales of PVC in the United Kingdom and a breakdown of these sales by status of the purchaser (that is, line of business of purchaser and whether it is a wholly or partly owned subsidiary belonging to the BP group).

3. The undertakings to which this Decision is addressed shall inform the Commission forthwith of any amendments or additions to the agreements referred to in Article 1 or of any change in the scope, nature or extent of the cooperation between them in the fields covered by this Decision.

Article 3

This Decision is addressed to the following undertakings:

— Imperial Chemical Industries plc
Imperial Chemical House
Millbank
UK-London SW1P 3JF

— BP Chemicals Limited
Belgrave House
76 Buckingham Palace Road
UK-London SW1 0SU

Done at Brussels, 19 July 1984.

For the Commission

Frans ANDRIESEN

Member of the Commission

COMMISSION DECISION

of 23 July 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.988 — Agreements and concerted practices in the flat-glass sector in the Benelux countries)

(Only the Dutch and French texts are authentic)

(84/388/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 decided on its own initiative on 8 August 1983 to open proceedings in respect of a set of agreements and related concerted practices in the flat-glass sector in the Benelux countries involving the undertakings BSN SA, Paris, Glaverbel SA, Brussels, Maasglas BV and Glaverned BV, both of Tiel, the Netherlands, on the one hand, and Compagnie de Saint-Gobain SA, Paris, Glaceries de Saint-Roch SA, Sambreville, Belgium, Glasfabriek Sas van Gent BV, Sas van Gent, the Netherlands, and Alglas BV, Driebergen-Rijsenberg, the Netherlands, on the other hand,

Having given the parties an opportunity to reply to the objections raised by it, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 ⁽²⁾,

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

Whereas:

I. THE FACTS

A. THE PRODUCTS

- (1) The products concerned in this case are types of flat glass, which fall into two main categories:

1. raw glass products straight out of the furnace, only cut into certain sizes: floatglass, sheet glass, cast glass;
2. finished glass products of which there is a very wide and continually increasing range: insulating-glass, toughened glass and laminated glass for the construction and motor industries, silvered glass, reflecting-glass, worked glass, etc.

B. THE UNDERTAKINGS

- (2) The undertakings concerned in this case are, on the one hand:

- Glaverbel SA, Brussels (hereinafter 'Glaverbel'),
- Maasglas BV (formerly Machinale Glasfabriek De Maas BV), Tiel, the Netherlands (hereinafter 'Maasglas'),
- Glaverned BV, Tiel, the Netherlands (hereinafter 'Glaverned'),
- BSN SA, Paris (hereinafter 'BSN'), and
- Asahi Glass, Japan (hereinafter 'Asahi'),

and on the other hand:

- Glaceries de Saint-Roch SA, Sambreville, Belgium (hereinafter 'Saint-Roch'),
- Glasfabriek Sas van Gent BV, Sas van Gent, the Netherlands (hereinafter 'Sas van Gent'),
- Alglas BV, Driebergen-Rijsenberg, the Netherlands (hereinafter 'Alglas'), and
- Compagnie de Saint-Gobain, Paris la Défense, France (hereinafter 'Saint-Gobain').

- (3) Until May 1981 Glaverbel and Maasglas were owned by BSN through its Belgian holding company Mécaniver SA. In May 1981 BSN sold 80 % of the two companies' equity to the

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

Japanese group Asahi Glass. Asahi later went on to take over the remaining 20 % of the two companies, but since a capital increase by Glaverbel, 21 % of the company has been owned by Belgian interests and 1 % by a German bank, leaving Asahi with 78 %.

Glaverned BV is the joint sales agency of Glaverbel and Maasglas in the Netherlands.

Glaverbel's sales during the period relevant to this Decision were as follows:

- 1978: Bfrs 8 656 826 392,
- 1979: Bfrs 9 061 194 690,
- 1980: Bfrs 10 172 416 265,
- 1981: Bfrs 10 547 625 000;

Maasglas's sales were:

- 1978: Fl 79 147 295,
- 1979: Fl 80 430 509,
- 1980: Fl 90 350 636,
- 1981: Fl 95 060 655.

- (4) Saint-Roch was majority owned during the period relevant to this Decision by Saint-Gobain. Saint-Gobain's stake was 50,05 % until a capital increase in 1982, when it rose to 66,5 %.

Sas van Gent is a 100 % subsidiary of Saint-Roch, and Alglas BV is their joint sales agency in the Netherlands.

The sales of Saint-Roch and Sas van Gent during the relevant period were as follows:

Saint-Roch:

- 1978: Bfrs 6 827 000 000,
- 1979: Bfrs 7 702 000 000,
- 1980: Bfrs 8 442 000 000,
- 1981: Bfrs 7 949 133 000;

Sas van Gent:

- 1978: Fl 33 000 000,
- 1979: Fl 36 000 000,
- 1980: Fl 41 500 000,
- 1981: Fl 42 960 000.

Until the beginning of 1982 Glaverbel, Maasglas and Saint-Roch were the only producers with industrial plant for making basic flat glass in the Benelux countries.

C. THE BENELUX MARKET

- (5) The Benelux market is dominated by the local producers. Though there are some imports, some of these are from producers who belong (or belonged) to the same groups elsewhere which exported the products either direct or via the local Benelux producers. However, the sales of firms belonging to the same group are coordinated to a greater or lesser extent to avoid undesirable competition between sister companies.

The volume of the Benelux market for all flat-glass products in recent years is indicated by the following table, compiled from figures supplied by the companies concerned and official Benelux trade statistics:

(tonnes)

Year	Gla- verbel Maasglas	Saint- Roch + group	Imports	%	Total
1978	} ⁽¹⁾	} ⁽¹⁾	178 000	27	640 000
1979			209 660	32	670 000
1980			241 645	32,9	735 000
1981			253 942	37,6	668 000

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

- (6) The figures in the table require some comment. Saint-Roch's sales figures have been adjusted for amounts sold in Belgium and subsequently exported. Secondly, part of the imports are in fact intra-group sales, the most notable example being the imports of cast glass by Saint-Roch from a German firm in the Saint-Gobain group. This somewhat reduces the impact of imports from the level suggested.

Bearing these adjustments in mind, it is safe to say that imports represented about 25 to 35 % of apparent consumption in the Benelux countries during the relevant period, with local-based producers accounting for 65 to 75 %, including supplies from sister companies within the same group.

D. PRICES AND OTHER TERMS

1. Identical published prices and other terms

- (7) A comparison of all the price-lists published in recent years in Belgium and the Netherlands by

Glaverbel and Saint-Roch and their respective sales agencies in the Netherlands, which also sell the products of Maasglas and Sas van Gent, shows that the lists were identical and in the majority of cases came into effect on the same dates.

2. Identical unpublished prices for different classes or groups of customer

- (8) Besides the published price-lists which are sent to all direct customers, the producers also maintain confidential price-lists differentiated by class or group of customer. These prices are for the basic product, clear and coloured floatglass.

Evidence obtained during inspections of the companies shows that during the period in question (1978 to 1981), Glaverbel and Saint-Roch and Glaverned and Alglas drew up identical confidential price-lists for different classes or groups of customer and brought them into effect on the same dates.

The voluminous documentary evidence, which was appended to the Statement of Objections, includes papers bearing identical remarks about invoicing and acceptance of orders at the old prices, as well as copies of the identical unpublished price-lists themselves, as evidenced by the minutes of meetings between representatives of the companies concerned at which prices and customer ratings in Belgium/Luxembourg and the Netherlands were discussed. One such document dated 22 November 1979 reports a joint meeting between Glaverbel and Glaceries de Saint-Roch held on 14 November 1979 about customer ratings and prices for the Belgian market. Another dated 20 September 1978 is a record of a meeting between representatives of the same firms held on 18 September 1978 about prices and the classification of customers by importance in the Netherlands.

3. Customer ratings

(a) Belgium

- (9) The companies classified their direct customers in four and later three classes, each class qualifying for different rates in the confidential price-lists.

Glaverbel's and Saint-Roch's customer rating lists in January 1980, for example, were identical and bore the same remarks and additions. The

Saint-Roch document dated 22 November 1979, which is referred to in point 8 above, proves that the lists were drawn up together and also indicates that the prices and customer-lists were considered part of the same problem which had to be dealt with simultaneously.

(b) Netherlands

- (10) In the Netherlands, too, customers were placed in rating categories, the number of which was reduced from four to three in 1981. A comparison of lists obtained from the companies confirms that collusion had taken place because the Glaverned and Alglas lists in October 1978 were identical and almost identical in the other years.

The collusion is evidenced in particular by the document dated 20 September 1978, referred to in point 8 above.

4. Other evidence of agreements or concerted practices on prices and other terms to customers

In addition to the evidence reported above, the Commission also found other evidence that the undertakings concerned had colluded on prices and other terms.

- (11) A coordination meeting was held between Glaverbel and Saint-Roch senior executives on 7 June 1977 to agree prices to be charged in the Benelux countries, and particularly the price-lists for various most-favoured customers. The meeting also discussed promotional discounts and exchanges of information on specific projects.
- (12) A Saint-Roch internal memorandum dated 9 June 1977 reported a telephone conversation between a Saint-Roch executive and a Glaverbel employee about the Dutch price-list and summarized what had been agreed on prices and discounts for window glass.
- (13) The managing director of Saint-Roch wrote in an internal memorandum dated 7 November 1979 about a Dutch customer that 'the Marketing and Sales Departments should look into the possibility of raising the prices simultaneously with Glaverbel'.
- (14) Another Saint-Roch memorandum dated 14 January 1980 reported that 'Glaverbel now appears to have come round to introducing an across-the-board 10 % price increase on the old price-list' for insulating-glass in the Netherlands.

- (15) A memorandum from Saint-Roch, also dated 14 January 1980, referring to insulating-glass including cast glass, expressed the company's astonishment at certain differences that had been found between Glaverbel's price-list and its own despite the discussion that had taken place between the two producers, and observed that 'it is anomalous for an identical line to be quoted differently'.
- (16) On 5 December 1979 Glaverbel representatives met a Saint-Roch representative at Glaverbel's headquarters to discuss the forthcoming price-list for cast glass in Belgium. Suggestions were made at the meeting for variable percentage rises for different articles.
- (17) A Saint-Roch memorandum dated 5 March 1980 also shows that Saint-Roch and Glaverbel agreed or at least colluded on the Belgian price-list for sealed triple-glazing units.
- (18) Another Saint-Roch memorandum dated 27 March 1980 on the 'Dutch price-list for float' mentions that the Dutch price-lists had been drawn up jointly with a Glaverbel representative under Alglas's leadership.
- (19) In a memorandum written by the Saint-Roch Marketing Department on 21 March 1980 concerning the Dutch price-list for float, it is stated that a draft price-list had been discussed and 'we were asked not to make any counter-proposal, as the draft was final and resulted from discussions between Alglas and Glaverbel'.
- (20) The new Belgian price-list for cast glass, which was introduced on 7 July 1980, had been discussed between Glaverbel and Saint-Roch not only with reference to the percentage rises for different products and to discounts and surcharges but also with reference to the date of its introduction. This is reported at length in a Saint-Roch memorandum dated 23 June 1980.
- (21) The especially close relations that existed between Glaverbel and Saint-Roch are attested by a comparative table of the companies' preferential prices for floatglass to particular customers in Belgium compiled by Glaverbel with information supplied by Saint-Roch, whereby the companies let one another know their prices charged to certain customers and notified one another of a forthcoming 8 % increase.
- (22) A meeting between Glaverbel and Saint-Roch executives on 19 March 1980 discussed price increases in various sectors and the need to 'abide by the agreed programme'.
- (23) On 7 February 1978 a Glaverbel representative met a Saint-Roch executive to 'discuss together the situation on the Benelux markets in the building sector and explore the possibility of increases there' and 'compare the instructions we had received directly or indirectly from our respective divisions'. The minute of this meeting said that the subject of prices had been raised for Belgium and the Netherlands and that in view of the divergences and to avoid any misunderstanding 'it was necessary to draft a joint paper for submission to our respective departments and forwarding to the respective divisions'.
- (24) Another minute by Saint-Roch of a meeting between Glaverbel and Saint-Roch executives on 17 April 1978 shows that its main purpose was to look for ways of carrying out a parallel price increase. The minute quotes the basic prices to specified best customers in Belgium and the Netherlands.
- (25) On 14 March 1978 two senior executives from the Saint-Gobain group met Saint-Roch managers at Sambreville. During the visit the Saint-Gobain executives referred briefly to the history of the agreements between their own and the BSN group and stressed the need to avoid price wars.
- (26) A Saint-Gobain memorandum dated 27 February 1978 discussed price levels in the Benelux countries and the action that could be taken to arrest the fall in prices and begin to restore them to the level of listed prices and if possible raise them above that level by means of action agreed between the respective divisions of the two groups.
- E. THE SHARING OUT OF THE BENELUX MARKET BETWEEN GLAVERBEL AND SAINT-ROCH AND THEIR ASSOCIATED COMPANIES UNDER ARRANGEMENTS ARRIVED AT BETWEEN THE SAINT-GOBAIN AND BSN GROUPS
- (27) A memorandum dated 8 August 1979 from Glaverbel to the Flat Glass Division of the BSN

group, with attached tables, contains a section entitled '1980 Plan — Balance with Saint-Gobain'.

The document sets out to establish the quantities of glass that Glaverbel-De Maas must sell to maintain the balance with Saint-Gobain.

The tables attached to the memorandum show the sales of the Mécaniver and Saint-Gobain/Saint-Roch groups in the Benelux countries in 1978, their estimates for 1979 and their plans for 1980. The percentage shares of the market as they emerge from the figures are as follows:

— 1978: Mécaniver 62,6 %; Saint-Gobain/Saint-Roch 37,4 %;

— 1979: Mécaniver 60,2 %; Saint-Gobain/Saint-Roch 39,8 %;

— 1980: Mécaniver 60,1 %; Saint-Gobain/Saint-Roch 39,9 %.

Glaverbel justifies its sales forecasts for 1980 by citing the figures in the detailed tables which show the relative positions of the two groups, and refers to their respective 'sales entitlements', which correspond precisely with those positions. The memorandum of 8 August 1979 also alludes to agreements with a certain 'group A', which, as the Commission showed in the Statement of Objections, must refer to the Saint-Gobain group.

- (28) Among other evidence of market sharing collected by the Commission and described in the Statement of Objections, mention should be made of a hand-written note made at Glaverbel on 7 January 1980 concerning targets for 1980, point 2 of which reads: 'Achieve 60:40 balance in Benelux (as against 58:42 in 1979)', which is again a reference to the balance with the Saint-Gobain/Saint-Roch group.

- (29) A Saint-Roch document dated 19 March 1980 about a meeting between senior executives of Glaverbel and Saint-Roch stated in point (a) on page 1: 'The two companies have agreed for the time being to maintain the status quo in their current overall positions in the construction and automotive markets. The two companies' positions will thus continue to oscillate in the range 60:40 to 62:38, and efforts will be concentrated not on gaining tactical advantages over one another (which only has a momentary

effect on volume but a lasting detrimental one on profitability) but on acting against the competition (imports + Luxguard).'

- (30) The minute of the meeting between Glaverbel and Saint-Roch executives on 7 February 1978 already referred to in point 23 also mentions the relative positions the two companies and their associates wish to hold in certain sectors in Belgium and the Netherlands.
- (31) A Glaverbel memorandum dated 17 April 1978 refers to the need for the company to regain market share and lists a number of steps Saint-Roch might take to allow it to mount a 'volume' campaign, principally allowing the customers controlled by Saint-Roch to purchase from Glaverbel.
- (32) A Saint-Roch document dated 20 March 1978 following a meeting between Saint-Roch and Glaverbel sets out country by country the detailed targets of the BSN group for 1979, compared with sales in 1977. Glaverbel's proposed campaign to regain market share and Saint-Roch's counter-proposals for Belgium and the Netherlands are described.
- (33) The report on the visit of Saint-Gobain executives to Saint-Roch on 14 March 1978 already referred to in point 25 quotes from the agreements between the Saint-Gobain and BSN groups and sets out the quantified proposals as to their respective positions in all the countries concerned and the Benelux countries in particular.
- (34) An analysis of the above evidence shows that the two companies agreed to maintain the status quo in their overall positions and that the parent companies of the Saint-Gobain and BSN groups were not only aware of the situation but organized and encouraged it. The sales figures of the companies also shows that the targets they set were broadly achieved.

F. EXCHANGES OF SALES FIGURES BETWEEN GLAVERBEL AND SAINT-ROCH

- (35) Other papers and memoranda which were also appended to the Statement of Objections provide clear evidence that Glaverbel and Saint-Roch exchanged article-by-article figures, in square

metres and tonnes and giving the conversion rates for square metres into tonnes, of their sales in Belgium/Luxembourg and the Netherlands. One of these papers states that the exchanges were to be made every quarter.

The papers indicate that the purpose of the exchanges was to determine and monitor the respective market shares (excluding competing importers) of the BSN and Saint-Gobain groups in the Benelux countries.

G. PROCEDURE UNDER ARTICLES 19 (1) AND (2) OF REGULATION No 17

- (36) In their replies to the Statement of Objections on 13 January 1984, the undertakings concerned waived the right to an oral hearing under Article 1 of Commission Regulation No 99/63/EEC.

II. LEGAL ASSESSMENT

A. ARTICLE 85 (1)

- (37) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.
- (38) The agreements and concerted practices outlined above fall within the terms of Article 85 (1) and the undertakings involved in them, which are listed in point 2 above, are undertakings within the meaning of the Article since they are engaged in the business of producing, processing and selling flat glass.
- (39) The practices were not denied by the undertakings in their reply to the Statement of Objections. However, they attempted to minimize the importance and impact of the practices and pleaded extenuating circumstances.

The agreements and concerted practices on prices

- (40) In their letters dated 13 January 1984 the undertakings concerned claimed that the

agreements and concerted practices had been unnecessary because prices in Belgium and the Netherlands would have been the same in any case because of the following factors:

- the existence of a duopoly made for greater market transparency, especially for the parties' sales forces when they were dealing with the same customers;
- the producers supplying the market in question owned comparable industrial plant, used the same raw materials purchased at more or less the same prices, consumed energy supplied at the same rates, employed labour with similar skills and shared the same social environment since their factories were close together. The costs of flat-glass producers on the Benelux market were thus very similar;
- the pricing of the Glaverbel-Maasglas and Saint-Roch-Sas van Gent groups was necessarily subject to the same conditions and constraints and had been influenced in Belgium and even in the Netherlands by price control.

The companies also claimed that their published and unpublished price-lists had not been observed. The recession in the flat-glass industry also allegedly forced the firms to concert their policy.

- (41) Whatever the influence of some of the above factors may have been, the data gathered by the Commission demonstrate that the parties regularly made agreements or concerted their policies on their published and unpublished price-lists and their other terms.

As to the argument that price control in Belgium was responsible for the identical prices, whilst it is true that this price control may have prevented, delayed or limited price rises announced by the producers, the decision to propose a price rise, the amount proposed and finally how the rise was actually implemented in the price-lists and when it took effect were in fact the subject of agreement or consultation between the producers.

The rises approved by the Ministry of Economic Affairs are in most cases averages which can be allocated between the various articles in the

price-list. Glaverbel's and Saint-Roch's price-lists for floatglass, which came into effect at the end of January 1977 and were in force until October 1978, for example, were based on Ministry approval for an average increase of 15 % with a maximum of 20 %. The price increases for the same articles of 10, 11, 12, 14, 17 and 20 % were, however, identical in both lists. Clearly, the parties must have consulted one another on these price-lists.

The parties also concerted their policies on other terms to customers which were not always specified in their applications for price increases. For example, the parties' price-lists for floatglass applicable from 5 May 1980 both reduced the maximum discount for different categories to 15 % from the previous 25 %.

Price rises also came into effect on the same dates, although the dates were not set by the authorities. The companies must, therefore, have concerted their plans for implementing approved price increases.

As to price control in the Netherlands, this is more flexible than in Belgium so that the above comments apply with greater force.

- (42) The maintenance by the producers of the same unpublished price-lists applying from the same dates in both Belgium and the Netherlands and the same customer rating lists, and the many minutes and other papers about coordination meetings between the producers on these matters, attest to the fact that the producers agreed, or at least engaged in a concerted practice, to apply the same prices and other terms, and that the parent companies of the groups to which they belong, or belonged over the period in question, were aware of this situation and assisted in bringing it about. Whether or not the prices were always implemented by the parties does not alter the fact that agreements or concerted practices existed which are in themselves infringements of Article 85. Furthermore, even if the agreements were not always observed, this does not mean they did not nevertheless have a significant effect on the firms' behaviour.

- (43) There can be no doubt that agreements and concerted practices of this kind on prices between firms producing the same goods are restrictions of competition within the meaning of Article 85 (1). By such agreements and concerted practices the firms surrendered a major part of their independence in dealing with their customers. The price-fixing must have had a particularly large impact on the Benelux market where Glaverbel and Saint-Roch and their associated companies together accounted for 65 to 75 % of sales.

This meant that there was little competition between the local producers which customers could exploit, and since local producers accounted for the vast majority of sales on the market, despite some imports, large wholesalers would have found it difficult to do without purchases from the local producers without endangering the regularity of their supplies.

Sharing of the market

- (44) The sharing of the market between the two companies and their subsidiaries and associated companies in the Benelux countries or more precisely the predetermination of the two groups' relative positions within a narrow band (between 60:40 and 62:38), is an extremely serious restriction of competition which was designed to keep the parties' market shares stable and so largely insulate them from customer pressures.

The 60:40 ratio was related to the two groups' installed capacity in the Benelux countries. It meant that their respective capacities were operated at similar levels at any given time. This must have affected the groups' ability to compete both on price and delivery and possibly also their investment.

The agreement to maintain the groups' relative positions would involve corrective measures to enable a party to catch up if its share fell below the planned level. Such measures were in fact taken.

Exchanges of sales figures

- (45) The exchange of sales figures by the competitors served not only to keep them better informed of

the general state of the market but also to allow them to monitor closely the sales of their main rival so that they could react more effectively if this proved necessary. The exchanges thus helped the parties to ensure they maintained their relative positions, within the planned fluctuation margin, for not only were the data which were exchanged very detailed, but the exchanges were frequent (quarterly) and they were the subject of discussions on interpretation and calculation methods.

Effect on trade between Member States

- (46) The practices described above affected trade between Member States, because the jointly fixed prices for Belgium and Luxembourg also applied to the Belgian producers' sales in Luxembourg and, in the case of cast glass sold by Saint-Roch, to a product supplied by a German subsidiary of the Saint-Gobain group. In this particular case the price-fixing agreement covered both Belgian-made products and imports from Germany.

The effect on trade in the Netherlands was even more significant since, although there was some domestic production, most of the glass sold by the agencies Alglas and Glaverned came from the groups' factories in Belgium. Here the price-fixing agreements and concerted practices between Belgian firms covered products exported to the Netherlands, where Glaverbel-Maasglas and Saint-Roch-Sas van Gent also held 60 to 68 % of the market.

The ratio range of 60:40 to 62:38 referred to the groups' aggregate shares in the Benelux countries. These ratios were composites of a series of different ratios for different sectors and countries. Alteration of any of these individual ratios was liable to destabilize the whole system. This acted as a restraint on the firms from freely expanding their sales in a particular country or for a particular product. In the absence of the above practices, their sales could have been expanded by imports into any of the Benelux countries of products manufactured by group companies in neighbouring countries.

- (47) More generally, inter-State trade was impeded by observance of the 60:40 ratio to the extent that, although the firms involved belonged to

multinational groups which also manufactured the same products in neighbouring countries, each of the parties was prevented from calling on its group to increase its market share.

The exchange of sales statistics for the three Benelux countries allowed the parties to control or modify the trade flows between the three countries whenever they perceived their market share in a particular country or sector to be declining or to need improvement. The exchange of statistics and the conclusions which could be drawn from them were thus likely to bring about quantitative or qualitative changes in the trade flows between the three countries.

- (48) It therefore seems to the Commission that the restrictions observed in this case constituted a coherent whole which falls squarely within the prohibition in Article 85 (1).

- (49) These infringements are not only the responsibility of the companies directly involved in the Benelux markets but first and foremost that of the parent companies of the groups to which they belong or did belong until recently, namely Compagnie de Saint-Gobain and BSN. Not only could such far-reaching agreements on prices and other terms, market sharing and exchanges of confidential information not have been unknown to the parent companies, they could not have been devised and enforced without instructions from or the consent of the parent companies. Some of the evidence referred to above shows that this was indeed the case.

B. ARTICLE 85 (3)

- (50) To be eligible for exemption under Article 85 (3), an agreement or concerted practice must have been notified to the Commission in accordance with Article 4 (1) of Regulation No 17, unless it is dispensed from notification by virtue of Article 4 (2) of the Regulation.

The agreements or concerted practices in the present case, although not falling within the category not requiring notification under Article 4 (2) of the Regulation since they concern exports between Member States and involve more than two undertakings, were not notified to the Commission.

- (51) However, even if they had been notified, no exemption under Article 85 (3) could have been granted because of the gravity of the restrictions of competition involved, the predominant position the producers concerned occupy in the Benelux countries and the fact that the restrictions satisfy none of the tests for exemption.

C. ARTICLE 15 (2) OF REGULATION No 17

- (52) On the above facts, the Commission has no alternative but to impose fines under Article 15 (2) of Regulation No 17 on the undertakings which, over a period stretching from at least 1 January 1978 to the date of the Commission's first on-the-spot inspection on 9 October 1981, committed infringements of Article 85 (1) of the EEC Treaty by entering into agreements and concerted practices which they were to operate in Belgium, Luxembourg and the Netherlands on prices and other terms to customers, the sharing of the market according to a fixed ratio, and the regular exchange of detailed sales figures to monitor the maintenance of those market shares.

In deciding the size of the fines to be imposed on the various undertakings involved account must be taken of the duration and gravity of the infringements.

The nature of the infringements, which are quite classic types clearly falling within Article 85, the economic importance of the undertakings and the share they have or used to have of the Benelux market, and the duration of the infringements (1978 to October 1981), all lead to the conclusion that the agreements and concerted practices in question were particularly serious. Although the arrangements were terminated after the Commission's first inspections in late 1981, this was not done spontaneously out of respect for Community rules but as a reaction to the Commission's intervention and under the pressure of events, notably the gradual withdrawal of the BSN group from the flat-glass sector.

- (53) There are also aggravating circumstances in the present case which warrant the imposition of high fines:

1. The undertakings concerned acted deliberately. The agreements and concerted

practices in which they engaged were specifically intended to restrict competition.

2. The Saint-Gobain and BSN groups had already been found guilty of previous infringements of Article 85 (Decisions 74/292/EEC ⁽¹⁾, 80/1334/EEC ⁽²⁾ and 81/881/EEC ⁽³⁾). The infringements were thus repeat offences for these groups.

3. In 1975 the Saint-Gobain and BSN groups agreed to break off the numerous links between them, following protracted negotiations with the Commission aimed at introducing greater competition into the flat-glass market ⁽⁴⁾. Although the letter of this undertaking was observed by the two groups, its spirit was not, since the old links were replaced, at least in the Benelux countries, by undercover relationships.

- (54) As to the apportionment of responsibility for the infringements, the circumstances described above and the parts each of the undertakings played in them indicate that the parent companies of Saint-Gobain and BSN were the main culprits since the infringements were part of arrangements devised at group level. The fines on these two companies should therefore be higher than those on the other companies.

The groups' two main production companies in the Benelux countries, Glaverbel and Saint-Roch, must also be apportioned some of the responsibility, in view of the degree of independence they enjoyed and the active part they played in setting up and monitoring the agreements and practices.

The Dutch companies Maasglas, Glaverned, Sas van Gent and Alglas, however, only played a supporting role confined to executing the arrangements, which makes it possible to consider waiving fines on these companies.

The same applies to the Asahi Glass group, which only took over 80 % of Glaverbel and Maasglas in June 1981 and did not have time to assume full control of the firms' commercial policy between then and October of the same year.

The fines on the BSN and Saint-Gobain companies should be assessed on their turnover

⁽¹⁾ OJ No L 160, 17. 6. 1974, p. 1.

⁽²⁾ OJ No L 383, 31. 12. 1980, p. 19.

⁽³⁾ OJ No L 326, 13. 11. 1981, p. 32.

⁽⁴⁾ See press release of 24 July 1975.

in this sector in other countries as well as in the Benelux countries, so as to reflect the true standing of their respective groups.

The fines on Glaverbel and Saint-Roch should be assessed on their turnover in the Benelux countries.

- (55) The undertakings have pointed out that during the period in question the flat-glass industry was going through a major recession and was also in the throes of technological change. They also claim that the sheet-glass divisions of Glaverbel and Saint-Roch were making heavy losses, so that the agreements and concerted practices between the groups had very little impact on the Benelux market, with glass prices rising less than those of other manufactured products and import penetration increasing.

While such arguments cannot be held to justify the agreements and concerted practices, the Commission nevertheless feels that the difficult trading conditions prevailing at the time should be taken into account in assessing the fines, although without forgetting the aggravating circumstances described above,

HAS ADOPTED THIS DECISION:

Article 1

The agreements and concerted practices which were applied on the flat-glass market in the Benelux countries over the period 1 January 1978 to 9 October 1981 by the undertakings BSN-Gervais-Danone SA (now BSN SA), Glaverbel SA, Maasglas BV and Glaverned BV, on the one hand, and Compagnie de Saint-Gobain SA, Glaceries de Saint-Roch SA, Glasfabriek Sas van Gent BV and Alglas BV, on the other hand, concerning the fixing of prices and other terms to customers, sharing of the market and regular exchanges of detailed sales figures for the purposes of monitoring the agreed market shares, constituted infringements of Article 85 (1) of the EEC Treaty.

Article 2

1. As a result of the infringements referred to in Article 1, the following fines are hereby imposed:

- BSN SA: a fine of 935 000 (nine hundred and thirty-five thousand) ECU (FF 6 423 627),

- Glaverbel SA: a fine of 850 000 (eight hundred and fifty thousand) ECU (Bfrs 38 529 395),
- Compagnie de Saint-Gobain SA: a fine of 1 450 000 (one million, four hundred and fifty thousand) ECU (FF 9 961 775), and
- Glaceries de Saint-Roch SA: a fine of 765 000 (seven hundred and sixty-five thousand) ECU (Bfrs 34 676 455).

2. The fines shall be paid into the following accounts of the Commission of the European Communities within three months of the date of notification of this Decision:

- BSN SA and Compagnie de Saint-Gobain SA:
Account No 5.770.006.5 CCE at the Société Générale, Agence internationale, direction de l'étranger, 23, rue de la Paix, F-75002 Paris;
- Glaverbel SA and Glaceries de Saint-Roch SA:
Account No 310-0231000-32 CCE at the Banque Bruxelles-Lambert, Agence européenne, B-1040 Brussels.

Article 3

This Decision is addressed to the following undertakings:

1. BSN SA, 7, rue de Téhéran, F-75008, Paris;
2. Glaverbel SA, chaussée de la Hulpe 166, B-1170 Brussels;
3. Maasglas BV, Panovenweg 20, NL-4000 AA Tiel;
4. Glaverned BV, Panovenweg 20, NL-4000 AA Tiel;
5. Saint-Gobain SA, Les Miroirs, 18, avenue d'Alsace, F-92026 Paris la Défense;
6. Glaceries de Saint-Roch SA, rue des Glaces Nationales 169, B-5700 Sambreville;
7. Glasfabriek Sas van Gent BV, Sas van Gent, the Netherlands;
8. Alglas BV, Stationsweg 3, NL-3972 KA Driebergen-Rijsenberg.

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

Done at Brussels, 23 July 1984.

For the Commission

Frans ANDRIESEN

Member of the Commission