

Official Journal

of the European Communities

ISSN 0378-6978

L 376

Volume 28

31 December 1985

English edition

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II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DIRECTIVE

of 20 December 1985

amending, on account of the accession of Spain and Portugal, Directive 85/384/EEC on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services

(85/614/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Act of Accession of Spain and Portugal, and in particular Article 396 thereof,

Whereas in view of the accession of Spain and Portugal, it is necessary to make certain amendments to Directive 85/384/EEC⁽¹⁾ to ensure its equal application by the Kingdom of Spain and the Portuguese Republic and the other Member States,

Whereas pursuant to Article 2 (3) of the Treaty of Accession of Spain and Portugal the institutions of the Community may adopt before accession the measures referred to in Article 396 of the Act of Accession, the measures entering into force subject to and on the date of entry into force of the said Treaty,

HAS ADOPTED THIS DIRECTIVE:

Article 1

With effect from 1 January 1986, subject to the entry into force of the Treaty of Accession of Spain and Portugal, Article 11 of Directive 85/384/EEC shall be amended by the addition of the following:

'(j) in Spain

- the official formal qualification of an architect (título oficial de arquitecto) awarded by the Ministry of Education and Science or by the universities,

(k) in Portugal

- the Diploma "diploma do curso especial de arquitectura" awarded by the Schools of Fine Arts of Lisbon and of Porto,
- the Architects Diploma "diploma de arquitecto" awarded by the Schools of Fine Arts of Lisbon and of Porto.
- the Diploma "diploma do curso de arquitectura" awarded by the Higher Schools of Fine Arts of Lisbon and Porto,
- the Diploma "diploma de licenciatura em arquitectura" awarded by the Higher School of Fine Arts of Lisbon,
- the Diploma "carta de curso de licenciatura em arquitectura" awarded by the Technical University of Lisbon and the University of Porto.'

Article 2

The Member States shall take the measures necessary to comply with this Directive within the time limit specified in Article 31 (1) of Directive 85/384/EEC.

Article 3

This Directive is addressed to the Member States.

Done at Brussels, 20 December 1986.

*For the Council**The President*

R. KRIEPS

⁽¹⁾ OJ No L 223, 21. 8. 1985, p. 15.

COMMISSION

COMMISSION DECISION

of 16 December 1985

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/30.373 — P & I clubs)

(Only the English text is authentic)

(85/615/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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

Having regard to the notifications made on 18 June 1981, on 27 July 1984 and on 20 February 1985 by the 17 protection and indemnity clubs listed in the Annex, concerning the International Group Agreement,

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

Whereas no further important facts have been drawn to the Commission's attention, following the said publication pursuant to Article 19 (3), nor any observation made that cause the Commission to modify its intention, in these circumstances, to accept the request for application of Article 85 (3) of the Treaty,

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

Whereas:

I. THE FACTS

1. On 18 June 1981, 17 protection and indemnity clubs (P & I clubs-mutual non-profit-making associations providing certain types of marine insurance), the names and addresses of which are listed in the Annex, notified to the Commission, in accordance with Article 4 of Regulation No 17,

the text of an agreement which they intended to put into effect, with a view to obtaining negative clearance or alternatively an exemption under Article 85 (3) of the Treaty.

The agreement, known as the International Group Agreement (IGA), came into force on 8 December 1981.

2. After a preliminary examination, the Commission considered that the agreement contained a number of clauses that could not be exempted under Article 85 (3). On 18 February 1983 it therefore opened proceedings and on 24 February 1983 sent the applicants a statement of objections prior to a decision under Article 15 (6) of Regulation No 17.
3. Following discussions with the Commission, the clubs submitted on 1 November 1983 a memorandum setting out a number of proposals for amendment of the IGA. The clubs asked whether the Commission would be prepared to issue an Article 19 (3) notice in respect of the IGA if it was amended in accordance with the proposals set out in the memorandum.
4. On 1 December 1983, the Union of Greek Shipowners and the Greek Shipping Cooperation Committee, whose members are members of the P & I clubs, lodged a formal complaint pursuant to Article 3 of Regulation No 17 in relation to:

(i) an agreement in similar terms to the IGA which was operated by the P & I clubs prior to the adoption of the IGA;

(ii) the IGA as notified and as adopted;

(iii) the IGA as now proposed to be modified.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 09, 11. 1. 1985, p. 11.

5. On 12 July 1984 the Commission sent to the P & I clubs a statement of objections in which it stated that having examined the information available, it considered that there were grounds for finding that certain clauses of the IGA infringed the provisions of Article 85 (1) and did not satisfy the conditions for exemption contained in Article 85 (3).
6. On 27 July 1984 the P & I clubs notified the text of a modified IGA (IGA 1984) for which they requested negative clearance or alternatively an exemption under Article 85 (3) of the Treaty. That text came into force on 31 July 1984.
7. On 2 August 1984 the Commission informed the clubs that in the absence of an agreement on all the issues in the Statement of Objections which would enable the Commission to grant an exemption, the proceedings under Article 85 (1) had to be continued.
8. On 27 September 1984 the clubs informed the Commission that without prejudice to their position in the existing proceedings and in an attempt to settle the procedures under Article 85 (3), they were prepared to modify the IGA as notified in 1984.

A. The market and the undertakings concerned

9. P & I insurance is the traditional name for the insurance of third-party liabilities and certain contractual liabilities which arise in connection with the operation of ships. The first P & I clubs were formed in England in the middle of the 19th century. The principle upon which they are based is mutuality, that is to say that they are not commercial insurers but associations of shipowners, charterers, operators and managers of ships, who agree to share each other's liabilities on a non-profit-making basis. In the main, all P & I clubs cover the same types of risk, but there are differences in the franchise or recovery standards.

A shipowner normally places hull and machinery insurance with commercial insurers, whereas insurance of contractual and some third-party liabilities is almost invariably placed with P & I clubs.

10. Each association is operated on a mutual non-profit-making basis for the benefit of its members. Each association insures third-party and contractual liabilities which its members incur in the operation of their ships. In addition, the associations pool and collectively reinsure liabilities in excess of certain thresholds. This 'pool' is operated jointly by all the clubs which share the risk of any claim made against any

member of any club which is in excess of the limit retained by each club. Thus any heavy claim that is made against a club is borne not only by the members of that club, but proportionately as to the excess by the members of all clubs within the pool. The pool itself also reinsures on the world market liabilities in excess of the limit retained by the pool.

11. The various P & I clubs which have subscribed to the IGA insured about 90 % of world shipping tonnage in 1979 and 1980. In 1980 the ocean-going merchant tonnage registered in EEC Member States was approximately 112,5 million tons and nearly all of this was insured by clubs in the international group. It can be estimated that premium income of the clubs amounted in 1983 to well over US \$ 500 million.

B. The agreement as originally notified

12. Chapter C below sets out the essential elements of the Agreement in its present form following the modifications which were contained in the notification of 1984 and modifications made thereafter.

However, the Agreement as originally notified in 1981 contained certain clauses which have been modified following the Commission's intervention. A summary of the main clauses which the Commission sought to modify is given below:

- (a) The obligation on a club ('new club') not to offer, for a ship currently insured with another club ('holding club'), a lower premium than the holding club's rate (i.e. the rate at which the holding club is prepared to renew the insurance) unless the holding club's rate exceeds a bracket of 'going' rates.

This obligation had the effect of preventing or restricting competition on premiums, since the only possibility a new club had of gaining the business of an operator already insured with another club and of applying a new rate was to convince the expert committee set up by the IGA that the holding club's rate was unreasonable, i.e. that it exceeded the maximum amount considered to be reasonable in the particular case.

If both the holding club's rate and that of the new club were deemed reasonable, the new club was able to insure the operator only if for the first year it aligned its rate with that of the holding club.

- (b) The clause applying the quotation rules referred to in (a) not only to ships currently insured, but also to new or newly acquired ships ('new ships rule').

The application of the quotation rules without more to new ships or those newly acquired by operators was a further restriction on the insured's freedom to choose his insurer.

- (c) The clauses relating to release calls.

The Commission was of the opinion that the clauses relating to release calls, i.e. the amounts members withdrawing a vessel or a fleet from a club are charged to cover their share of liabilities incurred during their membership but not settled at the time of withdrawal, could be used to reinforce restrictions on transfers between clubs.

- (d) The rules relating to a minimum 'estimated total cost' (ETC) for tankers.

These provisions constituted restrictions of competition in that the clubs agreed minimum basic rates which had to be observed in all their writing of tanker business.

- (e) The clauses relating to the composition and procedure of the expert committee.

Although these rules did not give rise to clear-cut restrictions, the Commission was of the opinion that their object or effect was to reinforce the ties between the clubs and could have contributed to restrictions on movements between one club and another. That consideration applied on the one hand to the composition of the committee, which did not contain any independent member, and on the other hand to the committee's procedures, which did not make any provision for appeal and restricted access to the records of the committee's deliberations to 'persons authorized by the clubs'.

C. The agreement as amended following the Commission's intervention

13. The modified agreement communicated to the Commission at the end of the discussions seeks to meet the objections referred to in Section B above.

14. Quotations for vessels already insured

- (a) A ship operator is in principle free to change clubs provided that the rate quoted by the new

club is not considered unreasonably low by an expert committee.

- (b) However, in particular to allow the holding club an interval between receiving notice of the operator's intention to leave it and deciding its own provisional rates for its members for the following year, it is provided that the freedom to change clubs is conditional on a contractually binding commitment at the quoted rate having been entered into between the operator and the new club by 30 September of the year preceding that for which the new insurance policy is to be effective. In addition, the holding club must be notified of this commitment within three days from the date on which it was entered into. Provided the binding commitment is made and notified in this way and the rate is not contested by the holding club or, if contested, is deemed reasonable by the expert committee, the operator can be insured with the new club as from 20 February of the following year, the date when new insurance policies come into effect.

- (c) As the rates the new club will charge its members in the following year will not have been finalized in September when the contract with the operator changing clubs is concluded, the rate quoted in the contract must be adjusted to reflect:

- (i) any general increase or reduction in rating adopted by the new club for the following year;
- (ii) any change in the limit of claims retained by the pool; and
- (iii) any variation in the cost of the reinsurance taken out by the pool.

This adjustment must be notified to the holding club.

- (d) The holding club may apply to the expert committee:

- (i) within 30 days after notification of the rate agreed with the new club to determine whether the agreed rate is reasonable;
- (ii) within two working days after notification of the adjusted rate to determine whether the adjustment fairly reflects the factors referred to above.

If the Committee considers that the agreed rate is unreasonably low or that the adjustment does not fairly reflect the factors referred to above, the new club can still insure the operator but for two years it will enjoy only a reduced pooling facility.

If no contract is concluded by 30 September, the rules of the IGA as originally notified will apply, i.e. the new club can only quote the operator a lower rate than that charged by the holding club, if the rate charged by the holding club is unreasonable. If it does quote a lower rate, and the rate charged by the holding club is found not to have been unreasonably high, the new club will enjoy only a reduced pooling facility. However, the new club is free to conclude a contract with the operator at the same rate as the holding club.

15. New vessels

- (a) An operator who has reached a binding commitment with a new club under the pre-30 September procedure (see paragraph 14 (b) above) for one or more vessels is free thereafter to insure a new (or newly acquired) vessel, benefiting immediately from the new club's rate, provided that that rate is not held by the Committee to be unreasonably low.
- (b) Unless an operator whose vessels are presently insured by a club has already reached a binding commitment with a new club under the pre-30 September procedure for one or more vessels, any new (or newly acquired) vessel of that operator may not be insured by any club for the balance of the current year at less than the rate offered by the holding club unless that rate is held by the Committee to be unreasonably high.

16. Release calls

- (a) Where a release call is demanded from an operator by a club which he is leaving to cover the operator's share of the club's outstanding liabilities in respect of those years in which he was a member, but in respect of which accounts are not closed, the operator has the option of paying the release call or providing a bank guarantee for his share of outstanding liabilities.

(b) In the event of the operator considering the amount of the release call demanded to be inappropriate, he may, within 20 working days, apply to the expert committee to determine whether the release call is in accordance with a rate or formula fixed by the holding club's directors and applicable to all its members in similar circumstances and, if not, whether the release call is reasonable.

(c) However, the holding club may make it a condition of the operator's right to request a determination that the operator deposits in escrow the amount of the release call demanded or provides a bank guarantee for that amount. The deposit or guarantee will be refunded or released so far as the expert committee finds in the operator's favour.

17. Minimum estimated total cost for tankers

The minimum rate provided for in the agreement as originally notified has been deleted. Instead it is provided that:

- (a) all quotations for tankers must make fair and adequate provision for the following elements of cost:
 - (i) claims within the club's retention;
 - (ii) contributions to pool claims;
 - (iii) reinsurance cost;
 - (iv) administration costs;
- (b) the clubs will recommend annually a reasonable minimum provision in respect of pool claims.

18. Composition and procedure of the expert committee

The committee now contains an independent element which it did not contain before. Apart from two members, one for each club directly concerned, (i.e. the holding club and the new club) chosen from a list A, the committee will comprise a third member, chosen from a list B (persons who are not party to the dispute and are accepted as independent persons qualified by their experience).

List A shall comprise one or more directors, employees or partners of each club or its managers, nominated by that club. A person on List A may not be appointed to the committee by the club which nominated him to that list or by a club which reinsures or is reinsured by that club. The two members chosen from List A shall jointly

appoint a third member from List B, but if they cannot agree within three working days, the appointment shall be made by the secretary of the committee.

The committee, which shall act as arbitrators pursuant to the English Arbitration Acts 1950 and 1979, shall give reasoned decisions in writing.

19. The clubs, in accordance with their letter of 27 September 1984 (see paragraph 8 above), have concluded a modified IGA (IGA 1985) which came into force on 20 February 1985.
20. In response to publication of the notice pursuant to Article 19 (3) of Regulation No 17, the Commission received comments from the Union of Greek Shipowners and the Greek Shipping Cooperation Committee, each of which had on 1 December 1983 already lodged a formal complaint pursuant to Article 3 of that Regulation.

The following general objections were raised to granting an exemption in relation to the IGA:

- in general, the four conditions for the applicability of Article 85 (3) are not satisfied,
- in particular, the cut-off date of 30 September is an impractical and unworkable date. The complainants suggest the date of 30 November, arguing that in practice all the information and details required would not be received and processed before 30 November,
- the combination of a cut-off date of 30 September with the application of the quotation rules to new vessels is unworkable. Therefore the complainants suggest either that the quotation rules should not apply to new vessels, or alternatively that the cut-off date should be 30 November.

These objections are not considered valid by the Commission for reasons that will be explained in detail in this Decision. However, the main reason for rejecting these objections is that the criticisms made are purely speculative and the complainants failed to provide evidence supporting their contentions.

However, in addition it is important to stress that, prior to dispatching the statement of objections on 12 July 1984 (see paragraph 5 above), the Commission received from several individual shipowners and associations of shipowners, all of which are members of the P & I clubs, like the complainants, approximately 15 letters in support of the IGA.

These shipowners, who can be considered as constituting the majority of shipowners in the Community, dissociated themselves entirely from

the position taken by the Union of Greek Shipowners and the Greek Shipping Cooperation Committee.

They pointed out in particular that the existing P & I clubs' system is beneficial to shipowners both in the services it provides and because it affords vital coverage on an 'at cost' basis, and that any threat to the stability of that system is detrimental not only to the interest of the shipowners but also to all transport users. A weakening of the pooling arrangement would have two deleterious effects: firstly, the clubs generally would no longer be able to meet the claims made against them in the event of serious mishap, and secondly, significant claims for damages submitted by third parties might go unsatisfied and the cost of the industry's inability to discharge its liabilities might consequently fall on the world community at large.

II. LEGAL ASSESSMENT

A. Article 85 (1)

21. Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings 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.

Article 85 is equally applicable to agreements for services as it is to agreements for goods.

22. The clubs which notified the IGA are undertakings within the meaning of Article 85 (1).

While mutual insurance agreements in themselves do not constitute a restriction of competition, the agreement in question goes further because the system which it establishes has as its effect the reduction of competition between the clubs by imposing limitations on the rights of each club to quote both for vessels already insured with another club and for new or newly acquired vessels. At the same time, as a result of these limitations, the insured's freedom to choose his insurer is restricted.

23. The effect of this restriction on the premiums the clubs may quote is appreciable since the insurance market in question is dominated by the P & I clubs, which between them insure nearly all the ocean-going merchant tonnage registered in the Member States of the EEC.

24. The following provisions appear to the Commission to fall within Article 85 (1):

- quotation, rules for vessels already insured (see paragraph 25 below),
- quotation rules for new vessels (see paragraph 26 below),
- rules relating to 'release calls' (see paragraph 27 below),
- rules relating to estimated total cost for tankers (see paragraph 28 below).

25. Quotation rules for vessels already insured

Under the agreement, a large number of insurers who, but for the operation of the IGA, would be in full competition with one another in particular as regards rate setting, have established machinery under which the freedom of a new club to insure a vessel already insured with a holding club is restricted.

This restriction is twofold:

- first, the freedom for an insured operator to change clubs is conditional on a contractually binding commitment at a quoted rate being entered into between the operator and the new club by 30 September of any year and the holding club being notified within three days of the commitment.

In the absence of such a binding commitment the operator is free to move to a new club only if the latter applies the same rate as the holding club, except where the holding club's rate is unreasonably high (see paragraph 48 below),

- secondly, the mechanism described above presupposes that the rate offered by the new club is either accepted by the holding club as being reasonable or if contested is subsequently considered reasonable by the expert committee.

The result of this stipulation is that the insurer's freedom to conclude agreements with a new client is restricted, with the result that the insured party's freedom to take advantage of competitive forces is reduced.

26. Quotation rules for new vessels

In spite of the modifications to the originally notified IGA agreement which resulted from the Commission's intervention, the 1985 IGA still contains restrictions of competition on the quotation rules for new vessels.

Thus an operator who acquires an extra ship for his fleet in the course of a new policy year is not

entirely free to seek a quotation for such a vessel with an insurer of his own choice.

The present rules oblige the insured first to go to the club or clubs which already insure all or part of his fleet.

An operator with a new or newly acquired vessel can benefit immediately from a better rate offered by a new club only if he has reached a binding commitment with the new club under the pre-30 September procedure (see paragraph 14 (b) above) in respect of one or more vessels, which were already insured. However, this advantage of being able to benefit immediately from the rate offered by a new club, if challenged by the holding club, is only available if it is not held by the committee to be unreasonably low.

In no other case may any new or newly acquired vessel of that operator be insured by any club for the balance of the current year at less than the rate offered by the holding club unless that rate is held by the committee to be unreasonably high. The result of this stipulation is to limit the possibilities for an operator to choose an insurer for new or newly acquired vessels who can offer a rate more financially advantageous than that which is presently available to the operator from his holding club.

27. Rules relating to release calls

Although these rules do not in themselves give rise to clear-cut restrictions, the Commission is of the opinion that the rules on release calls, i.e. the amounts which members withdrawing a vessel or a fleet from a club are charged to cover their share of liabilities incurred during their membership but not settled at the time of withdrawal, could be used to reinforce restrictions on transfers between clubs. These rules could indeed be used to further restrict the ability of an operator to avail himself of the opportunity of seeking better rates offered by another club. The level of a release call claimed by the holding club in the event of a withdrawal could in fact constitute a deterrent to transfers between one club and another.

28. Rules related to the estimated total cost for tankers

As a result of the Commission's intervention, the clubs agreed to delete the minimum rate provided for in the agreement as originally notified. However, the text which is at present in force still contains clauses which restrict competition within the meaning of Article 85 (1).

In the absence of an agreement the various insurers would be free to fix quotations for tankers according to their own evaluation of the risk involved.

The present text of the agreement on the other hand provides that the various clubs must insert in their quotation adequate provisions for the following cost elements:

- (i) claims within the club's retention;
- (ii) contributions to pool claims;
- (iii) reinsurance cost;
- (iv) administration costs.

Furthermore, the clubs will recommend annually a reasonable minimum provision in respect of pool claims.

Thus, even though the obligation uniformly to apply a minimum tariff is no longer present, the freedom for the insurers to fix their tariffs for tankers is restricted.

29. The notified agreement is capable of having an appreciable effect on trade between Member States, because its effect extends to the whole of the common market as well as third countries. Nearly the entire EEC merchant fleet is insured by the clubs, in such a way that ships from one Member State are commonly insured by a club established in another Member State. In addition, clubs established in more than one Member State are party to the agreement.

B. Article 85 (3)

30. Article 85 (3) of the EEC Treaty states that the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
31. The IGA as amended following the Commission's intervention satisfies all the requirements of Article 85 (3).

Improvement in production or distribution

32. The IGA was designed to maintain the system of mutual insurance offered by the P & I clubs. The

advantages of such a system of mutual insurance can be summarized briefly in the following way:

- the reduction of insurance premiums. This advantage stems from the fact that the clubs operate on a non-profit making basis and each member merely contributes to the amount of claims made against club members and the cost of reinsurance and administration,
- a better claims-handling system and a speedier assistance for shipowners. This advantage arises from the fact that in principle the insured and the insurer have mutual interests which do not conflict,
- elasticity of cover. The discretionary power that the clubs' directors enjoy means that a claim that is not specifically covered by the policy can be met. This sort of cover is a particular feature of mutual insurance where the members of a given club feel sufficiently confident in the judgment of the club's directors to accept their decisions outside the bounds of the policy cover,
- unlimited cover. As a result of the clubs' participation in the pool and in the clubs' collective excess reinsurance, they are able to offer shipowners unlimited cover in respect of all liability except oil pollution risks,
- rapid settlement of claims. This advantage of the mutual insurance system can also be of benefit to persons with legitimate claims against shipowners, such as employees of shipowners or stevedores injured in the course of their employment and other individuals suffering personal injury.

33. The rules contained in the IGA are designed to secure four objectives crucial to the operation of the mutual P & I clubs system, namely:
- continuity of membership,
 - preserving the principle of mutuality,
 - stability of premiums,
 - continuation of the pool arrangements.
34. Continuity of membership is of great importance for two reasons:

- the necessary experience to assess the members' proper rating could not be acquired by the underwriters of any one club if members were constantly moving from club to club,

- 'long-tail' liabilities would be very difficult to handle equitably if membership were to change constantly.

35. Preserving the principle of mutuality

The quotation rules are designed to avoid application of discriminatory rates. This situation could arise if the rate offered by a new club to attract an operator already insured with a holding club is not based wholly upon an underwriting assessment of the risk but is otherwise set to persuade the member to change his club. Such a rate could discriminate against the existing members of the new club.

To prevent the possibility of such discriminatory ratings the IGA contains a rule referred to in paragraph 14 (a) above. This rule provides that an operator may move from club to club if the new club's rate is not considered unreasonably low by an expert committee.

36. Stability of premiums

In order to enable shipowners to forecast their real insurance costs, stability of premiums is essential. A system whereby a general reduction on quoted rates on the basis of over optimistic estimations of the total cost of insurance would have to be corrected by the imposition of high supplementary calls, would be contrary to the accepted principles of insurance underwriting and would therefore be disadvantageous to the shipowners.

37. Continuation of the pool arrangements

Quotation of discriminatory rates would destroy the trust between clubs which is an important factor in the operation of the pool arrangements. Indeed, it is hard to see how the acceptance of the pooling system by the clubs could possibly continue in the absence of a high degree of mutual trust between the clubs.

38. The estimated total cost for a tanker gives rise to particular considerations. In this respect the 1985 version of the IGA contains stipulations which restrict competition (see paragraph 28 above).

However, at this point it is important to take into account the particular nature of the transport of petroleum and gas products by tanker. Such transport represents approximately 50 % of the tonnage insured with the clubs. While the insurance of dry-cargo fleet gives rise to a number of claims which occur with reasonable regularity, the situation for tankers and in particular the

tankers carrying dirty or heavy oils is different. Tanker claims tend to occur rarely but involve massive liabilities when they do occur.

To avoid the risks of quotations which are systematically below a premium sufficient to meet a serious incident of this nature, the clubs have decided to pool the collective experience of their underwriting experts in this particular field. While the version of the agreement which was originally notified contained a minimum estimated total cost (ETC) for tankers, the 1985 IGA version envisages that the clubs shall be free to fix tanker premiums on condition that the premium quoted makes fair and adequate provision for certain constant elements of total cost. Bearing in mind the need for a level of premiums sufficient to meet liabilities arising from serious incidents and the fact that the clubs now must have confidence in the premium levels of other clubs if the pooling arrangements are to work, the rule in respect of tankers is regarded by the Commission as contributing to the improvement of the insurance services in that sector.

39. An examination of the arguments put forward by the clubs has led the Commission to the conclusion that the advantages resulting from the notified agreement outweigh the disadvantages stemming from the fact that an operator is not totally free to move from one club to another and that tanker quotations are subject to the restrictions set out in the formula described above.

In such a context the setting up and functioning of the IGA can be considered to be a means of improving the production and the distribution of insurance services.

Benefit to the consumer

40. The abovementioned advantages for production and distribution of insurance services are of immediate benefit to the shipowner. As far as they are concerned, it goes without saying that the IGA permits them to benefit from all the advantages of the mutual insurance system (see paragraph 32 above).

41. However, in the context of mutual insurance the Commission is of the opinion that it is not sufficient to argue that the notified agreement benefits consumers merely because the insured shipowners are themselves consumers of the service in question.

Thus, it must be shown that persons other than the insured themselves, namely transport users who

are their customers, and the final consumers, also benefit from the agreement in question.

42. As far as the customers of the insured are concerned, it is appropriate to take into consideration the competitive situation in the shipping industry. This industry is characterized by a division between liner operations on the one hand and non-liner services which involve a very active charter market on the other hand.
43. In so far as the non-liner shipping services are concerned, the competitive nature of this market permits the assumption that any cost savings achieved from cheaper insurance will be passed on and result in lower freight charges with consequent effects on the prices charged to the final consumers for the goods in question.
44. This argument also applies to the liner sector, where certain rates are governed by the liner conferences. As far as these services are concerned, it must be borne in mind that in spite of the uniform fixing of rates, conferences are subjected to substantial competition from various quarters, such as outside liner operators. As a result, it can be assumed that it is unlikely that the conferences would be able to raise rates by more than enough to cover costs. In such circumstances any cost saving such as arises from mutual insurance will be passed on to the consumers.
45. For these reasons the Commission can agree with the argument of the clubs that in both the liner and non-liner sectors of the shipping industry cost savings accruing to the owners and operators of the ships as a result of the IGA can be expected to benefit consumers. This advantage arises because the pressure of competition amongst shipowners and operators is such that most if not all of the cost savings made available to them by the operation of the IGA will necessarily be passed on to the consumer.
46. The same positive conclusions may be reached in respect of the system according to which passengers and other customers of the shipowners who have suffered damage within the P & I system can obtain compensation. Thus the rapid settlement of claims made possible by the existence of a mutual system of assurance arising from the operation of the IGA undoubtedly constitutes a benefit for the consumer. This is also true of the unlimited cover, and the elasticity of cover, permitted by the IGA (see paragraph 32 above).
47. Indispensability of the restriction

The restrictions remaining in the 1985 version of the IGA appear to be indispensable to the attainment of the P & I clubs' objectives.

The first restriction to be considered is the rule on quotations for vessels already insured. This restriction is clearly designed to prevent the transfer of business from one club to another in response to a discriminatory quotation.

In a system of mutual insurance it is necessary to prevent discriminatory rates being applied. Without the rule on quotations, the mutual confidence necessary for the operating of the system would not exist.

48. The principal difference between the quotation system which was in force under the IGA notified in 1981 and the present (1985) version lies in the fact that a new club has the possibility of obtaining the business of an operator whenever its rate is a reasonable one.

Under the 1981 IGA a new club was obliged not to offer a lower premium than the holding club's rate unless the holding club's rate exceeded a bracket of going rates, i.e. it was unreasonably high. In the 1985 version on the other hand a ship operator is in principle free to change clubs provided that the rate quoted by the new club is not considered unreasonably low. This possibility is subject, nevertheless, to the condition that a binding agreement has been concluded before 30 September between the new club and the operator with effect from the beginning of the policy year which follows. It is further required that this binding agreement has been notified to the holding club within three days of the commitment being made. Otherwise, the 1981 IGA rules relating to reduced pooling facility will apply.

This cut-off date of 30 September is essential to the operation of the system, because of the insurers' need to make a sufficiently accurate estimate of the quantity and quality of its membership in the coming policy year. Such considerations are in fact indispensable to enable a correct rating of an owner's new premium to be made, given that such a rating is designed to establish an equitable relationship between the contributions of all the members of any club. The 30 September cut-off date furthermore coincides with the earliest date on which statistics are available relating to risks run by members both singly and collectively. Such statistics permit estimates of a provisional nature to be made by holding and new clubs in cases where the operator is contemplating a change. Such estimates are then adjusted as the need arises (see paragraph 14 (c) above).

The criticism raised by the complainants against the pre-30 September procedure appears to the Commission not to be supported by evidence. Firstly, it is incorrect to contrast that procedure with the 'old IGA', as if the latter had been abolished. A member wishing to change his club has the choice of either committing himself by 30 September under the new procedure or waiting until the normal renewal season, when the 'old' procedures still operate.

The Commission therefore cannot accept the contention of the objectors that the new mechanism is even worse than the 'old' IGA.

Secondly, an important advantage of the pre-30 September procedure is that it effectively enables a member to 'check' his holding club's rate against that of another club, even if, in the event, he decides to stay with his holding club. This is because the holding club is obliged to furnish to the new club, at its request, the shipowner's record. The objectors took great exception to their inability to do this under the old IGA. The new system therefore is an improvement to the extent that it meets this objection.

The objectors' fundamental contention is that the cut-off date of 30 September is an impractical and unworkable date. They argue that the pre-30 September procedure should be extended until a date on which there is available all the information that is used for the purpose of the 'traditional' type of renewal. The Commission does not share this view. During the discussions which took place between the services of the Commission and the clubs in order to cause the latter to modify the 1981 IGA, it was agreed to explore means of avoiding the IGA having the effect of binding an owner to his holding club's rate for a full year without disrupting the main structure of the system. The Commission agreed with the claim made by the clubs that giving a shipowner the complete freedom to change clubs at any time would jeopardize the functioning of the system as a whole, in particular in so far as the requirement of continuity of membership is concerned (see paragraph 34 above).

Initially the cut-off date was fixed at 20 August. However, following the submissions made by the complainants and notwithstanding the hesitations of the other shipowner members of the clubs, the latter agreed to defer the cut-off date until the 30 September. They refused any further postponement because that would have meant that the

premiums of all (or nearly all) fleets could be renewed without regard to the holding club's rate. That would have wholly defeated the purpose of having a separate procedure as accepted by the clubs. There would be no scope for two procedures, and the position of the clubs of preserving stable membership by preventing transfers at any time at unreasonably low rates would not be taken into account. In effect, what had been devised as a 'safety valve' would have become the standard practice, and the system would have been de-stabilized.

49. The date of 30 September, combined with the obligation on the holding club to furnish information to the proposed new club in relation to the rate applicable to an operator wishing to change club, also takes into account the interests of the operators who need to be able to decide at the earliest opportunity whether to stay with the holding club in full knowledge of the premium which will be quoted by the clubs in question for the next policy year.

The mechanism which is thus set up appears to the Commission to constitute an acceptable compromise between the legitimate interests of the clubs in maintaining stable membership and the interests of the operators who can now take advantage of competition between clubs in respect of rates and services offered.

50. The pre-30 September procedure is therefore a key element in the 1985 version of the IGA and is indispensable to its operation. However the clubs must be required scrupulously to observe its conditions.
51. The second restriction to be considered is the rule for the quotation of new vessels. This rule is the result of intensive discussions between the Commission and the clubs. In the Commission's view, the rule brings about an acceptable compromise between the interests of the clubs and those of individual operators, notably of the shipowners who introduced a complaint. The clubs seek to insure fleets rather than single vessels and argue that where a new vessel is purchased the operator should be obliged to insure it with his holding club since a correct evaluation of the risk requires knowledge of the operator's personal record in respect of all his vessels.

However, the operators who made a formal complaint against the IGA assert that in relation to a new vessel operators should be free to choose a different club. In support of their argument that the 'new-ship' rule is not necessary, the complainants point to the existence of split fleets i.e. cases where operators' ships are insured in different clubs.

But, although the 'new-ship' rule requires operators who purchase new ships to refer the matter promptly to their holding clubs, it does allow an operator who has already decided to transfer one or more vessels to a new club to make such a transfer and immediately benefit from the new club's rate. This possibility is an application of the theory of 'split fleets'.

The objectors' basic criticism concerning the 'new-ship' rule is a development of their main argument that all renewals should be effected under an extended version of the pre-30 September procedure. Given that the Commission has accepted the arguments of the clubs that the quotation rules should apply to new ships, the 1985 version of the IGA relaxes them as soon as any part of the existing fleet has been committed to a pre-30 September renewal. The Commission agrees with the clubs that giving the new club the freedom of insuring a single new vessel in any case where its proposed rate is 'reasonable' could give rise to more acute dangers in the case of a new vessel than in the case of a renewal. It would be relatively safe and easy for the new club to quote a low rate for a single vessel as opposed to a low rate for an entire fleet. Meanwhile, a low quotation by a new club for a single additional vessel would put the holding club under pressure to match or under-cut that quotation, and thus to reduce its rates for the rest of the existing fleet to a level lower than the rate which it considered justified on proper underwriting grounds.

52. The 'new-ship' rule, which takes into account the divergent interests of the clubs and of certain operators, is essential to the operation of the IGA for the reasons explained in relation to vessels already insured (see paragraph 49 above). 'New' ships cannot be treated as if they existed in isolation from the rest of an operator's fleet. It is unrealistic to think in terms of insuring single vessels, rather than assessing the risks for a vessel in terms of the operator's record in relation to his old fleet, or at least part of his fleet (in the case of a split fleet). Accordingly, the application of the 30 September date to 'new' ships must be regarded as indispensable.

53. The same conclusion is appropriate in relation to the potentially restrictive effects of the release call provisions which apply when an operator leaves a club. The need for a release call stems from the

necessity of preventing a shipowner who owes his former club money to cover liabilities incurred during his membership but not settled at the time of withdrawal, from avoiding his liabilities.

It is important to recognize that, once the last policy year within his period of membership has been closed (usually three years after the end of that year), a past member has the benefit of being protected against any further liability, notwithstanding the fact that up to 50 % by value of claims attributable to his last year of membership, and some proportion of those attributable to earlier years, are likely to be outstanding at that stage.

The release call provisions can in principle be considered as a means of preventing discrimination between members of the same club.

The modifications which were made as a result of the Commission's intervention, and which resulted in the provision for bank guarantees and the right to challenge the amount of the release call before the expert committee, means that release calls are unlikely to be used as a means of restricting transfers. This is particularly the case now that the composition and procedural rules of the expert committee have been amended in a manner acceptable to the Commission.

54. Finally, the rules on estimated total costs for tankers are indispensable in the operation of a system of mutual insurance, especially given the very large sums involved in any claim (see paragraph 38 above).

55. Elimination of competition

The IGA does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the insurance services in question. Each club is now free to determine autonomously the rates it applies to its members. Furthermore, competition in respect of services offered by the various clubs to their members can be expected to increase as a consequence of the new opportunities for changing clubs which the modified IGA rules permit.

56. For the reasons set out above, the Commission is of the opinion that the amendments agreed to by the clubs in the course of nearly three years of discussions have the consequence that the conditions laid down in Article 85 (3) are satisfied.

Moreover, the Commission is of the opinion that in the course of these discussions the points of view of the complainants have been duly taken

into account. Indeed, several meetings have taken place with the complainants who have had the opportunity fully to explain their concerns to the Commission's services. The 1985 version of the IGA is the result of intensive contacts between the Commission, the clubs and the complainants.

Under these circumstances, the Commission considers that the 1985 IGA represents a fair compromise between the different interests. There is a strong likelihood that prohibiting the IGA would have harmful effects on the mutual insurance system itself as operated for over a century by the clubs. Furthermore, it has been brought to the attention of the Commission that a prohibition of the IGA could have the effect that a large proportion of members of the clubs, at least those who are not established in the Community, would decide to leave the clubs and set up new P & I clubs outside the Community.

In the light of these considerations, and bearing in mind that undermining and putting at risk the functioning of the pooling arrangement would be detrimental not only to the interests of the shipowners but also to the interests of consumers and third parties (in view of oil-pollution risks in particular), the Commission is of the opinion that subject to a strict monitoring and scrutiny of the agreement, the IGA can be exempted.

C. Articles 6 and 8 of Regulation No 17

57. The present state of the market and the untested nature of the pre-30 September procedure justify the limitation of an exemption to 10 years as from the date of the last notification (20 February 1985).
58. To enable the Commission to check that the conditions which have justified the granting of the exemption continue to be fulfilled throughout the period of the exemption, the parties should be required to inform the Commission once a year of any amendment of the notified agreement or of the conclusion of any new agreement between them. This obligation however shall not dispense with the need to notify changes in the subject matter or membership of the exempted agreement under Article 4 (1) of Regulation No 17 should

the parties wish to continue to enjoy the benefits of exemption. Furthermore, in order to enable the Commission to check the application of the pre-30 September procedure, the parties should also be required to send the Commission annually a report containing statistical information on:

- the number of occasions on which operators have officially requested a new club to implement the new procedure (individualized data for each club), and the number of occasions on which a dispute over quotations has been brought before the expert committee and the results of the awards,
- the number of transfers actually carried out in application of the procedure in question,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable to the International Group Agreement as last notified on 20 February 1985. This exemption shall be valid until 20 February 1995.

Article 2

The undertakings to which this Decision is addressed shall inform the Commission once a year of any amendment and/or addition to the notified agreement and of the conclusion of any new agreement between them or between them and another P & I club. The undertakings shall also send the Commission annually a report containing the statistical information necessary to enable the Commission to check the operation of the 'pre-30 September' procedure.

Article 3

This Decision is addressed to the undertakings listed in the Annex.

Done at Brussels, 16 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission

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

The Britannia Steamship Insurance Association Limited.

Southwark Towers,
32 London Bridge Street,
London SE1.

The London Steamship Owners' Mutual Insurance Association Limited.

17 Crosswall,
London EC3.

The Newcastle Protection and Indemnity Association.

Centro House,
3 Cloth Market,
Newcastle-upon-Tyne.

The North of England Protecting and Indemnity Association Limited.

Douglas House,
4 Neville Street,
Newcastle-upon-Tyne.

The Standard Steamship Owners' Protection and Indemnity Association Limited.

International House,
World Trade Centre,
1 St Katharine's Way,
London E1 9UN.

The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited.

Burnaby Building,
Burnaby Street,
Hamilton,
Bermuda.

The Steamship Mutual Underwriting Association Limited

Aquatical House,
201/211 Bishopsgate,
London EC2.

Sveriges Angfartys Assurans Forening.

Barlastgatan 2,
S-400 40 Göteborg,
Sweden.

The Shipowners' Mutual Protection and Indemnity Association (Luxembourg).

33 Boulevard Prince Henri,
Luxembourg.

The Steamship Mutual Underwriting Association (Bermuda) Limited.

Clarendon House,
Church Street West,
Hamilton,
Bermuda.

The Sunderland Steamship Protecting and Indemnity Association.

Tavistock House,
Borough Road,
Sunderland.

The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited.

Mercury House,
Front Street,
Hamilton,
Bermuda.

The West of England Shipowners' Mutual Protection and Indemnity Association (Luxembourg).

33 Boulevard Prince Henri,
Luxembourg.

Assuranceforeningen Gard (Gjensidig).

4801 Arendal,
Norway.

Assuranceforeningen Skuld (Gjensidig).

Stortingst. 18,
Oslo 1,
Norway.

The Japan Shipowners' Mutual Protection and Indemnity Association.

Yanagiya Building,
2-1-10 Nihonbashi,
Chuoh-Ku,
Tokyo, Japan.

The Liverpool and London Steamship Protection and Indemnity Association Limited.

Equity & Law House,
47 Castle Street,
Liverpool.

COMMISSION DECISION

of 16 December 1985

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/30.665 — Villeroy & Boch)

(Only the French and German texts are authentic)

(85/616/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to 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 2 thereof,

Having regard to the application made on 25 May 1982 by Villeroy & Boch KG, Mettlach, Germany, and Villeroy & Boch Sarl, Luxembourg, for negative clearance of a network of standard form agreements for the distribution of ceramic tableware and ornaments,

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

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

I. THE FACTS

A. The undertakings

1. Villeroy & Boch KG of Mettlach, Germany, and Villeroy & Boch Sarl of Luxembourg, belong to the group of the same name, which is a major producer of ceramics (sanitary and fine ceramics). The Villeroy & Boch group has a consolidated annual turnover of ... ⁽³⁾, all operations combined, of which ... in respect of fine ceramics (ceramic tableware and ornaments),

which Villeroy & Boch markets in the Member States of the EEC and EFTA by means of a distribution network.

B. The product and the market

2. Villeroy & Boch is a large European producer of ceramic tableware and ornaments. Its production is sold mainly in Germany, the Benelux countries and France. The Villeroy & Boch network distributes 61 dinner services, of which the most reputed, numbering 21, are covered by a 15-year availability guarantee.

Villeroy & Boch's market share does not attain 10 % in any of the Community Member States, and is below 5 % in several.

3. The market in ceramic tableware and ornaments is a fragmented market in which competition is very strong. On the German market alone, numerous producers are active, of which the three leading ones together account for a third of the sales, the others sharing the remainder of the market on the basis of shares equal to or less than 5 %.

4. Since goods of high quality and limited bulk are involved, imports play an important role and can account for up to a third of annual sales on certain national markets. Each producer is thus exposed to competition from manufacturers established both in other Member States and in non-Community countries, some producers exporting more than a third of their output.

C. The network of notified agreements

5. Villeroy & Boch markets its ceramic tableware and ornaments in the common market via a network of some 3 500 specialist retailers who are supplied, depending on the country, either directly by Villeroy & Boch, or through the agency of importers or wholesalers, or both. In addition to this network, there are two specialist distribution channels: the supplying of hotels and restaurants and the distribution of publicity aids.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 206, 16. 8. 1985, p. 6.

⁽³⁾ Pursuant to Article 21 (2) of Regulation No 17, business secrets are not published in the *Official Journal of the European Communities*.

6. The distribution network which Villeroy & Boch has notified with a view to obtaining negative clearance or, failing that, exemption thus comprises several different standard form agreements of indefinite duration which may be terminated by either party on six months' notice. These standard form agreements are concluded by Villeroy & Boch with:
 - specialist retailers (*Facheinzelhändler*), their wholesalers and central purchasing agencies,
 - suppliers specializing in supplying hotels and restaurants,
 - distributors of advertising gifts (*Werbe-mittelunternehmen*), who are authorized to supply only certain trade customers with a view to subsequent disposal to third parties for promotion purposes.
1. *Features common to the notified agreements*
 - (a) No resale price maintenance
 7. The notified standard form agreements contain no provisions on the fixing of resale prices: all Villeroy & Boch resellers are free to set their own prices. Villeroy & Boch operates a system of recommended prices in some Member States of the Community.
 - (b) Freedom of cross-supplies between Villeroy & Boch resellers
 8. Any Villeroy & Boch reseller may resell the contract goods to other Villeroy & Boch resellers in the same distribution channel. For example, authorized specialist retailers may supply contract goods to any other authorized specialist retailer.
 - (c) Freedom of export
 9. Any Villeroy & Boch reseller may also perform the transactions referred to at (b) from a Member State of the EEC or EFTA to another Member State.
 - (d) No non-competition clause
 10. Villeroy & Boch resellers may buy and sell similar goods from competing producers.
2. *Specific provisions of the agreements between Villeroy & Boch and specialist retailers (EEC dealership agreement)*
11. Villeroy & Boch has concluded selective distribution agreements with some 3 500 specialist retailers established in the various Member States, who are supplied, depending on the country concerned, by way of direct deliveries from Villeroy & Boch and/or through the agency of importers or wholesalers. The main terms of the agreements are as follows:
 - (a) Goods excluded from the channel
 12. Publicity aids and goods intended for hotels and restaurants, which are covered by two specialist distribution channels, are excluded by Villeroy & Boch. These articles are clearly differentiated from dinner sets intended for private consumers.
 - (b) Closed distribution network (dealership agreement)
 13. Specialist retailers may supply only private customers or other specialist retailers authorized by Villeroy & Boch, irrespective of the user's Member State of establishment.
 - (c) Selection criteria
 14. Only retailers authorized by Villeroy & Boch are admitted to the distribution network in accordance with the selection criteria outlined below. In response to certain observations made by the Commission, Villeroy & Boch has made some of its criteria more flexible. These can now be summed up as follows:
 - The retailing of tableware, principally articles of high quality in a shop easily accessible to the public, specializing in such goods or having a specialist department.

The admission criteria relative to the specialization of the retail shop is deemed to be fulfilled where the retailer predominantly sells the range of any large tableware producer.

The standard agreement originally stipulated that the sales outlet should not be isolated from other shops and should be as centrally situated as possible. Villeroy & Boch has relaxed this requirement along the above lines in response to observations made by the Commission's departments,

 - The retailer must display a sufficiently wide and varied range of Villeroy & Boch products and other products of comparable quality capable of satisfying the demands of discriminating consumers. The extent and variety of the range depend on the size and location of the sales outlet,
 - Displaying of Villeroy & Boch goods in an attractive manner, setting them apart visually from other makes.

Villeroy & Boch articles must not be surrounded by products likely to detract from their appearance,

 - Obligation to keep sufficient stocks of Villeroy & Boch sets to be able to satisfy normal demand,

- A technically trained and professional staff,
- Checking of goods before selling them to the public,
- Usual after-sales service (replacement of articles and provision of advice to customers wishing to supplement a service),
- Obligation to promote Villeroy & Boch products via publicity, advertising and other customary means.

3. *Agreements between Villeroy & Boch and the wholesale trade*

15. Villeroy & Boch has concluded two types of distribution agreement with the wholesale trade (wholesalers and central purchasing agencies). The feature they have in common is that they restrict the resale of goods by the wholesale trade to resellers authorized by Villeroy & Boch. The wholesale trade is therefore prohibited from reselling either to unauthorized retailers or to private customers.

4. *Agreements between Villeroy & Boch and suppliers of goods to hotels and restaurants*

16. Villeroy & Boch delivers goods to suppliers specializing in this specific branch of the tableware trade only for resale to hotels and restaurants. It reserves the right to supply such trade customers direct.

5. *Agreements between Villeroy & Boch and firms which distribute advertising gifts*

17. Villeroy & Boch delivers goods to certain firms specializing in the distribution of advertising gifts exclusively for resale to trade customers, who subsequently pass them on to third parties as promotional giftware.
18. The Commission has received no observations from interested third parties following publication of the notice required by Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

19. 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.

20. The notified standard form agreements governing relations between Villeroy & Boch and its various resellers lay down the details of cooperation between legally independent undertakings and are agreements between undertakings within the meaning of the abovementioned provision.

21. The relevant product market in which the notified distribution network operates is that of ceramic tableware and ornaments (fine ceramics). The various types of ceramic tableware (earthenware and porcelain dinner services) are to be considered as similar having regard to their properties, their use and their price, which do not differ significantly. Ceramic ornaments may in this case be included in the same market inasmuch as they are accessory to dinner services, and made of the same material.

22. Although selective distribution agreements necessarily affect competition in the common market (judgment of the Court of Justice in Case 107/82, *AEG-Telefunken* [1983] ECR 3151, ground 33), some products or services, which are not simple products or services, possess certain characteristics which prevent them from being sold properly to the public without the intervention of specialist distributors. To this extent, selective distribution systems constitute an aspect of competition which accords with Article 85 (1) provided that resellers are chosen on the basis of objective qualitative criteria commensurate with the requirements of the distribution of the products concerned and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion (Court of Justice, Case 31/80, *L'Oréal* [1980] ECR 3775, grounds 15 and 16).

23. To that extent, the notified distribution agreements cannot be considered to restrict competition if it is established that the selection of resellers is based on criteria necessarily conditioned by the specific nature of the contract goods.

24. Indeed, since Villeroy & Boch has made some of the clauses of the selective distribution agreements with its specialized retailers more flexible, *inter alia* by deleting, at the Commission's request, the clause concerning the central location of retail outlets, which was likely to exclude from the network distribution channels capable of satisfying the producer's qualitative requirements without actually being situated in the centre of areas of consumption, it now makes admission to its network of specialist retailers subject only to general technical and professional conditions regarding retail outlets, which are objectively reasonable and suited to ensuring the sale of its products under favourable conditions.

25. The sale under appropriate conditions (cf. Court of Justice, Case 26/76, *Metro* [1977] ECR 1875, ground 37) of quality ceramic tableware requires first of all that they be displayed and sold through shops in the trade or having a specialized department, specifically equipped for the sale of these articles and having a trained staff.

To the extent that the Villeroy & Boch distribution system is open to outlets having a specialized department, it is not, as a matter of principle, liable to exclude certain modern forms of distribution.

26. The relevant products are durable consumer goods of a composite nature — each dinner service includes a wide variety of different pieces — whose sale is not exhausted in one simple transaction but is on the contrary repetitive, as broken items are replaced or additional items are acquired. Consequently, the long life of the products concerned justifies the legitimate interest of the producer in entrusting their sale only to retailers who are prepared to undertake after-sales service so as to ensure continuity of supply to the customer.
27. The displaying of Villeroy & Boch goods in an attractive manner and their separation both from other makes and from types of product which might harm Villeroy & Boch's brand image are designed simply to improve the appearance of, and assist in identifying, Villeroy & Boch products and avoid any confusion with similar makes and any equating of Villeroy & Boch products with inferior products capable of detracting from a product line on which Villeroy & Boch wishes on the contrary to confer a certain prestige. This obligation in no way prevents Villeroy & Boch specialist retailers from selling competing products.
28. The principle that the producer should himself verify the qualifications of specialized retailers admitted to the network is necessary to ensure that the selective distribution system is uniform and remains closed. Inasmuch as it is accessory to the main obligation of specialization incumbent on the retailer, and contributes to ensuring compliance with that obligation, the principle that the producer should himself control the access of specialized retailers to the network does not go beyond what is necessary to maintain the network.
29. As regards specifically the obligation to display a sufficiently wide and varied range of Villeroy & Boch products and the correlative duty to keep adequate stocks, these cannot appreciably restrict

competition within the meaning of Article 85 (1), since the very competitive structure of supply on the relevant market, the absence of any sales target obligation imposed by Villeroy & Boch on its specialist retailers as well as the absence of any non-competition clause, this being not only inherent in the system but also desired by Villeroy & Boch itself, ensure that Villeroy & Boch specialist retailers may conduct their sales policy independently and that other producers have unimpeded access to these retailers:

- none of the numerous producers operating on the market holds a market share over 15 % and none is therefore in a position to make its retailers dependent on its products. With a market share of less than 10 % in all Member States, Villeroy & Boch does not enjoy a position of strength with regard to its competitors in view of its modest market share in the Community or with regard to its retailers, such that it is able, through the abovementioned clauses, to limit their freedom to concentrate their activity on the brands which are for them the most profitable. Moreover, selective distribution networks similar to that of Villeroy & Boch are not widespread, so that distribution of ceramic tableware does not incur the risk of becoming dependent on rigid distribution structures in which each producer would try to reserve the activity of his retailers to its exclusive benefit,
- far from tending to the exclusive presentation of Villeroy & Boch articles, the Villeroy & Boch selective distribution system is on the contrary based on the joint selling of competing reputed brands, against which Villeroy & Boch wishes to measure the prestige of its reputation. The notified system aims so little at being exclusive that every specialist retailer is deemed to fulfil the admission criteria relative to the specialization of the retail outlet by the mere fact that he predominantly sells the range of products of any large tableware producer,
- therefore Villeroy & Boch specialist retailers are by no means prevented from also selling competing goods when they see an interest in doing so. This is all the more likely since Villeroy & Boch specialist retailers are not under any duty either to achieve any fixed turnover in Villeroy & Boch's articles or to order predetermined quantities of such articles at regular intervals.

30. Thus, even if the obligation to promote sales of Villeroy & Boch goods cannot strictly be regarded as qualitative selection criteria compatible with

Article 85 (1), they are not to be considered in this case as giving rise to any appreciable restriction of competition. The general requirement of a commitment (*Einsatz*) to the make Villeroy & Boch, involving the display of Villeroy & Boch emblems, the giving out of Villeroy & Boch catalogues, advertising, sales promotions and the other usual promotional activities, do not prevent Villeroy & Boch specialist retailers from benefiting from competition between the various makes.

31. In a market which is as fragmented at the level both of production and of distribution, it is out of the question for the agreements between Villeroy & Boch and specialist retailers to facilitate, through the medium of common distribution networks, a collusion between producers aimed at excluding competing firms from the market: the number of producers is too great, and the circle of distributors is too open and ill-defined for such a practice to be possible.

32. On the contrary, in as highly competitive market, the joint supply by specialist retailers of dinner services of comparable quality but of different makes cannot but enhance inter-brand competition. As a result of the concentrated and refined display of competing products, the consumer is able to determine which product will give him the best value for money, and, since the retailer is under no obligation to achieve a minimum turnover for Villeroy & Boch products, he is able to give customers impartial advice. To the extent that customers may consider as of secondary importance the services which accompany the sale, in a selective distribution system, they will be able to choose articles from competing producers who do not practice selective distribution, thus expressing their preference regarding the marketing strategy adopted by the producer.

33. While strengthening inter-brand competition, the operation of the selective distribution network cannot restrict intra-brand competition by means of collusion between specialist retailers with a view, for instance, to preventing Villeroy & Boch from freely determining its channels of distribution or ensuring compliance with the prices recommended by Villeroy & Boch. Such an eventuality is possible only where the number of retailers is relatively small. That is not the case here. Moreover, Villeroy & Boch has not granted exclusive sales territories to its retailers and it would not be impossible for it to counteract any concerted pressure from its distributors by supplying new authorized retailers.

34. The selectivity of the distribution system under review is also based on the commitment entered into by specialist retailers to resell the contract goods only to private customers or to other specialist retailers authorized by Villeroy & Boch. As the objective qualitative selection criteria and the sales promotion obligations are considered compatible with Article 85 (1), the said commitment does not itself appreciably restrict competition in the present case.

35. If the obligation on authorized retailers not to sell to unauthorized retailers is recognized as being lawful, the same must be true of the obligation on wholesalers and central purchasing agencies to supply only Villeroy & Boch retailers, inasmuch as it constitutes at the wholesale level the reflection of the selectivity of the retail distribution system.

36. The corresponding prohibition on the supplying of private customers by wholesalers and central purchasing agencies does not constitute a restriction of competition within the meaning of Article 85 (1). On the contrary, competition would be distorted if wholesalers, whose costs are in general proportionally lower precisely because of the marketing stage at which they operate, competed with retailers at the retail stage, in particular on supplies to private customers (Case 26/76, *Metro* [1977] ECR 1875, ground 29).

37. The clause in the standard form agreements between Villeroy & Boch and suppliers of goods to hotels and restaurants which limits to the latter the resale of the contract goods is justified by the special nature of such resellers' operations and the different range of products which they supply. Since the resale of dinner services in bulk not intended for private customers is involved, it is reasonable that such specialist resellers should not be able to dispose of the contract goods either to authorized retailers or to private customers.

Strictly speaking, this entails no restriction of competition since the make-up and appearance of the dinner services are different from those of household dinner services.

38. The same considerations apply to the standard form agreements between Villeroy & Boch and distributors of advertising gifts. Owing to their specific purpose, which is the resale to trade customers of individual items not included in dinner services for subsequent disposal to third parties for publicity purposes, these agreements

form part of a commercial channel quite different from that through which dinner services are supplied to private consumers. Consequently, the obligation on distributors of advertising gifts to resell only to such trade customers does not constitute a restriction of competition.

39. The network of notified distribution agreements does not contain any obligation on the part of Villeroy & Boch resellers having as its object or effect any appreciable prevention, restriction or distortion of competition within the common market within the meaning of Article 85 (1), and it is not therefore necessary to examine whether trade between Member States may be affected.

Consequently, there are no grounds, on the basis of the facts in the Commission's possession, for action on its part under Article 85 (1) of the Treaty. The Commission can therefore grant the network negative clearance under Article 2 of Regulation No 17.

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action pursuant to Article 85 (1) of the EEC Treaty in respect of the network of standard form agreements between Villeroy & Boch and its resellers which form the subject-matter of this Decision.

Article 2

This Decision is addressed to Villeroy & Boch KG, Mettlach (Federal Republic of Germany) and Villeroy & Boch Sarl (Grand Duchy of Luxembourg).

Done at Brussels, 16 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission

COMMISSION DECISION

of 16 December 1985

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/30.839 — Sperry New Holland)

(Only the English, Dutch and Greek texts are authentic)

(85/617/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 (1) and 15 (2) thereof,

Having regard to the application for a finding of an infringement submitted on 17 December 1982 pursuant to Article 3 of Regulation No 17, by W. Burns Tractors Ltd of Peebleshire, Scotland,

Having regard to the notification on 29 June 1973 pursuant to Article 4 of Regulation No 17 of a form of agreement between Sperry New Holland UK and its dealers,

Having regard to the Commission Decision of 5 September 1984 to initiate proceedings in this case,

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

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

Whereas:

I. THE FACTS

The parties

1. Sperry New Holland is a division of the Sperry Corporation which is a company incorporated in Pennsylvania, USA. The Sperry Corporation's consolidated revenue for 1984 was approximately US \$ 5 000 million of which Sperry New Holland contributed 15 % (US \$ 728,5 million). Sperry New Holland is one of the leading manufacturers

of combine harvesters and other agricultural machinery. In 1984, which was recognized to be a difficult year for manufacturers of agricultural machinery, Sperry New Holland realized worldwide operating profits of US \$ 71,8 million. Its turnover in such machinery in the common market was ... ECU ⁽³⁾ in 1984 (or ... ECU excluding turnover in the UK).

2. The most important Sperry subsidiary operating in the agricultural machinery sector in the Community is Sperry New Holland-Sperry NV (SNH NV) located at Zedelgem in Belgium. SNH NV manufactures *inter alia* combine harvesters and is responsible for the distribution of Sperry New Holland products in Belgium in accordance with agency agreements concluded with its appointees.
3. SNH NV is also responsible for coordinating the activities of other Sperry New Holland subsidiary companies or Sperry New Holland operating divisions in the Community. These are:
 - (i) Sperry New Holland Division of Sperry Ltd, Aylesbury, Bucks, (also responsible for Eire) (SNH UK);
 - (ii) Sperry New Holland SA, Paris, France (SNH F);
 - (iii) Sperry GmbH, Geschäftsbereich New Holland, Bielefeld, Germany (SNH D);
 - (iv) Sperry New Holland, Divisione della Sperry SpA, Milano, Italy (SNH I).

The abovementioned appoint distributors in their respective territories who then sell Sperry New Holland products directly to farmers.

Sperry New Holland, a division of the Sperry Corporation, together with SNH NV and the other subsidiaries mentioned above through which it operates are hereinafter referred to collectively and individually, if not otherwise stated, as SNH.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

⁽³⁾ Pursuant to Article 21 (2) of Regulation No 17, business secrets are not published in the *Official Journal of the European Communities*.

4. In those countries where SNH has no presence, SNH NV has appointed exclusive national distributors. These are:
 - (i) A. Blom, Skanderborg, Denmark;
 - (ii) Éts Wolf, Weyland Noerdange, Luxembourg;
 - (iii) G. W. Van Driel en Van Dorsten BV, Hoofddorp, Holland (Van Driel);
 - (iv) P. J. Condellis SA, Athens, Greece (Condellis).

For reasons which appear below, SNH NV, as the principal subsidiary within the common market, Van Driel and Condellis are the addressees of this Decision.

5. The complainant in these proceedings, W. Burns Tractors Ltd (Burns), is a distributor of Fiat tractors based in Peebleshire, Scotland. In addition, W. Burns has a large business in a wide variety of agricultural machinery of all makes which results in a total annual turnover in the region of £ ...

The product and market

6. The product involved is the type of agricultural machinery sold by SNH. There is a wide variety of agricultural machinery, some manufactured by specialists. Some manufacturers produce a wide range. In addition, some motor-vehicle manufacturers, who otherwise have no interest in the sector, produce agricultural tractors. SNH makes a wide variety of machinery but not including tractors.
7. Agricultural machinery is usually bought by a farmer from a local authorized dealer. Such machinery is usually used intensively for only a short period in the year — combine harvesters, for example, only in the harvest season. For this reason, farmers are concerned to have servicing facilities available, and manufacturers, such as SNH, are concerned to have a network of dealers capable of offering such a service. The structure of SNH's distribution system through wholesaling subsidiaries or independent national distributors selling to local dealers is detailed above.
8. Again because of the seasonal use of such machinery, selling and production plans follow an annual cycle. Dealers place orders or forecasts for orders in September/October, on the basis of which, manufacturers make their initial production plans. SNH, typically, may revise these plans as a result of orders received in November/December, and possibly again in the spring if orders exceed forecasts and production capacity allows.

The proceedings

9. On 29 June 1973, SNH UK notified the standard contract in use by it within the UK. The Commission commented on this contract on 24 April 1980; SNH UK submitted a revised contract on 20 November 1980.
10. On 17 December 1982, Burns lodged a formal complaint with the Commission in respect of the activities of SNH. This complaint, which related, in particular, to events that had taken place some 18 months previously, had already been informally communicated to the Commission. Burns complained that SNH had prevented a Dutch SNH dealer from continuing to supply it with SNH combine harvesters and, in particular, from fulfilling a contract for the supply of such SNH combine harvesters. Burns alleged that SNH's action took the form of representations to Van Driel to cease dealing with the Dutch dealer because of its relationship with importers such as itself. Burns stated that SNH's actions had exposed it to suits for damages in Scottish courts which it had no prospect of defending successfully.
11. Following Burns's complaints, the Commission carried out six inspections on the premises of SNH and its dealers between October 1982 and March 1983. In the course of these inspections, copies of documents relating to cross-border sales were obtained.
12. On 9 February 1983, the Commission sent a letter to SNH UK saying that the revised contract of 1980 (paragraph 9) still contained restrictions.
13. At a meeting with the Commission's services on 3 June 1983, SNH admitted that there had been infringements of the rules on competition at least in Germany and Italy, and on 16 June 1983, SNH voluntarily provided further documents, mainly from SNH D and SNH I, which tended to substantiate information already in the Commission's possession. The Commission was therefore able to cancel the inspection which was to have taken place in Italy.
14. At the same time, that is to say June 1983, SNH NV sent a circular letter to its distributors in the various Member States. This reproduced the content of a Statement of Policy and Guidelines that SNH NV's sales manager had sent to his staff and the sales managers of SNH subsidiaries within the Community on 23 April 1983. In this

statement, SNH provides concrete examples of actions which would constitute infringements of Article 85 and urges its staff and dealers to refrain from such action. SNH has also notified a series of agreements to replace those previously in use. The compatibility of these new agreements with the Community's rules on competition is not the subject of this proceeding.

15. On 11 January 1985, the Commission sent a statement of objections to SNH, Van Driel and Condellis. Lawyers representing SNH and Van Driel inspected the Commission's file later that month.
16. On 4 March 1985, Van Driel, on 27 March, Condellis and on 9 April, SNH replied to the statement of objections and sent further documents.
17. On 25 July 1985, SNH and Burns together with their lawyers and lawyers representing Van Driel participated in a hearing.
18. On 29 July 1985, the Commission by letter drew the attention of SNH and Van Driel to further documents already inspected that had, however, not been previously particularly mentioned that were of relevance to these objections and to SNH's and Van Driel's replies.
19. On 30 August 1985, SNH commented on the documents drawn to its attention in that letter.
20. On 15 October 1985, the Commission by letter drew the attention of SNH to further documents already inspected, that formed a correspondence part of which had been the subject of comment at the hearing.
21. On 28 October 1985 receipt of this letter was acknowledged.

SNH's distribution practices prior to 1983

22. The documents referred to in paragraphs 11, 13 and 16 above show that, in the main, the prices practised by SNH in the United Kingdom and in Greece were considerably higher than those elsewhere in the Community. (The pound sterling fluctuated considerably during the relevant period, and, in consequence, for short periods, UK prices were lower than those elsewhere.) These differences in price gave rise to parallel trading. The national distributors or local dealers affected by this trading asked SNH to quote them the same lower prices as those available to the distributors

or dealers in the Member States from which parallel trading stemmed, or, at the least, to prevent the parallel trading.

23. The documents show that from time to time SNH, reluctantly, offered temporary discounts. However, they also show that SNH had contractual export bans in a number of contracts within the Community from as early as 1973 until 1983 and that, quite apart from the terms of its contracts, SNH's relations with its distributors included many actions with the object, and, at least to some extent, the effect of preventing or hindering trade between the Member States, and of requiring national distributors to do the same in their dealings with their local dealers. The immediately following paragraphs give a brief description of a number of these contracts or practices.
24. In the UK, the contract notified in 1973 contained an export ban. This was modified in 1980 allowing dealers to accept orders from farmers outside the UK, but still banning exports to dealers. In addition, outside the terms of its contract but in the context of its contractual relations with its dealers, SNH UK took other steps to hinder parallel trade. There were advertisements and special bonuses for dealers selling against parallel importers; SNH UK had dealers help trace the sources of parallel imports by reporting serial numbers so that SNH elsewhere could cut off those sources; it also sought to use warranty or its ability to refuse to supply spare parts to discredit parallel importers.
25. In Germany there was a contractual ban on dealers exporting from 1976 to 1981. Exporting was regarded as a serious breach of contract justifying immediate cancellation of a dealers contract. Short of cancellation, SNH D refused the usual retail bonus on exports.
26. In Italy, SNH was concerned as early as May 1978 that its dealers were exporting combine harvesters to Greece. In December 1980, just prior to Greece's entry into the Community on 1 January 1981, SNH I sent a circular letter to its dealers in which dealers were requested to confine their activities to their allotted territories. Subsequent action by SNH I showed that this request amounted to a ban on exports. The object of SNH I's action was, in part, to satisfy Condellis' representations in respect of parallel imports into Greece. Condellis' representations (the Commission has documents dating from November 1980 to May 1982) took the form of requests that SNH NV either quote it prices low enough to

allow it to compete with offers from SNH dealers outside Greece or that SNH forbid those dealers to export to Greece.

27. In Belgium, the agreements concluded by SNH NV for the distribution of its products are intended to create a relationship of agency. In the version of the agency agreement which was in force from at the latest 1975 until 1980, the agent was required to insert an unequivocal export ban in each contract of sale entered into on behalf of SNH NV. The obligation not to export contained in this contract of sale was backed by a clause providing for accelerated payment of the total purchase price in the event of direct or indirect breach.
28. In the Netherlands, Van Driel suffered from parallel trading from, among other places, Germany. It attributed this to SNH practising lower prices in Germany. Van Driel asked to be protected either by lower prices or a ban on parallel trading from Germany claiming that it in its turn, for example, forbade its dealers to export to Belgium. For several months in 1981 SNH only gave Van Driel a bonus when Van Driel proved that the machine had not been exported either by Van Driel or by Van Driel's customer.
29. The documents also show that SNH was aware from at least as early as 1979 that such conduct was contrary to the EEC rules on competition.
30. The Commission, on the other hand, has no evidence of specific examples of restrictions on exports in relation to the agreements and the practices with which they were implemented in Denmark or Luxembourg.

The Complaint

31. The most significant evidence concerning the complaint includes the following.
32. Burns had a large trade exporting mostly second-hand and importing mostly new agricultural machinery of various brands. A Dutch dealer in SNH machinery was one of Burns's large export customers. In 1980, Burns arranged to import new SNH machines from this Dutch dealer.
33. The Dutch dealer was Van Driel's largest customer. In 1977, the dealer bought 60 combine harvesters in a single order for sale in Turkey (this is relevant to Van Driel's subsequent dealings with it). The sale was frustrated. The dealer was unable

to pay. An arrangement was made finally to pay the debt by a surcharge on all subsequent orders which were, themselves, to be paid cash with order.

34. In 1980, the dealer sold some combines made in 1977 or 1979 in Turkey with serial numbers indicating manufacture in 1980. SNH and Van Driel accused the dealer and the dealer either SNH or Van Driel of changing the numbers.
35. In December 1980 and January 1981, Burns advertised new SNH machines at advantageous prices.
36. On 23 January 1981, SNH UK's marketing director wrote to SNH NV's marketing director: 'We now have to locate a machine which has been imported and retailed, to establish the source.'
37. On 2 February 1981, during a visit by Van Driel to SNH in the USA, there was discussion of sales by the Dutch dealer to Turkey (SNH, having appointed a distributor in Turkey, did not wish Van Driel to supply for export to Turkey). Van Driel sought to persuade SNH that Van Driel's customer was a better outlet for sales in Turkey than the official importer.
38. On 6 February 1981, a SNH Scottish dealer asked SNH UK's sales manager for '... a letter stating categorically that Burns Tractors are unable to obtain spare parts direct from either Aylesbury or Broxburn and that any spare parts would have to be ordered through a Sperry New Holland main dealer franchise.' Such a letter was written on 9 February.
39. On 14 February 1981 SNH UK published in the *Scottish Farmer* an advertisement saying 'Caution — Protect your investment — Buy your Sperry New Holland combines only from an authorized Sperry New Holland main dealer. This will guarantee that your investment is protected by the full warrants, after-sales and services support available only from your Sperry New Holland Dealer.' Similar advertisements appeared around that time in other periodicals.
40. On 8 April 1981, a SNH employee told the SNH Scottish Dealers Association, in connection with 'grey' imports, that he was extremely doubtful if any units would eventually be imported. He suggested that, if any unit did arrive in a dealer's

territory, full details including serial number and any other identification markings be sent to SNH.

41. In 1981, SNH had particular success with one of its new models — the 8080 combine harvester, and was unable to produce all that were ordered. A late order from Van Driel for three 8080s was acknowledged on 16 April with an offer of delivery in November and was, in consequence, withdrawn.
42. In May 1981, the Dutch SNH dealer supplying Burns told it that it had begun to experience delays with deliveries the previous month. Burns, itself, began to fail to deliver some orders on time.
43. In May 1981, Burns's lorries were followed on the motorway and were examined in the docks by SNH UK dealers endeavouring to obtain serial numbers.
44. On 21 July 1981, SNH UK's sales manager wrote to the Scottish dealer referred to in paragraph 38 above saying: 'I would imagine that the Burns' credibility right now is somewhat jaded in the eyes of farmer customers who accepted quotations from him, as our information suggests that only a very limited number have been imported, and that our joint actions will be seen in the eyes of our customers to have put us in good stead for future trading.'
45. Van Driel supplied the Dutch dealer with two further combine harvesters in July, one in August and one in November. At the hearing (paragraph 17 above), SNH's representative said that these were the only machines supplied by SNH to Van Driel in those months, although further machines had been available and offered.
46. On 8 October 1981, in a telex from SNH NV to SNH D, it was said: 'Van Driel and Van Dorsten say that they have not been selling combines to ... (the name of the Dutch dealer involved) ... during the last four months.'
47. On 17 October 1981, SNH UK's sales manager told the Scottish Dealers Association that, with the information received from UK dealers, SNH had taken 'appropriate action' with the supplying dealers in Europe.
48. In its reply to the statement of objections, Van Driel says that it did, indeed, receive representations from SNH in 1981 not to supply the Dutch dealer because it was exporting to the UK, but

ignored them. Further machines were supplied (the deliveries of August and November were quoted). Van Driel said that it ceased to supply the Dutch dealer in 1982, after it had finally paid off the 1977 debt, because of its bad payment record and business ethics.

49. SNH admits tracing Burns's source of supply and then making representations to Van Driel to cease supplying it, but claims that, since Van Driel refused to conform, these were merely unilateral acts.

II. LEGAL ASSESSMENT

Article 85 (1)

50. Article 85 (1) provides that agreements and concerted practices 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 shall be prohibited.
51. SNH and its customers are undertakings within the meaning of Article 85 (1). The agreements between these parties, as written or applied, constitute agreements between undertakings within the meaning of Article 85 (1).
52. The facts set out above show that SNH's contracts and contractual relations with its customers included the obligation not to export or allow the export of the products and other provisions for the hindrance of parallel trade in the products. These constitute infringements of Article 85 (1). They took many forms, some of which have been admitted to be infringements by SNH.
53. More particularly, the Belgian agency contract which was in force until 1980 required the agent to insert an export ban in each contract of sale entered into on SNH's behalf with consumers. A restriction on the purchaser's freedom to alienate his property as he sees fit amounts to a restriction of competition within the meaning of Article 85 (1) if such a restriction affects trade between Member States (see Kerpen and Kerpen: Decision of 14 December 1983 of the European Court of Justice in Case 319/82 [1983] ECR 4173).

54. Special mention must also be made of the bonus to Van Driel on proof of non-re-export. SNH claims that it is legitimate for firms to adapt to local circumstances. Moreover, the Commission has accepted that exclusive and selective distribution systems can be beneficial; if it is lawful to prohibit active marketing outside a territory, it would be logical to allow rewards for active marketing within.
55. This reasoning cannot be accepted whenever the rewards in question have as their object or their effect impediments to intra-Community trade. Dealers must have the right to supply farmers from other territories without being penalized by the withdrawal of bonuses. Therefore agreements or practices concerning bonuses which are conditional on the machine not subsequently being exported by the customer are prohibited. The same rationale might apply to the condition that the machine is registered for use within the territory of the dealer or that the warranty service be completed within that territory.
56. The facts (paragraph 32 *et seq.*) directly related to Burns's complaint give a complicated picture. At least some of the combine harvesters ordered by Burns could not have been delivered because SNH did not have them available (paragraph 41). SNH did take steps first to trace Burns's source of supply and then make representations to Van Driel, which Van Driel received, to cut off the Dutch dealer involved. There were other facts (a bad debt and a contested allegation of falsifying serial numbers — paragraphs 33 and 34) that might have given Van Driel, independently of these representations, the desire to cease supplying this dealer. On the other hand, the fact that Van Driel dealt with this dealer cash with order meant that there was no risk of bad debt for the future (paragraph 33) and this dealer was its most important customer (paragraph 33) which Van Driel had clearly wished to continue to supply immediately, prior to the discovery that it was the source of Burns's supply (paragraph 37). The Commission, therefore, concludes that Van Driel's decision to reduce supplies to and ultimately to give up supplying the Dutch dealer with combine harvesters altogether was taken as a consequence of SNH's representations and constitutes an infringement under Article 85 (1). Moreover, SNH UK took other steps with UK dealers to discredit Burns (paragraphs 38, 39 and 44).
57. SNH's actions analyzed above have had the object and effect of preventing competition in trade between Member States and had a direct and actual influence on the pattern of trade between Member States.

Article 85 (3)

58. The contract used by SNH in the UK was notified to the Commission pursuant to Article 4 of Regulation No 17 with a view to obtaining an exemption in accordance with Article 85 (3) of the Treaty. However, those used in Germany, Italy and Belgium were never notified. Even for that notified, no exemption can be granted under Article 85 (3) since such an express prohibition on exports fails to satisfy any of the conditions for the granting of such an exemption.

Article 3 of Regulation No 17

59. Under Article 3 (1) of Regulation No 17, the Commission may, if it finds that there has been an infringement of Article 85 of the Treaty, require by decision that the undertakings concerned bring such infringement to an end.

60. It appears necessary to require SNH, Van Driel and Condellis to remove all intra-Community territorial restrictions from their agreements and practice and to refrain from seeking to reimpose such restrictions by other means.

Article 15 (2) of Regulation No 17

61. Under Article 15 (2) of Regulation No 17, the Commission may impose fines of from 1 000 to one million units of account or a sum in excess thereof, but not exceeding 10 % of the turnover in the preceeding business year of each of the undertakings participating in the infringement, where, either intentionally or negligently, they infringe Article 85 (1) of the Treaty. In fixing the fine, regard shall be had both to the gravity and to the duration of the infringement.
62. Having considered the facts in this case, the Commission considers that, although SNH dealers participated in the infringements as described above, only SNH itself should be fined. In view of the allocation of functions and responsibilities in SNH (paragraphs 1 to 3), the fine should be imposed on SNH NV. Where dealers, for example Van Driel, acted to restrict exports they were acting under duress and against their own economic interests. Moreover, their infringements predated the publication of Commission Decision

85/79/EEC in the John Deere case⁽¹⁾ and the behaviour of Condellis that constituted its infringement began before and was continued for a relatively short period after the accession of Greece to the European Communities.

63. SNH's infringements is very serious since it impeded competition between dealers in SNH products, from which consumers throughout the Member States could have derived substantial benefits. Quite apart from the intrinsic nature of such an infringement, the Commission cannot fail to take into account the size of the SNH operation and its importance in the EEC as a manufacturer of combine harvesters.
64. The infringement began in the UK in 1973. In Germany the infringements began in 1976, in Italy in December 1980, in the Netherlands at least in 1980 and in Belgium at least as early as 1975. In respect of Belgium the infringement lasted until 1980 when a new agency contract came into force which did not restrict the purchaser's freedom to export. In the case of Germany, on the other hand, contractual export bans were in existence until 1981, and for Italy, 1982. All contractual infringements ceased in April 1983 when SNH decided to adopt a policy of compliance with the Community rules on competition.
65. The contractual export ban in the United Kingdom is contained in Clause 17 of the agreement annexed to the notification of 29 June 1973. Because that notification was before the end of the six months period of grace ending 30 June 1973 for the notification of existing agreements following the accession of the UK to the Community, no fine may be imposed for activity falling within the limits of the activity described in it. It is to be noted that no reference to Clause 17 is made in Section III of the notification, which requires restrictions to be listed, and that the existence of the clause is implicitly denied by the claims in Section IV, that trade between Member States is not affected, and in Section V, that the agreement is exempt by virtue of Regulation No 67/67/EEC⁽²⁾ which declares such a clause inadmissible.

The Commission did not, however, take the formal point that the notification was invalid pursuant to Article 4 of Commission Regulation

No 27⁽³⁾, or was incorrect or misleading within the meaning of Article 15 (1) (a) of Regulation No 17, and does not now seek to impose fines in respect of this contractual export ban. The Commission has, therefore, and in spite of the fact that there were other activities in the UK (see paragraphs 24, 38, 39, 43 and 44 above) not in any way covered by the notification, excluded sales in the United Kingdom from the relevant common market turnover in assessing the level of the fine.

66. The Commission must also consider whether its failure to object to this export ban before 1980 (or to the modified ban notified in 1980 before 1983) has any wider significance. SNH claimed in its reply to the statement of objections, citing Chiquita (often referred to as United Brands)⁽⁴⁾, that in consequence, '... SNH was entitled to consider (at least until May 1980) that a blanket export prohibition imposed upon dealers was compatible with Article 85 (1).' It was drawn to SNH's attention (paragraphs 18 and 20 above) that documents provided by SNH itself while assisting the Commission in establishing the facts of the case (paragraph 13 above) show that SNH staff elsewhere had not been misled by the UK notification (even if they knew of it); they, indeed, well knew that export bans were contrary to Community law. SNH then argued that, even if aware that export bans were illegal, SNH could still implement them outside the UK with impunity by virtue of the UK notification, again citing Chiquita (paragraph 19). In that Decision, the Commission said that '... although only the general conditions for the Netherlands ...', had been notified, those in other Member States '... are substantially the same. UBC can therefore reasonably have considered that the notification covered all its general conditions of sale.' It is to be noted, however, that in Chiquita, the Commission did impose fines in respect of other activity, including activity in the Netherlands, not covered by the general conditions of sale. It is also to be noted that the activity of SNH for the banning of exports took many forms, both contractual and non-contractual, and that the contracts used by SNH in other Member States are not substantially the same as the contract in use in the UK. Indeed, the UK notification appears to be simply that of an existing agreement shortly before the end of the period of grace, without any thought or suggestion that it was to serve as a standard contract for use elsewhere. The Commission does not, therefore, consider that the UK notification affords any wider immunity.

⁽¹⁾ OJ No L 35, 7. 2. 1985, p. 58.

⁽²⁾ OJ No 57, 25. 3. 1967, p. 849/67.

⁽³⁾ OJ No 35, 10. 5. 1962, p. 1118/62.

⁽⁴⁾ OJ No L 95, 9. 4. 1976, p. 1.

67. Further, SNH claims that the modified agreement of 1980 provided for SNH UK to compensate a dealer appointed by it if another dealer appointed by it sold into the first dealer's territory, and to penalize the offending dealer; the serial number had to be provided to substantiate the claim. SNH argues that this protects the collection of serial numbers from fines. The Commission accepts that the provision of serial numbers in a claim for compensation from a fellow SNH UK dealer is so protected, but not the concerted collection and reporting of serial numbers specifically for the purpose of tracing the source, outside the UK, of parallel imports.
68. On the other hand, SNH actively and voluntarily furnished information to establish the allegations made against it. Also, before proceedings were opened but after investigations had started, SNH ordered its staff and dealers to comply with the Community's competition rules. In addition, the agricultural machinery sector is depressed. The Commission has taken these factors into account in deciding on the amount of the fine.

HAS ADOPTED THIS DECISION:

Article 1

The agreements between Sperry New Holland and its customers in the common market, including its national distributors in the Netherlands and Greece — Van Driel and Condellis — is written or applied, with the object or effect of prohibiting, discouraging or penalizing and requiring the prohibition, discouragement or penalization of trading by a customer outside the Member State in which the customer is established have constituted an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

An exemption under Article 85 (3) of the EEC Treaty for the agreements covered by the notification of 29 June 1973 is hereby refused.

Article 3

To the extent that this has not already been done, the undertakings shall bring the infringements as mentioned in Article 1 to an end forthwith and shall refrain from taking any measure having the same object or effect.

Article 4

In respect of the infringements set out in Article 1 other than those covered by the notification of 29 June 1973, a fine of 750 000 ECU, that is Bfrs 33 604 200, is hereby imposed on Sperry New Holland — Sperry NV. This fine shall be paid within three months of the date of notification of this Decision into the account of the Commission of the European Communities with Kredietbank, Agence Schuman, 2 rond-point Schuman, B-1040 Brussels (account No 426-4403001-52).

Article 5

This decision is addressed to:

1. P. J. Condellis SA
125 Orfeosstreet
Rouf
PO box 91
GR - Athens
2. Sperry New Holland — Sperry NV
Leon Claesstraat 3A
B-8210 Zedelgem
3. G. W. Van Driel en Van Dorsten
PO box 1
Stationsweg 17
NL-2130 XC Hoofddorp

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

Done at Brussels, 16 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission

COMMISSION DECISION

of 18 December 1985

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/30.739 — Siemens/Fanuc)

(Only the English and German texts are authentic)

(85/618/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the European
Economic Community,

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

Having regard to the Commission Decision of 10
December 1982 to initiate proceedings in this case,

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 Commission Regulation
No 99/63/EEC of 25 July 1963 on the hearings
provided for in Article 19 (1) and (2) of Council Regu-
lation No 17 ⁽²⁾,

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

Whereas:

I. THE FACTS

The undertakings

1. Fanuc Ltd is a Japanese undertaking. It was
formerly known as Fujitsu Fanuc Ltd, having been
set up by Fujitsu Ltd in 1972 to conduct the
business of its computer control division. Fujitsu
Ltd owns 44,8 % of Fanuc's shares, Siemens AG
owns 5,1 % ⁽³⁾ and others own 50,1 %. Fanuc's

turnover in numerical controls in 1984/1985 was
yen ... ⁽⁴⁾ world-wide and yen ... in the EEC.
Fanuc has established several subsidiaries in the
EEC: Germany (1976), France (1978), United
Kingdom (1980). These subsidiaries were set up to
service and maintain Fanuc NCs sold with machine
tools into which they had been incorporated
outside the EEC. In addition, Fanuc Mechatronics
SA (Luxembourg) has now been established as a
manufacturing facility.

2. Siemens AG is an undertaking incorporated in the
Federal Republic of Germany with its head office
in Munich. In 1984, Siemens' group turnover was
DM Siemens' turnover in numerical controls
in 1983 was DM ... world-wide and DM ... in
the EEC. In 1979, Siemens' market share for
numerical controls was 45 % in Germany, 8 % in
Italy, 12 % in France and 10 % in the United
Kingdom. Siemens produces a wide range of
numerical controls which, in recent years at least,
covers most customers' requirements.

The product

3. Numerical controls (NCs) are special-purpose
computers used mainly in the machine-tool
industry. They control the sequence of motions
and operations of a machine-tool. The installation
of the NC frequently requires extensive
preparatory engineering and programming in close
cooperation between the NC manufacturer or
distributor and the purchaser. According to
Siemens, an NC can amount to between 6 % and
18 % of the total cost of the machine-tool.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

⁽³⁾ It has recently been announced that Siemens has sold most
of its shares in Fanuc.

⁽⁴⁾ Certain figures have been omitted in the published version of
the Decision pursuant to Article 21 (2) of Regulation No 17.

The use of NCs in the machine-tool industry

The following Tables ⁽¹⁾ show the growing importance of NCs in the Community's machine-tool industry:

TABLE 1

(in million US \$)

EEC 10 (all machine-tools)	1971	1976	1980
Production	3 153	4 690	8 800
Consumption	2 478	2 948	6 300

TABLE 2

(in million US \$)

EEC 10 (NC machine-tools)	1976	1980
Production	554	1 820
Consumption	338	1 560

TABLE 3

NC machine-tools as a percentage of all machine-tools

EEC 10	1976	1980
Production	12	21
Consumption	11	25

TABLE 4

Annual growth rates 1976 to 1980

EEC 10	All machine-tools	NC machine-tools
Production	17	35
Consumption	21	47

By way of comparison, Tables 5 and 6 give the same figures as Tables 3 and 4 for the USA and Japan:

TABLE 5

NC machine-tools as a percentage of all machine-tools

	1976	1980
Production:		
— USA	24	26
— Japan	19	41
— (EEC 10)	(12)	(21)
Consumption:		
— USA	21	27
— Japan	34	30
— (EEC 10)	(11)	(25)

TABLE 6

	Annual growth rates All machine-tools	1976 to 1980 NC- machine-tools
Production:		
— USA	22	25
— Japan	42	63
— (EEC 10)	(17)	(35)
Consumption:		
— USA	27	35
— Japan	34	30
— (EEC 10)	(21)	(47)

The importance of NCs for new and succeeding generations of machine-tools can hardly be overstated. The European machine-tool industry has suffered from its delayed conversion to standardized NCs. In its communication to the Council on advanced manufacturing equipment in the Community of 21 March 1985 ⁽²⁾, the Commission found that as a result of the delayed introduction of new information technologies, European manufacturers of small machining centres and NC lathes have price handicaps in relation to their Japanese competitors of 10 to 40 % on the European market and as much as 60 % on the American market ⁽³⁾.

⁽¹⁾ See the Commission's statement on the machine-tool industry, 8 February 1983, SEC(83) 151.

⁽²⁾ COM(85) 112 final; Bulletin of the European Communities, Supplement 6/85.

⁽³⁾ Ibid., Annex I.

The situation of the NC market in the EEC in 1975

4. In 1975, almost twice as many NCs were produced in the EEC as in Japan. US production was slightly higher than EEC production. General Electric, a US corporation, was the world leader in NC production and had the strongest market position in terms of sales in the EEC. However, dramatic changes took place as a result of the development of standardized NCs and by 1977 Japan had taken the lead in the production of NC machine-tools. By 1981, Japanese producers accounted for 53 % of NC machine-tools manufactured in the West and Japanese production was double that of Western Europe. General Electric's share of NC sales in the EEC had fallen to ... in 1981 and Fanuc had become the world market leader.

In 1975 Fanuc produced a complete range of NCs. In that year it sold 2 000 NCs world-wide, double the 1971 figure but only one-tenth of the 1980 figure. Fanuc's exports to the EEC amounted to ... units, as against ... in 1971, ... in 1974 and ... in 1980. Fanuc's indirect exports, i.e. NCs already attached to machine-tools, were ... units in 1975 and ... units in 1980.

In 1975, Siemens was a well-established market leader in the production, marketing and servicing of NCs in the EEC. In Fanuc's view, Siemens' range was deficient in lower level products. Fanuc was attracted to Siemens as an exclusive distributor for its products because of its familiarity with the needs of EEC machine-tool manufacturers and its established network of sales engineers and servicing facilities.

In the years following the 1975 agreements with Fanuc, Siemens steadily increased its share of the NC market in the EEC. In 1980, it had by far the largest market share, with a commanding presence in all the major national markets. The undertaking with the second largest market share, General Electric, was also present in major Community markets, but with a much smaller market share overall. Other undertakings with significant market shares in one or the other of the Member States were Allen Bradley, Bosch, Eltag, Gildemeister, NUM-Télémécanique, Philips and Posidata.

Although Fanuc is now the world's leading manufacturer of NCs, in 1975 it was a much smaller concern. It was, however, a subsidiary of Fujitsu Ltd, one of the largest Japanese conglomerates and had developed numerical controls with considerable success on the Japanese market. Fanuc had been selling NCs in the EEC through its exclusive distributor, Siemens, since 1972. The market for NCs in the EEC was in the early stages of development towards widespread use of computerized numerical controls and Fanuc wished to penetrate the market as effectively as possible. Although Fanuc began to establish subsidiaries to provide after-sales service for NCs already incorporated into machine-tools imported into the EEC from 1976 onwards, it chose in 1975 not to set up its own sales network, however initially modest it might have been, but rather to enter into reciprocal exclusive distribution and other agreements on 11 June 1975 with Siemens, a major competitor. There follows a summary of these agreements.

The agreements

5. Following the conclusion of earlier agreements in 1965 and 1972 by Siemens and Fujitsu, Siemens and Fanuc entered into a number of agreements on 11 June 1975. These consisted of a basic agreement and four individual agreements and were amended several times thereafter. They were finally abrogated on 19 April 1983.
6. By the 1972 agreement, Fujitsu granted Siemens exclusive selling rights for its (Fujitsu's) NCs (unless already combined with a machine-tool) in the whole of Europe except the USSR. Fujitsu also undertook not to grant manufacturing licences for NCs to any third party in that territory and to grant such licences to Siemens on request. Siemens agreed to sell a certain volume of Fujitsu NCs defined as a percentage of sales of its own NCs in any one fiscal year.
7. The basic agreement of 11 June 1975 stated in its preamble that cooperation in the marketing of NCs was in the parties' joint interest. Moreover, cooperation in the development of NCs was deemed necessary. Under the agreement, Siemens granted Fanuc exclusive selling rights for its NCs in Asia and Fanuc granted Siemens exclusive selling rights for its NCs in Europe. The parties agreed to aspire to 'balance the value of the mutual supplies of the various products covered by

the agreement on the condition of the requirements of each party's market'. Each party undertook to supply to the other all necessary technical data and information for the marketing, installation and servicing of the products concerned and to inform the other promptly of any improvements and modifications of the products and of any developments of new models or decisions to discontinue old models. Each party had the right to put its own trade mark on products supplied by the other for resale in the allotted territory. There were also provisions regarding sales rights in other parts of the world: they are not the concern of this Decision.

The parties also agreed to cooperate in research, development and production with a view to developing jointly new NCs, sharing information regarding research and development work and making available to each other all design and manufacturing information regarding controls to be manufactured in the future. An advisory committee was to be set up to decide on development projects and to distribute work between the parties in approximately equal proportions.

8. In addition to the basic agreement of 1975, a number of 'individual agreements' were concluded.
9. Individual Agreement I

The preamble to this agreement states that:

'In the areas of research and development the parties intend to coordinate their work in such a way as to

- a) develop jointly new controls
- b) inform each other in other respects with regard to their actual research and development work, and
- c) make available to each other all design and manufacturing information with regard to all controls, the manufacture of which they shall start after the beginning of the cooperation.'

Individual Agreement I was divided into two sections. Section I, dealing with joint development contained, *inter alia*, the following provisions:

Article 1: Joint development

The parties agreed to develop numeric controls for machine tools as agreed upon by the advisory committee. Joint development would proceed according to clearly defined steps but in such a way as to ensure that the work was distributed to both parties 'in an approximately equal scope'. Each party was free to develop numerical controls by itself or, subject to previous discussion, under

technical licence from third parties to satisfy the requirements of its own market from time to time, but this provision was subject to the obligation of general disclosure which was required to be made under Section II.

Section II of the agreement dealt with the coordination of the development and the exchange of information and included the following provisions:

Article 2: Definitions

For the purposes of the agreement, 'information' meant all results of developments, including the joint developments of the parties, technical information and technical documentation under which either party was entitled to grant licences. The only information excluded was information and documentation which either party was actually manufacturing and offering to the market at the time the agreement was made.

Article 3: Further cooperation in development

The parties agreed to make available to each other their research and development information in accordance with the principles of an 'open-door policy'. Each party would endeavour to communicate such information to the other as early as possible, particularly where the development of a new or more modern product or manufacturing process was beginning to take form.

Development work was to be coordinated and a joint 'committee for research and development' was to be established to control the exchange of information provided for by the agreement. In fact the committee never came into existence.

Article 4: Exchange of information

Each party agreed to transmit to the other, on request, technical information concerning the products covered by the agreement as it became available and in the manner provided for in the agreement.

Article 5: Performance of exchange of information

Unless otherwise agreed, neither party would disclose to third parties any information received from the other party under the agreement, even after the expiry of the agreement, unless such information had become public. Each party agreed to supply to the other as far as possible and at most-favoured prices and terms, all materials, components and other products which the other

party required but did not itself manufacture. In fulfilling this condition the parties would endeavour 'to maintain a balance of the values of the products they supply to each other in such manner'.

Article 6: Licences for manufacture

The parties granted to each other non-transferable non-exclusive licences for the manufacture of the products covered by the agreement by Siemens in Germany and by Fanuc in Japan as well as for the use and sale of such products in all countries except those where an exclusive right had already been granted or might be granted to third parties.

Article 7: Agreements with third parties

The parties agreed that, in concluding agreements with third parties, no arrangements should be made which might adversely affect the cooperation provided for in the agreement. Any issues arising within this context would be raised in the advisory committee.

Each party should advise the other in good time of any plans which might influence the form and extent of the cooperation provided for under the agreement.

Each party should advise the other of any proposals to grant licences to third parties. The advisability of concluding such licences should be discussed beforehand if either party so desired.

10. Individual Agreements II and III

These two agreements under which Fanuc granted sales rights to Siemens in Europe and Siemens granted sales rights to Fanuc in Asia, were framed in substantially the same terms. The main provisions of these two agreements may be summarized as follows:

Article 1: Definitions

'Controls' meant all numerical control equipment, including drive units manufactured by either party and complete machine tools manufactured by Fanuc.

'Sales territory' meant Asia as regards Fanuc and Europe as regards Siemens.

'Machines' meant machine-tools and other machines.

Article 2: Grant of sales rights

Each party granted the other the right to sell its controls in the other's sales territory, where the controls were to be combined with machines in

that sales territory. Neither party could offer or sell its own controls to third parties in the other party's sales territory unless the control had already been combined with a machine outside the territory.

Each party should use its best efforts to promote the sales in its own territory of the products of the other party in order to increase the parties' respective market shares.

Article 4: Cooperation

Each party should from time to time provide the other with all necessary technical data and information for the marketing, installation and servicing of the products.

Each party was to inform the other promptly of any improvements and modifications to the products and of any developments of new types or decisions to discontinue old types.

Article 5: Trade marks

Each party had the right to put its own trade mark in its own territory on the products supplied by the other party.

Article 6 of Individual Agreement III: Marketing information

Each party should on request supply the other with details of its marketing activities (including tender prices, delivery prices, supplies, delivery conditions etc.) in the USSR and Bulgaria.

Article 6 of Individual Agreement II and Article 7 of Individual Agreement III

Neither party should disclose to third parties confidential information resulting from their cooperation under the agreements.

11. Individual Agreement IV

This agreement concerned sales rights conferred by one party on the other in other countries, except the United States where the parties marketed their products jointly through their jointly owned subsidiary. The principal provisions may be summarized as follows:

Article 1: Grant of sales rights

Siemens granted to Fanuc the right to sell Siemens controls in Australia and Fanuc granted Siemens the right to sell Fanuc controls in South America, India and South Africa.

Article 2: Applicability of provisions of other agreements

In so far as each party granted sales rights to the other, the provisions of Individual Agreement II or III should apply as appropriate.

Article 3: Modifications and further sales rights

At the request of either party the territorial assignments made in Article 1 could be modified.

12. With respect to other countries not dealt with in Individual Agreements II, III and IV, particularly in respect of the oil-producing countries, the United States of America excepted, the parties should make arrangements on a case-by-case basis before 31 December 1976.

13. The memoranda of 20 August and 6 October 1982

Following inquiries made by the Commission, Siemens and Fanuc signed a memorandum stating the parties' intention to modify certain provisions of their agreements. A second memorandum was signed on 6 October 1982 modifying certain provisions of the parties' agreements with effect from 5 October 1982.

14. Absence of notification

None of the abovementioned agreements was notified to the Commission in accordance with Article 4 of Regulation No 17.

15. The new agreements

The basic agreement was to remain in force until 1985. In the event, seven new agreements were concluded on 19 April 1983 and notified to the Commission on 1 July 1983. The agreements are to remain in force until 31 December 1992 and may be renewed for periods of two years. These new agreements are not the subject of this Decision.

16. On 19 April 1983, Siemens and Fanuc also concluded a memorandum abrogating the basic agreement of 11 June 1975 and Individual Agreements I to IV of the same date, as last amended on 6 October 1982, together with an agreement on robot systems of 12 May 1978, an agreement by letter of 5 February 1981, an agreement on general terms and conditions for Fanuc machine-tools of 1 September 1981 and a memorandum of 20 August 1982. It was provided that licences acquired and rights granted pursuant to Individual Agreement I of 11 June 1975 under information and patent rights filed before the end of the term of that individual agreement should continue in force.

17. The Commission's investigations and statements made by Siemens and Fanuc revealed the following facts:

- the technical nature of NCs is such that close cooperation between the manufacturer and the user is essential. Consequently, parallel imports are a less than satisfactory alternative to direct supplies for machine-tool manufacturers who are not themselves NC manufacturers and are thus unlikely to have the requisite technical skills and experience, particularly as Fanuc's subsidiaries established in the EEC from 1976 onwards were responsible for servicing NCs already incorporated into imported machine-tools,
- the selling price of Fanuc NCs was on average 34 % higher in the common market to EEC machine-tool manufacturers than in Japan to Japanese machine-tool manufacturers,
- the price at which Siemens sold Fanuc NCs in the common market was on average 163 % of the price at which Siemens purchased them from Fanuc,
- Siemens was not aware of Fanuc's selling prices for its NCs in the Far East and made no attempt to find out what they were,
- the cost of the NC can amount to between 6 % and 18 % of the total cost of a machine-tool.

II. LEGAL ASSESSMENT

Article 85 (1)

18. Article 85 (1) provides that 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 shall be prohibited as incompatible with the common market.
19. Siemens and Fanuc are undertakings within the meaning of Article 85 (1) and their agreements are agreements within the meaning of that provision.
20. The agreements in question relate to the distribution of goods in the common market and to research, development and production arrangements for goods sold or to be sold in the common market. Article 85 applies to those agreements in so far as they concern the distribution of goods and the research, development

and production activities of undertakings active in the common market.

(a) *Distribution*

21. The agreements between Siemens and Fanuc provided for a *de facto* sharing of markets between them with the result in the EEC that Siemens was the exclusive distributor of Fanuc NCs. In the event, Fanuc did not sell many Siemens NCs in Asia, but the principle of exclusivity was adhered to. The agreements also provided for research, development and production: these provisions will be dealt with separately at (b) below.

Siemens was able to widen its range of NCs on sale in the EEC by the addition of Fanuc's products and to neutralize the direct impact of an important competitor. Fanuc's strategy of selling standardized NCs to a machine-tool industry which adapts its products accordingly, rather than producing custom-made NCs to meet each machine-tool's individual characteristics, was shown to be successful on a world-wide scale. The agreements between Siemens and Fanuc in the EEC helped to retard and make more expensive the competitive development of the European machine-tool industry.

22. From 1975 to 1983, Siemens was the exclusive distributor of Fanuc NCs for the whole common market, except for Greece, which was excluded from February 1981, while Fanuc was the exclusive distributor of Siemens NCs in Asia. In fact, there was little demand for Siemens NCs in Asia and very few were sold there. In the common market, on the other hand, a considerable demand arose for Fanuc NCs to which Siemens, as the sole distributor, was alone able to respond. The price at which Siemens sold Fanuc NCs in the common market was stated by Siemens at the hearing to be on average 163 % of the price at which Siemens purchased NCs from Fanuc. It is recognized that Siemens contributed by its efforts to the success of Fanuc NCs in the common market. Nevertheless, again on Siemens' own admission, the difference between selling prices of Fanuc NCs in the EEC and in Japan was on average 34 %. This difference was sufficient to encourage attempts to seek purchases direct from Fanuc. The agreement between Siemens and Fanuc was sufficient to thwart such attempts.
23. Siemens and Fanuc are and were at all material times competitors. Although Fanuc was at the outset a smaller company than Siemens, it was nevertheless a subsidiary of Fujitsu Ltd, a large Japanese undertaking, and had established a position of strength in the market for NCs in the Far East from which it was later able to expand to

become a world market leader. When, in 1975, it concluded an exclusive distribution agreement for the common market with Siemens, Fanuc was already present in that market through its earlier agreements with Siemens and imported machine-tools carrying Fanuc NCs. In view of Fanuc's market position, its resources and expertise, Fanuc's argument that it could only expand in the common market by means of an exclusive distribution agreement with Siemens cannot be accepted.

Restrictions of competition within the common market and effect on trade between Member States

24. The agreement between Siemens and Fanuc whereby only the former could sell the latter's NCs in the EEC prevented all other undertakings in the common market from buying NCs direct from Fanuc, making Siemens the only practical source of supply of Fanuc NCs in the common market since the scope for parallel imports was in practice severely limited. This not only restricted the freedom of the parties to the agreement, but also affected the position of third parties, particularly machine-tool manufacturers in the EEC, who might have wished to purchase Fanuc NCs from suppliers other than Siemens. It would appear on the basis of the difference between the prices charged by Siemens for Fanuc NCs in the EEC and those charged by Fanuc itself for the same products in the Far East that there was a considerable saving to be made by purchasing from Fanuc direct. Several attempts were made to arrange such purchases and Fanuc referred inquiries from Europe to Siemens. A restrictive agreement between an undertaking in the common market and a competitor in a third country which brings about the isolation of the common market from a potentially cheaper source of a product essential to the development of a major Community industry, in this case the machine-tool industry, may be, and in this case is, of such a nature as to distort competition within the common market and to affect trade between Member States. The Court of Justice has acknowledged this principle in a case relating to trade mark rights⁽¹⁾ and it is equally applicable in the case at hand.

⁽¹⁾ Cases 51/75, 86/75 and 96/75 *EMI v. CBS*, [1976] ECR 811, 871 and 913.

As a result of the agreement and the factual context in which it operated, the flow of trade between Member States developed on lines other than those which would have prevailed otherwise. This is because, but for the agreement, EEC undertakings other than Siemens would have been able to buy NCs from Fanuc for use or resale in their own or another Member State ⁽¹⁾.

In the light of the size of the undertakings involved and the importance of NCs as a new technology product for the Community machine-tool industry, the effect on trade between Member States was appreciable.

25. For these reasons, the agreement between Siemens and Fanuc whereby the former had exclusive distribution rights for the latter's NCs in the common market had an appreciable effect on trade between Member States.
26. In conclusion, the 1975 agreements infringed Article 85 (1) of the EEC Treaty in so far as they provided for exclusive distribution by Siemens of Fanuc NCs in the EEC.

Article 85 (3)

27. The 1975 agreements referred to above and found to have infringed Article 85 (1) were not notified to the Commission in accordance with Article 4 of Regulation No 17. They do not fall within the block exemption granted at all material times by Commission Regulation No 67/67/EEC ⁽²⁾, since Siemens and Fanuc were manufacturers of competing goods who entrusted each other with exclusive dealing in those goods (Article 3 (a)). In addition, the agreements provided for more than exclusive distribution arrangements, containing as they did restrictions regarding research and development. They therefore fell outside the scope of Article 2 (1) of Regulation No 67/67/EEC. In the absence of notification, therefore, the agreements are not eligible for exemption under Article 85 (3) of the EEC Treaty.
28. While in certain circumstances adequate improvements in distribution within the meaning of Article 85 (3) of the Treaty may occur where a manufacturer entrusts distribution of his goods to a competitor, in this case, where Siemens, a large

company, and Fanuc, a member of a large conglomerate group of companies, concluded exclusive dealing and other agreements and parallel imports were not an attractive alternative to direct supplies for commercial and technical reasons, the serious anti-competitive impact of the arrangements between Siemens and Fanuc outweighs any possible improvements in distribution occasioned by Siemens' contribution to Fanuc's successful penetration of the common market. In any case, even if the agreements had been notified, an exemption could not have been granted. The application of the agreements gave rise to a market-sharing arrangement between the parties. Because of the price differences for NCs between the EEC and the Far East and bearing in mind the lack of parallel trade, users in the common market were prevented from gaining any appreciable benefit.

(b) *Research, development and production*

29. It is accepted that the provisions relating to research, development and production in the field of NCs were implemented in the case of one product only, the System 7. This project was a commercial failure and led the parties to realize that the necessary compromises between European and Japanese methods involved in joint work of this nature were unlikely to produce successful results in this field.
30. The object of the provisions in question (see paragraphs 7 and 9 above) was to restrict competition since the scope of the parties' cooperation and the commitment to share work between them entailed joint determination of how the products developed were to be manufactured, how the processes developed were to be applied and how intellectual property rights were to be exploited. Moreover, the parties agreed not to make any arrangements with third parties which might adversely affect their cooperation. These provisions, contained in agreements providing also for extensive cooperation in distribution between competing undertakings, therefore fell within Article 85 (1). The agreements did not have as their sole object the joint implementation of research and development projects, the joint placing of research and development contracts or the sharing of research and development projects. They do not therefore fall within the terms of the Commission's notice of 29 July 1968 concerning agreements, decisions and concerted practices in

⁽¹⁾ See Commission Decision 75/74/EEC, *Duro-Dyne/Europair*, OJ No L 29, 3. 2. 1975, p. 11.

⁽²⁾ OJ No 57, 25. 3. 1967, p. 849/67.

the field of cooperation between enterprises ⁽¹⁾. Moreover, the agreements fall neither within the categories set out in Article 4 (2) of Regulation No 17 in respect of which notification is not necessary if they are to be eligible for exemption nor within the terms of any relevant block exemption Regulation. They were not notified and so cannot qualify for an exemption under Article 85 (3).

Article 15 of Regulation No 17

31. Under Article 15 (2) of Regulation No 17, the Commission may by decision impose fines of from 1 000 to one million ECU or a sum in excess thereof but not exceeding 10 % of turnover in the preceding business year on each of the undertakings infringing, either deliberately or negligently, Article 85 (1) of the EEC Treaty. In fixing the amount of the fine, regard shall be had to the gravity and the duration of the infringement.
32. In this case, it is not considered appropriate to impose fines in respect of the research, development and production provisions since they were never fully implemented and cannot be said to have had a serious impact on the market for NCs.
33. The distribution provisions in the agreements of June 1975, on the other hand, were applied in full and were to have remained in force until 1985. In the event, following the Commission's intervention and the memoranda of intent referred to in paragraph 13 above, they were abrogated in April 1983. With the exception of Greece which was excluded from Siemens' exclusive sales territory in February 1981, the distribution provisions applied throughout the common market for more than eight years.
34. The provisions granting Siemens exclusive sales rights for Fanuc NCs in the common market constitute a serious infringement of Article 85, since they denied the Community machine-tool industry immediate access at the best possible prices to a development of modern technology of the utmost importance for that industry ⁽²⁾.

35. The Commission considers it appropriate to impose fines on Siemens and Fanuc in respect of their 1975 agreements for the distribution of NCs in the common market, particularly since the parties are competitors and large undertakings in a sector of great importance for the Community machine-tool industry. The parties should have known that such exclusive distribution agreements forming part of wider arrangements may fall within Article 85 of the EEC Treaty. Indeed, perusal of Regulation No 67/67/EEC, which was in force at all material times, should have convinced them at least of the advisability of notification. In the circumstances, it may therefore be concluded that their infringement was intentional or at least negligent.

In considering the gravity of the infringement, the Commission has had regard to all the relevant circumstances. The infringement was of a serious nature since it prevented price competition for Fanuc NCs in the common market and placed users at a considerable disadvantage. The undertakings involved are major participants in an industry of great importance for future technological development and provide a crucial input for the machine-tool industry, itself a vital part of the Community economy. However, regard should also be had to the fact that the parties sought to bring their arrangements into line with the competition rules when the Commission intervened in this matter. Finally, Siemens and Fanuc bear the same responsibility for the infringement and should therefore be fined identical amounts.

HAS ADOPTED THIS DECISION:

Article 1

The provisions of agreements of 11 June 1975 between Fanuc Ltd and Siemens AG relating to exclusive selling rights for numerical controls in the common market and to research, development and production of numerical controls constituted until their abrogation infringements of Article 85 of the EEC Treaty.

Article 2

1. For their involvement in the infringement relating to Siemens AG's exclusive selling rights in the common market for numerical controls manufactured by Fujitsu Fanuc Ltd and later by Fanuc Ltd, fines of one million ECU each, equivalent to Lfrs 44 744 900 (forty-four million, seven hundred and forty-four thousand, nine

⁽¹⁾ OJ No C 75, 29. 7. 1968, p. 3, as corrected by OJ No C 84, 28. 8. 1968, p. 14.

⁽²⁾ The significance of the new technologies for the machine-tool industry and the importance of market competition and free trade in this context were stressed by the European Parliament in its resolution of 29 March 1984 on the European machine-tool industry, OJ No C 117, 30. 4. 1984, p. 92.

hundred) or DM 2 190 750 (two million, one hundred and ninety thousand, seven hundred and fifty), are imposed on Fanuc Ltd and Siemens AG.

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

- (a) Kredietbank (Agence Schuman), 2 rond-point Schuman, B-1040 Brussels, account No 426-4403003-54 (for payment in ECU);
- (b) Caisse d'Epargne de l'Etat, 1 place de Metz, L-2954 Luxembourg, account No 1/002/9906/6 (for payment in Lfrs);
- (c) Sal. Oppenheim & Cie., Unter Sachsenhausen 4, D-5000 Cologne, account No 260/0064910 (for payment in DM).

Article 3

This Decision is addressed to:

- 1. Fanuc Ltd
Oshinomura
Minami-Tsurugun
Yamanashi Pref. 401-05
Japan
- 2. Siemens AG
Postfach 103
D-8000 Munich 1

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

Done at Brussels, 18 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission