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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 July 1987

relating to a proceeding under Article 85 of the EEC Treaty

(IV-31.192 — Tipp-Ex)

(IV/31.507 — Tipp-Ex (standard form contract))

(Only the French, English, German and Dutch texts are authentic)

(87/406/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 Spain and Portugal, and in particular Articles 3 (1) and 15 (2) thereof,

Having regard to the complaints lodged by ISA France Sarl., Bar-le-Duc, France, on 30 March 1984 and M. Visser's Industrie & Handelsonderneming — VIHO BV, Eijdsen, Netherlands, on 24 July 1984 against Tipp-Ex Vertrieb GmbH & Co KG, Frankfurt, Federal Republic of Germany,

Having regard to the notification and application for negative clearance submitted by Tipp-Ex on 7 March 1985 pursuant to Articles 2 and 4 of Regulation No 17 relating to the standard form 'authorized dealer contract',

Having regard to the Commission Decision of 10 April 1986 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 read in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article No 19 (1) and (2) of Regulation No 17 ⁽²⁾,

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

Whereas:

I. THE FACTS

- (1) These proceedings concern agreements and concerted practices between Tipp-Ex and its exclusive distributors in several EEC countries aimed at preventing parallel imports or exports of Tipp-Ex products within the common market. The proceedings began with a complaint lodged by ISA France on 30 March 1984. The standard form authorized dealer contract notified on 7 March 1985 was included in the proceedings because of the close correlation.

A. The undertakings

(a) *Tipp-Ex*

- (2) Tipp-Ex Vertrieb GmbH & Co KG, Frankfurt, is engaged primarily in the marketing of correction

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

products. It buys the products marketed under the 'Tipp-Ex' trade mark from Stadler GmbH & Co KG, Frankfurt. Since the shareholders and managers of both undertakings are the same, the Commission considers that Tipp-Ex and Stadler are associated companies.

In 1984 Tipp-Ex recorded total sales of (...) ⁽¹⁾. Domestic sales accounted for (...), and sales in the whole of the EEC for (...).

(b) *Beiersdorf*

- (3) Beiersdorf AG manufactures a large number of pharmaceutical, cosmetic and chemical products, including those of the 'tesa' range. Consolidated group sales of Beiersdorf AG and its domestic subsidiaries amounted in 1984 to (...). The Beiersdorf group's sales worldwide in 1984 came to (...).

Beiersdorf took over the exclusive distribution of Tipp-Ex products in France on 4 January 1982 following the termination of the contractual relationship between Tipp-Ex and (...) ⁽²⁾.

- (4) BDF tesa SA, Le Plessis Robinson, is one of three Beiersdorf subsidiaries in France. It markets, among other things, 'tesa' and Tipp-Ex products in France.

(c) *The remaining exclusive distributors concerned*

- (5) — Burotex SA, Brussels, Belgium,
— (...) (up to 31 December 1981),
— Esveha-Rijam (formerly Rijam Jade), Alphen aan de Rijn, Netherlands,
— Tipp-Ex (Leslie McLean) Ltd, Camberley, Surrey, United Kingdom.

(d) *ISA France*

- (6) ISA France Sarl, Bar-le-Duc, is a major importer and exporter of office supplies. Its markets are France, the Netherlands, the Federal Republic of Germany, and Africa. In 1984 it achieved total sales worth (...). Of this figure, Tipp-Ex products accounted for (...).

(e) *VIHO*

- (7) M. Visser's Industrie & Handelsonderneming-VIHO BV, Eijssden, Netherlands, is an importer and exporter of office supplies, especially within the EEC. In 1984 its annual turnover came to (...), of which (...) was accounted for by Tipp-Ex products.

B. The product and the market in correction products

- (8) These proceedings concern correction products for documents. These take the form mainly of correction paper, correction fluids and correction tapes.
- (9) The Commission notes that Tipp-Ex has a strong position in the correction products market without, however, occupying a dominant position. Although Tipp-Ex is by far the biggest supplier of correction paper and fluids in the Community, this is not the case with correction tapes, the fastest-growing market segment. The leading suppliers there are the established manufacturers of typewriters and typewriter ribbons. Tipp-Ex is only one of eight smaller suppliers who together have a market share of approximately 30 %.

In determining Tipp-Ex's market position, regard must also be had to the fact that, as a medium-sized undertaking, it has to compete with large firms and that there are no fundamental barriers to access to the correction products market.

C. The Tipp-Ex distribution system

- (10) Tipp-Ex markets its products throughout the EEC and in a large number of non-Community countries. In the Federal Republic of Germany, it sells to specialist traders (wholesalers and retailers), department stores and two 'authorized dealers'.

In the other Member States, Tipp-Ex markets its goods through the abovementioned exclusive distributors (cf. points 3 to 5 above), who resell them to specialist traders.

- (11) The collaboration between Tipp-Ex and these exclusive distributors is, with two exceptions, based on oral agreements. Under the terms of these agreements, Tipp-Ex has undertaken *vis-à-vis* each of these distributors to supply to him alone certain goods for resale within a defined area of the common market. For his part, each distributor has

⁽¹⁾ Certain figures have been omitted in the published version of the Decision pursuant to Article 21 of Regulation No 17 concerning the protection of business secrets.

⁽²⁾ The name of this undertaking is not stated in the published version of this Decision but is shown as '...', neither the Decision nor the Statement of Objections being addressed to it.

undertaken *vis-à-vis* Tipp-Ex to perform the usual sales promotion obligations of an exclusive distributor.

- (12) Written 'authorized dealer contracts' have been concluded only with Tipp-Ex (Leslie McLean) and Beiersdorf. The contract with Tipp-Ex (Leslie McLean) was concluded on 1 October 1983 and entered into force immediately. The contract with Beiersdorf was concluded in December 1983 with retroactive effect from 4 January 1982. Previous to that, the contractual relation between Tipp-Ex and these two undertakings were, like those with the other exclusive distributors, governed by oral agreements. On 7 March 1985, that is to say after the investigation was completed, Tipp-Ex submitted an application for negative clearance under Article 2 of Regulation No 17 in respect of a standard form contract corresponding to the authorized dealer contracts, and notified that standard form contract 'as a precautionary measure' in accordance with Articles 4 and 5 of that Regulation.

- (13) The standard form contract contains *inter alia* the following clauses of importance in this context:

'...

Article 14 — Sales outside the contract territory

- (1) The Authorized Dealer undertakes not to sell the contract goods to customers having their place of business outside the contract territory with the exception of EEC Member States. Enquiries by customers from such countries shall be forwarded by the Authorized Dealer to the Supplier. The Authorized Dealer furthermore undertakes not to sell the contract goods to customers who to his knowledge intend to resell them in areas outside the contract territory.
- (2) With regard to EEC Member States not included in the contract territory, the Authorized Dealer undertakes not to engage in active sales efforts. That is to say he must not canvass customers, open branch offices, maintain supply depots or advertise the contract goods in those countries.

'...

'...

Article 20 — Territorial protection

- (14) (1) The Supplier shall not supply the contract goods to distributors who to his knowledge intend to resell them in the contract territory. He shall examine with the diligence of a prudent businessman whether there is any danger of distributors reselling in the contract territory.
- (2) The Supplier undertakes to impose on the parties to his other Authorized Dealer

Contracts the same obligations as the Authorized Dealer assumed under Chapter II Art. 14 of this contract.

...'

D. The prevention of parallel imports and exports by Tipp-Ex

- (15) According to the Commission's findings, Tipp-Ex took, at least between 1979 and 1982, active measures to prevent parallel imports or exports within the Community. It also exerted pressure on its exclusive distributors in order to obtain their agreement and support.

The oral agreements between Tipp-Ex and (...), Burotex, Esveha-Rijam and Tipp-Ex (Leslie McLean) were also aimed at preventing parallel imports and exports. This is clear from the parties' conduct as established by the investigation.

(a) Conduct towards ISA France

- (16) In early 1979 ISA France obtained goods direct from Tipp-Ex for the first and last time. As these goods were not sold in a third country in breach of the agreement between the two firms and as some of them ultimately appeared on the German market, Tipp-Ex made further deliveries to ISA France dependent on that firm's giving detailed information on destinations and recipients.
- (17) On 11 April 1979 Tipp-Ex sent ISA France a telex accusing the latter of selling Tipp-Ex products in the Federal Republic and even of telling its customers where and at what prices it bought them; it went without saying, it continued, that this terminated their business relationship. Tipp-Ex did, in fact, cease supplying ISA France.
- (18) Likewise in 1979, ISA France bought Tipp-Ex goods on a number of occasions from (...) and sold them in the Federal Republic of Germany. When Tipp-Ex found out about this, it sent several telexes not only to (...), but also to Burotex, Esveha-Rijam and Tipp-Ex (Leslie McLean) in order to prevail upon the exclusive distributors to endorse the business policy pursued by Tipp-Ex, which was not to supply parallel importers in order thus to achieve absolute protection of the contract territories allotted. The Commission's findings in this respect are set out in points 19 to 24 below.
- (19) On 29 August 1979 Tipp-Ex complained by telex to its exclusive distributors in Belgium, France, the

United Kingdom and the Netherlands about reimports by German customers at prices far lower than those charged locally, and stressed that this would have direct consequences for the dealer concerned. Tipp-Ex also stated in the telex that, for its part, it would supply no exporter in the Federal Republic who could not prove with the help of forwarding documents that the goods had actually been sent to the third country concerned, and that, because of parallel imports, it had decided to affix a special country code to every consignment.

- (20) On 31 August 1979 Tipp-Ex requested (...) to trace the source from which ISA France obtained Tipp-Ex products. The telex ends with the sentence: 'We hope that you are able to help us to cut out the parallel market.'
- (21) On 5 October 1979 Tipp-Ex informed the exclusive distributors that (...) had supplied Tipp-Ex goods to ISA France and that the latter firm, which was known for its price-cutting activities, had resold the goods to a German dealer. The telex asks whether it makes sense for an exclusive distributor thus to place his distributorship in jeopardy, and states that action will be taken.
- (22) In a postscript to the abovementioned telex addressed to (...), Tipp-Ex gave notice of termination of supplies. On 12 October 1979 Tipp-Ex temporarily suspended the notice but withdrew (...)’s entitlement to a rebate in kind it had so far enjoyed equal to 10 % of the selling price. (...) reacted to the measures taken by Tipp-Ex by increasing its price quotations to ISA France by 10 — 20 %.
- (23) This led to arguments between (...) and ISA France because the latter saw in the price rise a concerted attempt by (...) and Tipp-Ex to prevent ISA France from continuing its parallel importing. In the period that followed there was a lengthy interruption of relations between ISA France and (...) which lasted, according to the information in the Commission’s possession, throughout 1980. In the course of that year, ISA France was able to obtain Tipp-Ex goods from a German wholesaler who, for fear of reprisals by Tipp-Ex, exported the consignments in a disguised form.
- (24) It was not until the beginning of 1981 that negotiations resumed between (...) and ISA France. (...) refused to supply ISA France itself direct, but said it had no objections to ISA France obtaining large quantities of Tipp-Ex goods from one of its customers. No deal was concluded, however, as ISA France considered the prices quoted to be too high.
- (25) On 20 November 1981 Tipp-Ex finally withdrew (...)’s sole selling right for France with effect from 31 December 1981 and transferred it with effect from 4 January 1982 to Beiersdorf. According to ISA France, one of the main reasons for this was the supplying of ISA France by (...). Tipp-Ex states, however, that the termination was due to the fact that (...) did not satisfactorily fulfil its sales promotion obligations, and in particular achieved too low a turnover with French wholesalers. That (...)’s inadequate sales performance did constitute one of the grounds for termination is apparent from the file on a civil action brought by Tipp-Ex against (...) in 1982.
- (26) From the above conduct on the part of (...), the Commission draws the conclusion that, under strong pressure from Tipp-Ex in October 1979, the firm was obliged to join, at least in part, in the measures demanded by Tipp-Ex against ISA France.
- In October 1979 (...) greatly increased the prices it quoted to ISA France and for a time, particularly in 1980, suspended supplies to ISA France. (...)’s declared readiness in early 1981 to tolerate the purchase by ISA France of large quantities from third dealers proves, moreover, that (...) continued to obey Tipp-Ex’s demand that it should not itself supply firms known to be parallel importers. Buying through third dealers is not comparable to buying direct from an exclusive distributor because a further profit margin then results. Nor, lastly, does the ending of the contractual relationship by Tipp-Ex at the end of 1981 invalidate the proposition that (...) for a time, and at all events from October 1979 to the beginning of 1981, supported a business policy pursued by Tipp-Ex aimed at partitioning the market.
- (27) From 1982 until February 1984, ISA France bought Tipp-Ex products from BDF tesa. The complainant maintains that BDF tesa practised price discrimination against it and that since 2 March 1984 it has been unable to obtain any further Tipp-Ex products from BDF tesa.
- (28) The investigation has shown, however, that BDF tesa did not break off business relations with ISA France but by letter dated 2 March 1984 temporarily discontinued them. This happened after ISA France had threatened action by 'a European body' because BDF tesa had not informed it of a particularly favourable special offer. In fact, in response to subsequent enquiries by ISA France mainly in April and June 1984, BDF tesa made offers on terms which it proposed only to the most efficient wholesalers. For all that, ISA France did not avail itself of these offers.

(29) Nor has it been established that BDF tesa practised price discrimination against ISA France compared with other wholesalers. When BDF tesa took over the Tipp-Ex distributorship with effect from 4 January 1982, it proved to be heavily dependent on ISA France. As a result, BDF tesa, like (...) before it, first of all granted ISA France particularly favourable price terms (including a functional discount of 25 % for specialist wholesalers, despite the fact that ISA France does not perform the usual wholesale services), which led to ISA France being placed in a better position than comparable wholesalers. Moreover, out of a total of 65 articles in the Tipp-Ex product range, ISA France bought only three, all fast-moving merchandise.

(30) This situation, which became apparent during the first months of 1982, made it desirable for Beiersdorf in the medium term to reduce the competitive advantage of ISA France over other wholesalers, that is to say to bring the special terms granted to ISA France into line with the normal terms granted to specialist wholesalers. After BDF tesa had reduced the one-sided dependence on ISA France by widening its distribution base, the terms granted to ISA France were brought into line with those of other wholesalers during late 1982/early 1983.

(31) However, the Commission's investigation has shown that the measures taken by BDF tesa — at least during the second half of 1982 — were also intended to prevent reimports by ISA France into the Federal Republic of Germany.

(32) This is clear from the following documents emanating from Beiersdorf itself.

A telex dated 13 May 1982 from Beiersdorf to BDF tesa states: 'Since your deliveries to ISA now jeopardize cooperation and contact with Tipp-Ex, a solution must be found immediately. Although it is impossible on legal grounds to stop supplies, special prices should no longer be applied ...'

In a letter to BDF tesa dated 15 June 1982, Beiersdorf observed that its subsidiary had yet to adjust its prices, and strongly insisted on an immediate price increase, since collaboration with Tipp-Ex would be jeopardized if ISA France continued to be able to export as a result of BDF tesa's pricing.

Finally, on 2 August 1982 Beiersdorf gave its subsidiary strict instructions to stop supplying ISA France on special terms as the latter had not adhered

to its undertaking not to export Tipp-Ex goods. Special terms should be granted only to big customers who were known not to export.

(33) From the documents referred to above, the conclusion can be drawn that Tipp-Ex made repeated representations to Beiersdorf with a view to preventing parallel imports by ISA France. It is also apparent that Beiersdorf expressed readiness to support Tipp-Ex in this endeavour. This understanding can be inferred *inter alia* from the fact that Beiersdorf sent a copy of the abovementioned letter to BDF tesa of 2 August 1982 to the owner of Tipp-Ex.

(34) In January 1984 ISA France asked the Belgian exclusive distributor, Burotex, to quote a price for certain Tipp-Ex articles. It made similar enquiries of the British exclusive distributor Tipp-Ex (Leslie McLean). Burotex referred ISA France to BDF tesa. The British company, for its part, did not reply.

The Commission has been unable to establish that Tipp-Ex took action at that time to induce the exclusive distributors to adopt such an attitude.

(35) In May 1984 ISA France addressed an enquiry to Tipp-Ex asking for a quotation for a considerable quantity of Tipp-Ex articles 'ex-works Frankfurt'. Tipp-Ex declined to execute the order, referring to its exclusive distribution agreement with Beiersdorf.

(b) Conduct towards VIHO

(36) On 24 July 1984 VIHO became a joint complainant with ISA France and declared that it, too, had had difficulty in obtaining supplies of Tipp-Ex products and had been cut off from all sources of supply outside its own country.

(37) This claim is inconsistent inasmuch as, in its answer to the Commission's request for information dated 11 December 1984, the complainant conceded that, since 1982, it had obtained Tipp-Ex goods from a subsidiary of Tipp-Ex's Dutch exclusive distributor, Esveha-Rijam, and from Dutch, Belgian, German, French and British dealers who are not Tipp-Ex exclusive distributors.

(38) Esveha-Rijam did, it is true, stop supplying VIHO in 1984. The Commission has been unable, however, to establish with sufficient certainty that in this connection and at that time there was any concerted action between Tipp-Ex and Esveha-Rijam.

(39) In May 1984 VIHO asked Tipp-Ex to quote a price ex-works for a large quantity of goods. Tipp-Ex first

of all referred VIHO to the Dutch exclusive distributor. In the ensuing exchange of correspondence VIHO took the view that the manufacturer was obliged to supply goods to it pursuant to Commission Regulation (EEC) No 1983/83⁽¹⁾, in conjunction with the Commission press release of 12 January 1984 in the 'La Maison des Bibliothèques' case. In November 1984 Tipp-Ex finally made VIHO an offer, informing it of the prices at which it supplied customers not bound by existing authorized dealer contracts. VIHO did not take up the offer as it considered the prices to be excessive.

- (40) VIHO received negative replies from various Tipp-Ex exclusive distributors in response to a number of requests for supplies made between May and October 1984. Burotex referred VIHO to the Dutch exclusive distributor. Tipp-Ex (Leslie McLean) did not reply and BDF tesa stated that it was Tipp-Ex representative for France alone and did not export.

With regard to the behaviour of these exclusive distributors, the Commission has not found sufficient grounds for concluding that Tipp-Ex took action in connection with VIHO's enquiries to induce the exclusive distributors not to give any quotations.

E. The main submissions of the parties concerned

(a) *Tipp-Ex*

- (41) According to Tipp-Ex, prior to 1982 it had no knowledge of Article 85 of the Treaty, Commission Regulation No 67/67/EEC⁽²⁾ or the Decisions published by the Commission and the Court of Justice. Its knowledge of the law was limited to what it understood to be its civil law obligation towards the exclusive distributors to protect the exclusive distribution system.
- (42) In 1982, to prepare the ground for the relationship with Beiersdorf, Tipp-Ex instructed a lawyer to draw up a standard form contract with a view to placing its relations with its exclusive distributors on a 'legally sound basis'. It is from what he said and from the correspondence with Beiersdorf on the subject that Tipp-Ex first learned of the competition law issues.
- (43) Tipp-Ex was then, up to the time of the 'Commission notice concerning Commission

Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements'⁽³⁾, of the opinion that the standard form contract in question fell under Regulation No 67/67/EEC, which was still in force in 1982. However, doubt set in after it learnt of the notice, and it decided to submit the authorized dealer contract to the Commission, but put off doing so in view of the impending investigation by the Commission.

- (44) Tipp-Ex has further submitted that it was not at fault as it relied on the opinion of a lawyer who spent a considerable amount of time dealing with the legal questions involved and commanded commensurately high fees. Tipp-Ex was convinced that in every respect it acted lawfully and with due regard to legitimate interests. The lawyer also advised Tipp-Ex during the drafting of the exclusive distribution agreement and during the negotiations with BDF tesa, assuring it that the contested Articles 14 and 20 of the standard contract were unobjectionable.

(b) *Beiersdorf*

- (45) Beiersdorf has contended that the present version of the authorized dealer contract, which contains an express restriction in relation to supplies to EEC countries only in the first sentence of Article 14 (1) and not in the third sentence of that provision or in Article 20, is a drafting error which was first noticed in the course of these proceedings. It has pointed out that its legal department made identically worded additions to the third sentence of Article 14 (1) and to Article 20 (1) of the draft contracts submitted by Tipp-Ex on 5 November 1982 and 8 February 1983. In the final draft contract then sent by Tipp-Ex to Beiersdorf on 20 July 1983, the amendments to Articles 14 and 20 proposed by Beiersdorf were omitted. This was not noticed, however, by any of Beiersdorf's employees. This explanation, which Beiersdorf gave in its answer to the Statement of Objections of 2 June 1986 and in the hearing on 18 September 1986, does not convince the Commission. It is clear from the record of the hearing that the persons acting for Beiersdorf at the signature of the final text knew which text they were signing and what its content was.

⁽¹⁾ OJ No L 173, 30. 6. 1983, p. 1.

⁽²⁾ OJ No 57, 25. 3. 1967, p. 849/67.

⁽³⁾ OJ No C 101, 13. 4. 1984 p. 2.

- (46) Finally, at the hearing on 18 September 1986 Beiersdorf submitted the addendum to the authorized dealer contract which had been adopted in the meantime, and by which the contested provisions of Articles 14 and 20 were amended. On 11 September 1986 Tipp-Ex made known its intention of reapplying for negative clearance.

(c) *The other parties concerned*

- (47) Burotex, Esveha-Rijam and Tipp-Ex (Leslie McLean) have contended in essence that, where they did not react to enquiries by ISA France or VIHO regarding supplies, they had passed on these enquiries to Tipp-Ex. They had entered into no obligations *vis-à-vis* Tipp-Ex regarding these customers and in future they would comply fully with the EEC competition rules.

II. LEGAL ASSESSMENT

A. Article 85 (1)

The agreements

- (48) Tipp-Ex and its exclusive distributors and dealers in the Community ([...], Beiersdorf, Burotex, Esveha-Rijam and Tipp-Ex [Leslie McLean]) are undertakings within the meaning of Article 85. The partly oral, partly written agreements between Tipp-Ex and these exclusive distributors and dealers, including the 'authorized dealer contracts', are agreements within the meaning of that Article. The written agreements were entered into with the content set out in Articles 14 and 20. The signatories were aware of the content of the agreement and were willing to commit themselves accordingly. The measures which Tipp-Ex has taken at least since 1979 in the exercise and on the basis of its contractual relations with its exclusive distributors and dealers in order to prevent parallel imports into the Member States of the Community are to be considered an integral part of those agreements.
- (49) As the Court of Justice has held in several judgments (cf., in particular, judgment of 25 October 1983 in Case 107/82 *AEG-Telefunken* ⁽¹⁾, and Judgment of 17 September 1985 in Joined Cases 25 and 26/84 *Ford-Werke* ⁽²⁾), the conduct of an undertaking does not constitute a unilateral act outside the scope of Article 85 where it forms part of the contractual relations between the undertaking and its dealers.

An agreement was entered into between Tipp-Ex and its authorized dealers. All authorized dealers adopted Tipp-Ex's ideas regarding the mutual protection of territories and hence these became an integral part of the agreement. It is immaterial whether or not that business policy coincides with the dealers' own interests.

- (50) This conduct on the part of Tipp-Ex and its dealers amounts at least to a concerted practice within the meaning of Article 85 (1).

The restrictions of competition

- (51) The agreements and concerted practices restrict competition as they are designed to prevent customers from exporting. This is clear, in the case of the written agreements, from the very wording of Articles 14 and 20 of the authorized dealer contracts and, in the case of the oral agreements, from the manner in which they have been implemented at least since 1979.
- (52) Tipp-Ex has made the supplying of its dealers in the Federal Republic of Germany, and of its exclusive distributors in France, Belgium, the Netherlands and the United Kingdom, dependent on their supplying no customers who are known or who are believed, in the light of the surrounding circumstances, to resell the goods in other Community Member States. Tipp-Ex has repeatedly given expression to this policy aimed at affording exclusive distributors absolute territorial protection. Moreover, Tipp-Ex has exerted strong pressure on individual dealers and in particular on (...), threatening them with, and even imposing, sanctions in order to prevent them from supplying the complainant, ISA France, who was known to be a parallel importer. (...) yielded at least partly to this pressure. Pressure was also brought to bear indirectly on the other exclusive distributors via an information campaign. They were meant to interpret Tipp-Ex's communications concerning the (...)/ISA France cases as a serious warning not to sell to parallel importing or exporting dealers. The continuation of contractual relations between Tipp-Ex and the exclusive distributors Burotex, Esveha-Rijam and Tipp-Ex (Leslie McLean) is proof that these undertakings were prepared to accede to Tipp-Ex's wishes.
- (53) Since it took over the exclusive distributorship in France on 4 January 1982, Beiersdorf also supported, at least for a while, the market-partitioning measures taken by Tipp-Ex. This was especially the case during the second half of 1982.

⁽¹⁾ (1983) ECR 3 151.

⁽²⁾ Not yet reported.

(54) The Commission does not doubt that the withdrawal of the special terms for ISA France was

based among other things on distribution policy considerations. Beiersdorf intended to bring the particularly favourable terms granted to ISA France into line with those granted to comparable wholesalers so as not to place the latter at a disadvantage and in order to make distribution in France more broad-based. ISA France had and has no right under Community law, by reason of its involvement in trade between Member States, to be treated more favourably than other dealers with a comparable sales performance.

- (55) According to Beiersdorf, however, this adjustment was to be brought about gradually, as at the beginning of 1982 ISA France was a major purchaser of Tipp-Ex products in France. Beiersdorf was therefore prepared initially to continue supplying ISA France on the same particularly favourable terms in return for an undertaking that it would not export to the Federal Republic of Germany or to the contract territories of other exclusive distributors. Only after ISA France had manifestly failed to observe this restriction did Beiersdorf force its French subsidiary to withdraw the special terms in their entirety and with immediate effect (cf. point 32 above).
- (56) Beiersdorf stated at the hearing that the withdrawal of the special terms was based solely on distribution policy considerations. The Commission does not agree. Following various measures by the firm's owner, Beiersdorf was aware of the importance Tipp-Ex attached to preventing the 'market disturbances' caused by ISA France. As Beiersdorf set great store by good relations with its new contracting partner, there was an understanding between the parties that ISA France should no longer have the opportunity of exporting to other EEC Member States. That there was such an understanding in clear *inter alia* from the fact that Beiersdorf sent a copy of the internal instructions to BDF tesa to the owner of Tipp-Ex (cf. point 33 above).
- (57) Although the withdrawal of the special terms was based on an obviously rational distribution strategy in the medium term, the measures taken from May 1982 until early 1983 were also the subject of an agreement or a concerted practice between Beiersdorf and Tipp-Ex. It was thus not a purely subjective secondary aim of the distribution measures taken, but rather an aim relevant from the point of view of competition about which there was an understanding between the parties and which is significant in its own right irrespective of any sales considerations.
- (58) A further means used by Tipp-Ex to bring about absolute territorial protection was to require detailed proof of the identity of the final recipients of goods supplied and of the carrying out of the

post-delivery checks requested by Tipp-Ex. Tipp-Ex clearly made the point to its exclusive distributors (see point 19).

- (59) The Commission's findings as to the obstacles actually raised permit the conclusion to be drawn that the agreements and concerted practices had not only as their object but also as their effect an appreciable restriction of competition within the common market.

The authorized dealer contracts in particular

- (60) Pursuant to Article 20 (1) of the authorized dealer contracts concluded with Beiersdorf and Tipp-Ex (Leslie McLean), Tipp-Ex is obliged to refrain from supplying goods covered by the contract to independent distributors who are known or who can be assumed in the light of the surrounding circumstances to want to resell the goods in the territory allotted to an exclusive distributor. This amounts in effect to an obligation on the part of Tipp-Ex to prohibit independent distributors from exporting the goods supplied to them. Under paragraph 2 of that Article, Tipp-Ex undertakes to impose on its exclusive distributors in general the obligations laid down in Article 14 of the standard form contract.
- (61) Article 14 provides that exclusive distributors are obliged 'not to sell the contract goods to customers having their place of business outside the contract territory with the exception of EEC Member States' (paragraph 1). With regard to EEC Member States not included in the territory allotted, both companies undertake not to engage in active sales efforts in those countries (paragraph 2). The third sentence of paragraph 1 provides, moreover, that: 'the Authorized Dealer furthermore undertakes not to sell the contract goods to customers who to his knowledge intend to resell them in areas outside the contract territory.' According to its literal meaning, but also in the light of the structure of Article 14 (1), this additional obligation relates quite clearly both to third countries and to EEC Member States. It, too, amounts in effect to an obligation on the part of the exclusive distributor to prohibit his customers from exporting the goods supplied to them.
- (62) The provisions of Articles 20 and 14 of the standard form contract are obviously aimed at conferring absolute territorial protection on Tipp-Ex in the Federal Republic of Germany and on exclusive distributors in their allotted territories. They are designed to prevent dealers, such as the complainants, who are known to wish to resell the contract goods in other territories, from obtaining supplies. Lastly, they are intended to prevent parallel importers from obtaining their requirements directly from the exclusive distributors in other territories or

from the trade in the Federal Republic of Germany.

Effect on trade between Member States

- (63) The agreements and concerted practices between Tipp-Ex and its exclusive distributors in the Community and the authorized dealer contracts concluded in 1983 were and are capable of affecting trade between Member States by limiting parallel imports and exports.
- (64) Article 85 (1) therefore applies both to the agreements and concerted practices between Tipp-Ex and its exclusive distributors in the form in which they have existed at least since 1979, and to the authorized dealer contracts dating from 1983.

B. Regulation No 67/67/EEC

- (65) Article 1 (1) of Regulation No 67/67/EEC provides that exclusive distribution agreements are in principle exempted from the prohibition in Article 85 (1) where they satisfy the conditions laid down in that Regulation. Regulation No 67/67/EEC expired on 1 July 1983; Article 7 of Regulation (EEC) No 1983/83 provides, however, that the rules contained therein continue to apply until 31 December 1986 to agreements which were concluded before 1 January 1984.
- (66) In the form in which they have been applied at least since 1979, the exclusive distribution agreements do not qualify for exemption under Regulation No 67/67/EEC as they impose on the parties obligations restrictive of competition which go beyond the restrictions that are permissible under Article 1 (1) and Article 2 (1) of that Regulation.

Furthermore, the agreements are likely to limit the opportunities for intermediaries and final consumers to obtain Tipp-Ex products from other intermediaries in the common market. According to Article 3 (b) of the Regulation, this renders the Regulation inapplicable.

- (67) Nor do the authorized dealer contracts dating from 1983 satisfy the conditions laid down in Regulation No 67/67/EEC. Article 20 (1) and (2) and the third sentence of Article 14 (1) seek to confer on the contracting parties an extensive territorial protection which is not provided for in Regulation 67/67/EEC. Whilst, pursuant to Article 1 (1) (a) of the

Regulation, the obligation on the manufacturer to supply goods only to the exclusive distributor within the latter's allotted territory is exempted, the same is not true of the obligation contained in the authorized dealer contract to protect the exclusive distributor and the manufacturer also from indirect competition from parallel importing traders.

- (68) On the other hand — contrary to the view taken by the complainants — nothing in the above points to there being a general right to be supplied by the manufacturer. Where the manufacturer, for business reasons, decides not to supply a dealer established in the territory of an exclusive distributor ex-works, this is unobjectionable provided other sources of supply are available to the dealer in the common market (cf. also Article 3 (b) of Regulation No 67/67).

C. Article 85 (3)

- (69) It was not until 7 March 1985, i.e. after the Commission had completed its investigation, that Tipp-Ex submitted an application for negative clearance under Article 2 of Regulation No 17 and notified the standard form authorized dealer contract as a precaution under Article 4 of that Regulation. According to Article 6 of the Regulation, a decision granting exemption may not cover the period prior to notification.
- (70) The standard form contract notified on 7 March 1985 does not fulfil the conditions for exemption under Article 85 (3). In particular, it is not apparent that restricting the opportunities for parallel importing or exporting traders to compete (cf. points 60 to 62 above) is indispensable to the attainment of the objective of improving the distribution of goods.

D. Article 3 of Regulation No 17

- (71) Article 3 (1) of Regulation No 17 provides that, where the Commission finds that there is infringement of Article 85, it may by decision require the undertakings concerned to bring such infringement to an end.
- (72) It appears to be necessary to require Tipp-Ex and its exclusive distributors in France, Belgium, the United Kingdom and the Netherlands to bring the infringements established to an end and to undertake not to take any measures which have the same object or effect. The requirement that the infringements be

brought to an end does not apply to the agreements and concerted practices between Tipp-Ex and (...), as these were terminated with the elimination of (...) on 31 December 1981. This Decision has not, therefore, been addressed to (...).

E. Article 15 (2) of Regulation No 17

- (73) Article 15 (2) of Regulation No 17 provides that the Commission may by decision impose on undertakings fines of from 1 000 to one million ECU, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) of the Treaty. In fixing the amount of the fine, regard must be had both to the gravity and to the duration of the infringement.
- (74) The Commission takes the view that the imposition of a fine on Tipp-Ex is justified in the present case. The infringement of Article 85 (1) was intentional. Tipp-Ex knew that the agreements and concerted practices were designed to prevent parallel imports or exports and to ensure absolute territorial protection. It was therefore in no doubt as to whether the requirements of the prohibitory provision were met, especially since the Commission and the Court of Justice have established the illegality of such agreements in a long line of decisions.
- (75) In determining the fine to be imposed on Tipp-Ex, the Commission has taken account, in particular, of the following factors:
- (a) The acts forming the subject-matter of this Decision constitute a serious infringement of the competition rules of the EEC Treaty as they substantially impede the integration of the markets in the Community;
 - (b) The infringement consisting in active steps to partition markets lasted at least from 1979 until 1982;
 - (c) Tipp-Ex is a medium-sized firm which went to great trouble and expense to penetrate the European markets;
 - (d) Tipp-Ex tried in 1982 to place its relations with its exclusive distributors on a legally sound basis by entrusting to a legal adviser the task of drawing up an authorized dealer contract, which was concluded for the first time in late 1983.

On the other hand, Tipp-Ex disregarded the amendments repeatedly made by Beiersdorf concerning the additional restrictions in the third sentence of Article 14 (1) and Article 20 (1) relating to EEC Member States;

- (e) Tipp-Ex expressed its readiness during the investigation to discontinue any practices which were found to be incompatible with the competition rules of the EEC Treaty and to amend, if necessary, the relevant provisions of its authorized dealer contracts.
- (76) A fine should also be imposed on Beiersdorf AG. The latter took part actively during the second half of 1982 in Tipp-Ex's market-partitioning measures. The persons responsible were manifestly aware that the measures taken were incompatible with Article 85 and were in any case designed to prevent parallel imports and exports by ISA France. The position is not altered by the fact that it was much in Beiersdorf's own interest gradually to increase selling prices to ISA France (cf. points 29 and 30 above), which must have led indirectly to ISA France ultimately having less latitude for engaging in parallel exporting. It is clear from its own records that Beiersdorf took the measures that were in fact taken in response to a request from Tipp-Ex and in agreement with the latter, and that those measures were also aimed indirectly at preventing ISA France from engaging in parallel exporting.
- (77) Nor is the position altered by the fact that, during the negotiations over the authorized dealer contract, Beiersdorf proposed that it be amended to bring it into line with Regulation No 67/67/EEC. For one thing, the authorized dealer contract was not concluded until December 1983, and for another the parties acted, not on the basis of the distribution agreement that was to be concluded, but on a basis of actual collaboration between the owner of Tipp-Ex and the managerial staff of Beiersdorf's tesa product division.
- (78) Moreover, the Commission is well aware that Beiersdorf's responsibility for the carrying out of the restrictions on competition is considerably mitigated by the fact of Beiersdorf's having given way under pressure from Tipp-Ex.
- The Commission has taken account of this subordinate role and considers that a much lower fine should be imposed on Beiersdorf than on Tipp-Ex.
- (79) It is not proposed to fine the other exclusive distributors. These are small firms which followed the policy pursued by Tipp-Ex only partially and with reluctance and only under considerable pressure. In view of the energy with which Tipp-Ex combatted the parallel trade, they must have feared that if they did not fall into line Tipp-Ex would

withdraw their sole selling rights, as did in fact happen in the case of (...). Moreover, beyond the general agreement with Tipp-Ex's policy, it has not been established that these exclusive distributors actually collaborated with Tipp-Ex in withholding supplies from the two complainants,

- | | |
|--|--|
| (a) Account
No 262.00.64910
Sal. Oppenheim & Cie
Untersachsenhausen 4
D-5000 Köln; | Commission of the
European Communities,
Brussels — ECU
(for payments in ECU); |
| (b) Account
No 260.00.64910
Sal. Oppenheim & Cie
Untersachsenhausen 4
D-5000 Köln | (for payments in DM). |

HAS ADOPTED THIS DECISION:

Article 1

The agreements and concerted practices between Tipp-Ex on the one hand and the exclusive distributors Beiersdorf, Burotex, (...), Esveha-Rijam and Tipp-Ex (Leslie McLean) on the other, concerning the discontinuance of sales to customers who resell the contract goods in other Member States, constitute infringements of Article 85 (1) of the EEC Treaty.

Article 2

The undertakings concerned shall forthwith bring the infringements referred to in Article 1 to an end in so far as they still exist, and shall refrain from taking any measures which may have the same object or effect.

Article 3

An exemption under Article 85 (3) of the EEC Treaty for the standard form authorized dealer contract notified on 7 March 1985 is hereby refused.

Article 4

The following fines are hereby imposed on the undertakings named below:

- Tipp-Ex Vertrieb GmbH & Co KG, a fine of 400 000 ECU,
- Beiersdorf AG, a fine of 10 000 ECU.

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

After three months, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, that is 10 %.

Should payment be made in the national currency of the abovementioned undertakings, the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 5

This Decision is addressed to:

1. Tipp-Ex Vertrieb GmbH & Co KG,
Eschborner Landstraße 135,
D-6000 Frankfurt/M. 94;
2. Beiersdorf AG,
Unnastraße 48,
D-2000 Hamburg 20;
3. Burotex SA,
Tollaan/Av. du Péage 65,
B-1940 St. Stevens-Woluwe;
4. Esveha-Rijam BV,
NL-2400 AE Alphen a/d Rijn;
5. Tipp-Ex (Leslie McLean) Limited,
5, Crawley Hill,
GB-Camberley-Surrey GU 15 2DD.

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

Done at Brussels, 10 July 1987

For the Commission

Peter SUTHERLAND

Member of the Commission

COMMISSION DECISION

of 13 July 1987

relating to a proceeding under Article 85 of the EEC Treaty
(IV/32.034 — Computerland)

(Only the French text is authentic)

(87/407/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 Spain and Portugal, and in particular Articles 6 and 8 thereof,

Having regard to the notification and application for negative clearance submitted on 18 September 1986 by Computerland Europe SA ('CLE'), Findel, Grand Duchy of Luxembourg, with regard to the standard form franchise agreement it has developed for the retailing of microcomputer products in Europe,

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

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

Whereas:

I. FACTS

A. General description of the Computerland franchise system

- (1) CLE is a wholly-owned subsidiary of the Computerland Corporation of California (USA). CLE has subsidiaries in France, Spain, the United Kingdom and Italy with varying responsibilities, a subsidiary in Luxembourg which handles the

distribution of products for the franchise network, and various branches, called regional offices, which handle marketing, advertising and public relations and provide on-the-spot support to franchisees, such as assistance in recruiting personnel. The Computerland group has approximately 850 retail stores worldwide. Its operations in Europe started in the late 1970s. Since then, 100 outlets have been established in Western Europe, of which approximately 85 in all of the Member States except Ireland; the largest number of Computerland stores are found in France, the UK and Germany. According to CLE's prognosis, the number of outlets will more than double over the next three years. The average turnover of a Computerland store in the Community is 1,5 million ECU. The turnover of the Computerland group worldwide in 1986 was over one thousand million US dollars.

- (2) Using the Computerland name, trademarks and the Computerland system, Computerland franchisees sell to end-users (predominantly business-users as opposed to home-users) numerous different brands of microcomputer products (hardware, software and peripheral products), and provide pre- and after-sales service and, usually, training facilities. CLE assists franchisees in setting up and running their stores, providing both commercial and technical know-how. Its continuing support services include training, information, advice, guidance and know-how regarding the Computerland methods in store management, operation, financing, advertising, sales and inventory, based on Computerland's extensive empirical experience in the area of retail sales of microcomputer products throughout the world. CLE procures advance information on numerous brands of new products and how they can be used together, and passes this on to franchisees, as well as advice as to which among the many new products are likely to succeed on the market. Franchisees can thus offer their customers a broad range of up-to-date products and well-researched technical advice. In return, franchisees make various financial contributions and are bound by obligations aimed at preserving the uniformity and quality standards of the system.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 114, 29. 4. 1987, p. 2.

- (3) There are approximately 20 major manufacturers of microcomputer products in the world, of which five are estimated to account for the top five market shares on the European market. They use various ways of marketing these products, some of which overlap. Sales can be divided broadly into direct sales by the manufacturers to end-users, on the one hand, which account for 20 % of total sales in Europe, and sales through various types of intermediaries on the other. While some manufacturers use non-specialized outlets such as retailers of consumer electronics, many others, believing that for the time being these sophisticated technical products can only be sold effectively by specialised dealers capable of offering pre- and post-sales service and generally fulfilling certain standards of quality, have chosen to sell through authorized dealers. Such dealers can be independent retailers authorized by one or more manufacturers, or part of a dealer chain offering a broad range of products of different brands, pre-sales advice and after-sales service; some of these dealer chains, such as Computerland, are in the form of franchise networks.

Computerland stores sell the products of approximately half of the major manufacturers, including the five biggest on the European market. Their competitors are thus all retailers of whatever form selling the same or similar products. Leaving aside non-specialized retailers, statistics indicate that there are approximately 10 000 authorized microcomputer dealers in Western Europe, of which less than 1 % are Computerland stores. Although Computerland is the only pan-European chain, there are half a dozen multi-country chains (franchised or not), of which the largest after CLE has some 50 outlets in four countries. Furthermore, there are several single-country chains. In the three Member States in which CLE has its greatest number of outlets (France: 22, United Kingdom: 16, Germany: 12), it is competing with at least half a dozen dealer chains, some having a comparable number of outlets.

In 1985, Computerland stores accounted for less than 3,3 % of retail sales in the Community as a whole, while in 1986 the largest market share in any given Member State was approximately 4 %. Worldwide, the Computerland group has much larger market shares, for example going even beyond 20 % in the United States, Canada, Australia and Japan.

B. Relevant features of the notified standard-form agreement

(4) *Choice and legal form of franchisees*

Franchisees are chosen on the basis of their personal and financial standing and their prior experience in the retail trade, and subject to successful completion of a training programme organized by CLE; employees are also expected to be fully trained in the Computerland system. Every franchisee is obliged to form a corporation for the purpose of running his Computerland store business, and a sign indicating that the franchisee independently owns and operates the business under a franchise from Computerland must be conspicuously posted in the store. The products sold must likewise bear labels indicating the franchisee's name, address and telephone number.

(5) *Use of the Computerland names, trademarks and system*

The franchisee is given the non-assignable right to use the Computerland names, marks and system in connection with the operation of the Computerland store and for no other purpose. In signing the agreement, the franchisee acknowledges the validity of the names and marks and CLE's ownership thereof, but there is no restriction of his right to contest CLE's industrial property rights.

The franchisee agrees to adhere to the standard business operating methods (set out in an 'Operator's Manual') and respect the confidentiality of the information he receives from CLE and to divulge it only, if necessary, to his employees, subject to a written statement in which the latter likewise acknowledge the confidential nature thereof. The franchisee must report to CLE any innovations or improvements he makes, and grants to CLE a worldwide, royalty-free non-exclusive right to use these during the term of the agreement. Upon termination for whatever reason, the franchisee must stop using the Computerland names, marks and system, and return the Operator's Manual and any other copyrighted material, but he may continue using any innovations or improvements he has developed which are demonstrably separable from the operation of the Computerland store and system.

(6) *Best personal efforts*

The franchisee undertakes to devote his best personal efforts to the day-to-day operation of his store; he may not engage in any other type of business at the store without prior written approval by CLE.

withdrawn because of the franchisee's pricing policy, for which he bears sole responsibility.

Franchisees may purchase their requirements from CLE, which exercises a central purchasing function, but they are not obliged to do so, nor are there any minimum purchasing requirements. Franchisees are thus free to buy approved products from any supplier they choose.

(7) *Location clause and protected area*

The franchisee must operate his Computerland store exclusively at the location approved in advance by CLE, but he is not obliged to make 'over-the-counter' sales, i. e. customers do not actually have to buy the products in the store itself. He must adhere to CLE's instructions regarding the interior and exterior of the premises and may not relocate without its prior approval.

CLE leaves franchisees free to determine their own resale prices; franchisees may, of course, receive recommended resale price lists from their other sources of supply.

Each location is surrounded by a 'protected area' having a radius of less than one kilometre after the first year of the agreement (during the first year it is double that distance) in which no other Computerland outlet may be established.

The protected area is not one of marketing or clientele exclusivity, which means that any franchisee can sell to any end-user customer, wherever the customers may reside or do business. They can also set up so-called 'satellites', which offer showroom and selling facilities and can be inside or outside the 'mother store's' protected area, but not in the protected area of another Computerland franchisee. For stocking and servicing purposes and other operational support, such satellite outlets remain dependent on the Computerland store to which they are contractually attached.

(9) *Training facilities*

Most franchisees provide training facilities at the approved location, although there is no obligation to do so. Customers may sign up for training courses even without purchasing any of the franchisee's products. In general, the revenue derived from operating these training facilities, over which the monthly royalty must be paid, represents a very limited percentage of the franchisee's overall turnover.

(8) *Products and services — advertising/pricing policy*

The franchisee may only sell those products and perform those services specifically authorized in the Operator's Manual or in other instructions from CLE, or products and services of equivalent quality, subject to prior approval by CLE, which will not be unreasonably withheld. Franchisees play an active role in establishing the range of products they sell, *inter alia* by participating in regular meetings of the 'European Network Product Council', where proposals can be made to CLE to authorize new products.

Advertising material must be made or approved by CLE, but approval may not be withheld or

(10) *Sales to end-users*

The Computerland system has been devised and developed to promote sales of microcomputer products at retail level. Franchisees are accordingly required to sell to end-users, unless otherwise authorized. Sales to other Computerland franchisees are expressly allowed. Furthermore, the obligation to sell to end-users does not prevent a franchisee from carrying out his obligations or exercising his rights under agreements he may have with any manufacturer as its authorized dealer.

(11) *Financial obligations/reporting requirements/right to inspect*

In return for being admitted into the Computerland franchise network, the franchisee must pay an initial entrance fee which varies between Lfrs 250 000 (5 800 ECU) and Lfrs 1 250 000 (28 750 ECU), depending on the type of outlet. Subsequently, a monthly royalty payment amounting to 3,5 % of the

preceding month's gross revenue, which is any income, from which certain items, such as VAT and interfranchisee sales, are deducted. Normally, a monthly payment is also made as an advertising contribution. Franchisees must submit regular financial statements including balance sheets and profit-and-loss statements, and CLE's representatives must be allowed into the premises during working hours in order to inspect the operation of the store, including the quality of the goods being sold, the supplies on hand and the services rendered.

(14)

Term and renewal

The term of the agreement is 10 years, unless terminated by mutual consent. Both franchisor and franchisee have the right to terminate unilaterally 'for good cause', with regard to which a non-exhaustive list of examples is given in the agreement.

Renewal for a further 10-year period is possible subject to certain conditions, including payment of a renewal fee.

Transfer of the agreement to third parties must be consented to by CLE.

On termination for whatever reason, CLE may choose to have assigned to it the franchisee's lease.

(12)

Non-competition clauses

During the term of the agreement, the franchisee may not engage or have an interest in any business whose activities include the sale or service, at retail or wholesale level, of computer hardware, software and related products and services offered by Computerland stores. The franchisee must, however, remain free to acquire financial interests in the capital of a competing enterprise, provided such investment does not enable him effectively to control such a business.

Under the agreement as notified, the above non-competition obligation continued for three years after termination of the agreement at a given distance from the ex-franchisee's former outlet, for two years after termination at a given distance from any Computerland store and for one year after termination at any location. Following discussions with the Commission in the course of the notification procedure, CLE decided that a non-competition obligation of one year after termination of the agreement within a radius of 10 kilometres of the ex-franchisee's former outlet would be sufficient to safeguard the confidentiality of the know-how transmitted to the ex-franchisee during the term of the agreement and to allow a new Computerland store to be established and start accumulating good-will and clientele in the ex-franchisee's former zone of business activities.

C. Other Computerland agreements

(15) Some Computerland franchisees have chosen not to replace their existing contracts with the notified standard form agreement which was introduced in 1983, for varying reasons, such as the royalty level, the size of the protected area or other reasons not relevant for the present purposes. CLE has undertaken to ensure that to the extent these agreements, which are not standard, contain obligations which might be considered as being more restrictive of competition than their counterparts in the notified standard agreement, the necessary adaption will take place.

(16) The same undertaking applies with respect to the special standard franchise agreement developed in 1986 for the German market in order to facilitate State-backed financing arrangements for the franchisees, which entails prior approval of the agreement by the lending bank.

(17) For Denmark and the Italian province of Tuscany, CLE has devised a slight variation to the standard agreement, 'Development Area Agreements', whereby a single enterprise is granted the exclusive right to open a fixed number of Computerland stores in a designated area over a limited period of time. This form of agreement is chosen for areas in which there are no existing Computerland stores and a franchisee is willing to take on the high economic risk of single-handedly setting up several stores in an

(13)

Guarantees

CLE will only agree to sell a manufacturer's products if they are covered by a Europe-wide guarantee of at least six months. Products which franchisees acquire from other sources, for example directly from the manufacturer, must be covered by each manufacturer's respective guarantee, otherwise approval by CLE will be withheld.

undeveloped market. In return, he receives the abovementioned exclusivity, unless the timetable is not met, in which case CLE is again free to grant third parties the right to open stores in the area. These special agreements are an exception to the rule that a franchisee normally operates only one shop, and also offer a wider protected area to the successful developing franchisee. The Development Area Agreements do not impose any obstacles to exports or imports.

D. Third parties' observations

- (18) The Commission did not receive any observations from interested third parties following publication of the notice required by Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1)

- (19) The standard franchising agreement notified by CLE is an agreement within the meaning of Article 85 (1) of the EEC Treaty. The individual franchisees who have entered into the standard agreement with CLE, a corporation under Luxembourg law, are the proprietors of their business and carry out economic and commercial activities at their own risk; the agreement is an instrument legally binding upon the parties.
- (20) Both the Court of Justice ⁽¹⁾ and the Commission ⁽²⁾ have been called upon to assess the applicability of Article 85 to distribution franchises, that is, franchise agreements under which the franchisee offers certain products and ancillary services, using the franchisor's business name and applying uniform business methods developed by the franchisor, usually subject to certain financial contributions. The main principle established by the Court, and followed by the Commission in its subsequent

decisions, is that such franchise systems, which on the one hand allow a franchisor to profit from its success and expand into new geographical markets without making significant investments and on the other hand enable interested candidates to use the franchisor's name and reputation to set up a new business more easily and rapidly than if they had to acquire the necessary expertise independently, are not in themselves caught by Article 85 (1) where competitive market conditions prevail. The applicability of Article 85 (1) can, however, not be determined in the abstract, but depends on the specific provisions concerned.

An effective transfer of the business formula can only take place:

- (i) if the franchisor is able to communicate his know-how to the franchisees and provide the necessary assistance without running the risk that competitors may benefit therefrom;
- (ii) if the franchisor is able to take the necessary measures for maintaining the identity and reputation of the network bearing his business name or symbol.

All contractual provisions which are necessary to ensure that these conditions are met can be deemed to fall outside the scope of Article 85 (1). Other provisions, in particular those which may lead to market sharing between the franchisor and the franchisees, or between the latter, or those which interfere with the franchisees' individual pricing policies, may on the contrary be considered restrictions of competition.

- (21) The franchise network set up by CLE by means of the notified standard franchise agreement is a distribution franchise: the franchisor has devised an original method for selling microcomputer products and accessories to end-users, which in the interest of expansion it is willing to share with others, the franchisees. In return for receiving the package of Computerland's specifically developed commercial and technical know-how and the use of the franchisor's business name, trademarks, symbols and business methods, franchisees must make certain financial contributions and adhere to the standards of operation devised by the franchisor. Although franchisees offer pre- and after-sales advice and make product repairs, such services are ancillary to their main task, which is the sale of products to the public. Furthermore, some franchisees may also choose to offer training facilities, not necessarily in connection with the sale of products. This service normally represents a minor part of their activities and can be viewed as a means of developing goodwill.

⁽¹⁾ See Court of Justice of the European Communities, 28. 1. 1986, Case 161/84 (*Pronuptia*), not yet reported.

⁽²⁾ See Commission Decisions 87/14/EEC, '*Yves Rocher*', OJ No L 8, 10. 1. 1987, p. 49, and 87/17/EEC, '*Pronuptia*', OJ No L 13, 15. 1. 1987, p. 39.

Having thus established that the Computerland system is a distribution franchise, the following tests can be applied.

PROVISIONS NOT FALLING WITHIN THE SCOPE OF ARTICLE 85 (1)

In the specific circumstances of this case, the following provisions are not caught by Article 85 (1).

a. Provisions aimed at preventing the know-how and other assistance given by the franchisor from benefiting competitors

(22) (i) The franchisee's obligation to respect the confidentiality of the information received and to ensure that his employees do the same;

(ii) The franchisee's obligation not to carry on competing activities during the term of the agreement; at the Commission's request, the scope of the non-competition clause was adjusted so as to allow franchisees to acquire financial interests in the capital of competing undertakings, although not to the extent that such participation would enable them to control those undertakings;

(iii) The franchisee's obligation not to engage in competing activities for one year after termination of the agreement within a radius of 10 kilometres of his previous outlet. The post-term non-competition obligation which was included in the agreement as notified was considered to be unreasonably broad as regards both duration and geographical extent, but as amended the clause is deemed sufficient to prevent the ex-franchisee from using the know-how and clientele he has acquired to the benefit of CLE's competitors. Also, given the time it takes CLE to choose, train and establish a new franchisee and for the latter to start acquiring goodwill and clientele, the clause as modified is a reasonable compromise between the franchisor's concern to protect the confidentiality of his business formula and to open a new outlet in the ex-franchisee's former exclusive territory on the one hand, and the ex-franchisee's legitimate interest in continuing to operate in the same field on the other hand. In view of the fact that, during the term of the agreement, a franchisee is not bound to over-the-counter sales and is furthermore free to sell anywhere, he can develop goodwill and clientele far beyond his own protected area; during the one year in which the post-term

non-competition obligation is in force, he can thus continue to reap the benefits of the efforts he has made as a franchisee, only being prevented from competing during that period in the vicinity of his former outlet.

The post-term non-competition clause is thus in the particular circumstances of this case not considered to be restrictive of competition within the meaning of Article 85 (1). This assessment does not prejudice any provisions of national law which may bestow certain rights on franchisees upon termination of the contract.

b. Provisions which allow the franchisor to safeguard the identity and reputation of the network bearing his business name or symbol

(23) (i) The criteria which CLE applies in selecting franchisees and their obligation to follow training courses and to familiarize employees with the Computerland system are justified means of ensuring that every Computerland outlet is managed in keeping with the business standards developed by the franchisor; the same concern underlies the provision that transfer of the agreement to third parties can only take place with CLE's consent;

(ii) The franchisee's obligation to use the Computerland names, trademarks and system only for the operation of the Computerland store and to stop using them immediately upon leaving the network are aimed at ensuring that the network image is not tarnished by activities not developed specifically by the franchisor; at the Commission's request, however, ex-franchisees are now expressly entitled to continue using innovations or improvements they have developed which are demonstrably separable from the Computerland system;

(iii) The franchisee's obligation to adhere to the franchisor's standard business methods is an inherent part of the franchise system and ensures the standards of uniformity and quality of the network;

(iv) The franchisee's obligation to devote his best personal efforts to the day-to-day operation of his store is necessary to ensure that the business methods developed by the franchisor are properly and fully applied; his obligation in principle not to engage in any activities in his store which are not included in the business formula transmitted by the franchisor, is acceptable in the light of the concern to preserve the reputation and uniform identity of the network;

(v) The franchisee's obligation to obtain the franchisor's prior approval for the location of his store, and to adhere to the franchisor's instructions regarding its interior and exterior aspects, is aimed at ensuring the reputation of the network, which is a concern not only of the franchisor but of every franchisee. In the Operator's Manual, CLE outlines the objective criteria it uses in site approval, such as the structure and dimensions of the building, its location in relation to key intersections and business centres, its accessibility for customers and the nature of the surrounding business centres. The main objective in setting up these criteria for site approval is to ensure that the success of the outlet is not hampered because of a possibly unfavourable location.

(vi) The franchisee's obligation to sell only the products and provide the services authorized by CLE, or products and services of equivalent quality, is necessary to preserve the network's reputation as a source of high-quality microcomputer products mainly for the business community; sales of sub-standard products which do not meet the technical norms applied by CLE would damage the reputation of the network, thereby harming not only the franchisor but all other franchisees as well.

The franchisor's prior approval of the goods and services offered in Computerland stores ensures buyers that they will be able to obtain goods of the same quality from all franchisees, regardless of their location. In the case at hand, given the wide product range (there are over 3 000 items on CLE's product list) and the very rapid technological evolution in this product market, it would be impracticable to ensure the necessary quality control by establishing objective quality specifications which franchisees could apply themselves. In fact, laying down objective standards could be detrimental to the franchisees' freedom to sell the most up-to-date products, unless the specifications were constantly up-dated, an overly burdensome if not impossible task. In the present system, franchisees have a substantial voice in proposing products for approval, in bilateral contacts with CLE as well as collectively in the 'European Network Product Councils', which meet regularly; most products aimed at business users will be approved, and such approval covers all relevant accessories and future improvements; furthermore, should a manufacturer introduce new products of a higher standard than an existing range which has been approved, franchisees do not require prior approval to sell such new products. Also, as CLE's main source of income is derived from royalties on sales of all products by

franchisees, it is in its interest to allow franchisees to sell products which are expected to be commercially successful, as long as they are technically suitable for the customers for which the Computerland network caters.

One essential element in assessing this provision under Article 85 (1) is the fact that once a given product has been approved by CLE, franchisees are free to procure it from any source of supply they wish. Although franchisees may purchase their requirements from CLE, they are not obliged to do so, nor are there any minimum purchasing requirements if they do.

Furthermore, in selecting products which it will itself sell to franchisees, as well as in approving products which franchisees can procure from any source, CLE ensures that a Europe-wide guarantee is given. This policy is in line with the Commission's concern for market integration and consumer protection ⁽¹⁾.

(vii) The franchisee's obligation to use only advertising material made or approved by CLE.

Advertising plays an essential role in the development of a network's reputation. A franchisor therefore has a legitimate interest in ensuring that publicity undertaken by the franchisees will not adversely affect the reputation established by the franchisor. In the present case, the policy regarding advertising is clearly based on a justifiable concern for quality control and not aimed at interfering with the franchisee's freedom to determine his own prices: the notified agreement expressly states that approval of advertising material will not be conditioned on, or subject to any change in, the pricing policy or the price quotations of the franchisee.

(viii) The franchisee's obligation to submit to inspections of the premises by CLE's representatives

⁽¹⁾ See for example Twelfth Report on Competition Policy, points 77 and 78, and Commission Regulation (EEC) No 123/85, OJ No L 15, 18. 1. 1985, p. 16, recital 12.

and to present financial statements allows the franchisor to verify whether the franchisee is operating in accordance with the Computerland business format and fulfilling his financial commitments.

c. Other Provisions

- (24) The franchise system includes a number of provisions which are not relevant to competition and can therefore by their very nature in the present case be excluded from the scope of Article 85 (1):
- (i) The franchisee's obligation to pay entrance fee and subsequent monthly royalty payments and advertising contributions; the financial commitment, which is applied on a non-discriminatory basis, is merely the consideration which the franchisee must pay for being admitted into the network and receiving the resulting rights and benefits; to ensure the possibility of interfranchisee sales, the agreement now specifies that royalties are not payable on such transactions;
 - (ii) The franchisee's obligation to form a corporation, which is based on the consideration that his business dealings will thus be facilitated;
 - (iii) The franchisee's obligation to post a sign on the premises indicating that he is the independent owner thereof, operating under a franchise from CLE, which ensures that the public is in no way misled as to the true ownership of and responsibility for each individual outlet;
 - (iv) The franchisee's obligation to indicate on each product he sells his name and address, which is required solely for the purpose of directing end-users to sales and service assistance;
 - (v) The provisions relating to the term and renewal of the agreement, and the assignment of the franchisee's lease to the franchisor.

The assessment of these provisions is without prejudice to any relevant constraints under national law.

PROVISIONS WHICH CONSTITUTE RESTRICTIONS OF COMPETITION WITHIN THE MEANING OF ARTICLE 85 (1)

- (25) The conjunction of the location clause, which obliges the franchisee to operate from the premises specified in his contract and thus prevents him from

opening further stores, and the exclusivity clause, which assures him of a protected zone in which no other Computerland outlets can be established, either by the franchisor or by other franchisees, results in a certain degree of market-sharing between the franchisor and the franchisees or between the latter, thus restricting competition in the network in which the Computerland business format is exploited.

In the present case, it is particularly the prohibition from opening further outlets which interferes with franchisee's commercial independence: in this context, it is important to take into account the fact that Computerland outlets are generally not one-man operations, but medium-sized enterprises employing on average ten to twenty persons and sometimes even substantially more. For such entrepreneurs, for whom expansion may be a logical and desirable development, the limitation to one outlet unless otherwise authorized is clearly restrictive.

Although franchisees are allowed to operate 'satellite shops' for display and selling purposes, also outside their protected areas, this freedom is only relative, in that prior approval by CLE and payment of a fee similar to the usual entrance fee, albeit reduced, are required. Also, such outlets may not be located in another franchisee's protected area.

- (26) Under the specific circumstances of this case, the franchisee's obligation to sell only to end-users or to other Computerland franchisees unless otherwise authorized is likewise deemed to be a restriction of competition. In certain franchise systems, for example where franchisees sell products bearing the franchisor's name and/or trademark, the prohibition on resale by franchisees to resellers who do not belong to that franchise network is based on the legitimate concern that the name, trademark or business format could be damaged if the contract products were sold by resellers who do not have access to the franchisor's know-how and are not bound by the obligations aimed at preserving the reputation and unity of the network and its identifying marks.

In the case at hand, however, the Computerland name and trademark cover the business format as such, but not the microcomputer products being sold, which bear the name and trademark of each individual manufacturer. The prohibition on Computerland franchisees to sell the products to

otherwise qualified resellers is thus restrictive, both as regards the franchisees themselves, who while being independent entrepreneurs are thereby limited in their freedom in deciding to whom to sell, and as regards third party resellers, who are thereby deprived of a possible source of supply.

In the present case, this restriction is mitigated by a characteristic which is peculiar to sales in the microcomputer field, namely the fact that retailers can be part of a franchise network such as Computerland and at the same time be appointed an authorized dealer in a selective distribution system established by a manufacturer to ensure that his products are handled only by qualified resellers. A Computerland franchisee who thus operates simultaneously in two or more different networks must be in a position to fulfil the obligations and exercise the rights which flow from each one. In this context, the Commission has sought to ensure that a Computerland franchisee who is at the same time authorized by one or more manufacturers, can function both within the Computerland network and within the selective distribution network(s) to which he belongs.

- (27) The provisions which lead to market sharing within the network and the obligation to sell to end-users are liable to affect intracommunity trade, because franchisees are not free to expand their operations to other Member States, either at retail or wholesale level. This effect on trade between Member States is liable to be appreciable, in view of:

- the expanse of the existing Computerland network, which is the only one of its kind having outlets in all Member States except Ireland (where two outlets are, however, planned for the near future),
- the growth of the network: although the market share has not yet reached the 5 % mark in the EEC, the rate of growth which the network has experienced already in its first years of existence in Europe should lead to substantial expansion in the years to come. Indeed, sales by the network will probably increase more rapidly than the current trend, in view of the expected increase in the total number of outlets before 1990 to more than 150,
- the fact that the products sold by Computerland stores are those of the most important European and worldwide manufacturers.

In view of the above considerations, the notified standard agreement is deemed to fall within Article 85 (1).

- (28) The 'Development Area Agreements' referred to above under point 17, which contain similar provisions to the standard form agreement regarding location clause, protected area and sales to end-users, are accordingly likewise deemed to be restrictive of competition.

B. Article 85 (3)

- (29) The block exemption regulations relating to exclusive dealing and exclusive distribution agreements⁽¹⁾ are not applicable to distribution franchise agreements such as the one at hand, which go beyond the category of agreements covered by those regulations⁽²⁾. The characteristics which are typical of distribution franchises, such as the franchisee's right to use the franchisor's business name and symbol in return for certain financial contributions and the obligations to adhere to uniform business standards developed by the franchisor, are not referred to in either block exemption regulation. The notified agreement must therefore be examined in the light of the conditions laid down in Article 85 (3) for exemption on an individual basis.
- (30) Distribution in the field of microcomputer products is improved by the Computerland system, since the franchisor, who acts as a link between the main microcomputer producers and the franchisees, is able to establish outlets throughout the Community without any major financial investments, while franchisees are closely assisted in rapidly setting up and operating retail outlets in which a wide range of products and services are offered. Given the technical nature of the products in question and the fact that they are normally not sold as single items but as part of a range, potential buyers attach particular importance to trying out different systems and receiving pre-sales advice regarding possible

⁽¹⁾ Commission Regulation No 67/67/EEC, OJ Nr. 57, 25. 3. 1967, p. 849/67, and its successor, Commission Regulation (EEC) No 1983/83, OJ No L 173, 30. 6. 1983, p. 1.

⁽²⁾ Case 161/84 (Pronuptia), points 15 and 33.

applications and configurations and post-sales repair and maintenance services. Furthermore, the franchise system promotes both intra-brand and interbrand competition: the products offered are also sold via specialized dealer networks set up by the manufacturers as well as various other types of outlets, and the Computerland stores thus offer an alternative source of supply which stimulates competition, and thereby distribution, at retail level. Moreover, Computerland franchisees are free to compete with each other, also as regards the prices at which they sell to customers, which equally enhances the distribution of the products concerned.

- (31) The Computerland system also contributes to rationalizing distribution: CLE takes orders from franchisees, buys the products from manufacturers or other sources of supply and resells them to the franchisees, thereby rapidly channeling the products concerned to the Computerland outlets. This central purchasing function enables CLE to negotiate favourable terms for its franchisees, with respect to prices and quantities supplied, and often allows franchisees to procure the products in question much sooner than other retail sellers.

- (32) The benefits resulting from the improvement and rationalization of distribution accrue directly to consumers, which in this case are mainly professional end-users.

In the first place, the Computerland stores provide a single location at which customers can compare the prices and characteristics of a wide range of different brands of up-to-date microcomputer products and benefit from the advice of specially trained personnel especially as regards the possibility of using different brands of products together, and the training facilities offered. Customers who decide to buy their products at the Computerland outlet are ensured of further advice, maintenance and repair services and if necessary further training possibilities.

Secondly, the Computerland system offers consumers an expanding network of outlets at which they can buy microcomputer products. Computerland stores compete directly with the numerous other outlets selling the same products, with the result that all retailers should, because of the pressures of heightened competition, offer better quality, services and prices.

- (33) The restrictions of competition which the Computerland system entails are indispensable to ensure the existence of the network: potential franchisees would not be willing to make the

investments necessary for opening up a new outlet if they were not assured that no other Computerland outlets will be established in their near vicinity. Aside from the restrictions which are thus the necessary cornerstone of the franchise system, franchisees are free as to the sources from which they procure approved products, the prices at which they wish to sell those products, the territories in which they operate, and the clientele they cater to.

- (34) The franchisee's obligation to sell to end-users only, unless otherwise authorized by the franchisor, is a direct consequence of the fact that the basic concept underlying the franchisor's business formula is the operation of a network of retail stores in which products and services are offered to final consumers. The training and support services given to franchisees, who are willing to pay a fee in return, are therefore specifically aimed at helping them to become and remain efficient and profitable retail sellers. The Computerland business formula and all the efforts put into making it successful would be diluted if franchisees were free to divert their efforts to activities other than retail sales and servicing. In order for the benefits relating to improved and rationalized distribution to accrue and be passed on to consumers, in this case business users, it is therefore indispensable that franchisees accept the obligation to operate as retail sellers and not, for example, as wholesalers.

An important relaxation of this rule is the express freedom of franchisees to sell to other franchisees within the network; no royalties are due in the case of such interfranchisee sales.

- (35) The Computerland franchising system does not afford its members the possibility of eliminating competition in respect of a substantial part of the products concerned.

Computerland franchisees offer products which are at the same time sold by a very large number of competing outlets. Even in the Member States in which the greatest number of Computerland stores are located, they are faced by competing chains having a comparable number of outlets. Finally, given the overall competitive structure of this market, there is no danger that the Computerland network will reduce or otherwise distort competition between competing brands and distribution outlets.

Furthermore, there is a substantial amount of competition within the network itself: the protected zone surrounding each franchisee is relatively small, and does not entail any marketing or clientele

exclusivity, which means that franchisees are free actively to seek and to sell to any customers. CLE does not in any way impose or recommend prices at which the franchisees sell to customers which, combined with the franchisees' freedom as to their sources of supply, results in a substantial degree of price competition within the network.

Under these circumstances, the agreements between CLE and its franchisees do not individually or collectively afford the parties the possibility of eliminating competition with respect to the goods concerned.

- (36) Consequently, the provisions of Article 85 (1) may, under the terms of Article 85 (3), be declared inapplicable to the standard form Computerland franchise agreement. The same arguments referred to in points 29 to 35 apply *mutatis mutandis* to the 'Development Area Agreements' and other existing franchise agreements which are equally or less restrictive of competition than the standard form agreement.

C. Articles 6 and 8 of Regulation No 17

- (37) The agreement as notified by CLE on 18 September 1986 contained a number of provisions which stood in the way of a favourable decision, in particular the clauses relating to the non-competition obligation both during the term of the agreement and after termination thereof, which was considered to be unreasonably broad. Following the discussions with the Commission during the course of the notification procedure, CLE has redrafted the standard franchise agreement taking into account the comments made.

Pursuant to Article 6 (1) of Regulation No 17, the Commission is required to specify the date from which an exemption is granted. As the notified agreement did not fulfil the requirements for exemption, the date on which the exemption takes effect is not the date of the notification, but the date on which the franchisees were informed by CLE of the amended version of the agreement.

- (38) According to Article 8 (1) of Regulation No 17, a decision in application of Article 85 (3) must be issued for a specified period. Given the 10-year term of the standard franchise agreement, a corresponding period would seem appropriate. In view of the changeable nature of the retail market for microcomputer products as a whole and the expanding tendency of the Computerland network,

the exemption should, however, not be more than 10 years either. CLE should be obliged, pursuant to Article 8 (1) of Regulation No 17, to communicate any substantial changes in the franchise system to the Commission and furthermore, halfway through the period of exemption, to inform the Commission of the number of outlets per Member State and the market share of the network in the Community as a whole and in each Member State individually.

- (39) Finally, to the extent CLE maintains franchise agreements which differ from the standard agreements, provisions which are more restrictive of competition will be adapted to be in line with the standard agreement as amended,

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 Computerland standard-form franchise agreement, including the 'Development Area Agreements', devised for the sale of microcomputer products at retail level in the common market, and to the other notified Computerland franchise agreements which have been adapted to the standard form agreement.

Article 2

With respect to the standard form agreement, including the 'Development Area Agreements', this Decision shall apply with effect from 10 July 1987 and shall be valid until 31 December 1997. With respect to other notified Computerland franchise agreements containing provisions which were more restrictive of competition than those contained in the standard form, this Decision shall take effect as of the date Computerland confirms to the Commission that those provisions have been adapted to be in line with their counterparts in the standard form agreement, and shall be valid until 31 December 1997.

Article 3

On 31 December 1992, CLE shall submit to the Commission an overview of:

- the number of outlets per Member State,
- the market share of the network in the Community as a whole and in each individual Member State.

Any substantial changes in the franchise system shall be communicated to the Commission on an *ad hoc* basis.

Article 4

This Decision is addressed to:

Computerland Europe SA,
Zone Industrielle,
Route de Trèves,
L-2632 Findel.

Done at Brussels, 13 July 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission

COMMISSION DECISION

of 13 July 1987

relating to a proceeding under Article 85 of the EEC Treaty
(IV/31.764 — Baltic International Freight Futures Exchange Limited)

(Only the English text is authentic)

(87/408/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 Spain and Portugal, and in particular Article 2 thereof,

Having regard to the notification and application for negative clearance submitted on 31 December 1985 by the Baltic International Freight Futures Exchange Limited concerning the Articles, Rules and Regulations of the Association,

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

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

WHEREAS:

I. THE FACTS

- (1) The Baltic International Freight Futures Exchange Limited (BIFFEX) was incorporated on 21 January 1985 by Anderson Man Ltd, Cargill Investor Services Ltd, Coley and Harper Ltd, and Merrill, Lynch, Pierce, Fenner & Smith (Brokers and Dealers) Ltd. Its purpose is the establishment and running of a market dealing in freight futures contracts in London which provides facilities for shipowners, charterers and users of shipping transport in general, to protect themselves against adverse price movements in freight rates. BIFFEX enables them to agree to buy or sell standardized freight futures contracts.

Agreements made on the Exchange are based upon, and settlement price is fixed by reference to, the Baltic Freight Index. This index is comprised of 13 of the most important dry-bulk cargo freight routes being chartered on the international market. It provides a continually calculated measure of world freight rate movements weighted to reflect the relative importance of the voyages included. Each day a panel of Baltic Exchange Members submits the spot rate which they consider applicable to each voyage for the relevant cargo. The secrecy of this information allows known fixture rates to be included; the panel members are unaware of each other's contribution. Computerized assessment of the information provides for a daily index which reflects each day's spot market rate movements.

The contract currently traded on the market is on ocean freight rates for dry cargo. A second contract introduced on 10 February 1986, was suspended for an indefinite period on 19 December of the same year. It was based on the Baltic Tanker Index, similarly compiled by taking a number of medium-sized dirty tanker voyages. Bids and offers are quoted in 'index points' of 1,0 with a value of \$ 10 per lot. The contract price is a multiple of the minimum price fluctuation, i.e. one-half of one index point. There is no physical delivery of an underlying cash commodity. Contracts can be liquidated by an offsetting purchase or sale at any date prior to maturity. Positions which are held until contract maturity are automatically settled in cash, based on an average of the relevant Baltic Index over the last trading days of the month.

BIFFEX offers a market for trading by the 'open outcry' method. In addition, it provides the advantage that the performance of any transaction concluded on the floor is guaranteed by a clearing house.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 114, 29. 4. 1987, p. 6.

- (2) All contracts traded on BIFFEX must be registered with the International Commodities Clearing House Limited (ICCH), an independent service company which provides clearing and settlement facilities for BIFFEX. ICCH has a substantial capital and reserves and is wholly owned by six clearing banks. The principal functions of ICCH are to maintain and organize daily clearing of all contracts traded and to provide a guarantee for due fulfilment of contracts, in accordance with the rules of BIFFEX, to clearing members in whose names such contracts are registered.
- (3) The figures annexed set out a comparison of the trading volumes for 1986 for Dry Cargo Contracts which are traded on BIFFEX and INTEX (the International Futures Exchange, situated in Bermuda), and the volumes for the Tanker Freight Contract in 1986.
- (4) The operation of the Exchange is administered by a board of directors which is responsible for the supervision of members and the functioning of the Exchange, and which passes resolutions in respect of various technical matters. The board appoints a committee which is responsible for admission to, and the rules of, the association.

The market is furthermore subject to the surveillance of the Bank of England.

- (5) There are two classes of membership of the BIFFEX: the first class of members are floor members whose number may not exceed 30. Only floor members may trade on the floor. The second class are ordinary members, with a maximum of 70. A detailed statement of the criteria for each class of membership in force may be obtained from the secretary of the BIFFEX. In order to qualify for floor membership, an applicant must be a firm or a company and meet certain financial requirements. It must maintain a properly established office in or sufficiently close to the City of London for the control and execution of its business on the BIFFEX and have a continuing interest in trading on the floor and maintain sufficient trading staff on that floor, to the extent required by the board of directors.

There are, currently, 28 ordinary members. No financial requirements are imposed upon them. These members may be firms, companies or individuals, and must have a continuing interest in the activity of the Exchange.

The fulfilment of the relevant criteria may be continually monitored.

Members may transfer their membership provided that the transferee is elected as a member. Proposed changes in the directorship of a member, like any circumstances that might have the effect of changing the control of the member, must be notified to and accepted by the board.

- (6) An appeal procedure applies if the board refuses an application for membership, refuses to grant permission for a transfer of membership, or refuses to approve a change in the directorship, partnership, nature of business, legal status or beneficial ownership of a member.

The board may be requested to reconsider its decision. In case of confirmation, the applicant or member may appeal to a commissioner appointed by the directors of the Baltic Exchange from a list of persons suitably qualified, which list may include the chairmen of the Stock Exchange and the Committee of London Clearing Bankers and others, but excluding persons connected with trades carried on by members of the member associations of the London Commodity Exchange Company Limited, members of BIFFEX or of the Grain and Feed Trade Association Limited.

The board may also expel or suspend a member: the exercise of that power is accompanied by the same safeguards as those mentioned above.

Independently of the rules and in accordance with English law, each member remains free to bring proceedings before the ordinary courts.

- (7) Each floor member is entitled to — and must, if the board so requires — apply for a trading licence valid for one calendar year.

No contract may be made on the floor other than by a licensed floor member who is a clearing member or a party to a clearing agreement under the terms of which the clearing member guarantees the performance of all contracts made by the non-clearing floor member or of its obligation in respect of contracts made on the floor and allocated to it.

Any member may become a clearing member upon application to ICCH and to the board, provided that it satisfies specific requirements as to its net worth. The clearing members must register all their contracts with the ICCH and deposit with the ICCH an amount fixed for each open contract ('margin')

and afterwards continually adjusted in consideration of their trading position.

Licensed floor members may nominate individuals as their floor traders, subject to approval by the Membership and Rules Committee, with a possibility of appeal to the board. Contracts may be executed on the floor only by duly-appointed floor traders.

- (8) The majority of the members of BIFFEX are either shipping companies, ship brokers or companies involved in the commodity business. Most members will not only use BIFFEX on their own account but will also act as brokers for clients, representing all sections of the international freight and shipping industry, both from the shipowners' and from the charterers' side.

However, the board may limit the trading right of a licensed floor member to transactions with other licensed floor members, if the member's net worth does not exceed a certain amount.

Each contract with a client gives rise to a matching contract on the floor. There is no condition as regards commissions charged to the clients by a member.

II. LEGAL ASSESSMENT

- (9) The notified Articles, Rules and Regulations of the Baltic International Freight Futures Exchange Limited are to be considered as agreements within the meaning of Article 85 of the EEC Treaty.
- (10) There are clear criteria for membership. Those requirements, together with the disciplinary powers given to the Board, allow members to maintain confidence in the financial and business standing of each other. Any dissatisfied member or applicant has the possibility of requesting consideration and may appeal against the decision which it contests. As an ultimate resort an appellant would have recourse to the ordinary courts under English law.

In order to maintain the ability of the clearing house to guarantee the performance of every transaction carried out on the floor, each licensed floor member entering an exchange contract must be a clearing member or a party to a standard clearing agreement; standard clearing agreements, however, do not cover matters relating to remuneration.

As regards transactions between members and between members and non-members, commissions are freely negotiated.

- (11) The publication in the *Official Journal of the European Communities* pursuant to Article 19 (3) of Regulation No 17 did not bring in any representations from third parties.
- (12) The notified Articles of Association, Rules and Regulations do not contain any clauses which constitute appreciable restrictions of competition within the common market. Therefore, the Commission, on the basis of the facts in its possession, has no grounds for action under Article 85 (1). Consequently, the Commission is able to issue a negative clearance pursuant to 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 under Article 85 (1) of the EEC Treaty in respect of the Articles, Rules and Regulations of the Baltic International Freight Futures Exchange Limited.

Article 2

This Decision is addressed to the Baltic International Freight Futures Exchange Limited, whose registered office is at 14/20 St Mary Axe, London EC3A 8BU, United Kingdom.

Done at Brussels, 13 July 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission

ANNEX

1986		1986 Tanker Freight Contract		
BIFFEX Baltic Freight Contract		INTEX	Month	Lots Registered
Month	Lots registered	Lots registered		
January	3 627	6 355	January	1 307
February	2 972	1 827	February	1 307
	6 599	8 182	March	1 037
March	2 450	2 851		2 344
	9 049	11 033	April	1 046
April	5 245	3 760		3 390
	14 294	14 793	May	806
May	4 684	2 768		4 196
	18 978	17 561	June	795
June	3 722	3 051		
			1st half	4 991
1st half	22 700	20 612		
			July	517
July	2 355	2 432		5 508
	25 055	23 044	August	195
August	3 989	3 189		5 703
	29 044	26 233	September	225
September	4 735	3 178		5 928
	33 779	29 411	October	303
October	4 320	1 898		6 231
	38 099	31 309	November	177
November	4 305	1 183		6 408
	42 404	32 492	December	
December	2 507	1 158		
			Year	6 408
Year	44 911	33 650		
			2nd half	1 417
2nd half	22 211	13 038		

COMMISSION DECISION

of 13 July 1987

relating to a proceeding under Article 85 of the EEC Treaty
(IV/31.741 — Sandoz)

(Only the Italian text is authentic)

(87/409/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 Spain and Portugal, and in particular Articles 3 (1) and 15 (2) thereof,

Having regard to the Commission Decision of 15 April 1986 to initiate proceedings in this case on its own initiative,

Having given the undertaking concerned, Sandoz Prodotti Farmaceutici SpA, the opportunity to make known its 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

A. Subject of the Decision

- (1) This Decision concerns the commercial relationship between Sandoz Prodotti Farmaceutici SpA and its customers. It concerns, in particular, an export ban.

B. The undertaking

- (2) The undertaking to which this Decision is addressed is Sandoz Prodotti Farmaceutici SpA, the Italian subsidiary of the Swiss group Sandoz. The Sandoz

group, which has its head office in Basle, Switzerland, is a multinational company of major importance. Its subsidiaries operate in all continents in a total of 44 countries and as producers in 34 of them. In the Community, companies of the Sandoz Group are present in all the Member States except Luxembourg. The Group is active in a variety of sectors (1985 turnover: SwF 8 453 million; about ECU 4 870 million), the principal ones being pharmaceuticals (1985 turnover: SwF 3 912 million; about ECU 2 253 million), dyestuffs and chemical pigments (1985 turnover: SwF 2 107 million; about ECU 1 213 million), nutritional products (1985 turnover: SwF 1 121 million; about ECU 645 million), agricultural ('agro') products (1985 turnover: SwF 601 million; about ECU 346 million), and the production of seeds and biotechnological research.

- (3) The Italian subsidiary of the Sandoz group was founded in the 1920s under the name of Sandoz SpA. The undertaking operated under this name until 31 December 1983. From 1 January 1984, the pharmaceuticals side of the business was separated from the chemicals side and assigned to two separate companies: Sandoz Prodotti Farmaceutici SpA (hereinafter referred to as Sandoz PF) and Sandoz Prodotti Chimici SpA. In Italy (at its Milan plant) Sandoz PF produces all the proprietary medicinal products and over-the-counter products of the Sandoz range, except for those which, mainly for technical reasons, are still manufactured and exported from Switzerland. Sandoz PF is also the distributor in Italy of the pharmaceutical products which it produces or imports. In the last financial years the turnover of Sandoz SpA's pharmaceuticals division (up to 1983) and then of Sandoz PF (from 1984) was the following: 1981: Lit 70 600 million (about ECU 56 million); 1982: Lit 84 100 million (about ECU 63,5 million); 1983: Lit 99 900 million (about ECU 74 million); 1984: Lit 109 800 million (about ECU 79,5 million); 1985: Lit 97 614 million (about ECU 66 million).

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

C. The product

- (4) The products to which this Decision refers are the pharmaceutical products distributed by Sandoz PF and more particularly its proprietary medicinal products.
- (5) Except for a few differences sometimes to be found in the packaging or the wording and the names generally expressed in the local language, these products are the same as those distributed by other Sandoz subsidiaries in the Member States.

D. The market

- (6) As stated by the Commission in its Fourteenth Report on Competition Policy, the European pharmaceutical market is large in total but is divided along both national and regional lines. The reasons behind this division stem mainly from differences in Member States' laws for the regulation of prices and the admission of pharmaceutical products to markets. Parallel trade and pressure to make more use of generics have emerged as ways in which a greater degree of price competition might be introduced. For the time being, the current flow of parallel trade seems to represent no real threat for the industry.
- (7) The market in pharmaceutical products in Italy is controlled by the national legislation which governs the production of and trade in drugs. The more specifically relevant provisions are Articles 143 to 189 of the consolidated health laws ('Testo Unico delle Leggi Sanitarie') (Royal Decree No 1265 of 27 July 1934), Articles 2, 6, and 28 to 31 of the Health Reform Law ('Legge della Riforma Sanitaria') (Law No 833 of 23 December 1978 establishing the National Health Service), the provisions of the Regulation implementing the said consolidated laws (Royal Decree No 478 of 3 March 1927), and various laws, regulations and administrative circulars (in particular, for prices, Law No 395 of 11 July 1977).
- (8) In accordance with the abovementioned legislation, the main characteristics of the Italian pharmaceutical market can be summarized as follows:
- administrative authorization is required for production and marketing,
 - in order to obtain this authorization, the product must be registered: the Ministry for Health must be supplied with full documentation specifying, *inter alia* the drug's technical characteristics,

costs, the establishment where it is produced, its packaging, its label, and the leaflet to be enclosed in the package. On the basis of this information, the Ministry decides whether or not to grant the authorization and, if authorization is granted, it issues an appropriate Registration Decree,

- this Decree *inter alia* fixes the price at which the drugs are to be sold to the public; this may not be varied in any way, except for the periodic review carried out by the same competent administrative authority. For 'proprietary medicinal products' the authorities use a special procedure to establish the price which is fixed by the Decree; for 'over-the-counter products', the price is decided by the producer and subsequently controlled on the market by the authorities,
 - drugs are resold to the public solely by pharmacies, who hold the concession for a specific 'territory' for which they are responsible,
 - under the present system, the final consumer generally does not pay for the drug (it is largely paid for by the State, through the direct health insurance scheme) nor does he choose it (it is chosen by the attending doctor who prescribes it for the patient),
 - proprietary medicinal products may not be advertised and only scientific information for doctors is permitted.
- (9) The Italian pharmaceutical industry — which includes foreign producers established in Italy — has on several occasions raised and indicated the problems which they say the present system of administered prices causes them, whereby prices are set at levels which are among the lowest in the EEC. Some 300 Italian and foreign pharmaceutical companies, mainly funded by private capital, operate on the Italian market. Within the Italian market, Sandoz PF, with a turnover in 1985 of Lit 97. 614 million (about ECU 66 million), is one of the 10 largest undertakings.

E. The subject of the proceedings

- (i) *The commercialization of Sandoz products*
- (10) The customers of Sandoz PF, as distributor of the Sandoz range of pharmaceutical products in Italy, are wholesalers (some 300), pharmacies (several

thousand) and hospitals. The commercial organization is directed from the Milan head office and comprises various depots in the rest of the country.

- (11) When a new customer wants to buy Sandoz PF's products he has to send a letter explaining, in particular, his financial position and guarantees, as well as his equipment and distribution structure. Sandoz PF examines this documentation and makes a visit to the customer's premises in order to verify the situation on-the-spot. Afterwards Sandoz-PF requests the opinion of the Italian Association of Pharmaceutical Industries (Farmindustria). Thereafter the customer receives a 'notation' on the basis of which the general sales conditions are established by Sandoz PF. These conditions refer in particular to the payment procedure (in advance/on receipt of the goods/10; 15 or 30 days after receipt) and to the regularity of the orders to be made by each customer.
- (12) Once the above described procedure is concluded, if the evaluation is favourable, Sandoz PF starts delivering to the customer. Every customer knows his position, which is on the basis of the 'notation' received: therefore he is aware of the sales conditions which rule his relations with the seller. It is normal for a customer to continue to deal regularly with Sandoz PF over a period of years on the same terms. If nothing happens to modify the viability of a certain customer — an increase or decrease — the same conditions continue to apply. This type of system is the usual one in the pharmaceutical sector in Italy in the sense that such systems are applied by all pharmaceutical producers following the criteria established by Farmindustria.
- (13) Customers place their orders mainly by telephone, and almost all contacts between Sandoz PF and customers take place by telephone; contacts relating to general or particular matters would not be made in writing, except in rare, isolated cases. When the Sandoz PF sales office receives an order for products, an employee feeds it into the computer's memory, unless he notices something unusual; in that case he asks the customer for an explanation and immediately informs the sales manager. Every evening, the manager in any event checks the data memorized during the day and, if he considers it appropriate, can gain access to the computer to make changes.
- (14) In general, the main operations are checks to be carried out on new customers or customers whose solvency is in doubt; sometimes, when quantities ordered are greater than the 'normal' average of a

certain client or when they do not correspond to what Sandoz PF considers to be the 'normal' consumption for the territory covered by a given customer, they may be reduced. The Commission's enquiry shows that Sandoz PF quite often reduces its customers' orders. The reasons for these reductions in customers' orders are varied and, as will be examined in the next section, may be connected with particular economic situations which determine an increase in demand.

- (15) Once the order has been memorized by the computer it has to be executed, and the sales office sets in motion the procedure for delivering the goods: it prepares the accompanying delivery note, orders the warehouse to prepare the packaging, and invoices and sends the goods to the consignee who pays the bill. Save for a few cases (e.g. the beginning of the commercial relationship between Sandoz PF and its clients, or in cases of sales to customers of doubtful viability) where payment is requested in advance, the invoice is usually sent to the customer after delivery of the goods. For clients of greater viability, payment is generally made after receiving the invoice — 10, 15 or 30 days later — according to the sales conditions applied to the particular client.

(ii) Aspects of distribution more directly connected with 'parallel trading'

- (16) According to Sandoz PF, 'parallel trading' is a marginal phenomenon and quite rare in terms of the company's overall distributive activity. However, since this is a question of major importance for the Italian pharmaceutical industry, Sandoz PF has dealt with the subject several times, both as regards relationship within the industry and as regards Sandoz PF itself. In general terms, Sandoz PF makes the point that parallel trading occurs in Italy by means of export flows to other foreign markets, where the demand is such as to enable an independent operator to make a profit on the difference between the resale price and the price he paid on the Italian market when acquiring the goods. According to Sandoz PF, therefore, the cause and the main reason for parallel trading is the low level of prices set by the public authorities in Italy.
- (17) As far as Sandoz PF is aware, various wholesalers and pharmacies are active as parallel exporters, either regularly or intermittently, and their destinations include other Member States. However these are merely suspicions, since the company has no means of ascertaining the subsequent destinations

of the products it distributes. With regard to the range of products distributed, Sandoz PF states that it has noted somewhat greater sensitivity to parallel exporting for the following drugs; Methergin, Visken, Calcium Forte and Sandomigran.

invoices used by Sandoz PF bore the words 'export prohibited'. According to the company, this kind of invoice had been introduced before the creation of the Community. The Commission considers, and Sandoz PF agrees, that the words 'export prohibited' always figured on the invoices after the entry into force of the Treaty of Rome.

- (18) As regards a possible connection between any reductions in customers' orders and parallel trading, Sandoz PF stresses that there could be many causes for such reductions. Of these, the most common are for example those which occurred at particular periods of the year when customers tended to order greater quantities to take advantage of the possibility of late payment (as in the case of 'holiday orders', which were made in June or July and not paid until a month later because of the summer holidays); another structural cause might be a warehouse shortage because stocks of a given product were exhausted (this happens, for example, with beginning-or end-of-year orders). Sandoz also stresses that a warehouse shortage could be connected with special local situations, often temporary in nature, for example, war pushing up the demand for drugs. Therefore, from a general point of view, Sandoz PF stresses that the said reductions in orders would be a marginal phenomenon connected mainly with the overriding need to plan its production, warehouse policy and distribution in accordance with its fundamental role of Italian subsidiary of the Sandoz group.

- (19) In this connection, according to the statements made by Sandoz PF, reductions which were somehow connected with parallel trading would be extremely rare and would relate to a few marginal cases (such as those referred to during the investigation visit of 13 February 1985). It results from the documents examined by the Commission that Sandoz PF fairly systematically reduced customers' orders. However, the company has produced evidence in order to show that there was no relationship of cause and effect between the cutting of orders and any intention of discouraging parallel exports.

(iii) *The invoices used*

- (20) The invoices used by Sandoz PF are printed on the front only; no standard sales conditions are printed on the back. However, some standard sales conditions are printed on the front of the invoice. These conditions include the competent jurisdiction (Milan), apportionment of transport risks and the time limit for introducing a complaint following the delivery of the goods. Until the most recent change made by Sandoz PF after receiving the request for information, pursuant to Article 11 of Regulation No 17, which was sent on 26 November 1984, the

- (21) These words were situated in the top right-hand corner of the invoice form in use until 31 December 1983. Afterwards, when the Italian subsidiary of the Sandoz Group was restructured, changes were made to the invoice involving the corporate name and the general layout: in particular, the words 'export prohibited' were moved to the bottom of the invoice, and centred. The latter form came into use on 1 January 1984 and was in regular use in relationships with customers when the Commission sent the abovementioned letter. In its reply of 22 January 1985 to the abovementioned Article 11 letter, Sandoz PF stated that it had arranged for the words in question to be provisionally deleted and be permanently removed, having ordered new invoice forms which were to replace the earlier ones.

- (22) Sandoz PF stresses that the presence of the said words was due to a 'mere oversight' and to 'an incomplete implementation of a company instruction' in which 'the company's management directed that the words 'export prohibited' should no longer appear anywhere or be used in any way'. It was explained that these instructions were issued by the Sandoz parent company in Basle, which ordered furthermore the removal of the words in question from all drug packaging and from invoices. However, Sandoz PF was unable to provide a copy of the instructions.

- (23) In the course of the Commission's enquiry, Sandoz PF stated that the existence of company instructions ordering the removal of every mention of 'export prohibited' was confirmed by the fact that until the early 1970s (the company is not able to specify the exact date) the packaging of Sandoz pharmaceutical products also carried these words which were later removed, as is the case today.

(iv) *Other subsidiaries of the Sandoz group*

- (24) The visits made to the subsidiaries of the Sandoz Group in Belgium, the United Kingdom and France showed *inter alia* that those companies never used invoices bearing the words 'export prohibited' or

equivalent phrases. None of those Sandoz subsidiaries, or the Sandoz parent company, were able to produce, or remember, any written group instructions about the removal of these words from invoices. For those subsidiaries, the Sandoz pharmaceutical products generally considered to be in greater demand by the parallel market are Methergin, Visken and Calcium Forte.

II. LEGAL ASSESSMENT

A. Article 85 (1)

- (25) Although no written general contract exists between Sandoz PF and its customers, it must be considered that the type of agreement referred to in Article 85 is represented by the continuous commercial relationship set up and concretised by the whole of the above-described commercial procedures normally provided for by Sandoz PF in its relations with its customers and at least implicitly accepted by them.
- (26) Consequently, the invoice cannot be seen as the expression of a merely unilateral act but forms part of such an agreement of which it constitutes the documentary evidence. The fact that the invoices have been constantly and systematically used leads to the conclusion that Sandoz PF's clients implicitly agreed with it and accepted it.
- (27) Hence the words 'export prohibited', which appear on the invoices used by Sandoz PF, represent, with regard to Article 85, a contractual clause forming an integral part of the agreement on which Sandoz PF and its customers base their transactions. This is confirmed by the presence, on the front of the invoices, of certain other commercial clauses relevant to clients. The fact that Sandoz PF claims that these clauses are void or simply respecting the Italian Civil Code does not affect their nature as sales conditions.
- (28) In the light of the above, the Commission considers that the adoption and acceptance of sales invoices bearing the clause 'export prohibited', in so far as it has to be considered an element of the above-described agreement between the parties, is an infringement of Article 85 (1). In particular, such a provision undoubtedly has as its object the

prevention, restriction or distortion of competition within the common market, and may affect trade between Member States. Furthermore, the continual use of such invoices is likely to have the effect of discouraging those customers who are less aware of Community law from exporting Sandoz PF's products.

- (29) By prohibiting exports, the clause in the agreement between Sandoz PF and its customers constitutes by its very nature a restriction of the competitive opportunities available to economic agents as a result of the establishment of the European common market. Through such agreements companies can compartmentalize the national markets to a considerable extent, thereby affecting trade between the Member States and contravening the basic aims of the Community.
- (30) Furthermore, in the framework of a commercial relationship such as described above, the seller's practice of reducing quantities ordered by its clients to what it considers to be their 'normal' demand may be an element of an agreement between the parties, in particular when it constitutes a well known and systematically applied commercial policy on a market characterized by active parallel trade. In such cases, where no different explanation exists, the reductions may be taken as evidence of an effort to prevent parallel trading. However, in the present case, no sufficient elements have been established to conclude that the reductions practised by Sandoz PF are systematically made with that objective.

B. Article 85 (3)

- (31) The agreement in question between Sandoz PF and its customers was not notified to the Commission; therefore, it cannot be exempted. In any event, such an agreement, even if it had been notified, would be unlikely to obtain an exemption because it is clearly opposed to Community competition rules since it imposes a serious restriction which is not indispensable to a proper sales system and is likely to be detrimental to consumers.

C. Article 3 of Regulation No 17

- (32) The Commission accepts that the invoices bearing the words 'export prohibited' have since 1985 been

removed; likewise the Commission accepts that, since at least the beginning of the 1970s, the packaging of Sandoz PF drugs has not carried any prohibition of export. However, it is necessary to require Sandoz PF to refrain from seeking to reimpose such restriction by any other means.

D. Article 15 (2) of Regulation 17

(i) *Liability of Sandoz PF*

(33) This Decision is addressed only to Sandoz PF because it alone must be held responsible for the infringement of Article 85 (1). As argued above, the export prohibition printed on the invoice must to all intents and purposes be considered to be a clause of the agreement between Sandoz PF and its customers and not a unilateral act. However, it must also be noted that the said invoice and the said clause were prepared and adopted by Sandoz PF itself. The export ban was set up in the essential interests of Sandoz PF, which was ultimately responsible for its creation and application and for any measures taken to ensure its practical effects on the market. Therefore, Sandoz PF's clients cannot be considered responsible for the infringement.

(34) As is clear from the foregoing, the invoices in question were adopted by Sandoz PF which could not have been unaware that the export ban had as its object the restriction of competition on trade between Member States. Consequently, it is of little relevance to establish whether or not Sandoz PF knew that it was infringing the prohibition contained in Article 85. Therefore it can only be concluded that the acts prohibited by that Article were undertaken intentionally. However, even if Sandoz PF's thesis of a 'mere oversight' were to be accepted, this would not exclude its liability and would represent a grave form of negligence.

(35) As explained above, Sandoz PF has stated that it was as a result of a 'mere oversight' that the invoice in question bore the words 'export prohibited', and that anyway the company had taken no steps to enforce the prohibition. However, on this point, it must be recalled that the words 'export prohibited' were found on the top right-hand corner of the invoice in use until 31 December 1983, and were then moved to the bottom centre of the new invoice introduced from 1 January 1984, after the corporate name was changed. It is precisely because the words

in question were moved that an actual recurrence of the 'mere oversight' is scarcely plausible. Indeed, it is rather difficult to imagine that the new invoice form, on which several significant changes were made compared to the earlier one, was examined and checked so superficially by the competent departments of Sandoz PF as to let slip an 'oversight' of such clear and evident commercial and legal importance, particularly to an important subsidiary of a multinational group.

(36) As regards the Sandoz PF comment on the removal of the words 'export prohibited' which, at least up to 1970, still appeared on its drug packaging, it must first be stressed that, rather than strengthening the validity of the 'oversight' argument, the fact that the packaging was brought into line with the EEC rules is evidence of another occasion on which Sandoz PF should have brought the invoice into line with such rules. It must also be pointed out that even before 1970 it was clear that Community law did not permit undertakings to prohibit exports between the Member States. Therefore, the fact that Sandoz PF also retained this prohibition until the said date on the individual drugs packagings it distributed, as well as its invoices, is an aggravating and not an extenuating circumstance.

(ii) *Duration of the infringement*

(37) For the reasons mentioned above, the Commission considers that the invoices adopted by Sandoz PF and accepted by its customers always bore the words 'export prohibited' from the entry into force of the Treaty of Rome until the end of 1984.

(iii) *Fines*

(38) For infringement of Article 85, the Commission may impose under Article 15 (2) of Regulation No 17 a fine of up to one million ECU or up to 10 % of the turnover of each undertaking in the preceding business year, if the latter amount is the greater. In determining the fine, regard is to be had to both the gravity and the duration of the infringement.

(39) The Commission, in this case, in deciding the level of the fine, has taken account of the clarity of Community law relating to the obstruction of the achievement of a fundamental objective of the Treaty, the integration of a single common market. It has also considered the very serious nature of at least a gravely negligent infringement of the EEC competition rules by Sandoz PF, which explicitly

prohibited exports in an agreement for a particularly long period and only brought the prohibition to an end in 1985 following the Commission's intervention. Account has also been taken of the economic importance and turnover of the undertaking and the fact that it is part of a large and experienced group of companies. On the other hand, in defining the amount of the fine, the Commission has also taken account of the impact of national government measures on trade and competition within the Community.

HAS ADOPTED THIS DECISION:

Article 1

Sandoz Prodotti Farmaceutici SpA (hereinafter Sandoz PF) has infringed Article 85 (1) of the EEC Treaty by providing for an export ban in the commercial relationships with its clients.

Article 2

Sandoz PF, which ended the infringement in 1985 after Commission intervention, is hereby required to refrain, in relation to the sales of its products, from any agreement and/or concerted practice which may have the same or similar object or effect.

Article 3

A fine of 800 000 ECU is hereby imposed on Sandoz PF. This amount shall be paid into the Commission's account No 9-130-707 — Commissione delle Comunità Europee, Bruxelles — ECU, at: Istituto Bancario San Paolo di Torino, 156 Piazza San Carlo, I - 10121 Torino, within three months from the date of notification of this Decision. On expiry of that period interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 10 %. Should payment be made in the national currency of the addressee, the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 4

This Decision is addressed to:

Sandoz Prodotti Farmaceutici SpA,
Via Arconati, 1,
I-20135 Milano.

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

Done at Brussels, 13 July 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission