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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 December 1992

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

(IV/31.400 — Ford Agricultural)

(Only the English text is authentic)

(93/46/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 3 (1) thereof,

Having regard to the Statement of Objections of 17 May
1990,

Having given the undertaking concerned 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,

THE FACTS

The parties

(1) Ford New Holland Limited, which is currently a
subsidiary of Fiat Geotech Tecnologie per la

Terra SpA, was, at the time of the Statement of
Objections, a subsidiary of Ford Motor Company
Limited, itself a subsidiary of the Ford Motor
Company. On 1 January 1987 it assumed responsi-
bility for the Ford Motor Company Limited's
tractor operations within the United Kingdom,
together with the harvesting machinery activities
of New Holland Ltd, formerly Sperry New
Holland. The Ford group of companies distributed
tractors within the Community, first through Ford
Motor Company Limited, and then through Ford
New Holland Limited, and through a number of
other subsidiary companies, established within
most Member States, or, exceptionally, through
independent importers and dealers under contract
to a company within the group. Hereafter, unless
the context requires the identification of a
particular subsidiary or division, these will be
referred to as 'Ford'.

The Product

(2) This Decision concerns tractors which, almost
exclusively, are sold for agricultural use.

The position of the parties

(3) Ford was one of the largest manufacturers of agri-
cultural tractors in the world. Within the
Community it had, in 1987, a market share of 9 %
and in the UK one of 29 %. Ford's group
turnover, worldwide, was US\$ 92 445 million.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

Ford's distribution system

- (4) Ford distributed tractors through a network of exclusive dealers appointed, in almost all cases, by the national Ford subsidiary. Since the adoption of Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements ⁽¹⁾, Ford had been adapting the terms of its contracts for tractor dealers so as to conform to the conditions of that Regulation and had claimed that its distribution system was thus exempt by virtue of that Regulation. Ford has, since, modified these contracts to conform with the conditions of Regulation (EEC) No 1983/83 ⁽²⁾.

The proceedings

- (5) From 29 October 1964, Ford had submitted a number of notifications of selective distribution contracts requesting either negative clearance or an exemption pursuant to Article 85 (3). In 1982, the Commission began to receive complaints, both formal and informal, of interference on Ford's part with parallel trade in tractors from other tractor manufacturers/importers. The Commission began to investigate Ford in 1985, with a request for information under Article 11 of Regulation No 17 in January, followed by investigations pursuant to Article 14 of that Regulation in Ford's Basildon tractor plant in the UK in March, Ford's Belgian subsidiary in June and Ford's Dutch subsidiary in July of that year.

In parallel, the Commission had obtained information from other manufacturers, from trade associations and from dealers or purchasers of tractors which throw light on Ford's conduct. The Commission had already, on 11 November 1988, issued a Statement of Objections concerning a UK tractor registration exchange (ref. IV/31.370 and IV/31.466) addressed, among others, to Ford; this sought to condemn Ford for its participation in the exchange, and for the use made by the members, including Ford, for the purpose of tracing parallel imports, of the registration documents made available to the exchange by the registration authorities for its statistical purposes. In its response dated 31 January 1989 to that Statement of Objections, Ford argued that the parallel import issue had nothing to do with the activities of the exchange.

⁽¹⁾ OJ No L 15, 18. 1. 1985, p. 16.

⁽²⁾ OJ No L 173, 30. 6. 1983, p. 1.

Ford asked, repeating this request at the hearing held in April 1989, that the Commission treat, if indeed it planned to treat at all, the parallel import question separately with each individual company. On 12 June 1990, the Commission addressed a Statement of Objections to Ford New Holland Limited in the present case which did deal with Ford's use of registration documents, as does the present Decision (it is not, however, concerned with the operation of the exchange itself). On 31 July 1990 Ford replied to the Statement of Objections. Fiat Geotech Technologie per la Terra SpA, the new owner of Ford New Holland Limited, has since waived, by letter dated 19 September 1991, the right to an oral hearing.

Economic background

- (6) The price levels of tractors in the various Member States have traditionally been different; for example, the UK had traditionally high prices. Currency fluctuations have, from time to time, caused price levels to differ; such fluctuations have been sufficient to cause the price levels in States with traditionally high prices to be, from time to time, lower than in neighbouring States. In the years prior to the Commission's investigations, Ford's prices in the UK were 20 to 30 % higher than in continental Europe. The different Ford subsidiaries had, from time to time, offered special prices or discounts. For all of these reasons, farmers or dealers had, from time to time, found it advantageous to buy from or sell into a different Member State. It is understood that Ford had, more recently, sought to equalize its prices in different currencies in order to avoid the problems differing price levels cause.

Ford's reaction to parallel trade

- (7) Ford attempted to prevent dealers selling to customers in, or buying from, another Member State.
- (8) To this end, Ford established systems for the identification of parallel imports and the tracing of their sources. In the UK this made great use of the Government's vehicle registration documents that were made available to the trade association for statistical purposes — copies of these registration documents, for example, were found in Ford's

Belgian offices. Ford also encouraged dealers to report parallel imports, obtained such information through the dealers' associations, from farmers, and even inspected tractors on the farm and die-stamped a secret number on them for the purpose of identification.

orders from outside territories and, in particular, not to export.

Extent of these practices

- (9) Either in reaction to a particular traced parallel trade, or generally, Ford told dealers that such trade was undesirable. In a letter dated 20 February 1979 written by Ford's zone manager for the north of England and Northern Ireland to his superiors, he assured them that on his next visit to Northern Ireland he would inform dealers of the problems created by tractors 'shipped across the border' and 'ask them to be careful not to sell to farmers from the south'. Ford threatened to cancel the dealerships of exporting dealers. Ford delayed delivery when an export was expected, as is shown in a letter written from Ford Nederland to Ford Motor Company Ltd in May 1981; it stated that Ford Nederland would delay delivery of nine tractors that it discovered were to be exported to the UK, since its legal counsel advised it that it would have lost the lawsuit threatened by the jobber if Ford Nederland had persisted in not honouring the order previously accepted. Ford charged higher prices or reclaimed discounts; it made discounts conditional on registration within the territory or on the purchaser retaining and using his purchased vehicle; it refused warranties or suggested that dealers refuse them. In a letter dated 15 May 1981, addressed to all agricultural tractor main dealers and open-territory retail dealers, for example, it was stated 'a warranty issued by Ford Motor Company Limited is only available on tractors purchased through an authorized Ford Tractor Dealer. Some unauthorized importers would appear to be offering "warranty insurance" and it is therefore advisable that farmers should verify the terms carefully because some warranty insurance policies have important exclusion clauses'. Ford sought to profit from differing safety regulations or to render the use of a parallel import illegal by refusing operating manuals in the importer's language. The letter of 15 May 1981 went on to state that 'the provision of an operator manual in English is a legal requirement in the UK and obviously this does not come with a tractor originally sold to another country unless the unauthorized importer can make special arrangements'. The Commission's evidence for these facts runs from 1964 until 1985, with the greater number of documents dating from 1976 to 1985. In spite of the changes made in Ford's distribution contracts (see recital 4 above), in 1990, the staff of some Ford dealers still understood that they were supposed not to accept

- (10) All the then Member States are mentioned in the documents as being involved with the exception of Luxembourg (the investigation took place before the accession of Spain and Portugal). The earliest document concerning parallel trade is dated 13 November 1964.

LEGAL ASSESSMENT

Article 85 (1)

- (11) Ford and its dealer customers are undertakings within the meaning of Article 85 (1). The agreements between these parties, as written or applied, constitute agreements between undertakings within the meaning of Article 85 (1).
- (12) The facts set out above show that Ford's contractual relations with its customers included a provision not to export or import or allow the export of the products, and other provisions for the hindrance of parallel trade in the products. These were general provisions relating to importing and exporting; they were not restricted to sales to unauthorized dealers which, whether exports or not, were forbidden by the notified dealer contracts. Therefore, these contractual relations constituted restrictions of competition within the meaning of Article 85 (1).
- (13) Special mention must be made of discounts dependent on non-export or penalties for exporting. It has been argued that, as the Commission accepts that it is lawful to prohibit active marketing outside an exclusive territory, it would be logical for the Commission to allow rewards for active marketing within.
- (14) However, as the Commission has already said in recital 55 of Decision 85/617/EEC in the Sperry New Holland case⁽¹⁾: 'Dealers must have the right to supply farmers from other territories without being penalized by the withdrawal of bonuses. Therefore agreements or practices

⁽¹⁾ OJ No L 376, 31. 12. 1985, p. 21.

concerning bonuses which are conditional on the machine not subsequently being exported by the customer, are prohibited. The same rationale might apply to the condition that the machine is registered for use within the territory of the dealer or that the warranty service be completed within that territory'.

- (15) Special mention should also be made of national safety legislation. The users of independently imported machinery should, of course, use it both safely and legally. Cooperation between Ford and its local dealers aimed at helping these users, at a reasonable price, to respect national law would have been a proper course of action. Contractual relations between them, however, aimed at exploiting safety regulations so as to discourage such importing constitutes an infringement.
- (16) Ford's actions examined above had the object and effect of preventing trade between Member States. There was no justification for Ford's seeking to deny the benefits of free trade to prospective purchasers of its products situated in a State in which the domestic price of its products was higher.
- (17) It must be concluded that these contractual relations constitute an infringement of Article 85 (1).

Article 85 (3)

- (18) As has been said in recital 4, Ford had been adapting its tractor dealer contracts so that their wording conformed with the conditions of Regulation (EEC) No 123/85, in order to claim benefit from the exemption under Article 85 (3) afforded by that Regulation (but, in 1990 and 1991, modified these contracts to conform with the conditions of Regulation (EEC) No 1983/83) (*). Earlier, Ford had notified a number of these contracts with a view to obtaining individual exemptions. These notifications did not, however, disclose the unwritten provisions of the contractual relations described in recitals 8 and 9 which are not, therefore, covered by those notifications.

(*) Agricultural tractors are not covered by Regulation (EEC) No 123/85 — see Commission press release IP(90) 917 of 16 November 1990.

No exemption under Article 85 (3) could, therefore, have been granted.

Article 3 of Regulation No 17

- (19) It appears necessary to condemn these infringements and require Ford so to act that its end users are free, and know that they are free, to buy Ford's products where they choose and that its dealers know that they are free to supply them.

Article 15 (2) of Regulation No 17

- (20) Ford's infringement was serious since it impeded competition from which consumers could have derived substantial benefits.
- (21) The Commission is, however, aware that its tolerance of the claims by Ford to benefit from the exemption afforded for motor vehicle distribution contracts by Regulation (EEC) No 123/85, even after it had carried out the greater part of its investigation in this case, has contributed to allowing Ford to believe that the tracing and prevention of sales to unauthorized dealers was legitimate.
- (22) The Commission also takes into account that the greater bulk of the infringements that have been established relate to a period six or more years ago and recognizes that, for example, the use made of registration documents (recitals 5 and 8) has ceased.
- (23) In these exceptional circumstances, and recognizing, in addition, that Ford's new owners now accept that Ford's conduct amounted to an infringement going beyond the limits of the activities described in Ford's various notifications, and are taking vigorous steps to avoid any repetition of these infringements, the Commission feels that it would be inappropriate to impose a fine on Ford,

HAS ADOPTED THIS DECISION:

Article 1

The contractual relations between Ford New Holland Limited, previously Ford Motor Company Limited, and the other companies within the group, of which the parent company was the Ford Motor Company and which distributed tractors within the Community, that forbade, discouraged or hindered parallel trade in its products constituted an infringement of Article 85 (1) of the EEC Treaty.

Article 2

An exemption under Article 85 (3) of the EEC Treaty for the arrangements mentioned in Article 1 is hereby refused.

Article 3

1. Ford New Holland Limited shall refrain from taking any measure having the same object or effect as those referred to in Article 1.

2. Ford New Holland Limited shall ensure that its resellers are free and know that they are free to sell, if so asked, and the purchasers of its products to buy its products wherever they choose within the Community.

Article 4

This Decision is addressed to:

Ford New Holland Limited,
Cranes Farm Road,
GB-Basildon, Essex SS14 3AD.

Done at Brussels, 15 December 1992.

For the Commission

Leon BRITTAN

Vice-president

COMMISSION DECISION

of 17 December 1992

imposing a fine pursuant to Article 19 of Council Regulation (EEC) No 4056/86

(IV/32.447)

(Only the French text is authentic)

(93/47/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the European
Economic Community,

Having regard to Council Regulation (EEC) No
4056/86 of 22 December 1986 laying down detailed
rules for the application of Articles 85 and 86 of the
Treaty to maritime transport⁽¹⁾, and in particular
Articles 18 and 19 thereof,

Whereas:

I. THE FACTS

- (1) Mediterranean Europe West Africa Conference
(Mewac) is a liner conference whose secretariat is
at the following address:

33, rue Jean-François Leca,
F-13002 Marseilles,
France.

Mewac is a group of shipping companies which
provide a liner service between Spain, the
Mediterranean coast of France, Italy and the
former Yugoslavia, on the one hand, and the coast
of West Africa, from the northern border of
Mauritania to the southern frontier of Angola, on
the other.

The companies are:

Members:

- Black Star Line (BSL),
- Cameroon Shipping Lines (Camship),
- Compagnie Béninoise de Navigation Maritime
(Cobenam),
- Compagnie Maritime Zaïroise (CMZ),
- Compagnie Sénégalaise de Navigation
Maritime (Cosenam),
- Garcia Minaur SA,
- Ignazio Messina,
- Linea Transmare SpA,
- Lloyd Triestino,
- Mac Lines SA,

- Maurel et Prom,
- Nigerbras Shipping Line Ltd,
- Nigeria America Line (NAL),
- Nigerian National Shipping Line Ltd (NNSL),
- Société Ivoirienne de Transports Maritimes
(Sitram),
- Société Ivoirienne de Navigation Maritime
(Sivomar),
- Navale Delmas,
- Société Togolaise de Navigation Maritime
(Sotonam),
- Splosna Plovba Piran (SPP);

Associate members:

- Acoa Lines,
- Setramar.

- (2) In 1987, the Commission received a number of
complaints pursuant to Article 10 of Regulation
(EEC) No 4056/86 concerning maritime trade
between Europe and West and Central Africa,
including that falling within the geographical area
covered by the activities of Mewac.
- (3) After carrying out an initial examination of the
complaints, the Commission considered that,
should the alleged facts set out in the complaints
prove to be true, they could:
- be incompatible with Article 85 (3) of the EEC
Treaty and so prompt the Commission to
withdraw the block exemption provided for in
Regulation (EEC) No 4056/86 from the liner
conference in the sphere of activities in which
the facts had been established,
 - constitute an infringement of Article 86 of the
EEC Treaty.

In order for it to be able to identify and obtain
additional information and any evidence, the
Commission considered that an investigation
should be carried out at Mewac.

⁽¹⁾ OJ No L 378, 31. 12. 1986, p. 4.

In view of the serious nature of the alleged infringements and the risk of evidence disappearing, the Commission considered that a decision was required ordering Mewac to submit to an investigation pursuant to Article 18 (3) of Regulation (EEC) No 4056/86.

- (4) On 26 June 1989 the Commission adopted a decision under Article 18 (3) of Regulation (EEC) No 4056/86 ordering Mewac to submit to an investigation in order to enable the Commission to establish:

- whether the acts of the conference had resulted or were resulting in the absence or elimination of actual or potential competition, in particular by closing the trade to competition and, notably, whether Mewac or member companies of Mewac had adopted agreements, decisions or concerted practices aimed at sharing all cargo carried on sea routes between Europe and Africa, in breach of Article 85 of the Treaty,
- whether the operation of outsiders was impeded by the behaviour of third countries in trade covered by the activities of Mewac,
- whether Mewac had abused a dominant position within the meaning of Article 86 of the Treaty.

The decision included a reference to Article 19 (1) (c) of Regulation (EEC) No 4056/86, which covers cases in which undertakings or associations of undertakings refuse to submit to an investigation ordered by decision issued pursuant to Article 18 (3).

- (5) On 28 June 1989 at 10.00 a.m., two Commission officials, accompanied by two officials from the Direction Régionale de la Concurrence, presented themselves at the premises occupied by Mewac in Marseilles in order to carry out the investigation ordered by the decision of 26 June.

As the Secretary-General of Mewac was away in Paris, he was immediately contacted by telephone. The Commission officials informed him of the purpose of their visit and faxed copies of the Commission decision, their authorization and the explanatory note accompanying the authorization.

The Secretary-General of Mewac stated that he was the sole representative of Mewac in

Marseilles, did not have a lawyer to represent him in that down and could not, therefore, allow the Commission officials access to any documents until he returned to Marseilles, i.e. on the following day at 8.30 a.m.

The Commission officials replied that his answer amounted to a refusal to comply with the Commission decision.

The Secretary-General nevertheless confirmed his position by fax.

The Commission officials, after informing the Secretary-General of the consequences of such a refusal, proceeded:

- to record in the minutes the notification and the refusal to submit to an investigation,
- to request the assistance of the French authorities in accordance with Article 18 (6) of Regulation (EEC) No 4056/86.

The French authorities proposed that, as a precaution, they take appropriate steps to seal the premises of Mewac until the following day. The Secretary-General of Mewac was informed of this and, in the presence of his legal adviser, suggested that the seals be placed by agreement between the parties.

- (6) This solution was adopted and the investigation started the next day, in the presence of the Secretary-General. Subsequently, the investigation proceeded normally.

II. LEGAL ASSESSMENT

- (7) Article 18 (1) of Regulation (EEC) No 4056/86 provides that 'in carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings'. Article 18 (3) states that 'undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission'.

Mewac is an associations of undertakings within the meaning of Article 18 of Regulation (EEC) No 4056/86; as such, it is required to submit to all Commission decisions adopted pursuant to Article 18 (3) and, consequently, to allow Commission

officials access on arrival to the documents relating to the subject-matter of the investigation, at their request.

Naturally the Commission's representatives are prepared to wait for a lawyer to be present before commencing an inspection, provided that the delay is reasonable and that no documents are removed from the premises or destroyed in the meantime. In the present case, there was no material reason why the Commission decision could not be implemented: had the Conference so wished, the Commission officials could have been joined either promptly by any legal representative or adviser designated by the Conference or, later in the day, by the Secretary-General himself or his Paris-based lawyer; in the latter case, the Conference could have allowed the Commission officials, with the help of the Conference staff present at the time, to begin an initial examination of documents relating to the subject-matter of the investigation, on the understanding that the Secretary-General or his representative could, as soon as they arrived, add any appropriate comments.

In the circumstances, there are no grounds for claiming that the absence of the Secretary-General from the headquarters of the Conference (four hours and 40 minutes away by train and less by plane) constituted exceptional circumstances preventing the investigation from taking place. Furthermore, in view of the difficulties experienced by the Secretary-General, the Commission officials sought to assist him by offering to allow him a reasonable period of time to return to Marseilles and to delay the start of the investigation. Even if the Secretary-General had believed the circumstances to be exceptional, he could have invited the Commission officials, also by way of exception, to remain on the Conference's premises after normal business hours.

In holding up matters for what was manifestly an unreasonably long period, the Conference effectively refused to submit to an investigation by the Commission on the date fixed, it being understood that it is not for an undertaking ordered by decision to submit to an investigation to decide on the date and time of the investigation.

- (8) Article 19 (1) (c) of Regulation (EEC) No 4056/86 provides that the Commission may by decision impose on undertakings or associations of undertakings fines of from ECU 100 to 5 000 where, intentionally or negligently, they refuse to

submit to an investigation ordered by decision issued in implementation of Article 18 (3).

- (9) As is clear from the circumstances described above, Mewac refused to submit to an investigation ordered by the Commission pursuant to Article 18 (3). This attitude was intentionally maintained after the Commission officials had informed the Secretary-General of the Conference of the consequences of his refusal and of their intention to record the refusal in the minutes and to request the assistance of the national authorities.

The fact that the Secretary-General of the Conference finally agreed to the placing of seals which the national authorities, notified pursuant to Article 18 (6) of Regulation (EEC) No 4056/86, were in any event considering placing, does not mitigate the effect of the refusal of the Conference to comply with the investigation ordered by decision of the Commission.

The infringement is particularly serious in that Mewac's attitude severely jeopardized the purpose and effectiveness of the investigation by preventing it from taking place on the date fixed by the Commission and chosen by it with a view to carrying out simultaneous investigations on the premises of several liner conferences suspected of having collectively infringed the competition rules.

In determining the amount of the fine to be imposed, the Commission takes account of the fact that while Mewac objected to the investigation being carried out without the presence of its Secretary-General, it did consent to the investigation the following day. Therefore, its refusal was not outright.

In view of these considerations, it is appropriate to impose on Mewac a lesser fine than the maximum provided for in Article 19 of Regulation (EEC) No 4056/86,

HAS ADOPTED THIS DECISION:

Article 1

Mewac infringed Article 18 of Regulation (EEC) No 4056/86 by refusing to submit to an investigation ordered by decision of the Commission.

Article 2

A fine of ECU 4 000 (four thousand) is hereby imposed on Mewac. This amount shall be paid in ecu within three months of the date of notification of this decision, to the following account:

No 310-0933000-43,
Banque Bruxelles-Lambert,
Agence européenne,
Rond-Point Schuman 5,
B-1040 Brussels.

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 three and a half percentage points, i.e. 13,25 %.

Article 3

This decision is addressed to

Mewac,
33, rue Jean-François Leca,
F-13002 Marseilles.

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

Done at Brussels, 17 December 1992.

For the Commission

Leon BRITTAN

Vice-President

COMMISSION DECISION

of 21 December 1992

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

(IV/33.031 — Fiat/Hitachi)

(Only the English and Italian texts are authentic)

(93/48/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

The product and market

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 6 and 8 thereof,

Having regard to the notification and application for negative clearance submitted on 23 December 1988 by Fiat Geotech Technologie per la Terra SpA and Hitachi Construction Machinery Ltd concerning a joint venture, as well as the amendment thereto submitted on 12 June 1992,

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) On 23 December 1988 the Commission was requested to give negative clearance for, or, alternatively, to exempt pursuant to Article 85 (3), a joint venture for the manufacture, distribution and sale of hydraulic excavators and related products.

The parties

- (2) The notifying parties are Fiat Geotech Technologie per la Terra SpA (Fiat) and Hitachi Construction Machinery Co. Ltd (Hitachi). Fiat is a subsidiary of Fiat SpA of Turin. Hitachi is a subsidiary of Hitachi Limited of Japan.

- (3) The principal product involved is hydraulic excavators of between 10,5 and 45 tonnes. These are medium to large excavators used mainly in road construction, large public works contracts and in mines and quarries.

- (4) Such excavators form part of the wider earth-moving machinery market which includes six other types of equipment (wheel loaders, crawler loaders, backhoe loaders, dozers, graders and scrapers). They are sold throughout the world, and although there are local markets, the more important customers which, however, represent only 10 % of the market, are international contracting firms that may buy anywhere in the world for use anywhere in the world.

- (5) After the worldwide recession in the early 1980s, when there was a drop in demand of about 35 %, the earthmoving machinery market seems to be on a slight rise or, at least, to have stabilized. Market changes have, however, influenced the structure of producers operating throughout the sector, which means that some companies have left the sector, joint ventures and mergers have been entered into to cope with new market conditions, certain plants of companies still in business following the setting up of joint ventures have been closed down and some producers have acquired plants abroad in order to be present directly in strategic markets. Within the Community the 8 largest manufacturers have 72 % of the market; the market leader has about 18 %. Fiat is in fifth place while Hitachi is not a full-line producer present in all product lines.

- (6) Analysis of the earthmoving machinery market structure shows up separate subsectors which have, to some extent, developed differently over recent years. As regards the hydraulic excavator subsector in particular, it has grown as a percentage of machines produced in the entire sector. Although the number of units sold show a decline, the sales of such excavators have held up relatively well compared with the sales of other types of earth-moving machinery.

⁽¹⁾ JO No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ JO No C 206, 7. 8. 1991, p. 3.

(7) The Community market is second in the world for excavators (with approximately 20 % of world sales) after the Japanese market; about 15 % of the excavators sold in the Community are produced outside.

(8) There are many producers of hydraulic excavators. Within the Community the 8 largest manufacturers have 75 % of the market. The market leader has nearly 15 %. Fiat, having sixth place within the Community, has a very uneven penetration with a large share above all in Italy, followed by Spain and France, and little elsewhere. Hitachi is in eighth place, and has a substantial presence only in the United Kingdom, Ireland and The Netherlands. Fiat and Hitachi combined had fourth place with about 12 % of the market, which they expect to rise to some [...] % ⁽¹⁾ following the creation of the joint venture. There are many smaller producers, most of them operating on a local basis, with about 15 % of the market. At present European manufacturers produce small quantities using components bought in from other suppliers. Even leading European manufacturers rely primarily on external suppliers for components. This is due to low output, as well as to the characteristics of the product and the manufacturers is based not so much on product innovation and price as on product diversification between manufacturers, who cater for the specific market requirements in their own main countries or areas of operation.

(9) The joint venture also makes hydraulic cylinders, which are used as components of hydraulic excavators, but also of other earthmoving machinery, either for incorporation in the joint venture's principal products or for sale. In addition, the arrangements concern the purchase of parts for incorporation in and the sale of spare parts for the principal product, and may involve the manufacture and/or distribution of other earthmoving or construction machinery. Many of the parts or components used in excavators, for example the motors, are also used in a wide variety of other products.

The arrangements

(10) The notified agreements provide for the formation of a joint venture company called Fiat-Hitachi

Excavators SpA (Fiat-Hitachi), based in Italy. It began trading by taking over the existing Fiat range of excavators and cylinders, but developed a new Fiat-Hitachi range using Hitachi technology. The joint venture also organized the integration of the marketing structures and networks of Fiat and Hitachi in the countries indicated as exclusive joint-venture countries.

(11) The joint venture has an exclusive market covering Western Europe (including the whole of the Community), the Mediterranean basin and Africa. It has non-exclusive access to the USA (where Hitachi has a joint venture with Deere) and the former Comecon countries. It has no access to the rest of the world which is the exclusive territory of Hitachi (other than for the right of Fiat to continue to produce and sell its non-Hitachi design excavators through Fiatallis Latino-Americana).

(12) Both Fiat and Hitachi license their relevant technology to the joint venture. The Fiat licence makes Fiat Hitachi joint owners of the technology with Fiat. The Hitachi licence is exclusive for the joint venture's exclusive market, and non-exclusive elsewhere. These licences are perpetual and irrevocable.

(13) After discussion with the services of the Commission, the parties have undertaken that, in so far as the Community is concerned, the agreements allow passive sales into the other's exclusive territory. This undertaking has been incorporated into the agreements. This means, in so far as the Community is concerned, that although Hitachi will not seek to sell to Community-based contractors or other undertakings, it will accept orders coming from such purchasers.

(14) The arrangements provide for the joint venture to buy all its motors from Iveco (which is part of the Fiat group) and all hydraulics which it does not manufacture itself from Hitachi.

(15) The two parent companies undertake that should they decide to manufacture and/or sell, on the joint venture's exclusive market any type of earthmoving machinery not then manufactured or marketed, each of them grant to the other first refusal right to realize such initiative together for the manufacture of such products through Fiat-Hitachi or by some other form of cooperation.

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

- (16) The arrangements include a minority participation by the Sumitomo Corporation in the joint venture. They also include provisions for the joint venture to buy plant, materials and components through Sumitomo, but at the joint venture's option rather than exclusively.
- (17) The term of the joint venture runs until 2001, and is renewable. The various exclusivities remain in force until the end of that year.

The parties' submissions

- (18) The parties ask for negative clearance claiming that, as Fiat is withdrawing from the market, Fiat and Hitachi are no longer competitors.
- (19) Alternatively, the parties ask for an exemption under Article 85 (3). They argue that:
- the agreements will lead to technologically-advanced products,
 - distribution and after-sales service will be improved,
 - the market share of the joint venture for 1988 is estimated at only some [...] % in the Community as a whole,
 - the agreements will, therefore, result in benefits for the consumer in terms of price, quality and reliability,
 - all the potentially restrictive provisions of the agreements are indispensable to achieving the objectives; in particular, the joint venture will be free to use all technology after the expiry of the relevant licences.

II. LEGAL ASSESSMENT

Article 85 (1)

- (20) The creation of the joint venture Fiat-Hitachi does not constitute a concentration within the meaning of Article 3 (2), second subparagraph of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings⁽¹⁾. Fiat and Hitachi were actual competitors in Europe and worldwide before they entered into the agreement to create their joint venture. They have remained at least potential competitors thereafter. Hitachi operates on the same product markets as Fiat-Hitachi in Japan and in the Far East and indirectly, through its joint venture with Deere, also in the USA. Fiat

continues to develop, manufacture and sell its product range based on its own technology through Fiatallis Latino-Americana and to operate in the other subsectors of the earthmoving machinery market. Both parent companies have retained their technologies for the production of hydraulic excavators and components and merely granted a licence to their joint venture and the relevant agreements are to terminate in the event of liquidation of the joint venture. As exclusive suppliers of motors and hydraulics, they are furthermore actively interested in the production and marketing activities of Fiat-Hitachi. Under these circumstances, the joint venture has to be qualified as cooperative in nature. Its creation would have led to coordination of competitive behaviour between the parent companies, on the one hand, and between the parent companies and the joint venture on the other hand, even if the parties had not included restrictive clauses in their contractual arrangements.

- (21) The parties have put together their European hydraulic excavator manufacturing and distribution activities. By agreeing not to compete with their joint venture, they have furthermore excluded any competition with each other and with the joint venture in the latter's contractual territory.
- (22) The agreement gives Fiat-Hitachi an exclusive territory covering the whole of the Community, while excluding it from Hitachi's home market, Japan, and from the Far East. This constitutes a ban on active imports by Hitachi into the Community.
- (23) The creation of the joint venture is expected to give Fiat and Hitachi a captive market for components for 16 % of the excavators sold within the Community.
- (24) These provisions in the agreements will have as their object or effect to appreciably restrict competition within the meaning of Article 85 (1) of the Treaty.

Article 85 (3)

- (25) The joint venture will develop better excavators than were currently being produced by Fiat and Hitachi separately, as each party will incorporate technically better components at its disposal. In addition, the merging of the separate and largely complementary distribution systems of Fiat and Hitachi improves the distribution of the resulting product.

⁽¹⁾ OJ No L 395, 30. 12.1989, p. 1; corrected version OJ No L 257, 21. 9. 1990, p. 13.

- (26) The joint venture is expected to have 16 % of the Community market for excavators. This will not give it a dominant position in this market. Moreover, it should be more effective than either Fiat and Hitachi separately, and, therefore, the creation of the joint venture will bring about a more balanced market structure and the joint venture will in future operate throughout the Community. In consequence, the purchasers of tractors should also benefit from the improvements in the products and of their distribution.
- (27) Although the exclusive purchasing provisions, described in recital 14, foreclose sales opportunities for third party manufacturers of motors and hydraulics, this restriction results from the setting up of the joint venture and appears to be reasonably necessary to its operation. In addition to that, the restriction will not have the effect of eliminating competition in respect of a substantial part of the products in question. In effect, even if third party manufacturers were to offer terms such that, in the absence of such provisions, the joint venture might be led to purchase from them rather than from its parent companies, these manufacturers will still have access to a large market comprising not only other manufacturers of hydraulic excavators but also manufacturers of the wide variety of products in which such motors and hydraulics are incorporated.
- (28) With the undertaking referred to in recital 13, the provisions on distribution as described above also appear to be no more than is necessary to allow the joint venture to function.
- (29) The notified agreements therefore meet the requirements for exemption pursuant to Article 85 (3).

- (30) The agreements will continue in force in their present form until the end of 2001. They were notified to the Commission on 23 December 1988. It appears appropriate therefore, pursuant to Articles 6 (1) and 8 (1) of Regulation No 17, to grant such an exemption for a period of 13 years with effect from that date,

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 for the period from 23 December 1988 to 31 December 2001 to the joint venture agreement creating Fiat-Hitachi Excavators SpA and the related agreements notified to the Commission on 23 December 1988.

Article 2

This Decision is addressed to:

Fiat Geotech Technologie per la Terra SpA,
Viale delle Nazioni, 55,
I-41 100 Modena;

Hitachi Construction Machinery Ltd,
62 Ohtemachi 2 Chome,
Chiyoda-Ku,
Tokyo, Japan.

Done at Brussels, 21 December 1992.

For the Commission

Leon BRITTAN

Vice-President

COMMISSION DECISION

of 23 December 1992

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

(IV/33.814 — Ford/Volkswagen)

(Only the English and German texts are authentic)

(93/49/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 of an agreement relating to multi-purpose vehicles made on 4 February 1991 by Ford of Europe Inc., Brentwood, United Kingdom and Volkswagen AG, Wolfsburg, Germany,

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

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

Whereas:

I. THE FACTS

A. The proceedings

- (1) This Decision relates to a 'foundation agreement' between the two motor vehicle manufacturers Ford of Europe (Ford) and Volkswagen AG (VW) on the setting up of a joint venture company (JV) for the development and production of a multi-purpose vehicle (MPV) in Portugal. The parties subsequently submitted Joint Venture Agreements executing the foundation agreement ('the agreement').

B. The parties

- (2) Ford is a subsidiary of the Ford Motor Company, Dearborn, USA, whose principal business is the manufacture, assembly and sale of motor vehicles and related parts. Ford Motor Company's

worldwide turnover for 1990 was US\$ 97,6 billion. In 1990 the Ford group was rated fifth in the Community passenger car market, with a market share of 11,6 %.

- (3) VW was the leading car manufacturer in the Community in 1990 with a market share of 15,5 % representing sales of 2 049 000 units. Its turnover in 1990 was DM 65,3 billion.
- (4) Ford and VW are already cooperating in a joint venture in South America (Autolatina). This cooperation does not involve the production of MPVs.

C. The agreement

- (5) The agreement commits Ford and VW to the joint development, engineering and manufacture of a MPV. The two partners will set up a JV (Auto-europa) which will be owned in equal shares and jointly controlled. Ford and VW will invest a total of approximately US\$ 2,9 billion in the whole project; all costs relating to the development, engineering and manufacture of the MPV will be shared equally. It is intended that the JV will last at least as long as the MPV's projected life cycle of about 10 years.
- (6) The plant which will house the JV, is to be built on a green field site near Setúbal, Portugal, and will commence its production of MPVs in January 1995. The product development will be predominantly carried out by VW in Germany while Ford will mainly be responsible for the manufacturing and plant engineering. The JV will have a capacity of 830 units per day representing an annual production of 190 000 units. Both partners will supply engines and transmissions whilst most of the remaining parts will be purchased from external suppliers.
- (7) The parties have agreed to differentiate their MPVs in order to preserve their brand image and to make their versions of the MPV distinguishable

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 182, 13. 7. 1991, p. 8.

to their customers. The product differentiation will, *inter alia*, concern:

- engines: VW will equip all its versions with its own engines and engine control systems. Ford will do the same for its standard versions (which will make up an estimated 75 % of its total MPV sales). For the remaining diesel and top models (2,8 litre engines), Ford will fit its vehicles with VW engines,
- design: with regard to the exterior design, the differentiation will involve the front appearance (bonnet, headlights, foglamps, radiator grille and corporate logos), side stripes, wheel covers, rear lights, applique as well as metallic paint. The differentiation concerning the interior design will concern the instrument panels (by colour, instrumentation and graphic design), steering wheels, gear knobs, seat trim fabrics and colours, inside door panel and side panel trim fabrics and colours.

The partners will, furthermore, have different series line-ups (VW will offer five, Ford will offer three) and offer different optional extras (e.g. trip computer, sliding roofs, air conditioning).

- (8) Ford and VW have committed themselves to each purchase fixed quantities (normally one half of the JV's production) of MPVs and parts from the JV on a 'cost plus basis', with shortfall penalties being payable if minimum quantities are not purchased. The partners are entirely free as to the distribution of the vehicles. They will independently distribute their respective MPVs through their own networks and under their own brand names.

D. The relevant market

- (9) An MPV can be described as a vehicle designed to carry up to seven persons in three rows or, alternatively, five persons with considerable space for luggage. Foldable and removable seats in the second and third row provide for high flexibility which makes the MPV suitable for both leisure and work. An MPV can be recognized by its distinctive design and its specific features making ride and handling correspond to passenger car standards.
- (10) The MPV occupies the gap between conventional five-door estate cars and light vans. However, due

to improved space efficiency, it can be generally distinguished from estate cars by its greater 'family carrier' comfort. The MPV can also be distinguished from commercial vehicles, which are not primarily designed for the transport of persons, by its passenger car-like conception and its usually lower height.

- (11) Therefore, the MPV constitutes a relatively new and distinctive market segment by virtue of its specific product features although a certain interchangeability with cars from neighbouring segments exists.
- (12) Ford is already offering a MPV with its US-manufactured model 'Aerostar'. The sales of this comparatively old model, which was constructed for and successfully sold on the US market have, however, remained negligible in Europe (less than 1 % of the MPV market segment in 1990). Ford and Nissan are currently cooperating in the US to develop a successor model for the 'Aerostar' for the US market. Furthermore, Ford is involved in some cooperation with Mazda in which it also has a minority shareholding. Mazda is a producer of MPVs, although presently it is not supplying these products in the Community.

VW's model 'Caravelle' cannot be regarded as a true MPV as described above. The 'Caravelle' was derived from a commercial vehicle and does not possess all the abovementioned characteristics for a MPV, predominantly lacking the car-like comfort, handling, speed and MPV flexibility.

- (13) The MPV market segment in Europe is dominated by the Renault 'Espace' of which an updated version has been released recently. The 'Espace' goes back to a concept developed by Matra SA (Matra) which assembles the vehicle and distributes it through the distribution network of Renault and under the latter's name. All other competitors of the Renault 'Espace' are either Japanese or US-produced. In 1990 the market shares of the participants in the MPV segment in the Community were the following:

— Renault:	54,7 %,
— Chrysler Voyager:	15,6 %,
— Mitsubishi Space Wagon:	12,0 %
— Nissan Prairie:	7,6 %
— Toyota Previa:	3,9 %,
— Toyota Space Cruiser:	2,9 %.

(14) The MPV market segment (with a current volume of less than 100 000 units is negligible in comparison to the overall car market) has been identified by most analysts and producers as a segment within the car market which is likely to expand significantly in Europe in the medium to long term. However, the total number of sales in the Community is not expected to go beyond 350 000 units by 1995.

(15) Entry to the market segment can generally be regarded as relatively difficult in view of the considerable investment necessary for both development and production. An economically viable production also demands a certain minimum capacity which has been estimated by the parties involved in this case, as well as other producers, to be in excess of 110 000 units per year. However, several MPV projects are currently under consideration and further entries into the MPV market segment can be expected before the end of the century.

E. State aid

(16) The Portuguese Government notified their proposal to provide financial aid to the JV in June 1991. The Commission decided in a separate procedure not to raise any objections to the proposed aid measure on the basis of Article 92 (3) of the Treaty. This decision is currently the subject of an appeal by Matra to the European Court of Justice.

II. COMMENTS OF THIRD PARTIES

(17) Following the publication pursuant to Article 19 (3) of Regulation No 17, the Commission received comments from Matra. Matra, at the same time, launched a separate complaint pursuant to Article 3 of Regulation No 17 against the project. It holds the view that the agreement between Ford and VW infringes Articles 85 and 86 of the Treaty and does not meet the conditions for an exemption pursuant to Article 85 (3). It mainly argues that the agreement will have as its effect a considerable restriction of competition without contributing to a promotion of technical or economic progress as the MPV envisaged by the JV would be produced under common production methods and technology and would not represent substantial product innovation. The agreement could also not be considered as indispensable within the meaning of Article 85 (3) because Ford and VW should be able to penetrate the MPV market segment independently. Both undertakings should, in principle, be in possession of the financial resources as well

as the necessary technology to develop and produce an MPV individually. Contrary to the statements published in the Commission's Notice of 13 July 1991, the production of an MPV would become profitable well below an annual production of 110 000 units. Furthermore, Matra alleges that the agreement between Ford and VW infringes Article 86 of the Treaty. The cooperation would lead to a dominant position of the two companies in the MPV market segment and enable them — taking into account the economies of scale and the extent of State aid involved — to eliminate competition in this sector by, for example, raising the entry barriers or exercising predatory behaviour which would have to be considered abusive.

III. LEGAL ASSESSMENT

A. Article 85 (1)

(18) The agreement between Ford and VW as to the setting up of the JV in Portugal for the joint development and production of MPVs falls within the scope of Article 85 (1) which, *inter alia*, prohibits all agreements between undertakings which may affect trade between Member States and which have as their object or effect the restriction of competition.

(19) Ford and VW are important competitors in the European and world car markets; both offer a wide and, for the most part, competing range of motor vehicles. In view of their financial, technical and research capacities, either company is, in principle, capable of producing a MPV on its own.

(20) The development of new models is one of the key elements of competition in the car sector and a determining factor for the success of a manufacturer in the market. Any agreements between competitors likely to restrict this activity have to be regarded as serious restrictions of competition. The joint development and production of an MPV by Ford and VW which involves an enormous investment of the parent companies and furthermore the obligation to buy fixed quantities of MPVs from the JV means that neither parent company would have any economic interest in independent activities in this field.

(21) The cooperation between Ford and VW will furthermore lead to an extensive exchange and

sharing of, *inter alia*, technical know-how which could affect the competitive behaviour of the two partners in neighbouring market segments like those of estate cars or light vans.

- (22) The agreement will appreciably affect trade between Member States as it was concluded between two internationally active car manufacturers concerning the joint development and production of a product which is to be sold throughout the Community.

B. Article 85 (3)

- (23) The envisaged JV between Ford and VW is characterized by the following elements:

- the MPV market segment has relatively low volume and will, at least in the medium term, stay that way despite positive forecasts (recital 14),
- neither Ford nor VW have until now been a supplier in the MPV market segment worth mentioning (recital 12),
- the structure of the segment in question is characterized by the clearly leading position of one supplier not exposed to any considerable competition from (other) European suppliers (recital 13),
- the vehicle will be produced in a new and modern plant (recital 6),
- the JV will have extremely positive effects on the infrastructure and employment in one of the poorest regions in the Community (recital 36).

Taking into account the exceptional circumstances of the case, the notified agreement between Ford and VW fulfils the four conditions for an exemption pursuant to Article 85 (3):

1. Improvement of production of goods or promotion of technical or economic progress

- (24) The cooperation makes available an advanced vehicle designed to meet the requirements of European consumers which will be separately

offered by the partners in differentiated versions throughout the Community.

- (25) Both companies have at their disposal extensive know-how in the field of research as well as car automation. The cooperation allows the partners to complement one another as to their engineering resources and technical expertise. This will result in an improvement in the production of goods through a rationalization of product development and manufacturing. Technical progress will be promoted due to a pooling of the existing technical knowledge and its conversion into a significantly improved, and in several aspects, innovative MPV. Production of MPVs in the Community will be improved by the establishment of an entirely new and most modern manufacturing plant using the latest production technology (e.g. a fully automated framing and weld line, an extra-large 1 200 tonne tandem press, robots). The implementation of a new component supply concept will allow computer-controlled deliveries feeding the production line resulting in minimum inventories and no delays. A 30-hectare industrial park next to the plant will be created to give the major suppliers (representing over 700 different components) direct access to the plant. This new concept aims to become the most efficient 'Just-in-time' component logistic system in the world, producing better results than the Japanese invented 'Kanban' component delivery system.

- (26) The MPV produced by the JV constitutes a continuous development of technical progress of production in the Community. It will set new standards in the MPV segment in several respects compared to its competitors. The vehicle will feature, *inter alia*, a newly developed front/rear suspension system, a new axle and sunroof concept as well as comprehensive passenger safety systems. It will also be considerably improved with respect to environmental requirements, for example, potentially hazardous materials (e.g. CFCs, PVC) in the final product will be either drastically reduced or totally eliminated. Furthermore, the extent of recyclability will be significantly increased and the MPV is also envisaged to lead the segment with regard to low emissions and fuel consumption.

2. Fair share to consumers

- (27) The European consumer can be expected to benefit directly from the JV. As a result of the cooperation, mainly due to the sophisticated production technology and the economies of scale, the consumer will be offered two versions of a high-quality and reasonably priced MPV which will be distributed in the whole Community through the extensive sales networks of the

partners. Ford and VW will be forced to pass on the benefits to the consumer, because as a result of their entry, along with that of other manufacturers into the expanding MPV segment, there will be increased competitive pressure on all suppliers leading to a more balanced segment (see recitals 37, 38 and 39). Moreover, with VW and Ford further competitive European car manufacturers will be present in this market segment.

3. Indispensability of restrictions

- (28) The JV between the two major car manufacturers, Ford and VW, to produce a MPV can be considered as indispensable for the period of exemption in the light of the exceptional circumstances of the case in question and the conditions the Commission considers necessary for an exemption to be granted.
- (29) The cooperation enables the partners to competitively offer a high-quality product, designed for the specific needs of European consumers, in the relatively new and low volume MPV market segment in a comparatively short time. The examination of the case leads the Commission to accept the partners' arguments that the beneficial results of the cooperation could not, to that extent, be achieved otherwise. The partners, each acting on its own, could not develop and produce the MPV in the same conditions so rapidly and efficiently in Portugal as their cooperation will enable them to do.
- (30) Neither partner has currently a sufficient capacity at its disposal for a production of the size projected for their JV on the basis of the concept described above. The cooperation, furthermore, enables the partners to complement each other as to their engineering personnel and technical expertise, as such a project requires a considerable amount of skilled manpower. For this purpose, Ford will, *inter alia*, make manufacturing engineering staff available while VW is able to sufficiently provide skilled product engineering staff. This will allow the partners to concentrate on certain tasks and thus to operate more efficiently.
- (31) The partners presented to the Commission the total investment costs which would be required if they were to develop and produce an MPV individually on the proposed basis with separate annual sales which they project at between 80 000 and 90 000 MPVs each. The minimum number of units for production of a MPV based on the concept described above to become economically viable was estimated by the companies concerned as being in excess of 110 000 annually. This figure, although always depending on the particular circumstances of each case, corresponds to statements of competitors in a similar case concerning the MPV segment currently being investigated by the Commission. Taking into account the investment required by either company for separate development and production of an MPV as well as the unit production necessary for profitability, it could not be expected that the companies, acting on their own, would achieve a reasonable return in view of their anticipated sales and with regard to the low volume of the MPV segment in comparison with other market segments. Even if the companies were to achieve their sales targets, the joint project is not expected to make profits for several years, despite its economies of scale and considerable financial aid from the Portuguese government.
- (32) In this context, the Commission accepts the view that a satisfactory penetration of the MPV segment by the partners individually cannot be achieved by a simple adaptation of already existing models like the Ford 'Aerostar' (which has not sold well in the Community) or the VW 'Caravelle'. The 'Aerostar' was initially designed as a commercial vehicle and later converted into an MPV for the US market, which differs substantially from the European MPV market segment. Due mainly to very advanced road networks, larger car parking facilities and far lower fuel costs, US customers are considerably less concerned with parking and congestion problems and with the dynamics and manoeuvrability of an MPV. Therefore, the specific requirements of European consumers for, *inter alia*, aerodynamic designs, faster and smaller engines, reduced fuel consumption, increased manoeuvrability, fuel efficient diesel engines and right-hand-drive versions cannot be met by the 'Aerostar'. These aspects would require an entirely new concept which cannot be achieved by simple adaptation. The same applies to the comparatively large and heavy 'Caravelle' (with up to nine seats) which would also need a substantial redesign in order to

lose its image as a light van and to provide the vehicle with the typical MPV characteristics, especially with passenger car-like handling.

It is, finally, and for similar reasons also not possible to produce an MPV of the projected kind by a simple adaptation of the partners' existing break models (e.g. Passat, Sierra). In particular, the platform of the break models are too narrow and too short to achieve the key design characteristics of a MPV (seating of up to seven persons in three rows, considerably higher gross vehicle weight).

- (33) This assessment of the Ford/VW joint project is not affected by the fact that Matra, as well as certain Japanese producers, were able to penetrate the MPV segment individually, since their situation is not comparable to those of the parties to the Joint Venture.

Matra has, since the mid-1980s when the 'Espace' was introduced and the MPV segment developed, always held a strong leading position with an average share of above 50 % of the MPV segment, exposed only to limited competition from non-European suppliers and always far ahead of its next closest competitor (see recital 13). Its position has enabled it to be profitable with a comparatively low annual production. Moreover, Matra had to enter into cooperation with Renault to distribute its vehicles. Renault is also a supplier of key components for the 'Espace'.

The Japanese suppliers are in a different situation in so far as they can profit from considerable economies of scale due to a strong and largely closed national market. The Japanese MPVs constitute in some respects a compromise between the different requirements of the European and the US market. For these reasons and due to their competitive pricing strategies, the Japanese sell a certain amount of MPVs in Europe. However, they sell far more units in the USA, the biggest MPV in the world.

- (34) The restrictions of competition to be caused by the cooperation between Ford and VW are limited to what is indispensable for the functioning of the JV. Both partners are free as to the distribution of their MPVs which will be sold separately under their respective trademarks and in differentiated

versions. The partners may use all intellectual property rights independently and are free to initiate design changes of their models without the knowledge of the other partner. However, in order to achieve and secure the minimum effects on competition, to maintain a certain level of product differentiation, and to limit potential spill-over effects of the cooperation, the Commission intends to impose a number of conditions and obligations (see recital 41). The Commission will also reconsider its decision taking into account the development of the MPV segment after the period of exemption has expired.

- (35) The MPV cooperation between Ford and Nissan expressly provides for the right of the partners to market the product worldwide. Ford intends to offer a certain amount of these MPVs in the Community to customers at the upper end of the MPV market segment. Nissan has also recently introduced, with its 'Serena' model, another MPV to the Community. The existing cooperation between Ford and Mazda does not exclude competition between them in the MPV sector, as is demonstrated by a dumping complaint in the US on the part of Ford and others against Japanese producers of MPVs including Mazda.

- (36) In the assessment of this case, the Commission also takes note of the fact that the project constitutes the largest ever single foreign investment in Portugal. It is estimated to lead, *inter alia*, to the creation of about 5 000 jobs and indirectly create up to another 10 000 jobs, as well as attracting other investment in the supply industry. It therefore contributes to the promotion of the harmonious development of the Community and the reduction of regional disparities which is one of the basic aims of the Treaty. It also furthers European market integration by linking Portugal more closely to the Community through one of its important industries. This would not be enough to make an exemption possible unless the conditions of Article 85 (3) were fulfilled, but it is an element which the Commission has taken into account.

4. No elimination of competition

- (37) The cooperation between Ford and VW will not lead to an elimination of competition in the MPV segment. Having regard to the leading position of the Renault 'Espace', it will, on the contrary, stimulate competition through the creation of an additional choice in this area and lead to a more

balanced structure in the MPV market segment. There will also be increased competition concerning price and quality over the next five to ten years with the further penetration of the segment by Japanese producers as well as other new entrants.

- (38) Taking into account that competition in the European car markets also takes place on the distribution level, the Commission considers that the product differentiation and profit margins in the MPV segment will leave sufficient scope for a certain degree of competition between Ford and VW despite the fact that they will purchase their versions of the MPVs from the JV, in principle, at the same price. The level of product differentiation achieved in the production of the MPV concerning both visual and technical elements, which will be further expanded, is considered by the Commission in this case as being the minimum necessary to ensure that Ford and VW can develop their own identity and pursue their individual sales strategies in the MPV sector. For the following reasons at least it can be expected that Ford and VW will in fact enter into direct competition with each other. First, the partners have the incentive of incremental sales profits through increased individual sales as the agreement does not provide for profit sharing. Second, the mass producers strategy in the car sector is to offer their customers the whole range of products in order to establish or reinforce a brand loyalty and not just a model loyalty. This overall competition will force Ford and VW to compete directly also in the MPV segment.

C. Article 86

- (39) Article 86 applies only where undertakings abuse an already existing dominant position. In the given case the partners do not hold a dominant position in the MPV segment. And even if such a position existed the mere risk of an abuse, as alleged by Matra, would not justify the application of Article 86. Notwithstanding this, the cooperation between Ford and VW will, for the abovementioned reasons, not lead to a dominant position within the meaning of Article 86.

In the light of the conditions of competition in the MPV segment it is not likely that the cooperation, despite the State aid granted to the project and the economies of scale resulting from it, will create such competitive advantages as to enable Ford and VW to prevent effective competition being main-

tained by giving them the power to behave to an appreciable extent independently of competitors in the MPV segment. In this context, the Commission — contrary to Matra's statement — does not see, despite some uncertainty regarding the various forecasts of MPV demand in the Community, that supply will dramatically exceed demand over a significant period of time from now to the end of the century. And even if such a situation occurs, overcapacity in the circumstances of the case in question could only lead to increased competition without creating new dominant positions. The Renault 'Espace' has been the leading product in the MPV segment since its introduction in the mid-eighties. Due to its high quality and reputation, it has always headed the segment with a significant lead over its nearest competitors. On the basis of a reinforced cooperation with Renault, Matra will develop and offer a new type of the 'Espace' in 1995 and will, therefore, remain an important competitor in the MPV segment. Ford and VW will, together with other suppliers (new entrants as well as Japanese producers), ensure an effective degree of competition in the MPV market segment.

- (40) The comments submitted to the Commission by Matra, which also presented its arguments in an oral hearing on 15 June 1992, in response to the Commission notice of 13 July 1991 do not, for the abovementioned reasons (see particularly recitals 23 *et seq.*), give rise to any assessment of the notified agreement other than that set out above.

D. Articles 6 and 8 of Regulation No 17

- (41) Pursuant to Article 8 (1) of Regulation No 17, a decision in application of Article 85 (3) of the Treaty has to be issued for a specified period and may be subject to conditions and obligations. Article 6 (1) of the same Regulation obliges the Commission to specify the date from which the decision shall take effect. In accordance with this Article, in the case in question the decision can take effect from the date of notification, i.e. 4 February 1991. Taking into account all relevant circumstances of this case and particularly to allow the high investments of the parties concerned to become profitable, the decision has to cover a period of 10 years after the production has commenced which approximately corresponds to the life cycle of an MPV. This decision has to be subject to a number of conditions and obligations which the Commission feels it should impose in

order to comply with its task under Article 8 (3) of Regulation No 17, as well as to secure the preconditions for a decision under Article 85 (3) in the case in question. In this context the Commission takes into consideration that the car sector is not only characterized by a dense network of relations between suppliers in the component area, but, above all, by increasing horizontal cooperation, including the common production of vehicles. Moreover, a number of suppliers hold shares in competitors. These conditions/obligations have to ensure, *inter alia*, that a certain level of product differentiation is maintained in order to enable the partners to actively compete against each other on the distribution level (see recital 38). In particular, the Commission takes the view that the engines, as a vital component of the MPV, should be different. Under the special circumstances of this case as outlined above it has been accepted, however, that Ford acquires a certain percentage of specific VW engines for a limited time-span. The partners should also be free to order the quantities which they require independently of each other from the JV. In order to limit the potentially negative effects of the joint project on the overall competition between the partners, the Commission feels it is appropriate to oblige them to take certain precautions concerning the exchange of sensitive information between them and the JV. In view of the abovementioned situation in the car sector the partners must also inform the Commission about their future cooperation with other car producers or suppliers as well as the use of licences acquired in connection with their project. So as to avoid a division of the market and to make the supply of MPVs from other Member States easier for European consumers, the partners must — according to their assurances *vis-à-vis* the Commission — offer their MPVs throughout the Community and apply for an EC type-approval for these vehicles. Finally, the Commission, in view of its experience, requires the partners to provide for effective separation in the event of the exemption not being extended,

HAS ADOPTED THIS DECISION:

Article 1

In accordance with Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable to the 'foundation agreement' between Ford of Europe Inc. ('Ford') and Volkswagen AG ('VW'), notified on 4 February 1991, as well as to the subsequently signed agreements which execute this aforementioned agreement.

Article 2

The exemption granted in Article 1 shall be subject to the following conditions/obligations:

A. Conditions

1. The parent companies shall maintain between the MPVs produced by the joint venture at least the differences between the engines which are described in the notification. Ford may not use VW diesel and petrol engines in more than 25 % of Ford's MPVs over any three-year period.
2. The parent companies shall establish appropriate procedures and safeguards to ensure that all competitively sensitive, non-public, information including their annual quantity requirements, marketing programmes and strategies, distribution policies, wholesale/retail prices, and their intentions regarding standard and optional features, does not reach employees of the other parent company, and reaches only those employees of the joint venture who have a need to know in order to ensure the proper functioning of the joint venture. Employees who have a need to know shall sign a confidentiality agreement that obliges them
 - (a) not to use such competitive information for purposes other than those related to the joint venture; and
 - (b) not to pass on such information to employees of the other parent company.
3. Any proposal by either parent company not to market its MPV in any Member State shall require prior Commission approval.
4. If the joint venture agreement is terminated each parent company shall grant or procure the granting of all technology licences (patented or not) necessary to enable the other parent company to continue to make MPVs separately.
5. The parent company shall not expand the range of products to be produced by the Joint Venture without prior approval of the Commission from MPV to other categories of vehicles.

B. Obligations

1. On an annual basis, following the first year of production, the Joint Venture company shall submit a report to the Commission showing its total production

volume of built-up MPVs divided up by model and engine specification. Also on an annual basis, following the first year of production, each of the parent companies shall submit to the Commission a separate report showing its wholesale sales of joint venture-produced MPVs on a State-by-State basis within the Community and an estimate of its market shares in each Member State plus its total exports of MPVs from the Community.

2. Each parent company is obliged:

(a) to inform the Commission before signature of any agreement concerning

- any acquisition of shares in any new jointly owned operation,
- any investment in a new product line in an existing jointly owned operation,
- any future joint research projects

in the car sector with any other company that would have an appreciable effect on competition within the European Economic Area;

(b) to report to the Commission annually as to how they comply with each of the conditions in this Decision.

'Parent company' means the Ford Motor Company Inc., USA, and Volkswagen AG, Germany, and the group of companies owned or controlled by each of them.

Article 3

The exemption takes effect from the date of notification of the agreement until 31 December 2004.

Article 4

This Decision is addressed to the following undertakings:

1. Ford of Europe, Incorporated,
Eagle Way,
Brentwood,
GB-Essex CM13 3BW;
2. Volkswagen AG,
D-W-3810 Wolfsburg.

Done at Brussels, 23 December 1992.

For the Commission

Leon BRITTAN

Vice-President

COMMISSION DECISION

of 23 December 1992

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

(IV/32.745 — Astra)

(Only the English and French texts are authentic)

(93/50/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European 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 for exemption submitted pursuant to Article 4 of Regulation No 17 on 3 June 1988 by British Telecommunications plc (hereinafter 'BT'), Société européenne des satellites SA (hereinafter 'SES') and BT Astra SA, of a series of agreements and related documents regarding the marketing and provision of television broadcasting services by satellite, which notification was subsequently amended by BT to include also an application for negative clearance,

Having decided on 3 April 1990 to open proceedings in the case,

Having given the undertakings concerned the opportunity to reply to 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⁾,

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

Whereas:

I. FACTS

- (1) On 3 June 1988, BT, SES and BT Astra SA notified to the Commission of the European Communities for exemption only a series of agreements and related documents regarding the marketing and provision of television broadcasting

services by satellite; subsequently, in its reply to the Commission's statement of objections, BT argued that Article 85 (1) did not apply to the arrangements and by letter of 5 December 1990 formally requested the notification to be considered as amended in that respect.

A. The parties

- (2) SES is a Luxembourg corporation established in 1985 for the purpose of operating satellites. Its first satellite, Astra IA, launched in December 1988, was the first medium-powered satellite not owned by telecommunications organizations ('TOs') offering international television services in Europe. At the time of notification, SES did not yet have a turnover. Capital to cover the costs of purchasing the satellite, having it launched and other expenses such as marketing and insurance, were covered by the input of approximately twenty shareholders from various Member States and others, and State-guaranteed bank loans.

In 1991, SES's turnover rose to Lfrs 3 471 954 747. A second medium-powered SES satellite, Astra IB, was launched in February of 1991.

- (3) BT has a number of subsidiaries, none of which is involved in the satellite sector. BT's total turnover for the year ended March 1992 was ± £ 13 337 000 000.

BT is a licensed operator, entitled to carry out telecommunications activities in the United Kingdom, which includes uplinking signals to satellites.

According to Condition 1.1 of BT's licence granted under Section 7 of the Telecommunications Act 1984, the 'Universal provision of telecommunications services' is imposed on BT *vis-à-vis* every person who requests such services; Condition 5 further requires BT to take all steps to provide international connection services to its customers to the extent necessary to meet all reasonable demands for such services. Condition 53-5-b provides for exceptions and limitations to

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/92.

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

these obligations in certain cases, i.e. if the demand for such services in a given area is, or seems likely to be, insufficient to cover the costs of setting up that service there.

Television distribution by satellite

- (4) TV channels are transmitted by various means, such as terrestrial broadcasting, cable and satellite. A combination is also possible, for example via a satellite to a cable operator who transmits it to the end-viewers. Transmission by satellite involves the following steps:

1. television channels are prepared by a 'programme provider';
2. the signals are transmitted from the television studio to an earth station from where the 'uplink' to the satellite takes place; programme providers must contract for such uplink services with a licensed operator, which in most EC countries is exclusively the TO;
3. on the satellite, the signals are received and amplified by a 'transponder', and then beamed back to earth. Satellites are covered by several such transponders, 16 in the case of the Astra I A satellite;
4. when the signals are 'downlinked' to the earth, they are caught by a satellite receive dish; the receiver can be:
 - (a) a cable operator who then transmits the signal by cable to the TV viewers;
 - (b) SMATV (satellite master antenna TV) systems which distribute to residents of a hotel or apartment building; or
 - (c) TV viewers who receive the signals directly by placing satellite dishes on their rooftop; the latter is referred to as direct-to-home (DTH) reception.

The size of the receive dish depends on the strength of the satellite being used. Low-powered satellites require very large receiving dishes, more than 1,5 metres in diameter, while the signals from medium- and high-powered satellites can be caught by much smaller dishes, suitable for individual rooftops.

As to geographical coverage, or the satellite 'footprint', low- and medium-powered satellites can cover all of Europe, whereas high-powered satellites are generally limited to reception in individual countries.

- (5) Until the launch of Astra I A all satellites in Europe were operated by TOs, individually or collectively. The various steps in the transmission of TV channels are covered by exclusive rights bestowed on TOs by international treaties and domestic laws:

1. The uplink

According to the Radio Regulations of the International Telecommunications Union and domestic telecommunication laws in the Member States, only 'licensed operators' are allowed to uplink signals to satellites. In most countries in Europe, at the time of the notification there was only one licensed operator: the TO. In the UK, the duopoly created by the 1984 Telecommunications Act resulted in two licensed uplink providers, BT and Mercury Communications Ltd; seven other licences to provide uplink services were granted in 1988 to 1989 and a class licence was introduced subsequently. At the time the joint venture agreement was concluded, however, BT was the only licensed operator in the UK actually providing uplink services for international television distribution. SES is likewise a licensed uplink provider in Luxembourg.

2. The space segment (satellites)

The geostationary satellites in orbit for telecommunication purposes are for the most part owned and operated by international organizations, such as Intelsat (International Telecommunications Satellite Organization), Eutelsat (European Telecommunications Satellite Organization), Inmarsat (International Marine Satellite Organization) or by domestic TOs.

The Intelsat and Eutelsat treaties, which have been signed by *inter alia* all Member States, restrict other persons from operating satellites alongside Intelsat and Eutelsat satellites without having gone through an approval or 'coordination' procedure. In the notification and subsequent proceedings, the parties referred primarily to the Eutelsat procedure.

Eutelsat was established in 1982 by an intergovernmental Convention, at present signed by 32 European Governments (called the 'parties').

Next to the convention there is an 'Operating Agreement' signed by the TOs (called the 'signatories') from the States who are parties to the convention. Each member country designates one 'signatory'; in the UK, BT is the Eutelsat signatory.

TO signatories finance the Eutelsat satellites in proportion to their utilisation thereof, in other words the more a TO uses transponder capacity on a Eutelsat satellite, the more its contribution will be; signatory TOs also share in the revenue in the same proportion. At the time the joint venture was established, BT had the largest investment share.

At the outset Eutelsat operated four low-powered telecommunications satellites. The first of the Eutelsat II series of medium-powered satellites of the same kind as Astra (i.e. enabling reception by a 60 to 90 cm dish) was launched in August 1990.

Pursuant to the Eutelsat Convention, when a Party or TO becomes aware that an entity wishes to operate satellites and/or satellite uplinking and downlinking equipment independently from Eutelsat within the Party's jurisdiction, that Party or TO is obliged to furnish all relevant information to Eutelsat. The Eutelsat authorities must then determine whether the operation of that non-Eutelsat satellite:

- will be technically compatible with the Eutelsat satellites,
- will not cause the Eutelsat system significant economic harm ⁽¹⁾.

With respect to the Astra satellite, the Eutelsat Assembly concluded that no significant harm would be caused to the Eutelsat system provided that, *inter alia*

- Astra would be used for one-way television transmission only,
- no more than four Eutelsat channels switched from Eutelsat's satellites to Astra.

The SAO

Following scrutiny of BT's role as Eutelsat signatory, the Office of Telecommunications, Oftel, announced in November of 1989 that a Signatory Affairs Office (SAO) would carry out BT's functions as signatory independently from BT's commercial arm; this means that UK licensed operators now have access to Eutelsat (and Intelsat) space segment capacity on the same footing as BT.

3. The downlink

The laws of most Community countries require a satellite operator to obtain the consent of the local TO for the reception in that TO's territory of downlink signals from satellites. Furthermore, in the case of Astra, Eutelsat required coordination not only in respect of the uplink to and operation of the satellite, but also with regard to the downlink into any countries party to Eutelsat.

The joint venture

- (6) SES's Astra I A satellite has a total number of 16 transponders for which customers had to be found. As the satellite television market was characterized by a predominance of English-language channels, SES concluded that a majority of the channel providers (potentially) interested in broadcasting via Astra would be located in the UK. Consequently, before the satellite was launched, the decision was taken to allocate a minimum of nine and a maximum of 11 of the 16 transponders to a joint-venture established by BT and SES, whose stated aim would be to:

- offer operators of UK-originated TV programmes a packaged service consisting of a BT uplink in the UK and transponder space on SES's satellite,
- stimulate the development of the satellite market by:
 - (a) encouraging manufacturers of satellite dishes suitable for so-called 'direct-to-home' (DTH) reception to increase production;
 - (b) encouraging retailers to promote and sell this equipment; and

⁽¹⁾ Article XVI (a) of the Eutelsat Convention.

In 1992, Eutelsat's Assembly of Parties adopted a Resolution according to which only those non-Eutelsat satellite systems providing 'reserved services' will be subject to the full Article XVI (a) consultation procedure.

- (c) encouraging home-viewers to buy such dishes so that they can receive Astra's signals directly on their roof-tops.

(7) The following agreements and other documents were examined during the notification procedure:

- the main or joint-ventures agreement of 17 December 1987 between SES and BT, in which they agreed to set up the 50/50 joint-venture company BT Astra SA, and whereby SES undertook to lease transponders to the joint venture company for further disposal via a UK licensed operator (thus not necessarily BT) to final customers as a packaged contract including the uplink,
- four side-letters dated 17 December 1987 relating to:
 - the allocation of options to BT of transponders on the Astra satellite,
 - SES's undertaking in relation to Clause 6 (4) of the agreement concerning its obligation not to divert satellite business from the UK,
 - the formation of a joint marketing company (Satellite Promotions SA),
 - SES's franchise from the Luxembourg Government as to the use of the Astra satellite,
- the BT/SES joint-venture marketing plan, which detailed the marketing activities to be undertaken by the parties: BT would concentrate on facilities marketing, i.e. finding customers for the service, and SES would concentrate on retail marketing, i.e. the receiver equipment industry and end-users,
- the main services and separate services agreements, likewise relating to the marketing activities,
- the agreements between BT and television programme providers. These agreements are not uniform. Most are for a period of 10 years, with a lump sum being paid in advance by the customer for the full period covering both

uplink and transponder lease; the price paid decreases in proportion to the number of transponders leased. One agreement is for three years, with the possibility of extending to 10 years; in the first three year period, the customer is charged monthly, thereafter a lump sum is paid. Only in one agreement is a distinction made in the amounts being paid for the uplink and the transponder lease.

The joint venture arrangements were to continue for as long as the Astra satellite would remain technically 'alive', i.e. normally 10 years.

(8) Individual provisions which were of relevance in the Commission's examination were:

1. Clause 3. The transponders covered by the joint-venture agreement between SES and BT were leased to BT Astra SA, which in turn would lease them to a 'licensed UK operator'. Pursuant to a side-letter of 17 December 1987 between the parties, SES agreed that the Joint Venture would grant BT options over 9 transponders, to be disposed of within a stated period. BT in its turn would offer a single contract to programme providers comprising both the uplink by BT and a space on the Astra satellite.
2. Clause 5 covered BT's rights and obligations 'where it is the licensed UK operator'. Sub (1) provided that although BT had the right to determine the component for the uplink service to be included in the total price to the customer, it would consult with SES in setting this price.
3. Clause 6 covered SES's rights and obligations. Clause 6 (1) provided that although SES had the right to determine the price which was charged to UK customers for the use of transponder space on the Astra satellite, it would consult with BT in setting that price even where BT was not the 'licensed operator'.
4. Clause 5 (2) obliged BT to make the Astra satellite the satellite of first choice in marketing TV services, and not to discourage use of Astra in its pricing and marketing, for

example by charging customers using the new medium-powered Eutelsat II series of satellites (at the time of the joint venture not yet launched) lower margins or uplink fees than those using Astra.

5. Similarly, Clause 6 (5) obliged SES to use its best efforts to ensure the use of BT's uplink services to the transponders, which was consistent with the 17 December 1987 side-letter whereby SES granted options with respect to nine transponders to BT.
6. Clause 6 (4) obliged SES not to seek to divert UK-originated programmes, i.e. programmes physically prepared primarily in a UK studio, to uplink outside the UK. According to the side-letter of 17 December 1987 with regard to Clause 6 (4), SES also had to refrain from encouraging programme providers to prepare their English-language programmes in studios outside the UK. Specifically, SES was obliged not to induce programme providers to use studios in and uplink from Luxembourg by providing commercially preferential terms 'either for the satellite capacity or for the uplink services' (SES being licensed to provide uplink services in Luxembourg).
7. Clauses 5 (3), 6 (2) and 7 contained provisions aimed at facilitating transfer to the Astra satellite of customers hitherto using satellite services on other satellites. In this context, BT could provide its existing customers (transmitting via the Intelsat I or Eutelsat I satellites) the facility of 'double-illumination', i.e. simultaneous transmission to both satellites. As customers would be hesitant to 'double-illuminate' if that meant paying for two full leases, these arrangements provided for BT and SES to bear part of the costs. Furthermore, BT undertook under certain conditions to facilitate early termination by customers of existing contracts.
8. Although SES was contractually free to market the transponders not covered by the joint venture arrangements as it saw fit, its freedom was limited by Clause 6 (4) which provided that all UK originated programmes (i.e. prepared in studios in the UK) uplinked to the Astra satellite had to be marketed through the joint-venture and by Clause 6 (5) which determined that where a customer planned to uplink from the UK, the terms offered to that third party could not be more favourable than those offered to the JV. Furthermore, SES would endeavour to ensure that the service offered by BT Astra in the UK was not 'mutually inconsistent' with the service offered by SES in other countries.
9. Clause 6 (6) provided that unless otherwise agreed between BT and SES, SES would not utilize transponders on satellites other than Astra IA for programmes prepared in or uplinked from the UK while any of the transponders covered by this Agreement remained available for use.
10. Pursuant to Clause 9 of the joint-venture agreement and the terms of the customer contracts, the channel provider paid BT a lump sum covering the uplink service and the transponder lease. The latter amount was passed on in its entirety by BT to BT Astra SA, which in the turn passed on 90 % to SES; 10 % went back to BT as the 'BT Service Charge'. In other words, for its involvement in the joint venture BT received;
 - the uplink fee,
 - the 10 % BT service charge on the transponder lease.
- Clause 9 also referred to a 'Eutelsat payment' to be made per transponder by SES to Eutelsat; in reply to a request for information from the Commission, the Director-General

of Eutelsat stated that 'there are no payments to Eutelsat whatsoever, nor indeed any other arrangement of payment in kind rather than cash, nor any exchange or transaction of any kind possessing any value, as between Eutelsat and SES or any other party which could be deemed as related to utilization of the GDL (Astra) satellite. We have not seen and are not aware of the contents of the joint-venture agreement of 17 December 1987 referred to in your letter'.

As the joint-venture agreement did not bestow any absolute exclusivity on BT, in theory any other 'licensed UK operator' could have leased the transponder capacity from BT Astra and conclude the customer contracts comprising uplink and transponder space with the programme providers. However, in that event the 10 % 'BT service charge' would continue to be paid by BT Astra to BT; the 'licensed operator' in fact carrying out the coordinating function would only receive the fees for its uplinking activities, while BT would still receive 10 % for an operation in which it played no apparent role, except that of being part owner of the joint-venture company.

Termination of the joint-venture

- (9) On 3 April 1990, the Commission initiated proceedings under Regulation No 17, having come to the preliminary conclusion that the notified arrangements fell under Article 85 (1) of the EEC Treaty and could not benefit from an exemption under Article 85 (3). Subsequently, the parties presented a proposal whereby the joint-venture agreement and related side letters and service agreements would be terminated, but the customer agreements concluded under the joint-venture arrangements would remain in place pursuant to a novation resulting in direct transponder leases from SES to BT instead of via the joint-venture company. As the removal of the joint-venture company from the chain of transponder leases from SES to, ultimately, the programme providers, did not in reality change the *status quo*, the Commission, on 26 July 1990, sent a statement of objections to the parties, who presented their views in writing and orally at a hearing held for that purpose on 13 and 14 November 1990.
- (10) On 30 January 1991, the parties signed an agreement terminating their joint-venture

arrangements, subject to the same conditions as contained in the proposal referred to above in recital 9.

II. LEGAL ASSESSMENT

A. Article 85 (1)

- (11) The arrangements between the parties restricted competition in the markets both for the provision of satellite transponder capacity for the distribution of television channels and for uplink services. The effects of the cooperation between the parties were felt both in the United Kingdom and elsewhere in the Community.
1. *Restriction in the market for space segment capacity*
- (12) SES and BET are direct competitors in the European market for the provision of space segment capacity for the transmission of television channels.
- (13) As the owner of the Astra I A satellite, SES could offer 16 transponders to programme providers seeking satellite transmission.
- (14) BT has since 1983 been offering space segment capacity on Eutelsat (and Intelsat) satellites to programme providers. Pursuant to Article 16 of the Eutelsat operating agreement, all applications for the allotment of Eutelsat space segment capacity to programme providers passes through the signatories, in the UK BT. BT arranged for the ultimate disposal of the transponders and concluded the customer contracts, direct contacts between the latter and Eutelsat being excluded by the terms of the operating agreement. Although the final allotment of space segment capacity is determined not by the individual signatory but by the Board of signatories, BT was at the time the joint-venture was concluded the signatory with the largest investment share. According to the notification, BT was providing more TV distribution services by satellite than any other European telecommunications organization; the fact that BT did not actually own the space segment capacity offered to customers does not mean, as it has argued, that it was not in competition with SES, given the context of the Eutelsat arrangements.

It is illustrative to note that the Eutelsat Assembly stated as a condition for Astra's coordination that there is an increased joint effort and aggressiveness by signatories ... in a drive to find new business ... in order particularly to make up for the loss of revenues originating from the implementation of the GDL (Astra) satellite. BT, as the UK signatory, had to reconcile this commitment with its obligation under the agreement with SES to make Astra the satellite of first choice.

- (15) BT has furthermore stated that BT and SES could not be regarded as competitors because BT could not, in 1986 to 1987, offer customers medium-powered capacity, but only low-powered Intelsat and Eutelsat capacity; it was not until the middle of 1990 that the first medium-powered Eutelsat II series satellite was launched. This argument must be rejected in that it presupposes that there are distinct separate markets for low-powered and medium-powered capacity. In fact, low-powered and medium-powered satellites offer customers the same possibilities as far as geographic coverage is concerned and as regards transmission to cable head-ends; medium-powered satellites simply offer the added feature of enabling DTH reception by relatively small receive dishes. DTH transmission and transmission by cable can however take place simultaneously. In countries with well-developed cable systems where there is thus less need for individual reception, cable subscribers will not know whether the programmes they receive are being transmitted via low- or medium-powered satellites — or in fact by other means.

Recent statistics⁽¹⁾ indicate that 73 % of all European homes receiving Astra channels do so via cable (and smatv), the percentage in highly-cablized countries such as Belgium and the Netherlands going up to nearly 100 %.

BT itself stated in its reply to the statement of objections: it is clear that medium-powered satellites were competing with low-powered capacity, referring in that context to the Eutelsat coordination procedure aimed at determining the competitive impact of medium-powered capacity on low-powered capacity.

- (16) Pursuant to the joint venture agreement and in particular Clause 6 (4) which provided that all UK

originated programme channels uplinked to the Astra satellite would be marketed through the joint venture, SES agreed not to enter the market in question independently but in cooperation with a direct competitor, BT. The restriction of competition flowing from Clause 6 (4) was reinforced by specific clauses in the main agreement between the parties, which also constituted restrictions of competition in the sense of Article 85 (1), viz:

- Clause 6 (1), which obliged SES to consult with BT in setting the price charged to UK customers for the use of transponder space on the Astra satellite,
- Clause 5 (2) which obliged BT not to offer more favourable terms with respect to the use of other satellites for TV services than Astra.

Through these two provisions, the conditions for the use of transponder capacity on Astra and all satellites on which BT leased capacity could be aligned: Clause 6 (1) achieved such alignment with respect to other existing satellite capacity and Clause 5 (2) for future satellite capacity. Although Clause 5 (2) referred to the Eutelsat II satellites, this was by way of example only, and BT's obligation not to discriminate against the Astra satellite by its pricing policy or other policies extended to all other satellites for TV services. These arrangements involved an all-over and far-reaching price coordination between the two parties and deprived customers of a new, alternative source of supply for transponder capacity in the UK.

The gravity of this alignment was reinforced by the consideration that aside from its role in Eutelsat, BT was also in its own right a direct potential competitor of SES: given BT's financial position as well as its technical and commercial know-how in the satellite sector, BT would not experience any barriers to entering the market for the operation of satellites independently; its unwillingness until now to do so, which BT argued indicated it was not a potential market

⁽¹⁾ Cable & Satellite Express, 10. 7. 1992.

entrant, is a purely subjective consideration and cannot be relied upon in determining potential competition.

Furthermore, the restrictions regarding the supply of transponder capacity extended beyond:

1. the transponders covered by the agreement between BT and SES,
2. the UK and
3. the Astra satellite itself:

re 1. and 2.: Clause 6 (4) provided that all UK-originated programmes must be marketed through the joint venture with BT and that SES would not seek to divert UK-originated programmes to uplink outside the UK.

As clarified by one of the side letters, SES had also to refrain from encouraging programme providers to prepare their English language programmes in studios outside the UK. Even if customers were to do so, Clause 6 (5), which determined that customers uplinking from the UK outside the joint venture could not enjoy more favourable terms than joint-venture customers, ensured that there would be no benefit in circumventing the joint venture.

re 3.: Clause 6 (6) obliged SES not to utilize transponders on satellites other than the Astra IA satellite for programmes prepared in or uplinked from the UK while any of the transponders covered by the joint venture agreement remained available.

2. Restrictions in the uplink market

- (17) UK programme providers who wished to lease transponder capacity on the Astra satellite were obliged to do so via the joint venture. Although theoretically a licensed operator other than BT

could have been used, SES's obligation to ensure the use of BT's uplink to the transponders (Clause 6 (5)), and the fact that the 10 % BT service charge would go to BT regardless of the licensed operator to whom BT Astra SA ultimately leased the transponder for further disposal to customers, meant that in reality the contract partner with whom programme providers were faced for access to Astra was BT. Pursuant to Clause 3 (1), the service offered to customers by the licensed operator comprised the transponder (s) and the uplink. Induced by more favourable conditions in the event they opted for long term leases, most customers (i.e. representing eight out of nine transponders leased at 1 December 1989) concluded 10 year customer contracts with BT. The arrangements involved the following restrictions:

Restrictions between the parties

- competition for uplink services between the parties: BT and SES are direct competitors in the uplink market, as both are licensed to provide uplinking services. Although the licences of BT and SES related only to their respective national territories, programme providers are not bound by national boundaries and could either transmit their programmes by conventional or other means to another territory for uplinking or establish studios in the locality where the conditions are the most favourable. At the oral hearing, SES has confirmed that four German television programmes were uplinked to satellites other than Astra in Germany, downlinked in Luxembourg and then uplinked again to the Astra IA satellite by SES. RTL-4, previously RTL-Véronique, a channel aimed primarily at Dutch-speaking audiences, set up a studio in Luxembourg to allow direct uplinking by SES to Astra IA.

However, various clauses in the main agreement between BT and SES eliminated any real competition between them as far as the uplink service was concerned: Clause 5 (1) obliged BT to consult with SES in setting the price for the uplink component, Clause 5 (2) obliged BT not to charge lower uplink fees in the event of uplink services to other satellites, e.g. Eutelsat II satellites, and Clause 6 (4) and 6 (5) sought to restrain SES from inducing programme providers to use its uplink facilities

in Luxembourg by providing commercially preferential terms either for the satellite capacity or for the uplink services.

Both parties have argued that these provisions did not have any practical consequences, as UK programme providers would not have been interested in an uplink by SES in Luxembourg anyway, either following transmission from the UK or directly in the case of relocation of TV studios. Transfrontier movement in the uplink market is, however, possible, as illustrated by the case of the German and Dutch television channels referred to above. The provisions of the joint venture and notably the side-letter to Clause 6 (4) were indeed precisely aimed at preventing this type of movement and cannot, as the parties suggest, have been without any practical significance. In fact, BT subsequently confirmed that the restrictions on SES as regards its uplinking activities in Luxembourg were inserted because there was a concern that there could be dumping of uplink prices which would then distort what would be the decision of an economically rational TV company... It might have been in Luxembourg's interest given that most of the customers were distant to have priced that (uplink) capacity at an unrealistically low rate,

Restrictions vis-à-vis third parties

- foreclosure of other (potential) uplink providers: the fact that under the joint venture, most programme providers who signed the BT customer contracts are bound to BT for the uplink services during a period of 10 years represents an absolute 10-year foreclosure for other licensed UK operators from providing this service as regards the Astra satellite, which until three years after the arrangements were concluded was the only medium-powered European satellite. Furthermore, pursuant to Clause 6 (6), SES could not use transponders on other satellites (e.g. Astra IB) for programmes originated or uplinked in the UK as long as any of the transponders covered by the joint venture agreement remained available. Also, until the SAO arrangements referred to above under recital 5 (2) were introduced, other uplink providers did not have access to Eutelsat or Intelsat space segment capacity,

- limitation of customer choice: UK customers interested in broadcasting via Astra were obliged to accept the uplink service provided by BT, whereas they may have found or may find more favourable terms elsewhere. The tying of BT's uplink service to the satellite capacity on Astra was aggravated by the fact that under the customer contracts, most customers were obliged to pay one lump sum covering both elements of the contract; unaware of the price being charged for the uplink, respectively transponder capacity, customers were thus not in a position to negotiate the conditions imposed on them.

3. *Appreciability and effect on trade between Member States*

- (18) For the above reasons, the agreements resulted in serious restrictions of competition which given the size of all parties concerned, including the customers involved, were appreciable. By the very nature of the service in question and also in view of the individual clauses aimed at discouraging or preventing cross-border activities in both the transponder and uplink markets, trade between Member States was affected and Article 85 (1) of the EEC Treaty was therefore applicable.

B. Article 85 (3)

- (19) In order for the Commission to declare the prohibition of Article 85 (1) inapplicable pursuant to Article 85 (3), the requirements provided for in Article 85 (3) must all be met. In the first place, the restrictive agreement must result in certain benefits in terms of improving production or distribution, or promoting technical or economic progress, which outweigh the disadvantages for competition.

As a general argument, the parties have stated that any restrictions of competition resulting from their cooperation were outweighed by the benefits which ensued in terms of economic progress in the provision of satellite television services and

improved distribution thereof. Admittedly, Astra, as the first privately-owned satellite for international television services to compete with the Intelsat and Eutelsat satellites, and furthermore the first medium-powered satellite, contributed to increasing competition on the market for television transmission by satellite. However, in the Commission's view these benefits were a result of the existence of the Astra satellite as such and not of the arrangements concluded between BT and SES for the purpose of marketing and operating the satellite. The question is thus whether SES could have entered the market with the Astra 1A satellite independently of the arrangements with BT or, rather, as the parties have argued, that those arrangements were indispensable to enable a new competitor to the existing Eutelsat and Intelsat systems to emerge successfully.

(20) The parties did not argue that SES needed to cooperate with BT in order to overcome the first hurdles facing new market entrants in this sector, namely the heavy costs involved in acquiring the satellite itself and the costs of launching it. These costs SES was able to bear by itself and it has indeed stated that it had no wish to enter the market for the provision of satellite capacity for the transmission of television channels with any partner. However, the particular features of this market represented obstacles to market entry which SES concluded could only be overcome through the arrangements with BT.

(21) Specifically, the parties have argued that in order for SES to exploit UK demand, it had no alternative but to conclude a joint venture with BT, because:

— BT's position as the UK Eutelsat signatory enabled SES ultimately to obtain Eutelsat approval for the operation of the satellite; Eutelsat requires two signatories to embark on the coordination procedure, so that SES needed another signatory aside from the Luxembourg PTT, which supported the Luxembourg-based company. In view of the considerations regarding English language programmes (see recital 6 above) and BT's apparent interest in providing uplink services, BT was chosen,

— BT's position at the time the arrangements were made as the sole effective uplink provider in the UK ensured potential customers that there would be no problem in obtaining the necessary uplink to the Astra satellite.

Although these considerations may well have resulted in SES's point of view at the time, they do not constitute valid objective reasons for the restrictive arrangements between the parties.

(22) The parties have submitted that although there are no provisions to this effect in the Eutelsat Convention, SES required a second signatory in order to embark successfully on the Eutelsat coordination procedure. It has also been established that more than a year before the main agreement was concluded, BT offered to contribute to the commercial success of the then-planned SES Astra satellite system by *inter alia* serving as the required second Signatory. BT clearly stated that this assistance would be given in the context of an agreement between BT and SES. It is therefore understandable that SES, as it has stated in reply to the Commission's statement of objections, did not expect BT to provide its services as signatory without some form of compensation.

There were, however, no objective reasons to justify the imposition of a partnership on SES as a *quid pro quo* for BT's assistance in the coordination procedure. Article XVI of the Eutelsat Convention merely states that a Signatory which becomes aware of any person within its territory intending to utilize non-Eutelsat space segment equipment, must furnish all relevant information in order to allow the Parties to establish whether there is likely to be any significant harm to Eutelsat. This provision does not in any way require the Signatory engaged in the coordination procedure to enter into some form of cooperation agreement with the applicant market entrants, nor are there any other provisions in the Convention or Operating Agreement which do so. In fact, as noted above under recital 8 (10), the Director-General of Eutelsat stated not to have any knowledge of the arrangements between BT and SES. In other words, when BT became aware of customer interest in the Astra satellite in the UK, that fact alone gave rise to BT's obligation to

coordinate under Article XVI; BT has submitted correspondence with programme providers dating back to well before the conclusion of the agreement with SES in which such interest was clearly expressed. One programme provider in a letter dated 9 October 1986 formally advised BT as the UK Signatory to Eutelsat of its very real interest in using Astra and expressed its concern that BT had not registered that interest at a previous Eutelsat meeting.

SES has noted that according to the OFTEL statement on the setting up of the SAO (see above recital 5 (2)) BT is entitled to a fee equivalent to 7 % of the space segment charge to cover its costs in providing its services as signatory; SES compared this fee to the 10 % BT service charge due under the notified arrangements. The Oftel statement cannot, however, be used as a point of reference in this case in that it refers to situations in which BT acts as an intermediary for applicants seeking space segment capacity on Eutelsat (and Intelsat) satellites and involves a far broader range of Signatory activities than its involvement in the coordination procedure alone. Furthermore, the arrangements between BT and SES went much further than the mere payment of the BT service charge and resulted in the serious restrictions of competition referred to in recitals 12 *et seq.*

In any event, an agreement concluded for the purpose of facilitating or complying with a procedure in which the entry of new competitors is subject to the approval of existing competing market participants cannot benefit from an exemption under Article 85 (3), the requirements of which relate to objective advantages such as improvements in production, distribution or technical and economic advances.

- (23) The Commission cannot accept that the arrangements between BT and SES were indispensable in order to ensure that UK programme providers would be provided with the necessary uplinking services by BT, at that time the only *de facto* provider of such services for television distribution via satellite in the UK.

In the Commission's view, BT was obliged both by Conditions 1 and 5 of its licence under the Tele-

communications Act 1984, and by the provisions of Community law, in particular Article 86, to provide the uplinking services without requiring to participate in the leasing of transponders on SES's satellite to customers, thereby collecting the 10 % BT service charge to be deducted from SES's revenues for the lease of the satellite capacity.

In reply to the Commission's statement of objections, SES argued that at the time the arrangements were concluded, it was far from clear that it could count on an obligation on the part of BT under its licence to provide uplinking services. It noted that Oftel's decision in the PanAmSat case, whereby it was established that BT's obligations arise as soon as it receives a request from a person in the UK for a given service, provided the customer is willing to pay a reasonable price, was not issued until March 1988. Furthermore, SES argued that even if Oftel's position on this point had been clear in the period preceding the conclusion of the joint venture agreement in December 1987, BT would probably not have been obliged to build an earth station if customers had not already entered into contracts for the supply of the service.

SES's arguments cannot be accepted. In the first place, if BT's obligations under its licence were not clear at the time SES needed to reassure customers that uplinking to the Astra satellite would be provided for, it was not by entering into restrictive arrangements with BT that the situation would be clarified. PanAmSat, which actually experienced difficulty in obtaining uplink services by BT, did not enter into a joint venture with the latter, but made representations to Oftel. SES, however, never put the issue to the test. Well before the arrangements between the parties were concluded, BT engaged in correspondence with programme providers who expressed a clear interest in the Astra 1A satellite; in October 1986, one potential Astra client formally advised BT that it had a very real interest in using Astra (see above recital 22) even on the basis of restricted downlink reception possibilities in northern European countries. In the absence of other uplink providers for television distribution at that time, all uplinking services to the Astra 1A satellite from the UK would necessarily accrue to BT. However, before those customers could translate their interest into commitments firm enough to actuate BT's uplinking obligation (according to Condition

53.6 of BT's licence it is not necessary that a contract actually be concluded), the arrangements between BT and SES were finalized. Again, the issue was not put to the test. Furthermore, it is not clear why simply by virtue of the joint venture agreement with SES, BT did decide that the building of a dedicated earth station was justified; BT itself has stated that it installed a new dedicated uplink terminal to access the Astra IA satellite ... prior to BT securing any customers for service on the Astra IA satellite.

Finally, BT's capital investment in these installations represented $\pm 3\%$ of SES's total expenditure in satellite construction and launching costs. Some arrangement far less restrictive than the joint venture agreement must have been possible to ensure BT that it would recoup this investment.

As far as Community law is concerned in this connection, as a matter of general principle, it should be clear that in the telecommunications sector, characterized by activities which can only be carried out by operators such as BT licensed to do so, the provision of services under licence to market participants must be freely available and cannot be made subject to market entrants concluding restrictive agreements with the licensed operator. The fact that SES was not satisfied that Community law was sufficient to compel BT to provide uplink services does not justify the solution it finally opted for. Again, SES did not put the issue to the test.

- (24) From the outset, the parties were informed that on the basis of the above arguments relating to Eutelsat coordination and uplinking services, the requirements of Article 85 (3) did not seem to be met. A further line of argumentation in support of the arrangements was subsequently developed, relating to:

— the benefits of a single packaged customer contract covering both uplink and transponder capacity,

— the need for BT's involvement in finding customers in the UK for Astra IA.

- (25) According to the parties, a single customer contract comprising uplink facilities and satellite capacity placed the sole responsibility for the entire service on one entity, BT. For the customer, this was not only convenient but could lead to a quicker resolution of technical problems; under the packaged arrangement, BT would be most likely to take measures to restore degradations in signal quality, regardless of their origin, for example by strengthening the uplink signal in order to compensate for a weaker downlink signal, the latter deficiency otherwise not falling under BT's responsibility. If there were two separate contracts, the uplinker (BT) and the satellite provider (SES) would only monitor their own responsibilities and there would be no control of the service as a whole. Neither would be willing to take corrective action until it had been established on which part of the transmission path the fault lay.

- (26) In the Commission's view, however, no reasons have appeared why a bundled contract offers technical advantages not available in the case of two separate contracts. In fact the following considerations run counter to this argument:

- (a) in order to provide uplink services, an operator such as BT must have the benefit of a licence. In return for the privilege of being allowed to provide such services, the licensed operator must ensure, to the extent he is capable of doing so, that the service actually reaches the viewer in the form of clear and continuous reception of the television programmes on his screen. If the uplink provider is capable of influencing the quality of the end product ultimately received by the viewer, he is, in the Commission's opinion, obliged to do whatever is necessary in that respect. If it subsequently appears that extra efforts by the uplink provider were necessitated by defects in parts of the transmission path for which he is not directly responsible, the uplink provider is of course entitled to compensation from the entity responsible for the deficiency;
- (b) the parties' contention that separate contracts would tend to slow down the remedying of signal problems ignores the fact that even under a packaged contract, whatever party

turns out to be responsible for the deficiency will be liable *vis-à-vis* the other party for any loss of revenue. It is thus directly in the interest of each party that faults are detected and remedied immediately, in order to limit their potential ultimate liability. This interest is not in any way linked to the presence of a bundled contract;

- (c) in the statement by the Director-General of Oftel regarding the independent PanAmSat satellite (see above recital 23), reference is made to Condition 35 of BT's licence, which contains a general prohibition of linked sales. The Director-General notes that although in the case of Intelsat satellites (and the same reasoning would apply with respect to Eutelsat), users have no direct access to the satellite sector and BT as signatory is permitted to provide both the uplink and the satellite sector, this argument would no longer hold with the advent of independent satellite systems ... and unbundling would be required. If there was an alternative satellite system, ... customers would be free to make their own arrangements with the independent satellite operator. Nowhere in the Director-General's remarks is there any mention of a technical reason why uplink and satellite sector should be provided by the same entity.

The Commission's position was confirmed by programme providers using the Astra 1A satellite. Users together leasing the largest number of transponders denied that there were any technical advantages to a bundled contract. To illustrate the fallacy of the argument that BT would be the single point of contact for customers in case of problems, programme providers cited the case of a technical incident which occurred in the spring of 1989. Having contacted BT as directly responsible under the customer contracts, one programme provider was subsequently advised to contact SES to solve the problem, while another programme provider stated that at a later stage it also discussed the problem directly with SES because BT had been tardy in dealing with the matter.

- (27) Also in support of the bundled customer contracts, the parties argued that it is contractually efficient to negotiate only one contract covering an entire service rather than engaging in separate contract negotiations for each element. Furthermore, a customer with a single contract for both uplink and transponder capacity is better placed to secure compensation for faults. For example, if the uplink service fails due to BT's fault, the customer will receive a rebate for the satellite part of the service as well as for the uplink. In the case of two separate contracts, one party would not be likely to make a rebate for the failure of the other party's service.

In the Commission's view, the efficiency which may result from negotiating only one contract does not outweigh the disadvantages which such tying arrangements entail, both for customers who are faced by bundled services and for competitors in the services concerned who are thereby foreclosed. With regard to the compensation for faults, the contractual arrangements involved in the case of separate contracts would admittedly have to contain provisions which ensure that customers are not obliged to pay for a service A they have not been able to enjoy not through any fault of their own but because a third entity providing a service B on which the execution of service A depends has not performed that service B satisfactorily or at all.

- (28) In conclusion, the Commission considers that the bundled contract does not bring about any benefits which justify the arrangements between the parties. In reaching this conclusion, the Commission took into consideration the views expressed by the four programme providers using the Astra 1A satellite via customer contracts with BT:

1. programme provider X which leased several transponders on Astra 1A stated The principal issue raised in the meeting 'with Commission officials' is X's dissatisfaction with the

'bundling' of services in its agreement with ... BT ... The lack of transparency in packaging the uplinking and the transponders is a major objection; X came to agreement with BT only because it had no alternative ... The reason for this is that BT obtained exclusive rights to market a number of transponders on the Astra satellite to UK customers; As a buyer, X would have preferred dealing with SES;

2. programme provider Y stated that it would have preferred two contracts, because then there would have been room for negotiating different prices. Several months before finally signing a contract with BT for two transponders on Astra IA, Y wrote to Oftel concerning the severe problems we are having in obtaining competitive quotations for the provision of medium power satellite capacity ...; we at Y, along with other satellite television companies, have invited Eutelsat and SES Astra to submit bids for the provision of such capacity. Both organisations have informed us that we must deal through British Telecom International; What makes matters worse for us is that BTI require as part of the contract for satellite capacity that we use their earth station uplink site at Woolwich. We believe this is using their monopoly to make a linked sale;

3. programme provider Z stated that the view was taken that it was better to deal with one person for the overall contract and service. In assessing this statement, the Commission took into consideration

— the fact that no reasons were given why this view was taken; with regard to the technical advantage of dealing with one entity, Z's first reaction as to whom it would contact in case of problem was SES,

— Z was 25 % owned by BT at the time the customer contract was concluded; all important decisions, such as transponder leases, were taken unanimously by the three shareholders;

4. programme provider Q is a non-UK company which already prior to the emergence of Astra IA was obliged to locate its studios in London because it was not clear whether the TO in its own territory would provide uplink services to Intelsat space segment capacity, a service which BT was willing to provide. Q stated that as it had already located its transmissions to London, British Telecom was the only one who could provide Astra capacity. Although Q does cite certain advantages in having a bundled contract, its starting point appears to have been that capacity on Astra could only be acquired through BT; also, the advantages it cited had never been put to the test in practice.

The parties have argued that there was no customer interest in an unbundled service at the time and that statements made by programme providers now when market conditions have changed do not necessarily reflect what they requested at the time the agreements were concluded. It is true that the Commission has not found any evidence of written requests by customers to BT and SES for separate, unbundled services. As BT noted during the course of the procedure, however, BT was engaged in oral discussions concerning Astra IA with programme providers before the arrangements with SES were concluded, which were not, however, evidenced by any 'correspondence in the file'. In a letter to Oftel, however, quoted above under 2., one programme provider stated that it and others had applied to SES directly for the provision of satellite capacity, but had been referred to BT as the entity to deal through. In any event, customers would necessarily have been denied unbundled services in view of Clause 3 (1) of the main agreement which stated that 'The service offered to customers will comprise the transponders covered by this agreement and the addition of the uplink'.

SES has stated that by choosing for long-term contracts, customers have indicated that they were not injured by the bundled service. In the Commission's view, however, it was more likely the up to 50 % savings programme providers

enjoyed by opting for a long-term contract which prompted their choice.

- (29) On the marketing side, the parties argued that the pooling of their respective skills, resources and experience was required in order to promote the use of the Astra satellite. BT with several years of experience in marketing and providing satellite services to UK television programme providers was responsible for finding customers, while SES's marketing responsibilities related to promoting the retail side, including both equipment manufacturers and viewers.

The Commission does not agree that SES could not have found customers itself in the United Kingdom, independently of BT's marketing efforts. The total number of television programme providers interested in satellite television in the UK was less than 10 at the time the joint venture was concluded, and there is no apparent reason why SES's commercial team could not have approached these potential customers itself. In fact, one programme provider has stated that SES's commercial director was very actively promoting the Astra satellite in the UK himself, several years before it was launched and before the joint venture was established. SES has argued that its initial contacts with customers were only translated into binding contracts with BT's assistance. Given the fact that potential customers were already at an early stage informed that they must deal through BT, well before the first customer contracts were signed, it is not possible to establish in retrospect whether customers felt BT's involvement was indispensable in this respect. It should be noted, however, that SES has sold the transponders not covered by the joint venture arrangements directly to programme providers in a number of countries, without the need for a joint venture with the local telecommunications organization.

Finally, BT's involvement in the sale of transponders on the Astra satellite admittedly facilitated the transfer of BT's Eutelsat and Intelsat customers to Astra thanks to the joint venture agreement provisions on double-illumination and early termination of existing customer contracts. However, several customers have noted that they believe the reduction in the satellite price which could have been achieved in the absence of BT's involvement in the Astra satellite would have amply offset the extra costs they would have had to bear in the absence of free of charge 'double-illumination'.

- (30) The 'retail' marketing being carried out by SES is a continuation of an area of activity in which, according to the parties, it 'had already been active on a pan-European basis including the UK', and which in any event it would have pursued, also in the absence of the arrangements with BT.

Conclusion

- (31) In view of the foregoing, the Commission has concluded that as the arrangements between BT and SES:

- did not bring about any improvements and benefits on the market in question, and
- were not indispensable in order to ensure SES's entry into the market for the provision of space segment capacity,

the notified arrangements were not eligible for exemption.

Under these circumstances, it is not necessary to examine whether the other requirements of Article 85 (3) are met.

C. Article 3 of Regulation 17

- (32) Pursuant to Article 3 of Regulation 17, the Commission may, by decision, find that there is an infringement of Article 85 of the EEC Treaty and require the undertakings concerned to bring such infringement to an end. This implies not only the termination of restrictive agreements between the parties, but also the elimination of restrictive effects residing in contracts which have been concluded with third undertakings under the terms of the aforesaid restrictive agreements.

In the case at hand, after the parties had been heard in accordance with Article 19 (1) and (2) of Regulation No 17, they informed the Commission that the joint-venture agreement between themselves, and various ancillary agreements and side letters, were terminated on 30 January 1991; under the provisions of the termination agreement, existing customer contracts will remain in force, whereby the transponder lease takes place directly from SES to BT instead of passing through the

joint-venture company; upon expiry of such contracts, BT shall have no further rights with respect to the transponders concerned nor any others on Astra I A or Astra I B.

- (33) The termination of the joint-venture agreement ensures the commercial autonomy of the parties for the future. However, the customer contracts which were concluded by BT under the joint-venture arrangements continue to be in force pursuant to Clause 5.1 (1) of the termination agreement without any modification.

These contracts perpetuate the restrictive effects resulting from the joint-venture agreement because customers who wished to transmit their programmes via the Astra IA satellite were not given the choice of concluding separate contracts for, on the one hand, uplink services and, on the other hand, the lease of transponder capacity. Furthermore, the terms of those customer contracts were determined by BT and SES in the context of the joint-venture arrangements, i.e. under conditions of distorted competition. This does not mean that the customer contracts, simply because of their links with the restrictive horizontal agreements, are also caught by Article 85 (1). However, the restrictive effects which these contracts perpetuate can only be eliminated when the customers have been given the right of readjustment. Therefore, they must have the option to remain committed to the customer contracts as signed with BT, to terminate those contracts or renegotiate the terms thereof. To this end, and within one month of the notification of this Decision to them, BT and SES shall inform programme providers who signed contracts with BT for international TV distribution services via the Astra IA satellite prior to 30 January 1991, that during the four months after having been so informed, they may, if they so wish,

- renegotiate the terms of the contract, or
- terminate the contract, taking into account a reasonable period of notice.

Customers who choose to renegotiate or terminate must in any event be ensured that the uplink services and the use of the transponder capacity

will continue to be provided to them without interruption during the transitional period.

Customer contracts which at the choice of the customer continue to run under the original terms would only be restrictive of competition if they result in the foreclosure of uplink providers other than BT. However, in the light of current market conditions, in particular the accessibility of UK uplink providers to Eutelsat and Intelsat space segment capacity through the SAO and additional new space segment capacity, such as Astra IB, which has in the meantime become available, such a foreclosure would seem unlikely. If new elements were to appear, proceedings independent of those which have led to this Decision could be called for,

HAS ADOPTED THIS DECISION:

Article 1

The main agreement of 17 December 1987 between Société Européenne des Satellites SA and British Telecommunications plc, and all related side letters and agreements regarding the arrangements whereby the two parties cooperated in the joint provision of a television distribution service by satellite (collectively referred to as the agreements), constituted an infringement of Article 85 (1) of the EEC Treaty until 30 January 1991, the date on which those agreements were terminated.

Article 2

An exemption pursuant to Article 85 (3) of the EEC Treaty for the agreements referred to in Article 1 is hereby refused for the period during which they were in force.

Article 3

Within one month from the date of notification of this Decision, British Telecommunications plc (BT) and Société Européenne des Satellites SA (SES) shall inform television programme providers who concluded contracts with BT for television distribution services via the Astra IA satellite prior to 30 January 1991 in writing of the Commission's Decision and in particular Articles 1 and 2

thereof, and advise them that during a period of four months after having been so informed, such television programme providers are entitled, if they so wish, to

- renegotiate the terms of those contracts, or
- terminate those contracts, subject to a reasonable period of notice given by them to BT, which in its turn shall forthwith inform SES that such notice has been given.

When the letter pursuant to this Article is sent to television programme providers within the one-month time-limit referred to above, a copy of such letter shall at the same time be submitted to the Commission.

Article 4

This Decision is addressed to the following undertakings:

- (a) British Telecommunications plc,
British Telecom Centre,
81 Newgate Street,
GB-London EC1A 7AJ;
- (b) Société européenne des satellites SA,
Château de Betzdorf,
L-6815 Luxembourg.

Done at Brussels, 23 December 1992.

For the Commission

Leon BRITTAN

Vice-President