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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 December 2001

relating to a proceeding under Article 81 of the EC Treaty

(Case COMP/E - 1/37.919 (ex 37.391) — Bank charges for exchanging euro-zone currencies — Germany)*(notified under document number C(2001) 3693)***(Only the German text is authentic)**

(2003/25/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

A. INTRODUCTION

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 Regulation (EC) No 1216/1999 ⁽²⁾, and in particular Articles 3 and 15(2) thereof,

Having regard to the Commission decision of 1 August 2000 to initiate proceedings in this case,

Having given the undertakings and associations of undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty ⁽³⁾,

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

Having regard to the final report of the Hearing Officer in this case,

Whereas:

(1) This Decision concerning an infringement of Article 81 of the EC Treaty is addressed to the following undertakings:

- Commerzbank AG,
- Dresdner Bank AG,
- Bayerische Hypo- und Vereinsbank AG,
- Deutsche Verkehrsbank AG,
- Vereins- und Westbank AG.

(2) The banks participating in the meeting of 15 October 1997 at Deutsche Verkehrsbank AG in Frankfurt am Main agreed to a commission of about 3 % for the buying and selling of euro-zone banknotes during the three-year transitional period beginning on 1 January 1999. The purpose was to recover about 90 % of the 'exchange margin' income after the abolition of the 'spread' (i.e. buying and selling rates) on 1 January 1999.

B. THE RELEVANT PRODUCT AND TRADE BETWEEN MEMBER STATES

1. The relevant product market

(3) On 1 January 1999, the euro was introduced as the European single currency. The twelve participating

(*) Confidential information has been deleted; it is replaced by square brackets and marked by an asterisk.

⁽¹⁾ OJ L 3, 21.2.1962, p. 204.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

⁽³⁾ OJ L 354, 30.12.1998, p. 18.

euro-zone countries are: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, Portugal, Spain, the Netherlands and Greece ⁽⁴⁾. During the transitional period (1 January 1999 to 31 December 2001), the euro existed in different denominations. The national currency units (ATS, BEF/LUF, DEM, ESP, FIM, FRF, IEP, ITL, NLG, PTE and GRD) were sub-units of the euro according to the conversion rates which were irrevocably fixed as from 1 January 1999.

- (4) The relevant product market is defined as the service of exchanging the 'subunits' ⁽⁵⁾ of the euro where at least one part of the transaction concerns notes and coins ('in-currency banknotes') ⁽⁶⁾. This service — buying and selling foreign euro-zone currencies — was offered mainly by banks and by bureaux de change. The following are typical examples of such exchange transactions:

- foreign in-currencies (cash) exchanged to be debited from or credited to an account denominated in euro or in the national in-currency,
- foreign in-currencies (cash) exchanged for the national in-currency (cash), and vice versa.

- (5) Whatever the supply substitutability, demand substitution for the (partly) cash exchange of in-currencies is very limited, if not non-existent. In particular as far as tourism is concerned, customers follow tour operators' and banks' advice to carry only small amounts of cash on them and to use their debit or credit cards abroad.
- (6) As for other categories of customer such as small businesses which exchange larger amounts of currency to carry out payments in other countries, cross-border bank-to-bank transfers may not present a viable alternative.

2. Trade between Member States

- (7) The data on volumes of note and coin transactions come from the answers to a questionnaire sent in October and December 1999 to about 240 banks in the euro zone (see recitals 22 to 24).
- (8) The 1998 selling and buying volumes for note and coin transactions per euro-zone country for all euro-zone

currencies are shown in Annex I. The amounts shown are underestimates because not all banks were able to provide data on transaction volumes. Furthermore, not all banks in the euro zone were sent the questionnaire. Also, the questionnaire did not systematically cover bureaux de change operations so that the transaction volumes for this business are not included in the data.

- (9) For selling, the transaction volume for all euro-zone currencies was about EUR 17,5 billion in 1998. About 35 % of this transaction volume was attributable to the selling of DEM. For buying, the transaction volume was about EUR 24,7 billion. Over 50 % of this transaction volume was attributable to the buying of DEM. The total transaction volume for buying and selling was about EUR 42,2 billion in 1998. Within the euro zone, the DEM was by far the most exchanged (bought and sold) currency (see Annex euro zone). Annex shows that there was considerable exchange of euro-zone currencies in each Member State.

C. THE MARKET IN GERMANY

1. The banks

- (10) Universal banks that engage in a wide range of banking activities dominate the German banking system. At the end of 1998 there were more than 3 400 banks with over 45 000 branches.
- (11) Universal banks can be classified into three major groups:
- commercial banks (*Kreditbanken*): This group includes Deutsche Bank, Bayerische Hypo- und Vereinsbank, Dresdner Bank and Commerzbank (the 'Big Four'),
 - savings banks and their regional giro institutions (*Sparkassen* and *Landesbanken*): This group is made up of 594 savings banks, 12 Landesbanks and DGZ DekaBank Deutsche Kommunalbank,
 - cooperative banks (*Volks- und Raiffeisenbanken*) and their central institutions (*Zentralbanken*): this sector consists of 2 256 local cooperative banks and four central banks (DG Bank, SGZ-Bank, WGZ-Bank and GZB-Bank).

- (12) In addition to the universal banks there is a wide range of specialised banks such as mortgage banks (*Hypothekenbanken*) and banks with special functions and other financial institutions such as building societies (*Bausparkassen*).

⁽⁴⁾ Greece joined the euro-zone countries on 1 January 2001.

⁽⁵⁾ See first preamble to the Commission's recommendation of 23 April 1998.

⁽⁶⁾ Most banks buy only foreign currency notes and no coins. Most bureaux de change also buy foreign currency coins, although at a higher rate than for notes.

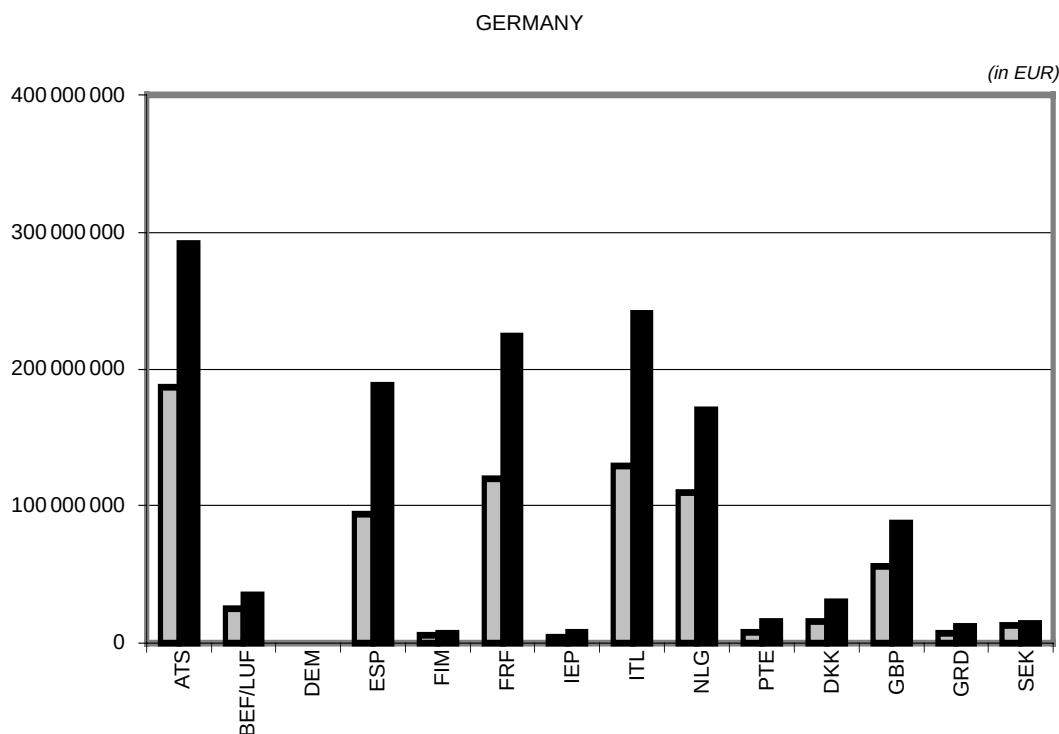
2. Currency exchange transaction volumes

- (13) Of the survey sample of 42 banks (see recitals 22 and 23), 35 banks carry out currency exchange transactions.

For these 35 banks, the volumes of Community currencies bought and sold per currency in 1998 are shown in Figure 1 below.

Figure

Volumes of currencies bought and sold in Germany (1998)



- (14) For the currencies shown in Figure 1, the total value of notes bought and sold in 1998 was approximately EUR 2,1 billion, with about twice as much being sold than bought. The buying and selling of ATS represented about 22 % of the value of currencies bought and sold, followed by ITL, FRF, ESP and NLG, which accounted (in descending order) for between about 18 % and 13 % each. The in-currencies represented about 90 % of the value of the EU notes bought and sold ⁽⁷⁾.

D. PROCEDURE

1. The requests for information

- (15) On 8 February 1999 the Commission addressed requests for information under Article 11 of Regulation No 17 to three German banking associations, namely the Bundesverband deutscher Banken, the Deutscher Sparkassen- und Giroverband and the Zentraler Kreditausschuss. The associations were asked to provide all minutes and/or records of meetings held within the association where questions relating to euro conversion, exchange of in-currencies, as well as costs (to credit institutions) and charges (to customers) were discussed. Also requested were copies of all correspondence exchanged between the association and its members, circulars addressed by the association to its members, and responses of the association to enquiries from its members concerning the abovementioned questions.

⁽⁷⁾ According to Westdeutsche Landesbank, German Bundesbank statistics give the total value of notes and coin bought and sold by German banks as EUR 6,8 billion; in-currencies represented 52 % of the total. This indicates that the value of in-currencies bought and sold was about EUR 3,4 billion and not EUR 2 billion as indicated by the survey. Westdeutsche Landesbank's reply to the statement of objections, p. 7 (file, p. 3976).

- (16) The Deutscher Sparkassen- und Giroverband responded by letter dated 3 March 1999. The Bundesverband deutscher Banken and the Zentraler Kreditausschuss each responded by letter dated 14 April 1999.

- (17) On 7 July 1999 the Commission addressed a further request for information under Article 11 of Regulation No 17 to the Bundesverband deutscher Banken asking for clarification concerning a number of meetings devoted to charges for foreign exchange transactions. The Bundesverband deutscher Banken responded by letter dated 29 July 1999.
- (18) On 6 March 2000 the Commission addressed a further request for information under Article 11 of Regulation No 17 to the Bundesverband deutscher Banken and to the German Bundesbank asking for details of any discussions and/or recommendations on charges and charging structures that had been made in Germany, and more specifically on:
- a 3 % charge and a minimum fee of DEM 5, and/or
 - a 4 % charge and a minimum fee of DEM 3.
- (19) By letters dated 21 March 2000, the Bundesverband deutscher Banken and the Bundesbank both replied that they had no knowledge of any such discussions and/or recommendations on charges and charging structures.

2. The February and October 1999 inspections

- (20) Under Article 14(3) of Regulation No 17, inspections were carried out on 16 and 17 February 1999 at two locations in Germany:
- Deutsche Bank AG (Frankfurt head office),
 - Dresdner Bank AG (Frankfurt head office).
- (21) Under Article 14(3) of Regulation No 17 an inspection was carried out on 20 and 21 October 1999 at a location in the Netherlands:
- GWK Bank NV/De Grenswisselkantoren NV (Diemen) ⁽⁸⁾.

3. Survey of bank charges for exchanging banknotes

- (22) By letter dated 19 October 1999, the Commission under Article 11 of Regulation No 17 sent a questionnaire to about 240 banks in the euro zone asking them to provide data on bank charges for foreign exchange transactions before and after the introduction of the euro. The addressee banks represent about 80 % of banking turnover in the euro zone.

⁽⁸⁾ GWK Bank specialises in the exchange of foreign currency banknotes and has 68 bureaux de change, including 33 at main railway stations and 25 along the border.

- (23) The questionnaire requested data on the buying, selling and reference rates ('official' rate) for each currency on 15 January 1998 and 15 December 1998, and the charges and charging structure on 15 January 1999. Also requested were the selling and buying volumes (per currency) of transactions carried out in 1998.
- (24) The questionnaire dated 19 October 1999 was addressed to 42 banks in Germany, including the following addressees of this Decision:
- Bayerische Hypo- und Vereinsbank AG,
 - Commerzbank AG,
 - Deutsche VerkehrsBank AG,
 - Dresdner Bank AG.

4. The statement of objections

- (25) By letters dated 3 and 10 August 2000, the Commission sent a statement of objections to Commerzbank AG, Deutsche Verkehrsbank AG, Reisebank AG, Dresdner Bank AG, Bayerische Hypo- und Vereinsbank AG, Vereins- und Westbank AG and other banks ⁽⁹⁾.

5. Replies to the statement of objections and the hearing

- (26) Following requests from the parties, the Hearing Officer informed the parties of his decision to extend the deadline for responding to the statement of objections (hereinafter called 'SO') from 3 November to 27 November 2000.
- (27) Deutsche Verkehrsbank AG and Reisebank AG ⁽¹⁰⁾ requested access to all other country-specific files and

⁽⁹⁾ In April and May 2001, with a view to termination of the proceedings, several banks proposed (a) for the general public, a considerable and immediate reduction (from May/June onwards) in charges and (b) a further substantial reduction in charges from October 2001 onwards for account holders. On the basis that the market for the exchange of in-currencies would disappear at the end of the year, and given that the proposed measures would produce immediate beneficial effects for consumers as well as facilitate the changeover to the euro, the Commission decided under the exceptional circumstances of the present case to terminate proceedings against: Bayerische Landesbank Girozentrale, SEB Bank AG (former BfG Bank AG), Hamburgische Landesbank Girozentrale, Westdeutsche Landesbank Girozentrale, Landesbank Hessen Thüringen Girozentrale, GWK Bank/De Grenswisselkantoren NV (and parent companies Fortis NV, Fortis Services Nederland NV and Fortis Bank Nederland NV).

⁽¹⁰⁾ Deutsche Verkehrsbank AG stated in its reply to the SO that, as only Reisebank AG was active on the retail forex market, the Reisebank AG reply to the SO would be referred to in its totality by Deutsche Verkehrsbank AG: pp. 1 et seq. (file, pp. 3692 et seq.).

the complete Dutch file in particular. They claimed this was necessary to safeguard their rights of defence as they suspected that the Dutch National Bank (DNB) had played a leading role in initiating the contacts between GWK Bank and German banks. They believed that the Dutch file included documents proving DNB involvement.

requests for supplementary access to the other parallel country-specific files were also denied ⁽¹¹⁾.

E. DESCRIPTION OF EVENTS

1. The introduction of the euro

(28) In response to this request, the Hearing Officer examined the Dutch file (Case COMP/E-1/37.791) and extracted all documents referring to Germany and other countries. Under cover of a letter dated 12 January 2001, these documents were sent to addressees of the SO, who were invited to submit observations by 24 January 2001.

(29) All parties except Deutsche Genossenschaftsbank AG requested a hearing and received an invitation to such a hearing scheduled for 1 and 2 February 2001. All parties except Deutsche Genossenschaftsbank AG attended the hearing.

(30) During the hearing the parties present were informed that they would be provided with a copy of an internal note of the Internal market Directorate-General which contained a short analysis of the approximately 700 complaints received by the Commission departments (Internal market and Consumer protection Directorates-General) from Community consumers in relation to bank charges for various payment means and services following the introduction of the euro.

(31) By letter dated 26 February 2001, the Hearing Officer sent the abovementioned copy of the internal note of the Internal market Directorate-General to the parties and requested them to submit their observations on the note and on the hearing itself by 14 March 2001.

(32) The banks taking the opportunity to comment on the internal note argued that the only reason for complaints was that for the first time customers were able to clearly identify the charges as they were no longer hidden in the difference between the buying rate and the selling rate. Dresdner Bank AG stated that consumers were disappointed as they had wrongly expected no charges at all.

(33) Also at the hearing on 1 and 2 February 2001, the parties repeated their request for full access to all parallel country-specific files. By letter dated 6 August 2001 the Hearing Officer denied these requests. Further

(34) The Madrid European Council of 15 and 16 December 1995 adopted a timetable for the changeover to the euro. The Madrid Council established the starting date for Stage 3 of Economic and Monetary Union (hereinafter called 'EMU') as 1 January 1999. For a period of three years from this date, the conversion rates would be irrevocably fixed among the currencies of participating countries (in-currencies) and against the euro ⁽¹²⁾.

(35) From 1 January 1999, and for a three-year transitional period, the euro would exist as a 'virtual' currency in the euro-zone countries. National banknotes of each euro-zone country would continue to circulate and foreign exchange services for the buying and selling of in-currencies would still be required during this period. However, the 'conversion' between in-currencies would be carried out at the irrevocably fixed exchange rates, and at no other rates.

(36) By 1 February 2002 at the latest, euro banknotes and coins would start to circulate alongside national notes and coins. At most six months later, the national currencies would have been completely replaced by the euro in all participating Member States.

(37) The use of the conversion rates was further stipulated in Council Regulation No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro ⁽¹³⁾. According to Article 4(3) of the Regulation, 'The conversion rates shall be used for conversions either way between the euro unit and the national currency units'.

(38) Prior to the introduction of the euro on 1 January 1999, customers were charged in Germany for the exchange of euro-zone foreign notes and coin (hereinafter called 'exchange of in-currency banknotes')

⁽¹¹⁾ See Cases T-216/01 R and T-219/01 R.

⁽¹²⁾ Presidency conclusions of the Madrid European Council of 15 and 16 December 1995 on the scenario for the changeover to the single currency: <http://europa.eu.int/euro/>.

⁽¹³⁾ OJ L 162, 19.6.1997, p. 1.

almost exclusively via a spread⁽¹⁴⁾. The irrevocable fixing of the exchange rates as from 1 January 1999 meant the abolition of the different buying and selling rates, i.e. the spread, as a means of expressing charges for the exchange of in-currency banknotes.

- (39) Furthermore, the 'exchange rate risk' cost element that existed prior to the introduction of the euro as a result of the fluctuating exchange rates between currencies disappeared with the fixing of euro-zone currencies' exchange rates on 1 January 1999.
- (40) While the scenario adopted by the Madrid Council in December 1995 provided the basic framework for the changeover, many practical details relating to technical preparation of the move to Stage 3 remained outstanding. During 1996, the Commission received written comments and queries from associations representing currency users on various aspects of the changeover. With a view to addressing concerns expressed by these associations and to advance technical preparations, the Commission organised on 15 May 1997 a Round Table on practical aspects of the changeover to the euro. The Round Table provided a forum for dialogue among all interested parties, both public and private, and addressed two main sets of issues: the practical arrangements for a smooth changeover to the euro and helping currency users adjust to the euro⁽¹⁵⁾.
- (41) Under the two main sets of issues, the Round Table discussed a broad range of EMU questions. Among these was a question on the costs of conversion during 1999 to 2001 and during the final changeover. The discussion on this subject mainly concerned the conversion of national currency units to euro units (and vice versa). Regarding the exchange of one participating Member State's banknotes to another during the transitional period, participants argued that this should be

chargeable because, 'while exchange rate risk will disappear and thus reduce costs by some 20 %, other costs will remain'.

- (42) Following the Round Table of 15 May 1997 the Commission set up an Expert Group on Banking Charges for Conversion to the Euro (hereinafter called 'Expert Group'), in parallel with a number of other groups. The Expert Group — comprised of experts drawn from banking, payment systems, enterprises and consumer organisations — met six times in Brussels (between 10 September and 20 November 1997), and received written and oral contributions from a wide range of market associations and institutions. It received assistance also from the Commission and the European Monetary Institute (hereinafter called 'EMI').
- (43) The Expert Group's terms of reference were to consider whether banks would be entitled to charge for conversion to the euro, whether they intended to do so, whether any new rules were necessary at Community level and how to ensure transparency of any conversion charges. In its report of 20 November 1997⁽¹⁶⁾ the Expert Group defines 'conversion' as relating to the process of changing the national currencies of participating Member States into the euro. Conversion thus refers to an arithmetical calculation for quoting national currency units in euro units, and vice versa⁽¹⁷⁾. The report expressly states that it did not deal with charges for bank services⁽¹⁸⁾.
- (44) The European Banking Federation gave evidence to the Expert Group on 24 September 1997. At this meeting, the Chairman of the Expert Group asked the Federation if it might be possible to draw up a list of specific euro-related services which would be free or be subject to charges per country. By letter dated 3 October 1997, the Federation requested its EMU Committee to provide this information giving a deadline of 10 October 1997 for a response. The Expert Group concluded in its

⁽¹⁴⁾ For the buying and selling of notes and coin to the public, the spread is determined with respect to a market reference rate. In the present case, the buying and selling rate is defined as the rate the bank applies to buy from, or sell to, a customer. This means that the buying rate is lower than the reference rate whereas the selling rate is higher. Depending on whether a buying or selling transaction is being carried out, the spread is either the difference between a reference rate and a buying rate, or the difference between a selling rate and a reference rate. For currency exchange, the spread (with respect to a reference rate) may be in the percentage range.

In foreign exchange trading, a spread is simply the difference between a bid (buy) and offer (sell) rate. Such spreads vary in size according to market volatility. Spreads can be so small that they are quoted to one hundredth of one percent (0,01 percentage commission) of the currency unit, usually called a 'pip'.

⁽¹⁵⁾ See 'Round table on practical aspects of the changeover to the euro. Summary and conclusions. Brussels, May 15, 1997': http://europa.eu.int/comm/internal_market/en/finances/banks/expert.htm.

⁽¹⁶⁾ 'Report of the Expert Group on Banking Charges for Conversion to the Euro' to the European Commission, Brussels, 20 November 1997, p. 2.

⁽¹⁷⁾ In legal terms a conversion, as that term is used here, is for all practical purposes an unknown phenomenon. This is because 'conversion' has little in common with similar-sounding legal concepts such as 'convertibility' or 'currency exchange'. The national currency unit is no more than a description (albeit transitional) of the currency 'euro'. A sum of money will have the same legal identity whether, temporarily, it is being expressed in one way or the other. Indeed the nearest legal analogy is the situation of units and sub units of a national currency. Thus 70 pfennigs is equal to DEM 0,70 and the way in which the book entry is carried out has not been the subject of learned legal expertise but more inspired by the search for technical convenience. See 'Report of the Expert Group on Banking Charges for Conversion to the Euro', Annex A: Legal aspects of charging for conversion.

⁽¹⁸⁾ See paragraph 4 'What is conversion?' of the Report of the Expert Group on Banking Charges for Conversion to the Euro to the European Commission, Brussels, 20 November 1997.

report of 20 November 1997 that 'most banks intended to charge their customers for the exchange of euro area national banknotes during the transitional period, though charges should be less than at present because the exchange rate risk will have been removed. Charges would cover handling, storage, insurance and processing costs, the opportunity cost of holding stocks of banknotes and the risk of accepting counterfeit banknotes.'

- (45) In its report the Expert Group concludes and recommends, among other things, the following:

— 'To encourage "good practice" relating to conversion without charge, the Group considers that the Commission should recommend the standard of "good practice" for banks on conversion without charge ... The standard would be advisory rather than binding.'

— 'Where banks are entitled to charge for conversion, and decide to do so, the conversion rate must be used (i.e. the irrevocably fixed rate in relation to euro). The Group recommends ... that the use of the conversion rate and any charges should be transparent, and included in the standard of "good practice". To reduce the risk that consumers attribute existing charges to the introduction of the euro, the Group recommends ... that the standard should be implemented by banks in advance of 1 January 1999, wherever possible.'

- (46) On 23 April 1998, the Commission issued a recommendation concerning banking charges for conversion to the euro⁽¹⁹⁾. The recommendation established 'a standard of good practice' on conversion⁽²⁰⁾ without charge regarding certain conversion operations where there is a legal requirement not to charge and on certain other conversion operations in order to facilitate the smooth introduction of the euro (Article 2). For example, banks are legally required to make the conversion without charge of incoming payments denominated in the euro unit into the national currency unit during the transitional period. The Commission recommends that banks should also convert without charge comparable outgoing payments.

- (47) The standard of good practice does not include the exchange of in-currency banknotes without charge. The recommendation does not restrict the banks' freedom in independently defining charges according to each individual bank's commercial policy.

- (48) The only 'obligation' that the recommendation imposed on banks with regard to exchange of banknotes and coin of participating Member States related to transparency: 'banks should show clearly the application of the conversion rates in accordance with the provisions of Regulation (EC) No 1103/97, and they should identify separately from the conversion rate any charges of any kind whatever which have been applied' (Article 3(1)). The recommendation also says that banks should provide clear and transparent information concerning those exchange charges by providing their customers in writing with both general prior (*ex ante*) information and specific (*ex post*) information on charges which they respectively propose to apply or have applied (Article 3(2)).

- (49) The recommendation also provided that banks should inform their customers before 1 January 1999 about whether and to what extent they would implement the recommendation (Article 4(2)). Banks were also recommended to publicise, either individually or in groups, their intention to implement the recommendation (Article 4(3)).

- (50) On 8 December 1998 the Commission published a report entitled 'Implementation of the Commission recommendation on banking charges for conversion to the euro' ⁽²¹⁾. The report sets out the information that the Commission had received from European banking associations about the intention of their member banks to implement the recommendation. In July 1998, the Commission asked four banking associations (The European Banking Federation, the European Savings Banks Group, the European Association of Cooperative Banks and the European Mortgage Federation) to report by 1 November 1998 on whether, and to what extent, their member banks were intending to implement the recommendation. Each association's assessment and evidence is published in the annexes to the report.

- (51) Regarding Germany the report notes, in part, the following:

'Compliance with the recommendation in each participating Member State

The Central Credit Committee (ZKA), which represents the whole German credit sector, has agreed to respect the provisions of the recommendation. The Bundesverband deutscher Banken considers that all its members intend to implement the recommendation. This is the case with member banks of the EACB and ESBG in Germany as well.

...

⁽¹⁹⁾ 98/286/EC; (OJ L 130, 1.5.1998, p. 22).

⁽²⁰⁾ 'Conversion' within the meaning of the recommendation is the change of denomination of a monetary amount from the national currency unit to the euro unit and vice versa at the conversion rate, in accordance with the provisions of Regulation (EC) No 1103/97.

⁽²¹⁾ This document is publicly available on the Internet at http://europa.eu.int/comm/dgs/internal_market/ (Annexes included).

Information for customers ...

In Germany, where banks have issued a great number of publications on the introduction of the euro, EBF member banks will explain the contents of the recommendation with letters or brochures.'

2. The background in Germany

- (52) A general presentation was made during the hearing on 1 and 2 February 2001 on the legal and economic background. According to this presentation and Westdeutsche Landesbank, a series of meetings took place between commercial banks and the Bundesbank prior to October 1997.
- (53) On 8 July 1997, a meeting took place between several commercial banks and the Bundesbank in Frankfurt at which the consequences of the introduction of the euro for the buying and selling of foreign banknotes and coin were discussed ⁽²²⁾.
- (54) Following this meeting, on 22 July 1997 the Bundesbank sent a questionnaire to commercial banks ⁽²³⁾ concerning the buying and selling of banknotes in the retail and wholesale markets. The questionnaire asked for data on volumes of banknotes exchanged, the transparency of charges during the transitional phase, the consequences for the retail business if the Bundesbank were to offer a free service to the public, and the consequences for the wholesale business if the Bundesbank were to offer a free banknote repatriation service to the commercial banks. The response of each bank was to be treated confidentially by the Bundesbank.
- (55) Following the meeting on 8 July 1997 and the Bundesbank questionnaire of 22 July 1997, four commercial banks (Commerzbank AG, Deutsche Verkehrsbank AG, Reisebank AG and Westdeutsche Landesbank) sent a letter dated 25 July 1997 to the Bundesbank stating their view that the spread should be maintained. This was because the necessary information technology changes could not be made in time and also

because any adaptation would give rise to additional costs resulting in higher charges to customers ⁽²⁴⁾:

'...The central banks of the participating countries have undertaken, after the fixing of the exchange rates, to exchange euro-zone currencies free of charge. However, from the point of view of the Bundesbank and the regional Landeszentralbanken, there is no interest in taking over the private customer business of banks as a new infrastructure for this purpose would first need to be created.

Owing to the planned obligation on the Bundesbank to buy in-currencies free of charge, a rush of consumers to the Landeszentralbanken would be inevitable as the commercial banks, for cost reasons, would refuse to buy currencies without a spread.

The turnover in forex business in bank branches in Germany amounts to DEM 16 billion. The turnover in DEM clearing with foreign correspondent banks should be added to this figure. The volume of purchases from customers and repatriation volumes will be estimated on the basis of a separate Bundesbank questionnaire.

The practical implementation of the necessary measures has been discussed between the signatories, who are heavily involved in the currency exchange business.

The question of charging instead of the current spread (selling/buying rates) was seen as highly problematic.

As a result of the discussion, all participants have in principle rejected a change as the resulting costs for IT adaptation would make the exchange of banknotes more expensive, and the public would not appreciate higher charges. Consumers would not understand the introduction of a charge when exchange rates were fixed and central banks purchased in-currencies free of charge.

It is also important to note that IT changes cannot be made at such short notice.

A survey among our euro-business partners has shown that foreign banks also insist on keeping the spread.

A separation between fixed rate plus commission in retail business and keeping the margins in interbank business may be possible for banks with branches as they can directly influence their branches. In the sector of Sparkassen (savings banks) and Genossenschaftsbanken (cooperative banks), such an

⁽²²⁾ Reply of Westdeutsche Landesbank to the SO, p. 16 (file, p. 3985).

⁽²³⁾ Reply of Westdeutsche Landesbank to the SO, p. 16 (file, p. 3985).

⁽²⁴⁾ 'Auswirkungen der EWWU auf das Sortengeschäft', Letter from Interessengemeinschaft Sortenhandel c/o [...] (Deutsche Verkehrsbank AG) to [...] (Landeszentralbank Hessen) of 25 July 1997 signed by Commerzbank AG, Deutsche Verkehrsbank AG, Reisebank AG and Westdeutsche Landesbank and copied to Deutsche Bundesbank, Bundesverband Deutscher Banken, Bundesverband der Deutschen Volksbanken und Raiffeisenbanken and Deutscher Sparkassen und Giroverband (file, pp. 2965 et seq.).

approach could only be implemented with difficulty as the independent Sparkassen and Genossenschaftsbanken could hardly accept charging their customers fixed rates plus commission while they themselves applied buying/selling rates with their central institutions.

For the above reasons, the signatories, as specialists in the currency exchange business, advocate maintaining selling and buying rates and sticking to tried-and-tested procedures to avoid any hitches in the run-up to the introduction of the euro'.

- (56) During July and August 1997, the commercial banks replied to the abovementioned (recital 54) Bundesbank questionnaire ⁽²⁵⁾.
- (57) As a follow-up to the informal Ecofin Council meeting on 12 and 13 September 1997 in Luxembourg, a meeting took place on 15 September 1997 between commercial banks and the Bundesbank in Frankfurt. The meeting provided further clarification that charging via a spread (i.e. buying and selling rates) would not be possible after 1 January 1999. Any charges would have to be shown separately:

The issue of fees, in particular exchange fees, was also addressed. On 1 September 1997, the Landeszentralbanken sent around a questionnaire by letter in order to determine whether the commercial banks would set a fee for the exchange of national euro-zone banknotes or whether they would practice a spread between two exchange rates. In this respect, the Bundesbank stated that charging for the exchange by way of a spread would no longer be possible. A solution would only be possible by way of a fee'.

3. Facts

- (58) In April 1997 GWK Bank, with its 68 bureaux de change (including 33 at main railway stations and 25 along the border), became concerned at the pricing to be implemented in Germany for the buying and selling of in-currency banknotes following the disappearance of the spread on 1 January 1999.
- (59) GWK Bank contacted a similar institution in Germany, Reisebank AG (with 59 bureaux de change at big railway stations and border crossings), initially to make

them aware that the German Bundesbank might use its network of about 200 offices to provide a free service to the public for the buying of euro-zone banknotes during the transitional period (1 January 1999 to 31 December 2001) as a consequence of the implementation of Article 52 of the Statute of the European System of Central Banks (hereinafter called 'ESCB Statute'). This would pose a threat not only to Reisebank AG, but also to the main business of GWK Bank, which was the buying and selling of DEM.

- (60) GWK Bank urged Reisebank AG to begin discussions with other German banks, in the first instance to try to ensure that the Bundesbank would not provide a free service to consumers via its network of 200 offices.
- (61) These discussions and contacts led to a meeting at Deutsche Verkehrsbank AG (Frankfurt) on 15 October 1997 where price fixing between several German banks took place.
- (62) The documentary evidence of the infringement is to be found in the reports of meetings and telephone conversations found during the inspection of 20 and 21 October 1999 at the premises of GWK Bank (Diemen) in the Netherlands.

3.1. Meeting between GWK Bank and Reisebank AG on 29 April 1997

- (63) On 29 April 1997, a meeting took place in Frankfurt between GWK Bank and Reisebank AG. According to the minutes of this meeting ⁽²⁶⁾, GWK Bank was surprised at Reisebank AG's lack of information on changes to be expected in the market for the exchange of euro-zone banknotes after 1 January 1999. Reisebank AG was under the impression that the exchange margins and fee structure for the exchange of euro-zone banknotes would be maintained until the introduction of euro cash in 2002:

'Minutes of 29 April 1997 of the meeting with Deutsche Reisebank ⁽²⁷⁾ in Frankfurt concerning the euro problem (dated 2 May 1997).

...

⁽²⁶⁾ 'Zusammenfassung der Gespräche vom 29 April 1997 mit der Deutschen Reisebank in Frankfurt über die Euro-Problematik'. Present: Mr [...] (Reisebank AG), Mr [...] (Reisebank AG), Mr [...] (GWK), Mr [...] (GWK); cc: [...] (GWK), [...] (GWK) and [...] (GWK); memo No AS/HB/Orig97/061 dated 2 May 1997 (file, pp. 2939 et seq.).

⁽²⁷⁾ The documents found at GWK almost always refer to Reisebank AG as Deutsche Reisebank.

⁽²⁵⁾ Reply of Westdeutsche Landesbank to the SO, p. 17 (file, p. 3986).

The predominant feeling at the discussions was astonishment on the part of GWK that Deutsche Reisebank lacked up-to-date information and astonishment on the part of Deutsche Reisebank at the position taken by the German Bundesbank and [because of] the other short-term euro problems.'

Assumptions by Reisebank

The gentlemen of Reisebank AG felt they were prepared for the euro. The development of the 'card-sales' product, the opening of bureaux de change on Germany's eastern border and the improvement of its market share in the exchange market would provide sufficient compensation for it to be able to face the future with confidence. In this scenario, however, Reisebank AG assumed that the euro problem would not arise until 2002. It expected there would be no changes to the cash exchange markets between 1 January 1999 and 1 July 2002 (or even as from May 1998), because:

1. the current margin structure would be maintained;
2. the current commission structure would be maintained;
3. the current network of exchange locations would remain unchanged.

(64) The information provided by GWK Bank to Reisebank AG at the meeting caused both surprise and concern. The main points raised were:

- exchange margins would disappear in 1999 and be replaced by a visible charge,
- the national central banks (NCBs), under the influence of the European Monetary Institute (EMI), were exerting pressure on the commercial banks to reduce bank charges after 1 January 1999,
- the Dutch National Bank had decided that the implementation of Article 52 vis-à-vis Dutch commercial banks would involve a free service for the repatriation of foreign euro-zone banknotes to their country of origin. Other NCBs were considering a free exchange service to the general public,
- there were rumours that German commercial banks were prepared to offer a free service for the exchange of euro-zone banknotes from 1 January 1999.

(65) On the above points, the meeting minutes state as follows:

'The information passed on by GWK

After we provided our information, there was a certain amount of disbelief and fear.

We provided the following information.

1. It is most probable that the margin structure will disappear in 1999, which will put pressure on the profit side; in the Netherlands, the banks consider that the margin will be nil and will have to be replaced by a (visible) commission. Public opinion could then turn against this higher commission.
2. The Dutch National Bank has tried (and according to Mr [...] is still trying) to induce the banks to require a substantially reduced remuneration for exchanging euro-zone cash and it is only because the banks insisted (according to the information provided by GWK) that a slight improvement in the DNB's position is to be observed. We conclude from this that other central banks (under the influence of the EMI) are exerting similar pressure on commercial banks.
3. This (political) pressure has been, together with Article 52, the occasion for an EMI-scale survey of the large commercial banks, in which GWK (because of its specialisation) has been included.
4. The DNB wishes to interpret Article 52 narrowly to mean that the European central banks are obliged to repatriate without charge only excess euro-zone currencies to the participating countries concerned and it does not wish to modify the existing infrastructure of the (retail) exchange business during the relevant period.
5. The DNB has taken this position after having been informed (mainly by GWK) of the problems that are to be expected.
6. GWK and the large banks are exploring the possibility of transforming the current margin- and commission-based remuneration structure into a purely commission-based remuneration as from the beginning of 1999 to avoid having to increase charges in parallel with the highly mediated introduction of the euro.
7. More specifically, the German Bundesbank and the French and Italian central banks have insisted on a broad interpretation of Article 52 so that the public can enjoy a free service.

8. Rumours are circulating (according to Mr [...]*) that German commercial banks are prepared to offer the public free cash-exchange transactions.

9. This would mean that the changes that are being planned by Deutsche Reisebank could most probably not be implemented.'

(66) According to the meeting minutes, Reisebank AG gave no credence to the GWK information. They decided to contact the Bundesbank and commercial banks in order to focus attention on the issues relating to the exchange of euro-zone banknotes after 1 January 1999:

'Deutsche Reisebank's reaction

The disbelief about the coming threat was palpable. Partly because of our presence and the conviction with which we expressed our views, this disbelief changed to consternation.

Deutsche Reisebank had no knowledge of the EMI survey. We have forwarded them a copy.

Action

Deutsche Reisebank will contact the Bundesbank and other banking institutions in order to draw attention in Germany also to the problems connected with the conversion of cash into euro. We have agreed to keep each other informed of developments.'

(67) The meeting minutes also note similarities in company structure between GWK Bank and Reisebank AG, as well as overlaps in product packages. Both banks made a charge for exchanging cash of around 3,5 % of the transaction value:

'Other information

Deutsche Reisebank has approximately 60 bureaux de change (e.g. in railway stations) and approximately 300 associates.

There is a clear overlap between product packages, e.g.:

Foreign exchange — Cash dispensers — Western Union — Card sales under development.

The head office employs about 50 people. Deutsche Reisebank's parent company has outsourced automation to a central cashier.

Of their current profits, approximately 80 % are exchange profits and total profits will, after the introduction of the euro, decrease by 40 % (it is not clear if these figures are based on the large or the small euro). The charge levied and the commission amount, as in the case of GWK, to around 3,5 %.'

(68) In its reply to the SO, Reisebank AG admits ⁽²⁸⁾ that it was not aware of the major changes in forex business involving in-currencies during the transitional period, and in particular that the buying and selling rates for the exchange of euro-zone currencies had to be abandoned.

3.2. Contact between GWK Bank and Reisebank AG on 5 May 1997

(69) A week after the meeting of 29 April 1997, GWK Bank sent Reisebank AG two documents by fax dated 5 May 1997 ⁽²⁹⁾.

(70) The first document was a copy of the completed 'Questionnaire to commercial banks and bureaux de change' which had been submitted to the central bank ⁽³⁰⁾. This was an EMI questionnaire on the implementation of Article 52 of the ESCB Statute (exchange at par value of euro-zone banknotes between 1999 and 2002). The questionnaire had been sent by the EMI to the NCBs requesting information on the annual volume of banknote exchange business, means of banknote repatriation, buying and selling volumes of euro-zone currencies, seasonal variations, existing spreads and commissions, and breakdown of cost components. The NCBs, according to selection criteria chosen by each NCB, sent out the EMI questionnaire to a sample of national banks and bureaux de change.

(71) The questionnaire includes a section entitled 'You are invited to make comments and suggestions on the exchange of euro area banknotes on separate sheets of paper, if you so wish'. With the aim of maintaining total income after 1 January 1999, GWK Bank proposed a single handling fee of 3,8 % for the exchange of all euro-zone currencies:

'The total income from a normal euro area currency exchange transaction is about 3,8 %. To maintain the

⁽²⁸⁾ Reply of Reisebank AG to the SO, pp. 21 et seq. (file, pp. 3715 et seq.).

⁽²⁹⁾ Fax of 5 May 1997 from [...]*, pp. [...]* (GWK), to [...]* (Reisebank AG), fax No 97.066 (file, pp. 2942 et seq.). Both of these documents were found during the inspection at GWK.

⁽³⁰⁾ 'Questionnaire to commercial banks and bureaux de change', dated 13 January 1997, AS/NvdN/HB/Orig97/002 (file, pp. 2943 et seq.).

service to the public for the exchange of circulating euro zone currencies, it is necessary to have a compensating commission.

Income from a normal euro-zone currency exchange transaction

$(\text{NLG } 350 \times 3,8 \%) = \text{NLG } 13,30$

Total costs of a normal euro-zone currency exchange transaction = NLG 11,60.

There will be no decrease in costs for our institution after 1 January 1999 and from a euro point of view it is not feasible to maintain different commissions for each euro-zone currency. We therefore propose a handling fee of 3,8 % on a normal (without any discount) euro-zone currency exchange transaction. A figure of less than 3,8 % would be too low, particularly for euro-zone currencies with a relatively low turnover (euro-zone currencies other than DEM,

BEF and FRF). Low turnovers result in additional interest losses and relatively higher back-offices expenses.

The Dutch National Bank has appended to the questionnaire additional comments on our constitution.

A copy of our comments is obtainable from the DNB.'

- (72) The second document sent by GWK Bank to Reisebank AG contains the detailed supplementary comments of GWK Bank in the EMI questionnaire. This document explains that, to maintain a total exchange income of 2,4 % for all euro-zone currencies, and taking into account the loss of exchange margin income after 1 January 1999 as well as discounts for special groups and clients, an increased commission of 3,8 % would be required ⁽³¹⁾:

'Retail exchange transactions

....

The income as a percentage of turnover (2,5 %) is lower than the exchange rate margins in the list of exchange rates for banknotes and the commission rates would suggest.

Margin according to exchange rate list	2,88 % ⁽¹⁾
Commission	1,00 %
Total income	3,88 %

⁽¹⁾ Average margin weighted according to purchase and sales turnover.

....

Acceptable commission rate after 1 January 1999

From a social point of view, it is desirable that the service to the public for the exchange of circulating EU currencies be maintained at current levels during the period 1 January 1999 to 1 July 2002. As a result, an increased commission will have to be charged to compensate for the loss of the margin. For GWK, a 3,8 % commission charge on the equivalent of an ordinary exchange transaction will suffice. Discounts for special groups and clients conducting large transactions (including coupon cashing, see also p. 2) will ensure a total exchange income of 2,4 % (3,8 % — 1,38 %) from the entire EU currency turnover. The 3,8 % results in a charge to the consumer which is comparable to the charge for a current, average exchange transaction in EU currencies (exchange rate margin for banknotes plus commission), as further specified below (Annex 2 contains an extensive list of figures).

⁽³¹⁾ 'Supplementary comments on the questionnaire of 21 November 1996 regarding the euro, as drawn up by the European Monetary Institute (EMI)' dated 13 January 1997, NvdN//Orig97/007 (file, pp. 2954 et seq.).

	Margin ⁽¹⁾ for banknotes as a percentage of exchange rate turnover	Current exchange rate for an NLG 350 transaction	Current commission for an NLG 350 transaction	Total customer charge for an NLG 350 transaction
EU currency of the euro zone	2,8 %	NLG 9,79	NLG 3,50	NLG 13,29
All currencies	2,88 %	NLG 10,08	NLG 3,50	NLG 13,58
EU currency exchange transaction with a 3,8 % commission				NLG 13,30

⁽¹⁾ The margin mentioned here is the average banknote margin for the respective currency group (see Annex 2), weighted by purchase and sales turnover.

A percentage less than 3,8 is too low, particularly for EU currencies with relatively low turnover (EU currencies other than DEM, BEF and FRF). Low turnovers result in greater loss of interest and relatively higher back-office expenses (counting, storage, transportation and transaction costs, etc.). From a "euro" point of view, it is not feasible to maintain different commissions for the individual EU currencies.'

(73) GWK Bank ⁽³²⁾ and Reisebank AG confirmed that GWK Bank sent the above-mentioned documents. According to them, the proposal for a 3,8 % charge was merely a statement made in response to the EMI questionnaire. The EMI itself disseminated the results of the questionnaire.

EMI eight-page report contains aggregated data and does not discuss bank charges for the exchange of euro-zone currencies. The report was not published but the EMI Council agreed to release the assessment of the results to the European Banking Federation and the European Savings Banks Group ⁽³³⁾.

(74) The Commission notes that neither the EMI questionnaire nor the EMI results of the questionnaire addressed bank charges for the exchange of euro-zone banknotes. The EMI drafted a questionnaire which included a request for information on the annual volume of banknote exchange business, means of banknote repatriation, buying and selling volumes of euro-zone currencies, seasonal variations, existing spreads and commissions, and a breakdown of cost components. The purpose was to gather information on the implementation by commercial banks of Article 52 of the ESCB Statute (i.e. the repatriation free of charge of banks' foreign euro-zone banknotes to their country of origin).

3.3. Meeting on 11 August 1997 between Reisebank AG, Deutsche Verkehrsbank AG, GWK Bank and Landeszentralbank Hessen

(76) On 11 August 1997 a meeting took place in Frankfurt between Reisebank AG, Deutsche Verkehrsbank AG, Landeszentralbank Hessen and GWK Bank ⁽³⁴⁾. The purpose of the meeting was to clarify the situation regarding the exchange of euro-zone notes and coin during the transitional period:

'Report on talks between Reisebank, Landeszentralbank, Deutsche Verkehrsbank and GWK held on 11 August 1997 at the head office of Reisebank AG in Frankfurt, Germany

(75) The EMI prepared a report dated 23 April 1997 entitled 'Exchange at par value of euro area banknotes: Assessment of the results of the questionnaire to commercial banks'. The report was based on the answers to the questionnaire received by the NCBs from banks and bureaux de change and reflected the situation in 1996. The EMI questionnaire covered 14 Member States and responses were received from approximately 150 commercial banks and 40 bureaux de change. The

⁽³³⁾ E-mail of 5 May 1999 from the European Central Bank to DG Competition in relation to a request for a copy of the report on 'Exchange at par value of euro area banknotes: Assessment of the results of the questionnaire to commercial banks'.

⁽³⁴⁾ 'Gesprächszusammenfassung Reisebank/Landeszentralbank/Deutsche Verkehrs-Bank/GWK vom 11 August 1997 am Hauptsitz der Reisebank AG in Frankfurt am Main'; Present: [...] (Reisebank AG), [...] (Reisebank AG), [...] (Reisebank AG), [...] (Deutsche Verkehrsbank AG), [...] (Landeszentralbank); cc: Members of the Board, [...] (Landeszentralbank); memo No AS/HB/Orig97/130 (file, pp. 2967 et seq.).

⁽³²⁾ Reply of the Fortis group to the SO, p. 13 (file, p. 4285).

Present: Mr [...] * Reisebank AG
 Mr [...] * Reisebank AG
 Dr [...] * Reisebank AG (lawyer)
 Mr [...] * Deutsche Verkehrsbank AG
 Mr [...] * Landeszentralbank in Hessen
 Mr [...] * GWK
 Mr [...] * GWK
 Mr [...] * GWK

Opening remarks

Mr [...] * welcomed everyone to the meeting. He pointed out that there were still many uncertainties with regard to the foreign exchange market for the period 1 January 1999 to 1 July 2002 and that one of the reasons for this meeting was to clarify the situation. After his brief introduction, he handed the floor to Mr [...] *, who was present in his capacity as Reisebank AG's expert on the euro.'

- (77) The legal representative of Reisebank AG made it clear that commercial banks would be allowed to charge for the exchange of euro-zone currencies during the transitional period but that the exchange margin (i.e. buying and selling rates) would cease to exist after 1 January 1999:

'Mr [...] *'

In Mr [...] *'s opinion, most members of the EMI held the following two points of view:

1. Commercial banks would be allowed to charge clients for handling exchange operations in euro-zone currencies.
2. Changing circulating euro-zone currencies into euros would have to be free of charge to the customer for the first half of 2002.

Point 1

The commercial banks would be able to charge for handling exchange transactions. The form this payment would take would not be laid down by the EMI. It could take the form of a fixed commission, a percentage commission or even the current exchange margin, which could vary from currency to currency (combinations were also possible). Mr [...] * pointed out to Mr [...] * that after 1 January 1999 changing euro-zone currencies would in fact be like changing a single currency, but in different forms, and that consequently price differentiation between euro-zone currencies was not a straightforward matter. As Mr [...] * saw it, price differentiation was only possible in the case of different cost prices. There were no

demonstrable, significant differences in cost price between the different euro-zone currencies and it was therefore unlikely that the present exchange margin structure would be preserved.

....

Point 2

If euro-zone currencies must be converted into euros free of charge between 1 January 2002 to 1 July 2002, this would mean that as of 1 January 2002 GWK would no longer earn any profit from changing foreign euro-zone currencies. Hitherto we had assumed that only circulating guilders would be converted into euros free of charge.'

- (78) At the meeting, the Landeszentralbank Hessen explained that, according to Article 52 of the ESCB Statute, the Bundesbank was obliged to purchase foreign euro-zone notes and coin from the banks and the public free of charge. The Bundesbank had carried out a survey of various banks to establish the number of transactions to be expected (recital 54):

'Landeszentralbank

The Bundesbank wished to interpret Article 52 as follows:

The central bank was under an obligation to buy foreign euro-zone currencies from banks and the public free of charge (at par was thus taken to mean free of charge, as it was by the Dutch central bank).

The bank would make alterations to (invest in) the present 180 (this number would fall) branches (Landeszentralbanks) so that it would actually be able to provide the service to the public. To establish how many transactions to expect, the Bundesbank had carried out a survey among various banks. Mr [...] * stated that the Bundesbank was not happy with the obligation under Article 52.'

- (79) This information that the Bundesbank and Landeszentralbanks might offer a free service to the public on a widespread basis caused alarm at GWK Bank. It urged Reisebank AG to reach a consensus with other German banks on the need to charge in order to avoid loss of profits from the exchange of euro-zone currencies during the transitional period:

Follow-up action

After Mr [...] * and Mr [...] * had left, we reminded Deutsche Verkehrsbank and Reisebank of their duty to gather accurate information about the German exchange market as quickly as possible in order to

alert the Bundesbank, and other banks too, to the possible loss of profits which would result from providing exchange services free of charge. If, before the Bundesbank took its final decision, a consensus could be reached between the commercial banks on the need to charge for the service and if the Bundesbank could be convinced of the impossibility of the task before it, it might be possible to avert the threat to Reisebank. Mr [...] reacted to this by saying that this was a problem in Germany because there was no consensus at all between the banks nor could one be expected. It seemed that Mr [...] would not make any attempt to reach a consensus anyway.'

- (80) GWK Bank was alarmed that, if the Bundesbank offered a free service on a widespread basis, then the German commercial banks might follow suit with low or no charges. There was a risk that the market for the exchange of euro-zone banknotes would shift from the Netherlands to Germany. There would be pressure on the Dutch banks to decrease charges accordingly:

'Conclusions

The developments in Germany were very alarming. The Bundesbank was going to intervene on the exchange market by providing services free of charge, which could easily have a knock-on effect on the level of charges levied by commercial banks, while the institution most closely concerned (Reisebank AG) could be expected to do little about it. The threat was also very considerable for the Dutch exchange market.

1. If the public was charged a reasonable amount in the Netherlands, there was a risk that the exchange market would shift from the Netherlands to Germany (or Austria etc.).
2. Low (or no) charges by commercial banks abroad would pave the way for a fall in charges in the Netherlands (with considerable help from the media).
3. The EMI could easily decide to opt for the Bundesbank's explanation, which would mean that the DNB would also be forced to introduce free exchange services and the consensus reached on the Dutch exchange market would again be up in the air.

The above development indicates that GWK must introduce as quickly as possible a high exchange rate commission in order to establish a new price balance

on the Dutch market, before pressure from the EMI and DNB upsets the consensus reached.'

3.4. Telephone conversation between GWK Bank and Deutsche Verkehrsbank AG on 29 September 1997

- (81) A telephone conversation took place between Mr [...] (GWK Bank) and Mr [...] (Deutsche Verkehrsbank AG) on 29 September 1997. Apparently, Mr [...] had not received the report of the meeting on 11 August 1997 and wanted to know about developments concerning Article 52 of the ESCB Statute⁽³⁵⁾. A record of the telephone conversation reads as follows:

'Record of (telephone) conversation with Deutsche Verkehrsbank AG, 29 September 1997

Mr [...] Deutsche Verkehrsbank AG

Mr [...] GWK

Reason

Mr [...] of Deutsche Verkehrsbank AG had somehow obtained the telephone number of Mr [...].

Because he was on holiday, Mr [...] could not be present at the discussion of 11 August 1997 at Reisebank AG in Frankfurt, attended by:

Mr [...] Landeszentralbank in Hessen

Mr [...] Reisebank AG

Dr [...] Reisebank AG (lawyer)

Mr [...] Deutsche VerkehrsBank AG

Mr [...] GWK

Mr [...] GWK

Mr [...] GWK

Mr [...] had evidently not received a report on this meeting.

He was looking for someone in the Netherlands who might know about developments regarding Article 52 and was looking for ways of doing something about this article in the international sphere.'

⁽³⁵⁾ 'Zusammenfassung des Telefongesprächs mit der Deutschen Verkehrsbank AG vom 29 September 1997', between [...] (Deutsche VerkehrsBank AG) and [...] (GWK) cc: [...] (all GWK), memo No AS/HB/Orig97/149 of 29 September 1997 (file, pp. 2971 et seq.)

- (82) The Commission notes that Deutsche Verkehrsbank AG at this point took the view that the exchange margins (i.e. buying and selling rates) should be replaced by a commission. This was contrary to the letter sent on 25 July 1997 by Commerzbank AG, Deutsche Verkehrsbank AG, Westdeutsche Landesbank and Reisebank AG to the Landeszentralbank Hessen arguing in favour of buying and selling rates being maintained after 1 January 1999 (recital 55). The record of the telephone conversation continues as follows:

'Assessment

Contrary to the letter Mr [...] had sent to Mr [...] (Landeszentralbank) about Article 52, Mr [...] now took the view that exchange margins should disappear in Germany and be replaced by a commission. His greatest concern was that no consultations had taken place on this development between the German banks and that only Commerzbank AG and Westdeutsche Landesbank were sharing their thoughts on this problem.

Four other German banks had pulled out. In Mr []'s opinion, this had been imposed at Board level.'

- (83) The record of the telephone conversation notes that Deutsche Verkehrsbank AG made the following invitation:

'Specific invitation

Mr [...] was attempting to get Commerzbank, Westdeutsche Landesbank, Verkehrsbank, Reisebank, and Landeszentralbank (Mr [...]) round the table during the week of 6 October 1997 to solve the problem. He specifically wanted GWK to be represented at the meeting. I assured him that I was in theory quite willing to attend this meeting with Mr [...].'

3.5. Meeting at Deutsche Verkehrsbank AG on 15 October 1997

- (84) By telefax dated 2 October 1997 entitled 'Consequences of EMU for the currency business', Mr [...] (Deutsche Verkehrsbank AG) invited representatives of SEB Bank AG (former BfG Bank AG), Commerzbank AG, Dresdner Bank AG, GWK Bank, Hamburgische Landesbank, Landesbank Hessen Thüringen, Landeszentralbank Hessen, Reisebank AG and

Westdeutsche Landesbank to a meeting on 15 October ⁽³⁶⁾. The purpose of the meeting was to discuss the state of play and possible measures.

- (85) The meeting took place as planned on 15 October 1997 at Deutsche Verkehrsbank AG (Frankfurt) ⁽³⁷⁾.

- (86) The GWK Bank minutes of the meeting are entitled 'Pricing of euro currencies between 1 January 1999 and 1 July 2002'. Several topics were addressed including:

- whether banks could charge for the exchange of euro-zone banknotes during the transitional period,
- whether exchange margins (i.e. buying and selling rates) could be maintained after 1 January 1999,
- whether different commissions could be used for exchanging different euro-zone banknotes,
- the calculation method for conversion between different euro-zone currencies,
- buying and selling rates in the interbank (wholesale) banknote trade.

- (87) The Commission notes that the meeting rapidly clarified that banks would be allowed to charge customers for the exchange of euro-zone banknotes and that charges must be shown in an explicit and transparent manner. The meeting minutes state as follows:

⁽³⁶⁾ Fax entitled 'Auswirkungen der EWWU auf das Sortengeschäft' of 2 October 1997 from Mr [...] (Deutsche Verkehrsbank AG) to [...] (BfG Bank AG), [...] (Commerzbank AG), [...] (Dresdner Bank AG), [...] (GWK), [...] (Hamburgische Landesbank), [...] (Landesbank Hessen Thüringen), [...] (Landeszentralbank Hessen), [...] (Reisebank AG) and [...] (Westdeutsche Landesbank) (file, p. 2973). The then Bayerische Vereinsbank AG received a separate written invitation on 13 October 1997; see reply to the SO from Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 9 (file, p. 3896).

⁽³⁷⁾ 'Zusammenfassung der Gespräche bei der Deutschen VerkehrsBank am 15 Oktober betreffend: Preisgestaltung bei Teilnehmerwährungen vom 1 Januar bis 1 Juli 2002', Present: [...] (Bayerische Landesbank), [...] (Vereins- und Westbank AG), [...] (DFG Bank AG, this being a typing error as it should read BfG Bank AG), [...] (Commerzbank AG), [...] (Deutsche VerkehrsBank AG), [...] (Deutsche VerkehrsBank AG), [...] (Dresdner Bank AG), [...] (Hamburgische Landesbank), [...] (Landesbank Hessen Thüringen), [...] (Westdeutsche Landesbank), [...] (GWK) and [...] (GWK); cc: [...] (all GWK), AS/NvdN/orig/160 (file, pp. 2974 et seq.).

'Record of talks with Deutsche
Verkehrsbank, 15 October 1997

Re: Pricing of euro currencies between 1 January 1999 and 1 July 2002

Opening remarks

Mr [...] welcomed everyone to the meeting. The banks present at this meeting represented between 70 % and 80 % of the German retail exchange market. Mr [...] summarised the position of the Bundesbank and the EMI concerning the pricing of euro-zone currencies in the period from 1 January 1999 to (at the latest) 1 July 2002.

Full agreement had not been reached within the EMI on the question of the retail exchange of circulating euro-zone currencies. The following point was clear, however:

Banks would be allowed to pass on the costs they incurred in changing euro-zone currencies to the public. Passing on these charges must be done in a transparent manner.'

- (88) The Commission notes that the meeting also quickly agreed that the exchange margins (i.e. buying and selling rates) would disappear after 1 January 1999. The participants decided to inform the Bundesbank that they would carry out the exchange of euro-zone banknotes at the fixed exchange rates and charge an explicit commission. The minutes record the following:

'Oral communications

Mr [...] read out correspondence between himself and the Bundesbank from which it was possible to infer that, in the interests of transparency, current exchange margins would have to be abolished. The oral explanation of this was very clear. Nowhere, however, was keeping the margin to offset costs explicitly rejected in writing. In the view of those present who had already looked into the matter more closely, the loss of the exchange rate margin could not be passed on to the retail trade.

Conviction

Following a remarkably short discussion, all of those present were convinced that the exchange rate margin on euro-zone currencies was going to disappear and that both the value of the money changed and the commission charged would have to be visible. This conclusion would be set out in a

protocol to the Bundesbank. The following points would be made:

exchange transactions involving the euro-zone currencies will be carried out at fixed prices, to which a commission will be added.

Although Mr [...] shared the meeting's opinion, there was little more he could do. In the absence of written instructions from the Bundesbank, Mr [...] could not do anything in-house to adapt the computer systems to the new charging structure. Not everyone had this problem (e.g. the Bayerische Landesbank's preparations for replacing the margin with a commission charge were already well advanced) but there was general dissatisfaction with the lack of clarity in the Bundesbank's written statement.'

- (89) The Commission notes that the meeting participants also discussed whether the existing system of different exchange margins per currency (i.e. different buying and selling rates per currency) should be transposed into a system whereby the existing exchange margins would be expressed as explicit percentage commissions. As complete consensus was not reached concerning the use of a single percentage commission charge for all currencies or different percentage commissions per currency, the participants decided to report to the Bundesbank that each bank would decide this for itself. However, the banks set themselves the common target of replacing the exchange margins by percentage commission(s) such as to recover 90 % of the exchange margin income. This would amount to an overall commission of about 3 %. The minutes mention the following:

'Differentiation in pricing between
euro-zone currencies

The present pricing policy on the German exchange market was more or less the same for all banks. This meant, for example, that the Austrian schilling was bought and sold cheaply while the Italian lira was very expensive. Commerzbank's Mr [...] felt that this price difference between the various euro-zone currencies must be allowed to remain. He argued that, as current margins could be seen as a result of market mechanisms, this price fixing could be copied over into a differentiated charging structure. On this point Mr [...] (Bayerische Landesbank) said that the differentiation between currencies could only be justified because there were differing levels of exchange risk involved. This argument would no longer work after 1 January 1999 when all euro-zone currencies had to be seen as denominations of the

euro. Mr [...] added here that it was not so much that the market mechanism had influenced current margin policy, but rather that this policy was the result of a tacit agreement on exchange rates. The EMI survey quoted by Mr [...], which stated that the German banking system's costs would fall by only 10 % with the introduction into circulation of the euro, showed that the price fixing on the exchange market was not caused by prices. This also indicated an oligopoly rather than a "polypoly".

Accordingly, the replacement of the current tacit differentiated-margin agreement by a tacit differentiated-commission agreement need not lead to major upheavals or loss of profits. Mr [...] was in full agreement with this.

In the absence of a complete consensus at the meeting on whether a single commission fee or a commission fee for each currency should be introduced, the following would be reported to the Bundesbank:

each of the banks present will decide for itself the form to be taken by its future charging structure.

The banks present at the meeting expressed the intention of replacing their present income from margins with income from commission fees up to a level of approximately 90 %. According to the banks, this would amount to a global commission of approximately 3 %.

- (90) The minutes note that the banks discussed the question of the quotation of the direct or indirect rate of exchange when converting between different euro-zone currencies ⁽³⁸⁾, particularly within the context of modifying existing computer systems:

'Compulsory calculating rules

The EMI had stated that for establishing the value in German marks of an amount in guilders only one calculating method would produce the correct answer. This meant that the present calculating method used by computer systems would have to be completely reworked (the rate for the guilder against

the German mark could no longer be worked out once the rules were applied). Several of those present were aware of these calculating rules, but had not considered the consequences for retail exchange operations. Mr [...] pointed out that it might be a good idea to do the same as the Belgian banks and inform the EMI that for the retail trade such a vast adaptation of computer systems for a period of only three years should be openly rejected, since the results of the various calculations for normal exchange transactions showed no difference.

Hasty note-taking on the part of those present seemed to imply that this problem too had been taken on board.'

- (91) With regard to the wholesale interbank trade in banknotes, the minutes note that the participants agreed to maintain fixed buying and selling rates to avoid changes to computer systems. Professional traders were well aware of the charges being paid via the different buying and selling rates:

'Interbank trade

For interbank trade the exchange margins for currency in circulation should disappear. For trade in circulating currency, however, the banks at the meeting wanted to retain the current practice of using exchange margins. In this way the systems would not need to be adapted (for a three-year period) and there would be no problem if a bank outside the euro-zone needed circulating euro-zone currencies. Mr [...] (Landeszentralbank), who was following the meeting by phone, stated that according to his assessment it was unlikely that there would be binding legislation for interbank trade in circulating currencies. The following comment would be made to the Bundesbank:

For interbank trade in circulating currencies, euro-zone currencies should be bought and sold at fixed buying and selling prices. The difference between the buying and the selling price would be the commission.

Mr [...] observed that the wording was not really very well chosen since this argument had been rejected in the case of the retail trade and there was therefore no reason why it should be accepted in the case of the banks.

A better idea would therefore be to include a reference to the fact that transparency within professional trading did not need to be further

⁽³⁸⁾ Article 4(4) of Regulation (EC) No 1103/97 states: 'Monetary amounts to be converted from one national currency unit into another shall first be converted into a monetary amount expressed in the euro unit, which amount may be rounded to not less than three decimals and shall then be converted into the other national currency unit. No alternative method of calculation may be used unless it produces the same results.'

increased, since the parties involved were well aware of the margins being paid. However, the chosen wording was kept.'

- (92) The meeting minutes indicate that Deutsche Bank AG was considering a free service to customers for the exchange of euro-zone banknotes. This was seen as much more of threat to the agreed position of the participants for a commission fee of about 3 % (to achieve 90 % exchange margin income recovery) than any free service offered by the Landeszentralbanks:

'Deutsche Bank spoils the party

In the course of the meeting it was suggested that Deutsche Bank could spoil things by allowing exchange operations to go ahead free of charge. The commercial banks present at the meeting considered this to be a much more serious threat than the provision of services free of charge by the Landeszentralbanks (which were not equipped for it). This could undermine the position agreed at the meeting on a commission fee of approximately 3 % (90 % of present income). Mr [...] pointed out that this would in any case create a new situation, even though, in his view, it would be a long time before exchange activities would be carried out for nothing. Others took a firmer line and said that if, for political reasons, exchange operations were going to have to be carried out at zero tariff, they would withdraw exchange services for euro-zone currencies.'

- (93) The meeting minutes record that the participants were not in favour of introducing the new charging system before 1 January 1999:

'Early introduction

The banks were not aiming for the introduction of the new charging structure before 1 January 1999:

1. as much profit as possible would have to be generated in 1998 (the idea of maintaining exchange margins until 1 January 1999, but charging a higher commission, was also felt to be inadvisable). After 1 January 1999 profits could fall sharply under outside pressure (Bundesbank, EMI, Deutsche Bank, the media), so the banks should grab what they could;
2. a possible reduction in turnover as a result of introducing the new charging structure in 1998 was therefore viewed as undesirable;

3. none of the banks was too obviously dependent on the exchange product, so developments after 1 January 1999 would not be life threatening;

4. the short time still remaining between then and 1 January 1999 was already felt to be tight for adapting all systems to the new charging structure.'

- (94) Mr [...] (Commerzbank AG) wrote the official meeting minutes entitled 'Meeting of banknote dealers' ⁽³⁹⁾. These minutes were faxed on 17 October 1997 by Deutsche Verkehrsbank AG to the meeting participants ⁽⁴⁰⁾. The theme of the meeting is given as structure/price-setting for buying and selling banknotes during the transitional period. Both the private customer (retail) and interbank (wholesale) buying and selling of banknotes were discussed.

- (95) With regard to the retail business, the minutes note that there was consensus on the use of fixed exchange rates for in-currencies (i.e. no buying and selling rates) with charges/fees to be calculated as a percentage commission. The calculation method for converting between in-currencies would be decided by each bank individually:

'Meeting of banknote dealers in Frankfurt on 15 October 1997

Held at Deutsche Verkehrsbank

Participants: see annex

Minutes

Concerning rating/pricing in forex business in phase 3a (1 January 1999 to 1 January 2002) of EMU, consensus was reached on the following points:

1. Private customer business

- For private customers there will be a fixed exchange rate for in-currencies and the charges/fees will be calculated separately.

⁽³⁹⁾ 'Sortenhändler treffen in Frankfurt, am 15. Oktober 1997 im Hause der Deutschen Verkehrsbank' of 15 October 1997 by [...] (Commerzbank AG) (file, p. 2985).

⁽⁴⁰⁾ Fax 'Übersendung des Ergebnisprotokolls zum Sortenhändler treffen am 15. Okt. 1997' from [...] (Deutsche Verkehrsbank AG) to Bayerische Landesbank, ([...]), BfG Bank AG([...]), Commerzbank AG ([...]), Dresdner Bank AG ([...]), GWK Bank ([...]), Hamburgische Landesbank ([...]), Landesbank Hessen Thüringen ([...]), LZB Hessen ([...]), ReiseBank AG ([...]), Vereins- und Westbank AG ([...]) and Westdeutsche Landesbank ([...]) (file, pp. 2983 et seq.).

— Charges/fees will be calculated as a percentage amount of the exchange value.

Frankfurt, 15 October 1997

[...]*

— The decision whether the calculation will be done using the direct or indirect rate of exchange is to be taken individually by the banks'.

Annex'

(96) The Commission notes that the official and GWK Bank minutes of the meeting correspond to the extent that the customer charges would be in a percentage form. The official minutes do not mention a charge of about 3 %. However, during the hearing on 1 and 2 February 2001, Bayerische Landesbank stated that its representative at the meeting of 15 October 1997 (Mr [...]*) recalled that: 'some representatives of individual banks mentioned some figures, and these were somewhere between 2 % and 4 %'. However, Mr [...]* 'could not recall the 3 %'.

(97) With regard to the wholesale (interbank) banknote business, the minutes note that the banks agreed to maintain buying and selling rates:

'2. Interbank trade

In interbank trade all in-currencies will be traded with buying and selling prices. These prices are the result of the conversion of the commission. The quotation of the indirect rate of exchange will become general usage as of 1.2.2002. Until that date both quotation methods are to be tolerated.

Reasons for the buying and selling quotation

In the interbank trade, where the usage has always been set by the participating banks, trading has always been done via buying and selling rates. This should not be changed as

— we do not want to make any distinction in the way of quotation between euro-zone currencies and so-called out-currencies,

— we do not want to distinguish between contracting parties inside and outside the euro zone,

and last but not least as

— a change in the present usage would only apply for a limited time period.

3. Next meeting, if needed, at Commerzbank, Frankfurt.

F. LEGAL ASSESSMENT

1. Article 81(1) of the EC Treaty

(98) Article 81(1) of the EC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production, markets, technical development or investment, or share markets or sources of supply.

2. Agreements

(99) An agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties.

(100) According to the established case-law of the Court of Justice of the European Communities and of the Court of First Instance, there can be said to be an agreement within the meaning of Article 81(1) of the EC Treaty when the parties have expressed their joint intention to conduct themselves on the market in a specific way ⁽⁴¹⁾.

(101) The concept of an agreement within the meaning of Article 81(1) of the EC Treaty, as interpreted by the case law, centres around the existence of concurrence of wills between at least two parties, the form in which it

⁽⁴¹⁾ Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 86; Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 256; Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, at paragraph 120.

is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention ⁽⁴²⁾. An agreement for the purposes of Article 81(1) of the EC Treaty may also fall well short of the certainty required for the enforcement of a commercial contract. Its exact terms may never be expressed: the fact of agreement may have to be inferred from all the circumstances.

3. The nature of the infringement

3.1. The agreement

(102) The banks participating in the meeting of 15 October 1997 at Deutsche Verkehrsbank AG in Frankfurt agreed to implement a global commission of about 3 % for the buying and selling of euro-zone banknotes during the three-year transitional period beginning on 1 January 1999. The purpose was to recover about 90 % of the exchange margin income after the abolition of the spread on 1 January 1999 ⁽⁴³⁾.

(103) At the meeting of 15 October 1997, the participants discussed whether the existing system of different exchange margins per currency (i.e. different buying and selling rates per currency) should be transposed into a system whereby the existing exchange margins would be expressed as explicit percentage commissions. As complete consensus was not reached concerning the use of a single percentage commission charge for all currencies or differentiated percentage commissions per currency, the participants decided to report to the Bundesbank that (recital 89):

'Each of the banks present will decide for itself the form to be taken by its future charging structure.'

(104) However, there was agreement that the percentage commission(s) would be set with the purpose of recovering about 90 % of the exchange margin income, meaning an overall or average commission of about 3 % for the buying and selling of different euro-zone banknotes (recital 89):

'The banks present at the meeting expressed the intention of replacing their present income from margins with income from commission fees up to a level of approximately 90 %. According to the banks, this would amount to a global commission of approximately 3 %.'

⁽⁴²⁾ Case T-41/96 *Bayer AG v Commission* [1991] ECR II-3383, paragraphs 68-69.

⁽⁴³⁾ Prior to the introduction of the euro, the banks had no explicit charges for the exchange of foreign banknotes. Instead, customers were paying hidden bank charges via the different buying and selling rates per foreign currency (spreads and/or exchange margins). The exchange margins ranged from about 1,5 % commission to 7 % depending on the currency being exchanged.

(105) The agreement was again referred to at the meeting of 15 October 1997. The banks were concerned that their agreement would be put in jeopardy if, as seemed likely, Deutsche Bank AG introduced a free service (recital 92):

'In the course of the meeting it was suggested that the Deutsche Bank could spoil things by allowing exchange operations to go ahead free of charge. The commercial banks present at the meeting considered this to be a much more serious threat than the provision of services free of charge by the Landeszentralbanken (which were not equipped for it). This could undermine the position agreed at the meeting on a commission fee of approximately 3 % (90 % of present income).'

(106) Mr [...] (Commerzbank AG) wrote the official meeting minutes entitled 'Meeting of banknote dealers'. The Commission notes that the official minutes and GWK Bank minutes of the meeting correspond to the extent that there was consensus on the use of fixed exchange rates for in-currencies (i.e. no buying and selling rates) after 1 January 1999, with charges/fees to be calculated as a percentage commission (recitals 94 and 95):

'1. Private customer business

— For private customers there will be a fixed exchange rate for in-currencies and the charges/fees will be calculated separately.

— Charges/fees will be calculated as a percentage amount of the exchange value.'

(107) The official minutes are less descriptive than the GWK Bank minutes and do not mention specific figures. However Bayerische Landesbank and Commerzbank acknowledge that some bank representatives at the meeting expressed their ideas about possible future charges lying between 2 % and 4 % ⁽⁴⁴⁾. At the hearing on 1 and 2 February 2001, Bayerische Landesbank stated that its representative at the meeting of 15 October 1997 (Mr [...]) recalled that 'some representatives of individual banks mentioned some figures, and these were somewhere between 2 and 4 %'. However, Mr [...] 'could not recall the 3 %'.

⁽⁴⁴⁾ Replies to the SO: Bayerische Landesbank, p. 30 (file, p. 3454); Commerzbank AG, p. 35 (file, p. 3624); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 16 (file, p. 3903); Westdeutsche Landesbank, p. 47 (file, p. 4016); Hamburgische Landesbank mentions possible percentage charges ranging from 2 % to 6 %, p. 6 (file, p. 3768).

(108) The background to the agreement of 15 October 1997 is as follows. In early 1997, GWK Bank became concerned that the German Bundesbank might use its network of about 200 offices to provide a free service to the public for the buying and selling of banknotes during the transitional period (1 January 1999 to 31 December 2001). GWK Bank became concerned that if a free service were to be offered on a widespread basis by the Bundesbank and the Landeszentralbanken, then the German commercial banks might follow with low or no charges (recital 79).

(109) This prospect was alarming to GWK Bank since a large part of its turnover came from the exchange of in-currencies and the DEM in particular. There was a risk that the market for the exchange of euro-zone banknotes would shift from the Netherlands to Germany and/or there would be pressure on the Dutch banks to decrease charges accordingly (recital 80).

(110) In April 1997, GWK Bank contacted a similar institution in Germany, Reisebank AG, and urged them to begin discussions with other German banks, in the first instance to try to ensure that the German Bundesbank and the Landeszentralbanken would not provide a free service to consumers via their network of offices (recital 63 to 67).

(111) These discussions and contacts led to a meeting which took place at Deutsche Verkehrsbank AG (Frankfurt) on 15 October 1997 where several German banks agreed, *inter alia*, to implement a charge of about 3 % for the buying and selling of euro-zone banknotes during the three-year transitional period with the purpose of recovering about 90 % of the exchange margin income (recitals 85 to 93).

3.2. The parties' arguments and the Commission's replies

— Arguments of the parties in relation to the interpretation of the facts

(112) The parties challenge the Commission's interpretation of the facts and deny that the discussions between the banks concerning charging structures and amounts for the exchange of in-currencies during the transitional period amount to an 'agreement' falling within the scope of Article 81(1) of the EC Treaty.

(113) Several banks argue that, since the difference between the buying and selling rates can be calculated as a

percentage charge, it was a logical step that participants in the meeting of 15 October 1997 agreed to express the exchange margin as a visible percentage commission after 1 January 1999. This was not a competition-restricting agreement but arose out of the legal necessity to display charges in an explicit and transparent manner with the disappearance of the spread ⁽⁴⁵⁾ ⁽⁴⁶⁾. Landesbank Hessen Thüringen admits having entered into an agreement on the charging structure for the transitional period at the meeting of 15 October 1997. As however there were hardly any alternatives to calculating the charge other than in a percentage form, this agreement on a common charging structure only marginally influenced the freedom of the banks to determine their own pricing policy ⁽⁴⁷⁾.

— Commission's reply

(114) The transparent and explicit display of charges does not require any standardisation of prices, charging structures or other service concepts in the banking sector. Each bank must independently decide its commercial policy with regard to charging. If a customer bank charge is to be implemented at all, then the charging policy — including charging structure — must be determined independently by each bank.

(115) It was not a natural or logical step that each bank would individually have transposed the exchange margin into a percentage commission. Indeed, it seems that Deutsche Bank was initially considering a free service. In any case, the issue is not what may or may not be the most economically rational charging structure, but whether there was an agreement between banks on the charging structure.

(116) In the present case, there was an explicit agreement between banks on an overall commission of about 3 % with the aim of achieving about 90 % income recovery after the abolition of the spread on 1 January 1999.

⁽⁴⁵⁾ Replies to the SO: BfG Bank AG, pp. 17 et seq. (file, pp. 3538 et seq.); Commerzbank AG, p. 31 (file, p. 3620); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 14 (file, p. 3901); Westdeutsche Landesbank, p. 48 (file, p. 4017).

⁽⁴⁶⁾ Reply of Westdeutsche Landesbank to the SO, pp. 20 et seq. (file, pp. 3989 et seq.).

⁽⁴⁷⁾ Reply of Landesbank Hessen Thüringen to the SO, p. 4 (file, p. 3817); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 14 (file, p. 3901) also claims that there was no other viable alternative to a percentage charge, as a fixed-fee changing of small amounts would have discriminated against the small consumer.

— Arguments of the parties to the effect that no agreement was reached

- (117) Several banks argue that no agreement on a percentage charge of about 3 % was reached ⁽⁴⁸⁾. Some banks also argue that there was no agreement to recover about 90 % of income nor was the figure of 90 % of the costs mentioned as the calculation basis for the new charges after the introduction of the euro ⁽⁴⁹⁾.

— Commission's reply

- (118) The question arises as to the credibility of the GWK Bank meeting minutes of 15 October 1997. The official minutes and GWK Bank minutes of the meeting correspond to the extent that there was consensus on the use of fixed exchange rates for in-currencies (i.e. no buying and selling rates) after 1 January 1999, with charges/fees to be calculated as a percentage commission. Westdeutsche Landesbank notes that only one point of the alleged infringement, the fixing of a charging structure, is included in the official minutes of the meeting produced by Mr [...] ⁽⁵⁰⁾.
- (119) Indeed, Bayerische Landesbank and Commerzbank AG acknowledge that some bank representatives at the meeting expressed opinions about possible future charges lying between 2 % and 4 % ⁽⁵¹⁾. Commerzbank AG states that some participants at the meeting mentioned that 90 % income recovery would lead to a charge of 2 % to 4 %, or an average commission of 3 %. At the hearing on 1 and 2 February 2001, Bayerische Landesbank stated that its representative at the meeting of 15 October 1997 (Mr [...]) recalled that 'some representatives of individual banks mentioned some

figures, and these were somewhere between 2 and 4 %'. However, Mr [...] 'could not recall the 3 %'. This shows that the GWK Bank minutes, written within a day of the meeting, are a credible and complete record of the 15 October 1997 meeting.

- (120) The Commission considers on the basis of the documentary evidence that the banks participating in the meeting of 15 October 1997 agreed to introduce an overall commission of about 3 % (to achieve 90 % income recovery) after 1 January 1999.

— Arguments of the parties against early introduction

- (121) The banks also argue that fixing charges in 1997 would have made no sense because of the long period of 14 months before the introduction of the euro combined with all the economic uncertainties that could arise in such a time period ⁽⁵²⁾. The banks argue that they fixed their charges independently in late 1998 ⁽⁵³⁾.

— Commission's reply

- (122) The argument that it would have been premature for the banks to agree on charging structures and charges in October 1997 is contradicted by the banks themselves. The letter sent by four commercial banks (Commerzbank AG, Deutsche Verkehrsbank AG, Reisebank AG and Westdeutsche Landesbank) to the Bundesbank on 25 July 1997 states their view that the exchange margin (i.e. buying and selling rates for in-currencies) should be maintained because, amongst other reasons, the necessary information technology (IT) changes could not be made in time for 1 January 1999 (recital 55):

The question of charging instead of the current spread (selling/buying rates) was seen as highly problematic.

As a result of the discussion, all participants have in principle rejected a change as the resulting costs for IT adaptation would make the exchange of banknotes more expensive, and the public would not appreciate higher charges. Consumers would not understand the

⁽⁴⁸⁾ Replies to the SO: BfG Bank AG, pp. 19 et seq. (file, pp. 3540 et seq.); Commerzbank AG, p. 35 (file, p. 3624); Reisebank AG, p. 27 (file, p. 3721); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 16 (file, p. 3903); Westdeutsche Landesbank, p. 47 (file, p. 4016).

⁽⁴⁹⁾ Replies to the SO: Bayerische Landesbank, p. 30 (file, p. 3454); BfG Bank AG, pp. 18 et seq. (file, p. 3539); Commerzbank AG, pp. 33 et seq. (file, pp. 3622 et seq.); Reisebank AG, pp. 26 et seq. (file, pp. 3720 et seq.); Landesbank Hessen Thüringen, pp. 16 et seq. (file, pp. 3830 et seq.); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 15 (file, p. 3902); Westdeutsche Landesbank, pp. 47 et seq. (file, p. 4016); Fortis group, p. 23 (file, p. 4295).

⁽⁵⁰⁾ Westdeutsche Landesbank reply to the SO, p. 43 (file, p. 4012).

⁽⁵¹⁾ Replies to the SO: Bayerische Landesbank, p. 30 (file, p. 3454); Commerzbank AG, p. 35 (file, p. 3624); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 16 (file, p. 3903); Westdeutsche Landesbank, p. 47 (file, p. 4016); Hamburgische Landesbank mentions possible percentage charges ranging from 2 % to 6 %, p. 6 (file, p. 3768).

⁽⁵²⁾ Reply to the SO: Dresdner Bank AG, p. 10 (file, p. 3750); Westdeutsche Landesbank, p. 42 (file, p. 4011).

⁽⁵³⁾ Replies to the SO: Bayerische Landesbank, pp. 34 et seq. (file, pp. 3458 et seq.); BfG Bank AG, p. 20 (file, p. 3541); Commerzbank AG, pp. 36 et seq. (file, pp. 3625 et seq.); Dresdner Bank AG, p. 10 (file, p. 3750); Hamburgische Landesbank, pp. 9 et seq. (file, pp. 3771 et seq.); Landesbank Hessen Thüringen, pp. 12 et seq. (file, pp. 3826 et seq.); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, pp. 22 et seq. (file, pp. 3909 et seq.); Westdeutsche Landesbank, pp. 33 et seq. (file, pp. 4002 et seq.).

introduction of a charge when exchange rates were fixed and central banks purchased in-currencies free of charge.

It is also important to note that IT changes cannot be made at such short notice.'

- (123) The GWK Bank meeting minutes of 15 October 1997 also mention that the time remaining for adapting information technology systems to the new charging structure was short (recital 93):

'4. The short time still remaining between then and 1 January 1999 was already felt to be tight for adapting all systems to the new charging structure.'

- (124) The conclusion to be drawn from the above is that the price-fixing agreement of 15 October 1997 was most opportune and timely for the banks.

— Arguments of the parties concerning the different charges

- (125) The banks claim that the banks present at the meeting of 15 October 1997 apply different charges ranging from 3 % to 4 %. Only 2 banks actually apply a 3 % charge ⁽⁵⁴⁾.

— Commission's reply

- (126) Firstly, it should be noted that the finding of the existence, content and object of an agreement infringing Article 81(1) of the EC Treaty and described in the SO was based on specific documentary evidence and not on parallel pricing behaviour in the market.

- (127) Secondly, since the agreement was to introduce an overall commission of about 3 % aimed at achieving about 90 % income recovery, it is not to be expected that all banks would have identical percentage commissions. The agreement eliminated or, at the very least, substantially reduced uncertainty as to the

eventual conduct to be expected of each other on the market with regard to bank charges for the buying and selling of in-currency banknotes. The banks themselves admit that charges of 2 % to 4 % were discussed. However, following the introduction of the euro, none of the parties introduced a commission of less than 3 % (recitals 147 and 148).

4. Restriction of competition

- (128) The banks participating in the meeting of 15 October 1997 agreed to an overall commission of about 3 % with the aim of achieving about 90 % income recovery after the abolition of the spread on 1 January 1999. This agreement had both the object and effect of restricting competition in the Community.

4.1. Object of the agreement

- (129) Article 81(1) of the EC Treaty expressly mentions as restrictive of competition agreements between undertakings and decisions by associations of undertakings which directly or indirectly fix purchase or selling prices or any other trading conditions. In the present case, the direct fixing of prices is the object of the agreement.

- (130) Faced with the disappearance of the exchange margin (i.e. buying and selling rates) income after 1 January 1999, the object of the agreement concluded by the banks present at the meeting of 15 October 1997 was to fix the participating banks' commissions for the buying and selling of in-currency banknotes at about 3 % with the aim of achieving about 90 % income recovery after the abolition of the spread on 1 January 1999.

- (131) Therefore, it must be concluded that the agreement had as its object a harmonisation of banks' future pricing policies and the alignment of prices in the buying and selling of in-currency banknotes.

- (132) It follows from the above that the agreement concluded between the banks present at the meeting of 15 October 1997 is caught by Article 81(1) of the EC Treaty in that it directly fixes the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission) and the level of charges in the form of a target price.

⁽⁵⁴⁾ Replies to the SO: Bayerische Landesbank, p. 43 (file, p. 3467); BfG Bank AG, p. 20 (file, p. 3541); Commerzbank AG, p. 41 (file, p. 3630); Deutsche Verkehrsbank AG / Reisebank AG, p. 28 (file, p. 3722); Dresdner Bank AG, p. 10 (file, p. 3750); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, pp. 25 et seq. (file, pp. 3912 et seq.); Westdeutsche Landesbank, pp. 43, 53 (file, pp. 4012, 4022).

4.2. *The parties' arguments and the Commission's replies*

bank charges for the exchange of euro-zone banknotes after 1 January 1999.

— Arguments of the parties concerning the interpretation of Article 52 of the ESCB Statute

— Arguments of the parties to the effect that the Commission was the initiator of the discussions

(133) The parties argue that their discussions were held to address considerable regulatory uncertainty concerning the implementation of Article 52 of the ESCB Statute, particularly as regards whether or not the German Bundesbank would offer a free forex service to the public.

(136) According to the parties the Commission was the initiator of the discussions and contacts between the banks. The starting point was the Round Table on 15 May 1997 organised by the Commission and dealing with practical aspects of the transition to the euro ⁽⁵⁵⁾. The banks argue that the reason for the meeting of 15 October 1997 is to be found in the regulatory uncertainties and as a consequence of the initiatives of the European Commission and discussions with the German Bundesbank.

— The Commission's reply

— The Commission's reply

(134) In 1997, the German Bundesbank had discussions with German commercial banks principally concerning implementation of Article 52 of the ESCB Statute. A meeting took place on 8 July 1997 between the commercial banks and the Bundesbank at which the consequences of the introduction of the euro for the exchange of banknotes was discussed. Following this meeting, the Bundesbank on 22 July 1997 sent a questionnaire to commercial banks concerning the buying and selling of banknotes in the retail and wholesale markets. The questionnaire asked for data on volumes of banknotes exchanged, the transparency of charges during the transitional phase, the consequences on the retail business if the Bundesbank were to offer a free service to the public, and the consequences for the wholesale business if the Bundesbank were to offer a free banknote repatriation service to the commercial banks. The response of each bank was to be treated confidentially by the Bundesbank. Also as a consequence of the 8 July 1997 meeting, on 25 July 1997 four commercial banks (Commerzbank AG, Deutsche Verkehrsbank AG, Reisebank AG and Westdeutsche Landesbank) sent a letter to the Bundesbank expressing their view that the exchange margin (i.e. buying and selling rates for in-currencies) should be maintained, in part, because the necessary IT changes could not be made in time and because any adaptation would give rise to additional costs giving rise to higher charges. A meeting took place on 15 September 1997 between commercial banks and the Bundesbank, which clarified that charging via the exchange margin (i.e. buying and selling rates) would not be possible after 1 January 1999. Any charges would have to be shown separately (recitals 53 to 57).

(137) The Commission organised the Round Table of 15 May 1997 on practical aspects of the changeover to the euro to address concerns expressed by various associations and to advance technical preparations. The Round Table provided a forum for dialogue among all interested parties, both public and private, and addressed two main sets of issues: the practical arrangements for a smooth changeover to the euro and ways of helping currency users adjust to the euro. The Expert Group report of 20 November 1997 expressly states that it did not deal with charges for bank services ⁽⁵⁶⁾ (recitals 40 to 43).

— Arguments of the parties on the question of the admissibility of charges

(138) According to the parties, their discussions were also held to address the question as to whether or not it would be permissible for the commercial banks to charge for the exchange of banknotes by way of spreads.

— The Commission's reply

(139) As early as 1995 it was known that the exchange rates would be irrevocably fixed and that only those fixed rates should be used. This is clearly and explicitly stated

(135) As is clear from the above, the discussions between the Bundesbank and commercial banks concerned the application of Article 52 as well as the abolition of the buying and selling rates on 1 January 1999. The meetings did not encompass collective discussions on

⁽⁵⁵⁾ Reply of Westdeutsche Landesbank to the SO, pp. 32 et seq. (file, pp. 4001 et seq.).

⁽⁵⁶⁾ See paragraph 4 'What is conversion' of the Report of the Expert Group on Banking Charges for Conversion to the Euro to the European Commission, Brussels, 20.11.1997.

in the Presidency conclusions of the Madrid European Council of 15 and 16 December 1995 on the scenario for the changeover to the single currency. Article 4(3) of Council Regulation (EC) No 1103/97, which has been directly applicable law in all Member States since 20 June 1997, states that 'The conversion rates shall be used for conversions either way between the euro unit and the national currency units' (recitals 34 to 37). The direct consequence of this is that the use of spreads would not be permissible, and that any charges should be explicitly and transparently shown. All this is also clearly stated in the document setting the terms of reference of the Expert Group on Banking Charges for Conversion to the euro and in the final report of this Expert Group (recital 45).

- (140) In any case, prior to the meeting of 15 October 1997, a meeting took place (on 15 September 1997) between commercial banks and the Bundesbank which clarified that charging via the exchange margin (i.e. buying and selling rates) would not be possible after 1 January 1999 (recital 57).

— Arguments of the parties concerning the invitation fax

- (141) Several banks claim that, as can be seen from the agenda attached to the invitation fax, the meeting of 15 October 1997 was focused on questions of interbank trade — where pricing was mentioned — as well as on IT issues ⁽⁵⁷⁾. It is for this reason that the representatives present at the meeting were either from the department dealing with the buying and selling of notes in interbank trade or from the IT department. The private customer department, being the only one with decision-making power concerning the setting of forex charges for private customers, was not represented ⁽⁵⁸⁾.

— The Commission's reply

- (142) Even the official minutes of the meeting produced by Mr [...] record that discussions took place on pricing for both the private customer business and interbank trade (recitals 94 to 97). It seems therefore that the

banks' representatives were competent to discuss pricing for both retail and wholesale aspects of the banknote exchange business. The Commission considers on the basis of the documentary evidence that the banks participating in the meeting of 15 October 1997 agreed to introduce a global commission for private customers of about 3 % (to achieve 90 % income recovery) after 1 January 1999.

- (143) With regard to computer (IT) systems, the Commerzbank AG representative explained during the hearing that the retail and wholesale information technology systems are interlinked (if not the same computer program). This means that the pricing/charging systems for both the retail and wholesale business would need to be known prior to any adaptation of the IT systems. Indeed, for private customers, the official minutes indicate that during the three-year transitional period beginning on 1 January 1999 the parties agreed that 'Charges/fees will be calculated as a percentage amount of the exchange value' (recital 95). With regard to the interbank trade, the parties opted to keep buying and selling rates.

4.3. Implementation of the agreement

- (144) In order to conclude that Article 81(1) of the EC Treaty applies, there is no need to consider the actual effects upon competition of an agreement once it is established that the agreement had the object of restricting competition.
- (145) In the present case, there was an agreement between banks on a global commission of about 3 % with the aim of achieving about 90 % income recovery after the abolition of the spread on 1 January 1999.
- (146) The Commission considers that, having concluded that the agreement was to directly fix the level of charges, there is no need to demonstrate any effect.
- (147) In any case, the agreement did have an effect on charges that were implemented on the market:

Dresdner Bank AG 3 %

Commerzbank AG 3,75 %

Bayerische Hypo- und Vereinsbank AG 3,0 % (minimum DEM 10) ⁽⁵⁹⁾

Vereins- und Westbank AG 3,0 % (minimum DEM 10) ⁽⁶⁰⁾.

⁽⁵⁷⁾ Replies to the SO: Commerzbank AG, p. 29 (file, p. 3618) and Annex 16 (file, p. 3671); BfG Bank AG, p. 15 (file, p. 3536); Hamburgische Landesbank, p. 4 (file, p. 3766).

⁽⁵⁸⁾ Replies to the SO: Bayerische Landesbank, p. 29 (file, p. 3543); BfG Bank AG, p. 16 (file, p. 3537); Dresdner Bank AG, p. 5 (file, p. 3745); Landesbank Hessen Thüringen, p. 10 (file, p. 3824); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 10 (file, p. 3897).

⁽⁵⁹⁾ Minimum reduced from DEM 10 to DEM 6 on 11 March 1999.

⁽⁶⁰⁾ Minimum abolished on 2 August 1999.

(148) According to Reisebank AG, the charges with the introduction of the euro were ⁽⁶¹⁾:

Selling: 3,5 % plus a service fee of DEM 5 ⁽⁶²⁾

Buying: 4,5 % plus a service fee of DEM 5

These are the same selling and buying percentage commissions as introduced by GWK on 16 June 1998:

Selling: 3,5 % (for transactions up to NLG 5 000), minimum NLG 5

Buying: 4,5 % (for transactions up to NLG 5 000), minimum NLG 5 ⁽⁶³⁾

5. Effect on trade between Member States

5.1. Currency exchange

(149) The infringement at issue concerns a service which is cross border in nature and, for that reason alone, likely to affect trade between Member States. As shown above, there is a large volume of euro-zone currencies exchanged in each Member State (recitals 7 to 9).

(150) Selling and buying of foreign currencies within the euro zone are operations concerning essentially consumers, and in particular tourists (both Community and non-Community) who wish to make payments within the euro zone. Payments made by consumers with currencies other than those of their country of origin constitute transactions which affect intra-Community trade.

(151) It should be noted that, if consumers buy foreign currencies in their home countries, the bank selling the currencies must first have imported the bank notes. If, on the other hand, consumers buy currencies in the countries of destination with foreign cash, the selling bank must export (or repatriate) the foreign cash to the country of origin. For each bank within the euro zone, there is never a perfect balance at a given time between the volumes of foreign currencies bought from, and sold to, the public.

⁽⁶¹⁾ Reply of Reisebank AG to the SO, pp. 18 et seq. (file, pp. 3712 et seq.).

⁽⁶²⁾ Three weeks later, Reisebank AG changed its percentage commissions for selling to:

DEM 0,01 — DEM 500	3,5 %
DEM 500,01 — DEM 1 000	3,25 %
DEM 1 000,01 — DEM 2 000	3,0 %
DEM 2 000,01 — DEM 5 000	2,75 %
from DEM 5 000,01	2,5 %

⁽⁶³⁾ 1,5 % for selling transactions above NLG 5 000.
2,5 % for buying transactions above NLG 5 000.

(152) The import and export of euro-zone currencies by the banks are commercial operations that directly affect intra-Community trade.

5.2. The parties' arguments and the Commission's replies

— Arguments of the parties concerning the effect on trade between Member States

(153) At the hearing ⁽⁶⁴⁾ the banks argued that the German case was a purely national case thus not having any effect on trade between Member States. The exchange of foreign currencies was a local service, provided on different national markets. Despite being present at the meeting of 15 October 1997, GWK Bank was not active on the German market just as the German banks were not active on the Dutch market.

— The Commission's reply

(154) The Court of Justice has consistently held that, in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market between Member States ⁽⁶⁵⁾. Accordingly, the Court has held that the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive ⁽⁶⁶⁾. It is also settled case law that it is enough to establish that an agreement is capable of having an effect on trade between Member States ⁽⁶⁷⁾.

(155) The Commission has described in the statement of objections and the present Decision (see recitals 149 to 152) several factors which have been taken into account when concluding that the agreement has an effect on trade between Member States. Following the case-law of the Court of Justice, the Commission holds that in this case the effect on trade is a combination of several factors, which taken as a whole, show that there is an effect on trade.

⁽⁶⁴⁾ Presentation given by Dr Satzky on behalf of all the banks at the hearing on 1.2.2001.

⁽⁶⁵⁾ Case 56/65 *Société Technique Minière* [1966] ECR 282, paragraph 7 and Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, paragraph 22.

⁽⁶⁶⁾ Case C-250/92 *Gottrup-Klim* [1994] ECR I-5641, paragraph 54.

⁽⁶⁷⁾ Case C-219/95 *P Ferrière Nord SpA v Commission* [1997] ECR I-4411, paragraph 19.

(156) In the present case, however, particular attention should be paid to the special nature of the service and the product concerned. As noted above, the service is already cross-border in nature. This stems from the fact that the products concerned are the currencies of other Community Member States, which are exchanged in large volumes in each Member State.

— Arguments of the parties concerning the lack of a market definition

(157) The banks claim that the Commission has failed to define the geographic market and has therefore made an incorrect assessment of the effect on trade.

— The Commission's reply

(158) The Commission contends that a definition of the geographic market is not decisive in this case. This is due to the fact that the documentary evidence proves that the parties committed an infringement whose object and effect was to restrict competition. The infringement was also by its nature liable to affect trade between Member States. This conclusion is in line with the Court of First Instance rulings in *European Night Services* and *Volkswagen AG* ⁽⁶⁸⁾, in which the Court held that there is an obligation on the Commission to define the market in a decision applying Article 85 (now Article 81) of the EC Treaty where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market.

(159) The fact that the agreement on charges for the exchange of in-currencies concerns mainly Germany and the Dutch regions bordering on Germany does not preclude an effect on trade between Member States. The Court of Justice has ruled in a number of cases that behaviour restricting competition and extending over the whole territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about ⁽⁶⁹⁾.

(160) In particular, the relevant product has been defined as the service of exchanging in-currencies where at least one part of the transaction concerns notes. The banks have to buy and sell banknotes on the international wholesale markets as a direct consequence of national demand for foreign currency. The Court of Justice has held in *Stichting Sigarettenindustrie* ⁽⁷⁰⁾ that an agreement concluded between undertakings established in one Member State and covering only the market of that state affects trade between Member States if it concerns, even partly, a product imported from another Member State.

G. ADDRESSEES OF THE DECISION

(161) It is clearly established by the facts that Commerzbank AG and Dresdner Bank AG have directly participated in the infringement.

(162) The question of appropriate addressees arises only in relation to:

— Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG,

— Deutsche Genossenschaftsbank / Deutsche Verkehrsbank AG / Reisebank AG.

(163) At the time of the meeting of 15 October 1997 the majority shareholder in Vereins- und Westbank AG was the then Bayerische Vereinsbank AG. Bayerische Vereinsbank AG and Bayerische Hypotheken- und Wechselbank AG merged on 1 September 1998 to form Bayerische Hypo- und Vereinsbank AG. This merger made Bayerische Hypo- und Vereinsbank AG the major shareholder in Vereins- und Westbank AG.

(164) Bayerische Hypo- und Vereinsbank AG is the second biggest banking group in Germany and considers itself to be a 'bank of the regions' in which Vereins- und Westbank AG has an individual identity as 'bank of the region of Northern Germany'.

(165) Although the invitation fax for the incriminating meeting of 15 October 1997 was sent only to the then Bayerische Vereinsbank AG, no employee of the then Bayerische Vereinsbank AG participated in the meeting.

(166) The recipient of the invitation fax for the meeting of 15 October 1997 in the then Bayerische Vereinsbank AG showed it to his superior, who decided that

⁽⁶⁸⁾ Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission* [1998] ECR II-3141, paragraphs 93 to 95 and 105 and Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paragraphs 230 and 231.

⁽⁶⁹⁾ See *inter alia* Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, paragraph 29 and Case T-29/92 *SPO v Commission* [1995] ECR II-289, paragraph 229.

⁽⁷⁰⁾ Joined Cases 240-242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831, paragraph 49.

participation was not necessary. The fax recipient however passed the invitation on to a colleague at Vereins- und Westbank AG as he was of the opinion, in contrast to his superior, that it might be possible to obtain some useful information at the meeting.

(167) Vereins- und Westbank AG was not invited to the meeting, but nonetheless one of its employees participated and also represented ⁽⁷¹⁾ the then Bayerische Vereinsbank AG ⁽⁷²⁾.

(168) As a result both Vereins- und Westbank AG and Bayerische Vereinsbank AG were represented at the meeting of 15 October 1997 through the employee of Vereins- und Westbank AG.

(169) The reply to the SO of Bayerische Hypo- und Vereinsbank AG/Vereins- und Westbank AG states that Vereins- und Westbank AG was not bound by the policy of Bayerische Hypo- und Vereinsbank AG concerning the fixing of charges for the exchange of euro-zone bank notes ⁽⁷³⁾. This shows that both banks operated independently on the market and that Bayerische Hypo- und Vereinsbank AG did not influence Vereins- und Westbank AG's decision on charges.

(170) In the light of the above the Decision is therefore addressed to Vereins- und Westbank AG in its own right and to Bayerische Hypo- und Vereinsbank AG as the legal successor to the former Bayerische Vereinsbank AG.

(171) Deutsche Genossenschaftsbank AG has a 67 % shareholding in Deutsche Verkehrsbank AG. Deutsche Verkehrsbank AG owns all the shares in Reisebank AG with three members of the managing board of Deutsche Verkehrsbank AG as the sole members of the supervisory board of Reisebank AG. Reisebank AG is the only company within the Deutsche Genossenschaftsbank AG group that is active exclusively in the retail forex business ⁽⁷⁴⁾. Deutsche Verkehrsbank AG at all times exercised decisive influence over its

subsidiary by participating in meetings and in discussions with other banks (see recitals 58 to 97). Deutsche Verkehrsbank AG was at all times fully informed and aware of all the discussions between banks concerning charges for the exchange of euro-zone banknotes. According to the case law of the Court of Justice, the decisive criterion in deciding if Article 81(1) of the EC Treaty can be applied between a parent company and a subsidiary is whether or not the subsidiary was able to determine its market behaviour independently of the parent company ⁽⁷⁵⁾. In the present case, Reisebank AG enjoyed no real autonomy in determining its own course of action vis-à-vis Deutsche Verkehrsbank AG. Reisebank was therefore not capable of infringing Article 81(1) of the EC Treaty independently of Deutsche Verkehrsbank.

(172) In the light of the above, this Decision is therefore addressed to Deutsche Verkehrsbank AG as the parent company of Reisebank AG ⁽⁷⁶⁾.

H. DURATION OF THE INFRINGEMENT

(173) Commerzbank AG, Dresdner Bank AG, Deutsche Verkehrsbank AG, Bayerische Hypo- und Vereinsbank AG and Vereins- und Westbank AG concluded the agreement infringing Article 81(1) of the EC Treaty in October 1997. The agreement was concluded for the duration of the 'transitional' period 1 January 1999 to 31 December 2001.

⁽⁷⁵⁾ The leading case for determining whether Article 81(1) can be applied between parent and subsidiary company and whether they can thus be independent members of a cartel is Case T-102/92 *Viho v Commission* [1995] ECR II-17, paragraphs 47 to 55 (as confirmed by the Court of Justice in Case C-73/95 P *Viho v Commission* [1996] ECR I-5457), in which it is stated that: Article 85(1) (now Article 81(1)) does not apply to the relationship between the subsidiary and the parent company with which it forms an economic unit if the subsidiary, although having a separate legal personality, does not freely determine its conduct on the market but carries out the instructions given to it directly or indirectly by the parent company by which it is wholly controlled. Paragraph 16 of the judgment in Case C-73/95 P reads as follows: Parker and its subsidiaries thus form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them.

⁽⁷⁶⁾ The judgment in Case C-286/98P *Stora v Commission* [2000] ECR I — 9925 reads, at paragraph 26, as follows: It should be remembered that, as the Court of Justice has held on several occasions, the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, *inter alia*, Case 48/69 *ICI v Commission* [1972] ECR 619, paragraphs 132 and 133; Case 52/69 *Geigy v Commission* [1972] ECR 787, paragraph 44; and Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 15).

⁽⁷¹⁾ In the reply of Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG to the SO, p. 4 (file, p. 3891) the banks claim that Vereins- und Westbank AG, although not invited to the meeting of 15 October 1997, sent an employee as representative of the then Bayerische Vereinsbank AG.

⁽⁷²⁾ In the reply of Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG to the SO, pp. 9 et seq. (file, pp. 3896 et seq.) it is stated that the recipient of the invitation fax for the meeting of 15 October 1997 in the then Bayerische Vereinsbank AG showed it to his superior, who decided that participation was not necessary. The fax recipient however passed the invitation on to a colleague of his at Vereins- und Westbank AG as he was of the opinion, in contrast to his superior, that it might be possible to obtain some useful information at the meeting.

⁽⁷³⁾ Reply of Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 24 (file, p. 3911).

⁽⁷⁴⁾ Reisebank AG reply to the SO, pp. 2 et seq. (file, pp. 3696 et seq.). In its reply to the SO, DG Bank stated that it is not active in the forex business (file, p. 3689).

- (174) In the light of the above, the duration of infringement established for all addressees of this Decision is from 15 October 1997 to the present time.

setting fines imposed pursuant to Article 15(2) of Regulation No 17 (hereinafter called 'guidelines on fines') ⁽⁷⁸⁾.

I. REMEDIES

1. Article 3 of Regulation No 17

- (175) Where the Commission finds that there is an infringement of Article 81(1) of the EC Treaty, it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Council Regulation No 17 ⁽⁷⁷⁾.

- (176) In the present case, the agreement, whose object was to fix (a) the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission) and (b) a target price level of about 3 % (to achieve 90 % exchange margin income recovery), was concluded for a future three-year period beginning on 1 January 1999 and ending on 31 December 2001.

- (177) Therefore, the Commission requires the undertakings to which the present Decision is addressed to henceforth refrain from any agreement, concerted practice or decisions of associations which may have the same or similar object or effect as the agreement which is the subject of this Decision.

- (181) The role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fine imposed any aggravating or attenuating circumstances and will apply, where appropriate, the notice on the non-imposition or reduction of fines in cartel cases (hereinafter called 'leniency notice') ⁽⁷⁹⁾.

2.2. Basic amount of the fines

- (182) In order to determine the amount of the fines, the Commission calculates a basic amount that will be increased to take account of aggravating circumstances, or reduced to take account of attenuating circumstances. The basic amount is determined according to the gravity and duration of the infringement.

2.2.1. Gravity

- (183) In its assessment of the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

2. Article 15(2) of Regulation No 17

2.1. General considerations

- (178) Under Article 15(2) of Council Regulation No 17, the Commission may by decision impose upon undertakings or associations of undertakings fines from one thousand to one million euro, or a sum in excess thereof not exceeding 10 % of the turnover in the preceding business year of each of the undertakings and associations of undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the EC Treaty.

- (179) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation No 17.

- (180) The Commission follows the methodology explained in its guidelines of 14 January 1998 on the method of

- (184) In this case the agreement had the object of fixing (a) the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission) and (b) the level of charges in the form of a target price (to achieve 90 % exchange margin income recovery) for the exchange of in-currency banknotes. Article 81(1) of the EC Treaty expressly prohibits both direct and indirect fixing of prices or other trading conditions. By its nature, the infringement is a very serious violation of Article 81(1) of the EC Treaty.

- (185) The agreement was implemented by Commerzbank AG, Dresdner Bank AG, Bayerische Hypo- und Vereinsbank AG, Vereins- und Westbank AG and Deutsche Verkehrsbank AG (recitals 147 and 148).

- (186) However, the infringement produced its effects within a limited part of the common market, namely in Germany, where the agreement covered the whole country, and in the Dutch regions bordering on Germany.

⁽⁷⁷⁾ OJ 13, 21.2.1962, p. 204/62.

⁽⁷⁸⁾ OJ C 9, 14.1.1998, p. 3.

⁽⁷⁹⁾ OJ C 207, 18.7.1996, p. 4.

(187) Given that the infringement by its nature is a very serious violation of Article 81(1) of the EC Treaty but limited in its effect to Germany and the Dutch regions bordering on Germany, the Commission on balance concludes that the agreement concerned falls within the category of a serious infringement of the Community competition rules.

(188) Within the category of serious infringements, the proposed scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition and to set the fine at a level which ensures that it has sufficient deterrent effect. This exercise seems particularly necessary where, as in the present case, there is considerable disparity in the size of the undertakings participating in the infringement.

(189) For this purpose the undertakings concerned can in principle be divided into two categories according to their size and their relative importance in the relevant market. The comparison is made on the basis of the income information for the last business year for which audited results are available.

(190) Into the first category fall Commerzbank AG, Dresdner Bank AG, Bayerische Hypo- und Vereinsbank AG and Deutsche Verkehrsbank AG. Vereins- und Westbank AG falls into the second category.

(191) On the basis of the foregoing, the appropriate starting point for a fine resulting from the criterion of relative importance in the relevant market is for each category as follows:

Commerzbank AG	EUR 10 million,
Dresdner Bank AG	EUR 10 million,
Bayerische Hypo- und Vereinsbank AG	EUR 10 million,
Deutsche Verkehrsbank AG	EUR 10 million,
Vereins- und Westbank AG	EUR 2 million.

(192) In order to ensure that the fine has a sufficient deterrent effect, the Commission will determine whether any further adjustment of the starting point is needed for any undertaking.

(193) In the case of Commerzbank AG, Dresdner Bank AG and Bayerische Hypo- und Vereinsbank AG, the Commission considers that the appropriate starting point for a fine resulting from the criterion of the relative importance in the relevant market requires further upward adjustment to take account of their size and their overall resources.

(194) On the basis of the foregoing, the Commission considers that, in the case of Commerzbank AG, Dresdner Bank AG and Bayerische Hypo- und Vereinsbank AG, the need for deterrence requires that the starting point of its fine determined under recital 191 should be increased by EUR 10 million to EUR 20 million.

2.2.2. Duration

(195) As mentioned earlier, the Commission considers the duration of the infringement of Article 81(1) of the EC Treaty for all addressees of this Decision to be from 15 October 1997 until the present time (recitals 173 and 174). The starting amounts of the fines determined for gravity (recital 191) are therefore increased by 40 % for each of the undertakings.

(196) The Commission accordingly sets the basic amount of the fines as follows:

Commerzbank AG	EUR 28 million,
Dresdner Bank AG	EUR 28 million,
Bayerische Hypo- und Vereinsbank AG	EUR 28 million,
Deutsche Verkehrsbank AG	EUR 14 million,
Vereins- und Westbank AG	EUR 2,8 million.

2.3. Individual fines

(197) In setting the fine for each company, the Commission is obliged to assess any aggravating or attenuating circumstances on an individual basis and to apply, as appropriate, the leniency notice.

(198) In the present case there are no aggravating or attenuating circumstances.

2.4. Amount of the fines imposed in the present proceedings

(199) In conclusion, the Commission fixes the fines to be imposed pursuant to Article 15(2) of Regulation No 17 as follows:

Commerzbank AG	EUR 28 million,
Dresdner Bank AG	EUR 28 million,
Bayerische Hypo- und Vereinsbank AG	EUR 28 million,
Deutsche Verkehrsbank AG	EUR 14 million,
Vereins- und Westbank AG	EUR 2,8 million.

HAS ADOPTED THIS DECISION:

Article 1

Commerzbank AG, Dresdner Bank AG, Bayerische Hypo- und Vereinsbank AG, Deutsche Verkehrsbank AG and Vereins- und Westbank AG have infringed Article 81(1) of the EC Treaty by participating in an agreement whose object was to fix (a) the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission) and (b) a target price level of about 3 % (to achieve 90 % exchange margin income recovery) during the transitional period beginning on 1 January 1999.

Article 2

The undertakings named in Article 1 shall put an end to the infringement.

They shall henceforward refrain in relation to their activities from any agreements or concerted practices which may have the same or a similar object or effect as the infringement.

Article 3

The following fines are hereby imposed on the undertakings named in Article 1 in respect of the infringement found herein:

Commerzbank AG	EUR 28 million,
Dresdner Bank AG	EUR 28 million,
Bayerische Hypo- und Vereinsbank AG	EUR 28 million,
Deutsche Verkehrsbank AG	EUR 14 million,
Vereins- und Westbank AG	EUR 2,8 million.

Article 4

The fines imposed by Article 3 shall be paid within three months of the date of notification of this Decision to the following account:

Account No: 642-0029000-95

Code IBAN: BE76 6420 0290 0095

Code SWIFT: BBVABEBB

of the European Commission with:

Banco Bilbao Vizcaya Argentaria (BBVA) SA
Avenue des Arts/Kunstlaan, 43
B-1040 Brussels.

After expiry of that period, interest shall be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first working day of the month in which this decision is adopted, plus 3,5 percentage points.

Article 5

This decision is addressed to:

1. Commerzbank AG
Kaiserplatz
D-60261 Frankfurt am Main;
2. Dresdner Bank AG
Jürgen-Ponto-Platz 1
D-60329 Frankfurt am Main;
3. Bayerische Hypo- und Vereinsbank AG
Am Tucherpark 16
D-80538 München;
4. Deutsche Verkehrsbank AG
Friedrich-Ebert-Anlage 2-14
D-60325 Frankfurt am Main;
5. Vereins- und Westbank AG
Alter Wall 22
D-20454 Hamburg.

This decision shall be enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, 11 December 2001.

For the Commission

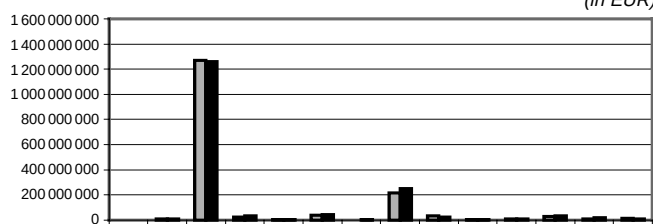
Mario MONTI

Member of the Commission

ANNEX

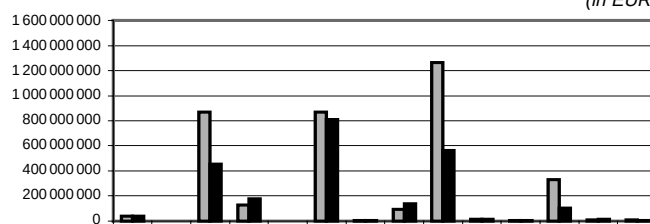
AUSTRIA

(in EUR)



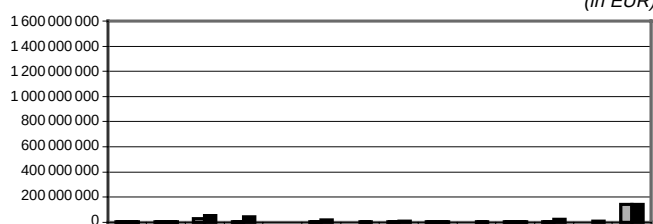
BELGIUM

(in EUR)



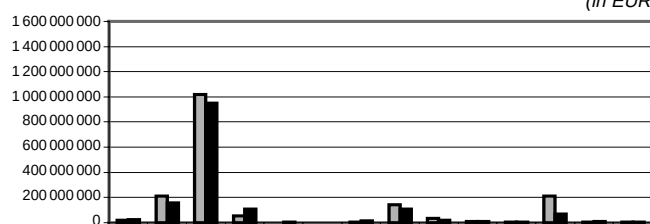
FINLAND

(in EUR)



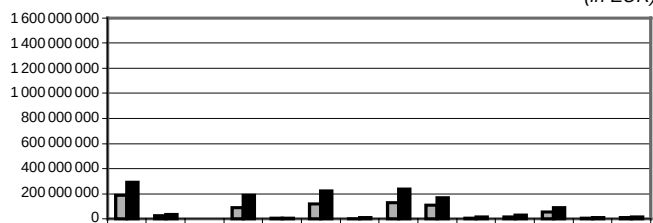
FRANCE

(in EUR)



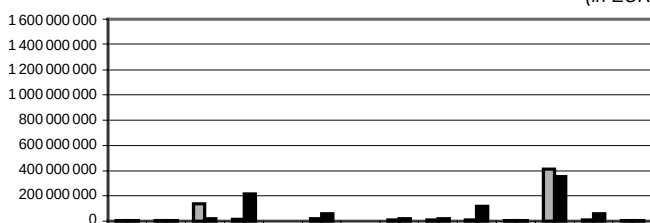
GERMANY

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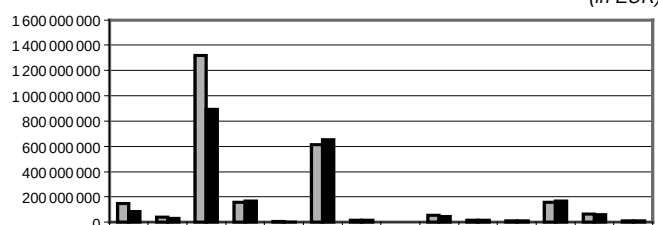
IRELAND

(in EUR)



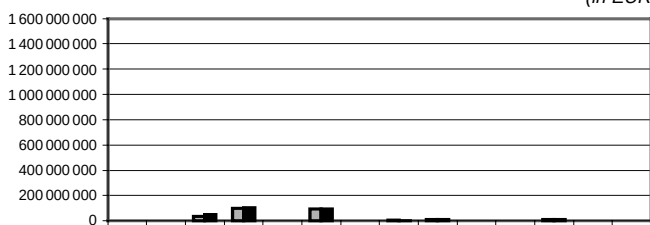
ITALY

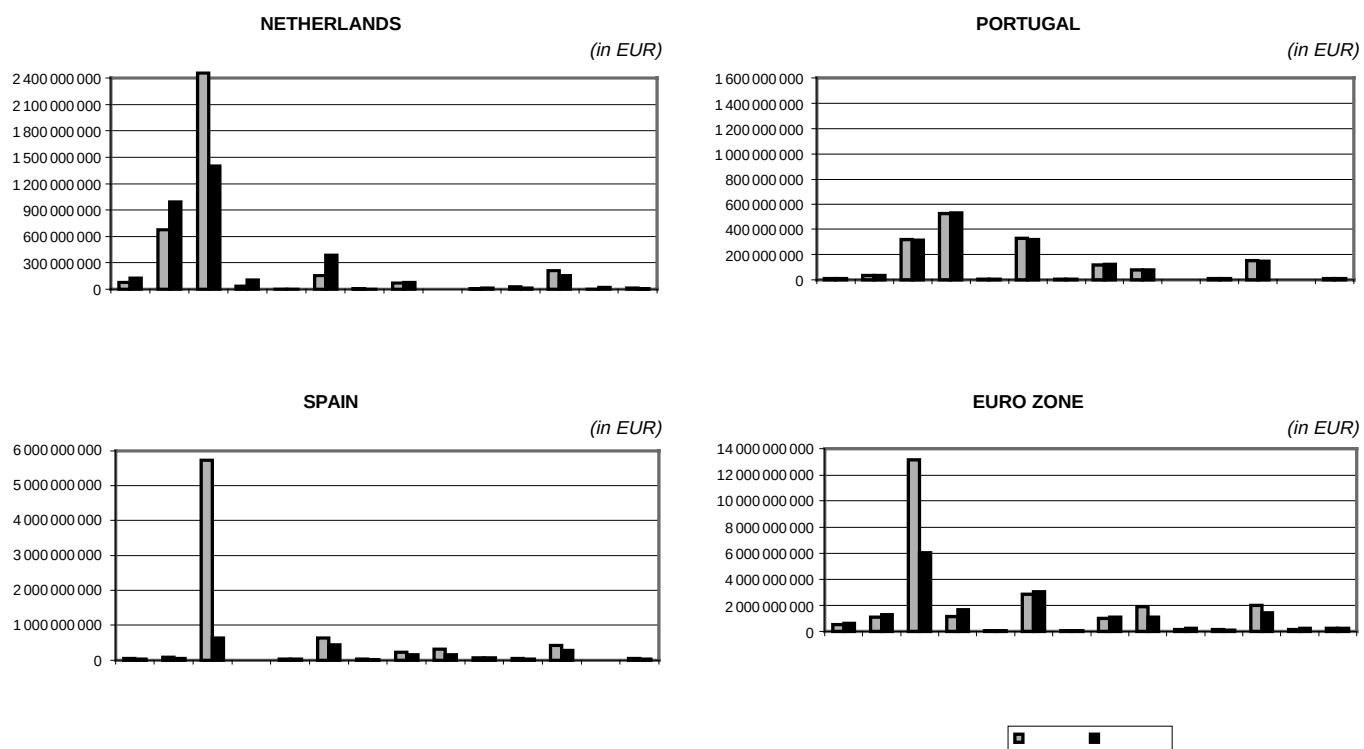
(in EUR)



LUXEMBOURG

(in EUR)





Buying and selling volumes per euro-zone country for EU currencies (in EUR, 1998)

(Note: Different scales for the Netherlands, Spain and the euro zone).

COMMISSION DECISION**of 20 December 2001****declaring a concentration to be compatible with the common market and the EEA Agreement****(Case COMP/M.2389 Shell/DEA)***(notified under document number C(2001) 4526)***(Only the English text is authentic)****(Text with EEA relevance)***(2003/26/EC)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽¹⁾, as last amended by Regulation (EC) No 1310/97 ⁽²⁾, and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 23 August 2001 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations ⁽³⁾,

Having regard to the final report of the Hearing Officer in this case ⁽⁴⁾,

WHEREAS:

I. INTRODUCTION

(1) On 10 July 2001, the undertakings Deutsche Shell GmbH (Deutsche Shell) and RWE Aktiengesellschaft (RWE) notified the Commission, in accordance with

Article 4 of Regulation (EEC) No 4064/89 (the Merger Regulation), of a proposed concentration by which Deutsche Shell and RWE acquire, within, the meaning of Article 3(1)(b) of the Merger Regulation, joint control of a newly created joint venture (Shell/DEA or JV) that will combine their respective downstream oil and petrochemicals businesses. After an interim period ending on 1 July 2004 at the latest, Shell will acquire sole control of the combined businesses.

(2) After examination of the notification, the Commission by decision of 23 August 2001 concluded that the notified operation fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement. The Commission accordingly initiated proceedings in this case pursuant to Article 6(1)(c) of the Merger Regulation and Article 57 of the EEA Agreement.

II. THE PARTIES AND THE OPERATION

(3) The Dutch-British Royal Dutch/Shell group of companies (Shell) is active world-wide in the exploration, production and sale of oil and natural gas, the production and sale of chemicals, power generation and the production of energy from renewable resources. Shell's wholly owned subsidiary Deutsche Shell GmbH is active mainly in the refining of crude oil and the distribution and sale of refined products in Germany, in the production, distribution and sale of certain chemicals, in the production and distribution of natural gas and crude oil, and in the solar energy business.

(4) RWE is the ultimate parent company of a group of companies focusing on a multi-utility strategy with activities in energy, water distribution and treatment, mining and raw materials, environmental services, petroleum and chemicals, industrial systems and construction. The upstream and downstream oil and petrochemicals business of RWE is operated via its

⁽¹⁾ OJ L 395, 30.12.1989, p. 1, corrected version OJ L 257, 21.9.1990, p. 13.

⁽²⁾ OJ L 180, 9.7.1997, p. 1.

⁽³⁾ OJ C ...

⁽⁴⁾ OJ C ...

subsidiary RWE-DEA Aktiengesellschaft für Mineralöl und Chemie (RWE-DEA). The affected downstream oil and chemicals activities are operated via DEA Mineralöl AG, a 100 % subsidiary of RWE-DEA.

- (5) The parties will use the existing DEA Mineralöl company as the joint venture vehicle, which will be renamed as Shell/DEA. Shell will separate its downstream oil business in Germany, currently operated by Deutsche Shell, and contribute this business to Shell/DEA, including certain of Shell's petrochemicals assets, namely its aromatics production from its plant at Godorf. As a result, Shell/DEA will include the entire downstream oil business and petrochemicals business of each of Shell and RWE-DEA in Germany. The joint venture will operate its business under the brands of both Shell and DEA. The joint venture will not extend to any upstream oil or any natural gas businesses of the parties.
- (6) Shell and RWE-DEA signed a Joint Venture Agreement on 5 July 2001. Pursuant to this agreement, the shares in Shell/DEA will be held 50/50 by RWE-DEA and Shell for an initial period. RWE-DEA will have a first put option to sell its 50 % stake in the JV to Shell between [...] (*) and [...]*. If the put option is not exercised, RWE-DEA will be legally bound to sell and Shell will be legally bound to purchase [...] % of the shares in Shell/DEA effective [...]*. In addition, Shell will grant RWE-DEA a second put option for RWE-DEA's remaining shares in the JV, to be exercised between [...] and [...]*, effective [...]*. Given this structure, Shell will in any case have a [...] % stake in Shell-DEA by 1 July 2004 if it has not acquired the whole share capital of this company by then.

III. CONCENTRATION

- (7) The transaction consists of two subsequent steps, namely an initial period which will end either with the exercise of the first put option by RWE-DEA or, at the latest, with the purchase of the additional [...] % of Shell/DEA's shares by Shell effective 1 July 2004, and the period after that date.
- (8) During the initial period, the members of the management board which is in charge of Shell/DEA's day-to-day operation will be equally appointed by each shareholder via the JV Committee and Shell/DEA's supervisory board. The chairman of the management board will have a casting vote and will be a nominee of

Shell. Resolutions in the shareholders' meeting will be taken by simple majority. As each party will hold 50 % of the voting rights, decisions can be blocked by either party. During the initial period certain decisions within Shell/DEA will be taken by a JV Committee composed of six members, three nominated by each shareholder. Decisions will require unanimity. The JV Committee will have sole discretion and authority for a number of strategic decisions such as the business plan, the annual operating budget, structural changes in the JV, investments above a certain threshold and the appointment of members of the management board. In the light of these veto rights of both parties safeguarding their decisive influence in the JV, it can be concluded that during the first period, Shell and RWE will have joint control over Shell/DEA.

- (9) After 1 July 2004, unless RWE-DEA exercises the first put option, which will transfer sole control to Shell even earlier, Shell will hold [...] % of the shares in Shell/DEA. Shell will control the decisions of the shareholders' meetings as far as they are taken by simple majority, as well as the day-to-day management of Shell/DEA through the management board. It is foreseen that Shell's majority in the shareholders' meeting will translate into an appointment of its representatives for the management board at this stage. The JV Committee will remain in place, but the reserved items, requiring a unanimous decision, will become limited to core arrangements concerning issues such as changes in the articles of association of the JV or in the JV agreement, restructuring with a project value above significant thresholds, dividend policies and cash calls on partners. Veto rights in these areas do not appear to confer on RWE-DEA the ability to exercise a decisive influence over Shell/DEA. They appear to be limited to issues necessary to protect the financial interests of RWE-DEA as a minority shareholder. It can therefore be concluded that Shell will acquire sole control over Shell/DEA after 1 July 2004 at the latest, resulting in a concentration within the meaning of Article 3 (1) (b) of the Merger Regulation.
- (10) The transaction can be considered as one single concentration consisting of the acquisition of sole control over Shell/DEA by Shell, although effectuated in two consecutive steps, with a starting-up period of joint control. Point 38 of the Commission notice on the concept of concentration under Regulation (EEC) No 4064/89 on the control of concentrations between undertakings ⁽⁵⁾ states that an operation will normally be considered to be an acquisition of sole control,

(*) [...] represents text omitted for confidentiality.

⁽⁵⁾ OJ C 66, 2.3.1998, p. 5.

where it leads to joint control for a starting-up period of up to three years, but according to legally binding agreements this joint control will be converted into sole control by one of the shareholders.

- (11) In the present case, from today on, the acquisition of sole control by Shell within less than three years is a legal certainty. [Shell will also have a strong influence in the operational management of the JV]*.

IV. COMMUNITY DIMENSION

- (12) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 billion⁽⁶⁾. Shell, RWE and DEA each have an aggregate Community-wide turnover in excess of EUR 250 million. Not all of the undertakings concerned achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

V. PROCEDURE

- (13) On 3 August 2001 the German competition authority, the Bundeskartellamt, informed the Commission that the concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within Germany, which presents all the characteristics of a distinct market pursuant to Article 9(2) of the Merger Regulation, requested the Commission to partly refer the case. The request related to the markets for downstream mineral oil products in Germany, including in particular the markets for motor gasoline, diesel and light heating oil retailing and wholesaling, aviation fuels, heavy fuel oil, bitumen and lubricants. The request did not concern the markets for petrochemicals, the markets for upstream oil activities as well as the markets for downstream oil products outside Germany. By decision of 23 August 2001 the Commission partly referred the case to the competent German authorities as requested.
- (14) On 24 October 2001 a Statement of Objections was sent to Shell and RWE, which sent a combined reply on 5 November 2001. As requested by the parties, a hearing was held on 6 November 2001.

⁽⁶⁾ Turnover calculated in accordance with Article 5 (1) of the Merger Regulation and the Commission notice on the calculation of turnover (OJ C 66, 2.3.1998, p. 25). To the extent that figures include turnover for the period before 1 January 1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

VI. ASSESSMENT UNDER ARTICLE 2 OF THE MERGER REGULATION

PART 1: ETHYLENE

A. RELEVANT PRODUCT MARKET

- (15) Ethylene is one of the most important basic chemical products, which belongs to the olefin group consisting of ethylene, propylene, and butadiene. In Western Europe, ethylene is produced principally from naphtha (itself a product of the process of refining crude oil) in steamcracking equipment. It is used as a raw material for ethylene derivatives such as polyethylene and PVC and no other product can replace it. In line with previous decisions for ethylene⁽⁷⁾, the market investigation has confirmed that ethylene constitutes a separate product market.

B. RELEVANT GEOGRAPHIC MARKET

- (16) In line with its previous decisions the Commission considers that the relevant geographic market for the supply of ethylene is a function of the extent of the available pipeline network⁽⁸⁾. Ethylene is a hazardous gas which is highly flammable. Due to these product properties it is neither profitable nor practical to transport ethylene overland by road or rail. For instance in Germany, this transport would require a special permit and transport by barge on the Rhine is even prohibited. Over long distances, ethylene is transported either in compressed form by pipeline or in liquid form by refrigerated ship. However, such transport requires major investment in logistical equipment such as pipelines and specially equipped sea terminals which in turn are often connected to pipelines or to one or several ethylene consumers. In order to reduce transport costs and logistical difficulties, ethylene consumers tend to be located near to the ethylene production sites. It is impossible in practice to move large quantities of ethylene from a production site to an inland consumption site if the two sites are not connected to the same network of pipelines. Consequently, given these constraints for the transportation of ethylene, ethylene production and consumption sites are characterised by individual systems where producers and consumers are combined on-site or linked by a pipeline and/or the access to deep sea terminals. Therefore, the

⁽⁷⁾ See Cases COMP/M.1628 — Totalfina/Elf, OJ L 143, 29.5.2001, p. 1; COMP/M.2345 — BP/Erdölchemie, 26.4.2001; IV/M.361 — Nestlé/Statoil, 17.2.1994; IV/M.550 — Union Carbide/Enichem, 13.3.1995.

⁽⁸⁾ Cases COMP/M.1628 — Totalfina/Elf, IV/M.361 — Nestlé/Statoil, IV/M.550 — Union Carbide/Enichem. In case M.2092 — Repsol Chimica/Borealis (19.12.2000), the Commission left open whether the relevant market was local or wider, but in the area at question (the Iberian peninsula) there were no ethylene pipelines. The geographic scope of the ethylene market was also left open in COMP/M.2345 — BP/Erdölchemie.

relevant geographic market is delineated by the available pipeline network.

- (17) The pipeline network relevant for delineating the relevant geographical market for ethylene is the pipeline network owned and operated by Aethylenrohrleitungsgesellschaft mbH & Co KG, together with its associated pipelines (the so called 'ARG+' pipeline network), these associated pipelines being mostly owned by the linked ethylene consumer or producer. The ARG+ links various production sites and ethylene consumers in Belgium, the Netherlands and Western Germany.

- (18) The limited amount of imports and their restricted availability for consumers means a broader definition of the geographic market is not possible. There are five sea terminals linked to the ARG+ which allow for ethylene imports by ship from production sites located outside the ARG+ area. Of total ethylene consumption by ARG+ consumers, approximately 15 % were imported from outside the ARG+ area in 2000, which was a peak year due to several unscheduled downtimes of ethylene production facilities (so-called 'crackers') on the ARG. Usually imports account for approximately 10 % of total (captive and merchant) demand. By far the greatest share of imports is done by the owners of the import terminals, third-party imports only account for 10 to 20 % of the total imports. For third parties, the amount of ethylene imports into the ARG+ catchment area is severely restricted. First, there are no public terminals offering free access to third parties, but all are owned by ethylene producers. Second, existing terminals have been designed primarily to fit the ethylene needs of their owners, they are in addition to imports used for the storage of excess production of the cracker usually linked to the terminal, and do not provide sufficient long-term capacity for the open market. Even if third parties are allowed to use these terminals, third parties raised a number of contractual and practical difficulties which prevent them from using these terminals on a structural basis. In contractual terms, it appears to be very common that terminalling contracts are linked to the existence and duration of a supply agreement with the terminal owner and that the terminal is only made available for a certain percentage of the volumes which are supplied directly by the terminal owner. In addition, such contracts partly provide for certain rights of the terminal owners whereby the ethylene purchaser is obliged to negotiate with the terminal owner whether the purchaser would accept direct supply instead of using the terminal. Third, consumers which are not directly linked to a sea terminal have to pay ship freight cost, terminalling fees and transportation costs charged by the ARG for transport over the pipeline, which means that large scale imports are not an economically viable alternative to product produced on the ARG+.

- (19) The parties did not dispute the Commission definition of the geographic market.

- (20) It therefore can be concluded that the relevant geographic market is the pipeline system of the ARG+ ethylene pipeline.

C. COMPATIBILITY WITH THE COMMON MARKET

- (21) On 27 July 2001 BP plc (BP) and E.ON AG (E.ON) notified the Commission of their agreement whereby BP, together with E.ON, will acquire joint control over Veba Oel AG (Veba) (case COMP/M. 2533 – BP/E.ON). This transaction will equally affect the market for ethylene on the ARG+. A single analysis of this market was carried out for the two cases, which leads to the present decision as well as to a parallel decision in case M. 2533 – BP/E.ON, adopted simultaneously.

1. *Current market structure*

1.1. **The market for ethylene is already today characterised by a high degree of concentration**

- (22) In line with previous decisions of the Commission ⁽⁹⁾ and the view of Shell and RWE, the parties' and other market participants' market shares are calculated and considered with regard only to the merchant market. The merchant market comprises sales to third parties, and does not consider production volumes which are used internally within the same group for the conversion into products further downstream (captive use).
- (23) Furthermore, market shares of ethylene suppliers as well as the volume of the merchant market itself may be calculated in principle on a net basis as regards sales and purchases on the ARG+. In case a producer is at the same time selling and purchasing on the merchant market, it is appropriate to consolidate sales and purchases to a net position as either net buyer or net seller. The Commission's investigation has shown that swaps among producers as well as sales and purchases on the (spot) market in the same year are mainly carried out for operational reasons and not for the purposes of a systematic and large scale on-sale. Furthermore, swaps do not reflect independent market power on the part of the participating undertaking and cannot be compared to sales. For the special situation as regards Erdölchemie, see recital 40.
- (24) Imports by producers connected to the ARG+ from outside the ARG+, whether they are delivered by one and the same company/group of companies or purchased from third parties, are accounted in the same way as ethylene production on the ARG+. It is not appropriate to treat imports onto the ARG+ as

⁽⁹⁾ See Case IV/M.361 — Nestlé/Statoil, 17.2.1994.

purchases in the ARG+ (which, as a consequence, would lower the importer's net selling position and market share). Imports on a continuous basis are not readily available for all ethylene consumers in the ARG+. In addition, large-scale imports usually are not operated on a swap basis or for other operational reasons without market effects. Therefore, via imports a considerable market position can be achieved and the offset of imports against merchant sales would lead to a significantly distorted picture of the individual undertaking's market share. Furthermore, in line with the parties' submissions, imports account for a part of the total ethylene market volume on the ARG+. In order to be consistent, the market share deriving from these imports also has to be attributed to the undertaking selling these imports within the ARG+ catchment area.

- (25) The parties argue that volumes sold to third parties on the basis of long term, formula based contracts should be excluded from the merchant market and market share calculation. They submit that these contracts are economically comparable to captive use and should therefore be treated likewise, that is to say, excluded. The volumes under these 'mechanistic' contracts are committed for an extremely long period (longer than 15 years) and are therefore not available for the market in the medium term. The pricing is based on a mechanistic transfer price without further negotiation taking into account the actual market situation. The pricing for these volumes is therefore not linked to and not relevant for the overall merchant market. If these contracts were excluded from the market, the parties' combined market share would be approximately [5 to 15 %]*.
- (26) The Commission does not share the parties' view that long-term supply contracts based on a price formula should be excluded from the market calculation. As a general point, it appears that a different treatment of contracts based only on their pricing formula would lead to inconsistent and arbitrary results. [There are contracts of a mixed nature combining the two pricing schemes. It appears to be highly artificial and arbitrary to split one single contract with regard to market share calculation]*.
- (27) The long term character as such cannot justify the exclusion of these contracts. On the market for the supply of ethylene, long-term contracts are the rule and therefore do not qualify these contracts as exceptional. It is possible that on the basis of a snapshot view on the market in a given moment, these volumes might indeed be not immediately available. However, on the basis of a forward looking analysis of the market which is required by the Merger Regulation, these volumes will be on the market at the time of expiry or re-negotiation of the contracts, and therefore reflect the respective

producer's medium and long term market power. Furthermore, there are continuously and in a revolving manner contracts that expire or that require renegotiation on the market. Therefore, these long term contracts are not excluded from competition between suppliers and they regularly allow for market interaction when they expire.

- (28) The formula character of the pricing scheme does also not justify an exclusion from the market calculations. Market shares are used as an indicator to measure market power because they reflect market success in the past, and there is a certain likelihood that this success will continue at the same level in the short and medium future. Against this background, market shares based on formula based contracts also appear to be meaningful. Formula based contracts are often a result of the disintegration of former intra-group supplies with physical links between supplier and consumer. As a result, there is some probability, although no certainty that the supplier will gain the respective part of the market also in the future.
- (29) The fact that there are no quarterly market related price negotiations during the term of the contract does also not justify an exclusion of these contracts from the assessment of the parties' market power. Also formula based contracts are not fixed entirely for the whole time of their duration. They often provide for adjustments of the formula in case of supply and other developments and therefore are not excluded from competitive interaction during their term. For example, DEA's contract with CPO (which the parties want to exclude from their market share with respect to the part of the volumes supplied on a formula basis) [...]*. Furthermore, in [...]* the parties agreed on a discount from the formula based price of an additional DEM [...]*. This further illustrates that the price actually to be paid under a formula contract is not entirely mechanistic, but allows for renegotiation and amendments which are influenced by general market conditions. The DEA-CPO contract contains another strong link to market pricing [...]*. Therefore, it cannot be argued that formula based contracts are entirely unrelated to market developments and negotiations.
- (30) In conclusion, it is not appropriate to exclude long-term formula based contracts when calculating market shares in the present case.
- (31) The above described concept for the definition of the merchant market and the calculation of market shares does, however, not remove the necessity to individually assess restructuring operations which may lead to an increase in market shares without leading to a corresponding direct and immediate increase of market

power. Such a situation may in particular occur if, in the case of a divestiture of some activities in downstream production, intra-group supplies of ethylene are replaced by long-term supply agreements with third parties. As a consequence of the new third party supply agreements, the former captive use is accounted for the merchant market and may generate additional market shares. However, such additional market shares may not necessarily be considered as a full reflection of new market power. Such operations and their particularities have to be assessed on a case-by-case basis.

- (32) On the basis of the foregoing, the market shares and capacities of the ethylene sellers on the ARG+ merchant market as well as imports by third parties for the year 2000 are as follows:

Table 1

Market shares

Ethylene seller	Share of merchant market %	Capacity kt
Veba	[25 to 35]*	[900 to 1 000]*
DEA	[10 to 20]*	[400 to 500]*
Shell	[10 to 20]*	[900 to 1 000]*
BP/Erdölchemie	0,0	[900 to 1 000]*
BASF	[10 to 20]*	[1 300 to 1 400]*
Atofina	[5 to 15]*	[700 to 800]*
Exxon	[5 to 15]*	[400 to 500]*
Imports third parties	[0 to 10]*	

- (33) In general, the ethylene suppliers in the ARG+ area can be grouped into three different categories. These are:

- (i) suppliers which are not vertically integrated downstream and sell their whole ethylene production on the merchant market;
- (ii) ethylene producers which are vertically integrated downstream and partly use their ethylene production captively and partly sell it on the merchant market; and
- (iii) ethylene producers which are vertically integrated and use their whole ethylene production captively.

- (34) Veba Oel is seen by the market to belong to the first category (non-downstream integrated full seller). With a

capacity of its two crackers in Gelsenkirchen of around [900 to 1000]* kilotons per annum (ktpa), a production which was fully exploiting the capacity and was entirely sold to the merchant market in the year 2000 (as also in the years 1998 to 1999), it is by far the largest player in the merchant market in the ARG+ catchment area with a market share of around [25 to 35]* %.

- (35) The other market player belonging to the first group is DEA. In the ARG+ area DEA owns two crackers in Wesseling with an ethylene capacity of [400 to 500]* ktpa which was [highly]* exploited in the year 2000. The whole production was sold to the merchant market, as was also the case for the years 1998 and 1999 ⁽¹⁰⁾. DEA's market share lies around [10 to 20]* %. The parties argue that DEA only has one customer, CPO, which it has supplied since the 1970s, and thus its market share does not reflect its market position appropriately. However, CPO is not a consumer on its own, nor is it an independent trader. It negotiates the supplies for Basell, Clariant, Celanese, Vinnolit and Vintron. [...]*. The respective agreements are a result of the divestment of former members of the Hoechst group, for which economic supplies had been secured at the time. The contracts of CPO with its customers are limited to the duration of CPO's supply contracts with DEA (and Veba). Furthermore, [a large proportion]* of CPO's demand is passed on to Basell, the Joint Venture between Shell and BASF, both net sellers on the merchant market. Basell today has its own ethylene cracker and is likely to be able to procure remaining demand at economic terms via its parents. Against this background, CPO itself expressed the expectation that it will not continue to exist in the present form after the expiry of its supply contracts with DEA and Veba.

- (36) In conclusion, the two players DEA and Veba provided [a significant proportion]* of the merchant market in the ARG+ area in the year 2000.

- (37) Shell is seen by the market as belonging to the second category. Shell owns an ethylene cracker at Moerdijk, the Netherlands, connected to the ARG via a proprietary pipeline. Shell submits that it is an overall net purchaser of ethylene due to the fact that the demand of its Basell joint venture (under joint control and ownership together with BASF) has to be taken into account as captive use. This argument cannot be accepted. As a full-function joint venture within the meaning of the Merger Regulation, Basell is set up as an autonomous economic entity which only initially will purchase

⁽¹⁰⁾ Although DEA was, to a limited degree, active in downstream ethylene derivatives production until early 2001, their entire production on the ARG was available to the merchant market. DEA's downstream activities were mainly located off the ARG at Heide/Brunsbüttel and thus were not supplied via the ARG.

smaller parts of its required ethylene supply from its parents ⁽¹¹⁾. Since at least in a medium-term perspective Basell is free in its choice of ethylene supply, Basell's actual demand cannot be included in the calculation of Shell's net balance of ethylene. This assessment corresponds to the market perception according to which Shell is a significant player in the ethylene merchant market at the ARG+ level. In addition to Shell's production on the ARG+, its imports onto the ARG+ are added to its production. According to this calculation Shell's 2000 market share amounted to [10 to 20]*%.

non-integrated consumers such as Sasol, Celanese, Solvay/Solvin, LVM, Ineos and Borealis, which are entirely dependent on third ethylene producers' supplies for their requirements of ethylene on the ARG+.

1.2. As the only non-integrated suppliers, DEA and Veba are the main price settlers in the ethylene market and therefore play a decisive role for the functioning of the market

(38) This figure may understate Shell's actual market potential. In the year 2000 the capacity of Shell's ethylene cracker in Moerdijk was increased from [600 to 700]* kt to [800 to 900]* kt. The expansion of cracker capacity, which is not reflected in the 2000 market share, will strengthen Shell's market position in the future and increase its market share in excess of the current level.

(39) Other players belonging to the second group are BASF with a market share in the merchant market of [10 to 20]*%, Atofina with a significantly lower market share of around [5 to 15]*%, and Exxon with a market share of [5 to 15]*%. Exxon's share is largely based on its imports on the ARG from its ethylene production sites in the United Kingdom. The remaining market shares are accounted for by imports carried out by other parties.

(40) BP belongs to the third category with respect to its net ethylene balance, consuming all its ethylene production captively on a net basis (see recital 23), even taking into account BP's considerable imports in the year 2000. This still holds true after the taking over of sole control over Erdölchemie in April 2001. However, Erdölchemie still supplies customers with ethylene on the basis of long-term contracts. Although according to the Commission's market investigation Erdölchemie's ethylene sales are decreasing (from [...] kt in 2000 to expected [...] kt in 2001) following the acquisition of sole control by BP, Erdölchemie's sales nevertheless give BP a market perspective and intelligence also from a seller's point of view.

(41) Other players belonging to the third group are DOW, DSM and Basell, as their entire ethylene production (in terms of a net balance) is used captively, and they purchase additional volumes on the market.

(42) Beside these ethylene consumers which are themselves active in the ethylene production there are also free,

(43) The vast majority of ethylene supplies are based on long-term contracts between suppliers and consumers. In general, there are three different types of contracts in terms of pricing schemes.

(44) First and foremost, large volume contractors widely refer in their long-term contracts to a basic contract price, which is then adjusted via individual discounts. Whilst the individual discount is fixed for the whole term of the contract, the basic contract price is subject to renegotiation between the partners every quarter. A large proportion of these contracts contain fallback clauses which state the reference contract price published by the industry report ICIS-LOR as agreed in case the parties do not reach an agreement in their negotiations.

(45) Second, there are contracts mainly for smaller volumes that do not foresee quarterly price negotiations, but refer to the published reference contract price, which is also adjusted by an individual discount agreed for the whole term of the contract. The actual price to pay varies automatically according to the movements of the published reference price. The price to pay according to these types of contracts therefore follows the price of the first type of contracts. To arrive at this published reference price, the most important players on the market (having a contract of the first type) with minimum volumes to negotiate of around 200 kt report their contract prices (without discounts) which they agreed in the quarterly individual negotiations to publishing organisations like ICIS-LOR or CMAI. Other parties which also have to negotiate prices either follow this price or deviate from it, and these facts are subsequently also reported and published. After certain deals have been closed at the same price, this price is considered as the accepted contract price for a certain quarter, and published by ICIS as the headline reference price 'North Western European Contract Price (NWECP)'. In case no such reference price is widely accepted, a weighted average is published as the headline quarter price. As a consequence, all other contracts referring to this price without any further renegotiations will be adjusted accordingly.

⁽¹¹⁾ See Case COMP/M.1751 — Shell/BASF/JV Project Nicole, 29.3.2001.

- (46) On the basis of this pricing mechanism, influence on significant volumes of product does not only have an impact on the individual contract, but has a broader impact on the general pricing level on the ethylene market. Veba and DEA are the most important merchant sellers, and therefore already play an important role in terms of volumes in the described price setting mechanism. This role is particularly emphasised by the fact that Veba and DEA are the only suppliers that are not integrated in products downstream of ethylene. Consequently, the prices they set are considered to be entirely free from biasing interests in downstream markets and considerations of captive use, and driven only by objective aspects of the ethylene market such as feedstock cost, the supply/demand balance, margin trends, and so forth. Although the contracts of other suppliers have been reported in the past as well, all market participants that answered to the Commission's questionnaires agreed that Veba and DEA were the price setters in the ARG ethylene market, ensuring a supply/demand orientated price finding widely accepted by the market.
- (47) The parties argue that the role of DEA (and Veba) for the pricing mechanism and the functioning of the market is widely overstated for the following reasons: DEA has only one supply contract with one customer. It was partially integrated downstream of ethylene until April 2001, as was Veba until 1998, which did not influence their role as independent price settlers. Several other suppliers contributed to the settling of the ICIS price in the past, and even parties not linked to the ARG+ pipeline can settle the ICIS prices. There are also other mechanisms that could replace the ICIS reference. Finally, the bargaining position of a combined Shell/DEA entity and its incentive to achieve the highest possible price for the ethylene vis-à-vis CPO would be the same as for DEA alone.
- (48) The Commission does not agree with those arguments. The situation of DEA's only customer CPO is addressed in detail below in recital 138. The degree of downstream integration of DEA and Veba was limited in the past and therefore did not alter their perception as independent suppliers. DEA's main ethylene derivatives plants were located outside the ARG+, and DEA did not even supply the derivatives plants which it owned on the ARG+. Therefore, the total volume of its ethylene production site on the ARG+ was destined for the merchant market even at the time when DEA had some downstream activities. In addition, DEA's former captive use of ethylene accounted only for [a small proportion]* of total production, the remaining [...] % were supplied to the merchant market which also was the overall focus of its activities. As regards Veba, its proportion of former captive use is estimated between 25 and 50 % of its production. The majority of the volume was therefore also intended for the open market. Furthermore, Veba divested all its downstream activities in 1998 and therefore has already been acting for a significant time as a wholly independent, pure merchant seller on the market.
- (49) As regards the influence of other producers in the price-settling mechanism, market participants submitted that over the last five years on less than 10 occasions the quarterly ICIS reference price was based on other agreements than those involving DEA and Veba (mainly with CPO). It further appears that suppliers outside the ARG+ never formed a basis for the ICIS reference price. This is due to the fact that the ARG+ area is the only cluster with a sufficient number of producers and customers of ethylene to allow for market interaction, whereas at most other production sites in Western Europe there is one supplier and very few customers, interlinked via pipelines and without a choice in their contract partners. Although there might be other pricing schemes than the ICIS reference, such as references to feedstock cost or margin sharing arrangements, these other mechanisms are not such a close reflection of the ethylene market conditions, and therefore are less likely to be applied by market participants.
- (50) Finally, as it will be set out in detail below (recitals 84 to 104), after its merger with the fully vertically integrated supplier Shell, DEA's incentives, which so far focused only on the ethylene merchant market, will be significantly altered and biased by Shell's downstream activities, and thus alter its negotiation behaviour.
- (51) Third, there are formula-based contracts, which usually take into account the supplier's cost, feedstock prices, cracker economies and downstream derivatives margins. There are no regular price negotiations, as prices are the result of the objective data which is processed through the formula calculation. This type of contract is mainly used in situations where formerly integrated production sites belonging to one group were split and the derivative production unit downstream of ethylene was sold to a third party. Of total volumes contracted on the merchant market, this type of contract appears to account for [a small proportion]*.
- ## 2. *Collective dominance*
- (52) The Commission considers that following the proposed concentration and if the transaction between BP and E.ON is implemented a collective dominance of the two new entities on the ARG+ market for ethylene will arise. In former collective dominance cases, the Commission

has referred to the following elements to establish the existence or not of a collective dominant position ⁽¹²⁾: (i) supply concentration; (ii) homogeneity of the product; (iii) symmetry of market shares, costs, and interests; (iv) price transparency; (v) retaliation possibilities; (vi) high entry barriers and absence of potential competition, and (vii) inelastic demand without countervailing buying power. However, this list is neither binding, in particular in that not all of these elements have to be present to establish a collective dominant position, nor exhaustive but merely serves to provide a set of useful indicators. In the light of these factors the present case must be assessed as follows:

2.1. After the proposed mergers, Shell and BP will have together a market share of around [55 to 65]* %, and will not be exposed to comparably strong competitors

- (53) The most obvious and important effect of the two transactions on competition in the ethylene merchant market would be the disappearance of DEA and Veba as independent competitors and non-integrated suppliers from the merchant market. The main consequence for the market structure would be brought about by the loss of independence of the most important sellers to the merchant market, which is particularly aggravated by the fact that the merged entities would not be able to play DEA's and Veba's current role as independent price settlers in the ethylene market on the ARG+, and that no other independent ethylene producer, without interests in downstream production, would be left on the ARG+.
- (54) After the proposed mergers, the market shares of the ethylene sellers on the ARG+ would be as follows:

Table 2

Market shares post merger

Ethylene seller	Market share in %
BP/Veba	[25 to 35]*
Shell/DEA	[25 to 35]*
BASF	[10 to 20]*
Exxon	[5 to 15]*
Atofina	[5 to 15]*

- (55) Shell and BP would have arithmetically a combined market share of [55 to 65]* % (Shell/DEA [25 to 35]* % and BP/Veba [25 to 35]* %). The situation would not change considerably if, in a post merger scenario, BP's

further net demand were to be balanced against Veba's surplus as outcome of a net calculation. In such a scenario (also if the merchant market volume is reduced by BP's net deficit) the two entities would have a combined market share of [55 to 65]* % (Shell/DEA [25 to 35]* % and BP/Veba [25 to 35]* %). Applying the net calculation directly to the immediate future amounts to a very conservative presentation of the BP/Veba market position as Veba's market sales will not immediately decrease once the merger has been completed, as was also the case with Erdölchemie.

- (56) The increase in market share also corresponds to an increase in market power of Shell/DEA and BP/Veba as a result of the two transactions. Since currently the ethylene production of DEA and Veba is entirely designated to be sold on the merchant market, the market shares would also correspond to the respective market power of the combined Shell/DEA and BP/E.ON in the merchant market. The increase in market power may even go beyond the mere gain of market shares since DEA and Veba have been of particular importance for the market in their role as ethylene producers without downstream interests and independent price settlers. The transactions would therefore not only lead to pure formal changes in market share figures, but would considerably affect the market structure in substantive terms.
- (57) The capacity share for the ethylene production in the ARG+ area of the two new entities would be approximately [10 to 20]* % for Shell/DEA (with a capacity of [1300 to 1500]* ktpa) and approximately [15 to 25]* % for BP/Veba (with a capacity of [1900 to 2000]* ktpa). Other producers' shares would be BASF with [10 to 20]* %, Atofina with [5 to 15]* %, and Exxon with [2 to 7]* %. The two new entities would be the two biggest producers of ethylene along the ARG+.
- (58) Beside the two new entities, only the following three net ethylene sellers on the ARG+ would be left: BASF, Atofina and Exxon. According to the Commission's market investigation, DOW is not a seller of ethylene on the ARG+. All these ethylene suppliers are, in the same way as the combined entities, though not necessarily as regards the same products, vertically integrated downstream and share similar incentives with regard to the supply of ethylene to customers with whom all these companies compete downstream on the market for ethylene derivatives.
- (59) The next strongest competitor would be BASF whose market share is considerably smaller [10 to 20]* % for the year 2000). A very strong structural link between BASF and Shell lies in the JV Basell to which BASF and Shell have contributed all their interests in polypropylene and polyethylene. The joint ownership of Basell gives BASF the incentive not to support the downstream polyethylene competitors by economically

⁽¹²⁾ See, for example, Case IV/M.1383 — Exxon/Mobil, 29.9.1999.

priced ethylene supply (as outlined for Shell below at recitals 84 to 104) and thereby reduces its incentives to compete fiercely via price decreases with Shell and BP in the ethylene market on the ARG+. Furthermore, BASF is also active in other downstream markets, such as ethylene oxide/monoethylene glycol. Thereby the same incentives arise not to compete with the two new entities on the upstream market for ethylene as discussed for Shell and BP below (recitals 84 to 104). It can thus be expected that BASF will follow the two new market leaders rather than play the role of a maverick.

(60) In addition, whereas the merged entities would be active also in the upstream business BASF lacks the vertical integration upstream into refineries and the ready naphtha supply for its steam crackers from own sources. The parties submitted that this does not lead to a decisive disadvantage as naphtha is readily available on the market. However, although this may be the case for the supply of BASF's crackers in Antwerp, the situation appears to be different for the Ludwigshafen crackers. The cost disadvantage does not only refer to the necessary shipping of naphtha to these crackers, but BASF is dependent for a certain amount of naphtha on the supply via the Rhein-Main Rohrleitungstransport pipeline (RMR), a multi-product pipeline leading from the Amsterdam/Rotterdam/Antwerp (ARA) region to the Frankfurt/Ludwigshafen area in Germany [...]*. For transport via the RMR pipeline BASF is dependent on the shareholders of the pipeline company namely BP, Veba and in particular Shell. These factors very much limit BASF's possibility and incentives to exercise pressure on the two merged entities in the ethylene market on the ARG+.

(61) Post-merger, Atofina's market share would reach [5 to 15]* %. This limited share of the merchant market as well as Atofina's lack of [...]* do not give Atofina sufficient market power to increase competitive pressure on the two merged entities, and its incentives to vigorously compete with BP and Shell are limited by its extensive downstream interests.

(62) Exxon's ethylene production capacity in the ARG+ is limited to its minority 35 % share in the Fina Olefins Antwerp (FAO) joint venture in Antwerp. Its market sales to third parties are largely dependent on its imports and its market share, being [5 to 15]* %, is much smaller than those of the merged entities. The capacity of the FAO joint venture has been [highly]* exploited in the year 2000 and according to the Commission's market investigation there are indications that Exxon [...]*. In addition, its incentives to supply the ethylene derivatives producers with economically priced ethylene is also restricted by its own large production of ethylene derivatives. Hence, Exxon is also likely follow the two market leaders' strategy, and is not able to provide for sufficient competitive pressure on

the parties to the two transactions, nor does it have any incentive to do so.

2.2. The two new market leaders have a privileged position in essential infrastructure

2.2.1. BP/Veba will have privileged access to the ARG pipeline and a strong influence over the ARG company structure

(63) The importance of the ARG pipeline as the only economic means of transport for ethylene in the area has been outlined already (recitals 16 and 17). In the ARG area, ethylene is not transported via any other means. Therefore, availability of product and competition between the different suppliers connected to this pipeline for the supply of customers very much relies on access to this pipeline at competitive conditions. Ethylene suppliers are mainly located at the Western and Eastern end of the pipeline system. Without the economic possibility to transport product over the ARG pipeline, the ability and incentive for those producers to compete for contracts along the whole of the ARG will be restricted, thus limiting customers' choice and their ability to achieve competitive ethylene prices. This also applies to the competitive force of imports. All import terminals which allow for ethylene imports via deep sea ships are located at the North Sea coast. Consequently, especially for customers located at the Eastern part of the ARG, imports are not readily accessible and cannot be used as a constraint to ARG-suppliers without the availability of the ARG transport pipeline at low prices.

(64) The position of the merged entity BP/Veba Oel on the ARG ethylene market will be supported by the increased share it will hold in the Aethylen-Rohrleitungs-Gesellschaft mbH & Co. KG (ARG company), the company owning the core ARG pipeline network. The current holding of the share capital in the ARG company is as follows:

Table 3

ARG ownership

Shareholder	Capital share
BP (incl. Erdölchemie)	33,33 %
Veba (E.ON)	16,66 %
Degussa (E.ON)	16,66 %
Bayer	16,66 %
DSM	16,66 %

(65) BP/Veba as a shareholder in the ARG company [...]*

- (66) Moreover, BP/Veba will have significant influence over the ARG company policy and in particular [...] through its combined capital share. According to the articles of association, unanimity is required for decisions of crucial importance such as [...]*. A [special majority]* is required for [strategic decisions]*
- (67) Post merger, the combined BP/Veba alone will hold 50 % of the capital, meaning it will be able to block all decisions requiring a [special majority]*. It would be therefore in a position to block, in particular, [...]*. BP/Veba would therefore be able to exercise a significant influence over [strategic decisions]*.
- (68) Furthermore, until July 2001 there were three managing directors appointed one each by the shareholders DSM, Veba and Erdölchemie (BP). This situation will be changed officially by the end of 2001 towards a system of one managing director who is recruited from the outside, and not directly appointed by individual shareholders. There are already respective subcommittee resolutions, and the shareholders are expected to agree on the new concept by the end of this year. In preliminary execution of this change, since July 2001 there has been only one acting managing director for the ARG company.[...]*. With its blocking vote, BP/Veba will be in a position to [influence the appointment of a managing director]*.
- (69) It cannot be argued that, prior to the combination of BP and Veba, BP already enjoyed a blocking minority with regard to decisions requiring a [special majority]*, and that the transaction would therefore not bring about any substantial change with regard to the ARG. The merger will completely change BP's interests in the use of the pipeline and in exercising the rights conferred by its shareholding in the pipeline company. BP currently is a net ethylene buyer on the ARG+ and has an interest in opening third party producers' access to the ARG to guarantee ready supply of ethylene. It formed a counterbalance to E.ON, which controlled the shares of Veba — the strongest net seller — and Degussa, in any strategy the E.ON group was to adopt in the ARG company. BP itself, on the other hand, was exposed to the E.ON block of comparable strength, which it had to consider in any strategy for the ARG company. After the merger the combined BP/Veba will become the strongest seller of ethylene on the ARG+. It will therefore be no longer interested in supporting and defending the interests of ethylene buyers in the ARG pipeline company, namely open access at low prices for suppliers and consumers. In particular, BP/Veba could use its share in the company conferring a blocking vote to[...]*. Moreover, BP/Veba will be the only shareholder with a blocking capacity, and it will not be counterbalanced by any other equally strong shareholder. This puts the new entity in a position of particular strength.
- (70) It can therefore be concluded that BP/Veba will have [...] and significant influence over the ARG pipeline which is the essential infrastructure of the present ethylene market.
- (71) BP/Veba's position in infrastructure will further be strengthened by the ownership of or influence on extension pipelines. Veba owns the pipeline which links certain ethylene consumers [at a site in the Rhine/Ruhr area]* with the ARG pipeline via Veba's cracker in Gelsenkirchen⁽¹³⁾. The supply of these consumers, who account for a considerable amount of total merchant market sales, is fully dependent on the access to this pipeline. As none of the consumers linked via this pipeline are vertically integrated, they entirely depend on supplies from third parties on the open market. Any supply by Veba's competitors would need the consent of Veba for the use of the pipeline. This gives Veba considerable control over the choice of suppliers for these consumers and the competitive pressure alternative suppliers could exercise.
- 2.2.2. Shell/DEA will have privileged access to import infrastructure and control over important pipeline links*
- (72) Due to extremely high investment costs, market participants agreed that the entry of a completely new supplier on the ARG ethylene market based on a new cracker has to be excluded for the short and medium term. Additional capacity can only be expected from the debottlenecking of existing producers' facilities, which will not introduce a new independent competitive force on the market. Therefore, imports are the only additional independent source of ethylene supplies which could constrain the current suppliers' position on the market. Imports of ethylene can only be fed onto the ARG via the existing import terminals. These can thus be considered as a bottleneck control of which confers a considerable influence over competition on the ARG+ ethylene market.
- (73) Shell currently owns one of the five import terminals for ethylene connected to the ARG⁽¹⁴⁾, which will significantly support Shell/DEA's strong position on the market. First, it enables Shell/DEA to import additional volumes into the ARG and therefore to react flexibly to supply/demand imbalances resulting from cracker downtimes or demand fluctuation. Shell/DEA will be able to closely follow market movements by still constantly maintaining high utilisation rates for their

⁽¹³⁾ The pipeline is actually owned by Ruhr Oel GmbH (ROG), a 50:50 joint venture between Veba and the Venezuelan oil company PdVSA. [...]*.

⁽¹⁴⁾ The others are owned by Exxon, FAO (a 65:35 JV between Atofina and Exxon), BASF and Dow.

crackers, which is of an essential importance for the economic production of ethylene. This flexibility also allows Shell/DEA to bring additional volumes on the market even in times of full capacity rates at the ARG production sites.

- (74) Second, via the terminal ownership Shell/DEA will control the access of third party ethylene consumers to this terminal and therefore their ability to access competitive ethylene sources from outside the ARG area. Through the capacity provided for third party throughput and the respective terminalling fees and terms, Shell/DEA will be able to influence to a large extent the volumes available for third parties through imports and the terms and conditions under which these imports can be operated, thereby being able to make imports at least uneconomic due to high terminalling fees and capacity limitations.

- (75) The parties submit that its terminal ownership does not mean that Shell/DEA has a privileged position. The Shell terminal is only one of five import terminals linked to the ARG, resulting in ample alternatives for third parties requiring import capacity. There is enough spare capacity at Shell's terminal today which is not used for Shell's own needs and which is made available for third parties at competitive terms.

- (76) However, although there are other import terminals, all these terminals are owned by ethylene producers, that is to say, there are no independent terminal and storage providers without their own interests in ethylene production and distribution. Therefore, all terminal owners share the same interests with regard to their own ethylene activities and do not have greater interest in providing import capacity to third party competitors. In particular, it appears that Exxon's own terminal is fully utilised by Exxon itself as the largest importer of ethylene volumes so that terminal access for third parties is limited to the other four terminals. Furthermore, although Shell today allows third party access to its terminal, the respective amounts are very limited. Third party imports via Moerdijk accounted for only [10 to 80]* kt in 2000 (a peak year due to cracker downtimes on the ARG) and [5 to 75]* kt in 1999. The volumes imported by Shell in the same period are [several]* times higher. The limited capacity available for third parties is also due to the fact that the terminal owner will reserve a large margin of manoeuvre in the terminals capacity for its own needs to fully enjoy the flexibility described above (recital 18). For example, in 2000, Shell increased its own imports via Moerdijk by [a large degree]* due to increased outside requirements as its cracker at Moerdijk was down for expansion

works. It can therefore be concluded that the ownership of an import terminal is an important asset for an ethylene producer on the ARG which significantly enhances its competitive power on the ARG.

- (77) In addition, Shell owns a pipeline link between the core ARG pipeline, its cracker and sea terminal at Moerdijk and sites near Rotterdam. The Port Authority of Rotterdam plans to connect Rotterdam to the core ARG-pipeline on the basis of [...]*, which will enhance Shell/DEA's market intelligence and influence in the ethylene market. In the other direction, this pipeline gives Shell access to the Antwerp area with its numerous ethylene consumers without having to use the core ARG.

2.3. Ethylene is a homogeneous product without significant innovation on a mature market

- (78) The ethylene transported on the ARG pipeline is subject to a common binding specification and therefore there are no quality differences between the different suppliers. There have been no major research and development advances over the last 20 years.

- (79) The parties argue that the market for ethylene is lacking homogeneity as although the product itself is homogenous, the different contracts are not. These contracts in their view differ significantly in terms of volumes, duration and pricing mechanism thus not allowing for any coordinated behaviour in that respect. However, it firstly has to be noted that due to the importance of pipelines as the only means for transporting ethylene, the terms of distribution are similar [...]*. Secondly, differences in contracted volume and duration do not appear to constitute a considerable difference which would exclude tacit coordination. The same applies to the differences in pricing schemes. The vast majority of ethylene supply contracts refer to a quarterly contract price or directly to the respective published reference price, subject to a discount within a limited range. Differences might be observed with regard to pricing schemes based on cracker economics, margin sharing or other cost related formula. However, these contracts are of a limited importance in relation to the overall merchant sales on the ARG market. Moreover, it might be anticipated that at the expiry of contracts of this type the pricing scheme, which reflects the disintegration of formerly intra-group activities, may be changed to one of the other two contract types. In addition, formula based contracts are not entirely disconnected from market pricing, as they allow for negotiated discounts from the prices resulting from the formula and in some cases contain references to published prices as maxima or minima (also see recital 29).

- (80) The market for ethylene is mature, with growth rates linked to the GDP and an estimated basic growth trend of 2,5 %.

2.4. There is a strong similarity between Shell and BP in terms of market shares, capacity and costs

- (81) The merged entities BP/Veba and Shell/DEA will have very similar market shares in the range of [25 to 35]* % each. After the transactions the company structures of the two entities will be aligned as both are vertically integrated upstream into raw material supply as well as downstream into ethylene derivatives. They are also the ethylene producers who dispose of the largest cracker capacities in the ARG+ catchment area. Even if the size of their crackers is not identical, their overall capacities are similar ([1200 to 1600]* and [1600 to 2000]*) and they have the two biggest production capacities linked to the ARG+. These similarities in company and production structure will lead to a similarity of the respective cost structures of their businesses in the ARG+ area.

- (82) The parties argue that based on a market share calculation excluding long term formula based contracts (as suggested by the parties), the market shares of the two new entities would differ significantly ([...]* and [...]* % respectively). However, as the Commission does not accept the market share calculation suggested by the parties, this argument is also unfounded with regard to an alleged market share asymmetry.

- (83) The parties further argue that there is no symmetry in costs, as the production costs vary significantly from cracker to cracker, and transportation costs vary from supplier to customer and customer to customer, based on their relative location. However, although the efficiency and as a result the production costs of different crackers in particular of different capacity might vary, the overall range of variation is limited. According to industry consultants, the maximum difference in production costs between the most and least economic plant is less than 25 %. [...]* Furthermore, it has to be considered that in terms of size, Shell/DEA's crackers are on the extreme points of the possible range (one cracker over [...]* kt and two relatively small crackers of [...]* kt each), whereas BP/Veba will have a homogeneous set of four crackers of approximately [...]* kt. Consequently, as production cost is strongly related to the capacity size of the cracker, it can be assumed that the overall, average production cost of both entities will be in a sufficiently similar range. In addition, the smaller scale crackers of DEA, BP and Veba respectively are located at the same site and therefore allow for combined economies of scale with regard to raw material supplies and logistics. Finally, the fact that transportation costs might differ for any given supplier-customer

combination is a general feature of the majority of markets where physical products are delivered. There is no indication that either of the two new entities would be in a fundamentally different position as regards transport costs in relation to the other entity. The advantage of BP/Veba in terms of lower costs and preferred access to the pipeline by virtue of its shareholding in the ARG company is balanced by the fact that Shell/DEA after the merger will dispose of production sites at both ends of the ARG and therefore has a certain ability to avoid long distance transports over the ARG.

2.5. Both groups are vertically integrated in a similar way and therefore have similar interests with respect to the upstream market for ethylene

- (84) Ethylene is a basic raw material for a number of downstream products. BP and Shell are – contrary to the current situation of DEA and Veba – vertically integrated downstream into ethylene derivatives, as would be the remaining ethylene suppliers post merger. Due to their vertical integration the combined entities Shell/DEA and BP/Veba will share similar incentives with respect to ethylene sales to ethylene derivatives producers, in particular to those downstream producers which do not have their own ethylene supply or do so only in part. Such sales may give the parties to the transactions incentives to increase ethylene prices in order to reduce the competitiveness of competitors in ethylene derivatives. Since most of the price formulas laid down in ethylene supply contracts are linked to published reference prices such a price increase would not only relate to the direct contract partners of the merged entities but could translate into higher market prices in general. In addition the published reference price NWECP, exclusively set on the ARG+, also applies to ethylene sales outside the ARG+ area. An increase of the ethylene price on the ARG+ can therefore translate into a price increase outside the ARG+.

- (85) The similarity of the two merged entities' incentives does not imply that they necessarily have to be active in the same downstream products. Such incentives are already provided by the fact that they are active in some of the same downstream markets as the ethylene customers and derivative producers linked to the ARG+, partly also direct ethylene customers of the parties to the two transactions. Such incentives can in particular be shown with respect to the different forms of polyethylene, ethylene oxide/its derivatives, and ethanol.

2.5.1. Polyethylene

- (86) Around 55 % of the ethylene produced within the ARG+ network is used for the production of the

different types of polyethylene (approximately 9 % are used for low density polyethylene (LDPE), approximately 23 % for linear low density polyethylene (LLDPE), and approximately 23 % for high density polyethylene (HDPE)). 42 % of the Western European LDPE capacity, approximately 34 % of the LLDPE capacity and approximately 46 % of the HDPE capacity are based on the ARG+. The ethylene costs amount to 67 % of the price of HDPE.

(87) In previous decisions the Commission ⁽¹⁵⁾ defined the market as 1. HDPE individually, and either 2. C4 LLDPE, C6 LLDPE and LDPE together or 3. C4 LLDPE and C6 LLDPE together and 4. LDPE individually. In order to assess the incentives of the parties to the transactions with regard to the ethylene supply it is sufficient to limit the analysis to the three main families of PE: LDPE, HDPE and LLDPE (defined as C4 LLDPE and C6 LLDPE).

(88) Shell is active in the polyethylene market via its joint venture Basell which Shell jointly controls with BASF. Basell is active in LDPE, HDPE and LLDPE, producing these petrochemicals partly in its different production sites linked to the ARG catchment area, partly outside the ARG area, mainly in Western Europe. Basell's market shares of the Western European PE market are in the range of [15 to 25]* % for LDPE, LLDPE and HDPE.

(89) BP is also active in all three types of PE in Western Europe. Its market shares are [between 5 to 15]* % for LDPE and [10 to 20]* % for LLDPE. After the recent combination of BP's and Solvay's HDPE production and marketing businesses in Europe ⁽¹⁶⁾, becomes effective, BP's market share (including the JV) in HDPE will have [approximately doubled]* in a Western European market.

(90) Producers of polyethylene downstream linked to the ARG+ and belonging to the group of ethylene net buyers are in particular Borealis (which is not vertically integrated in ethylene production in the ARG+) and DSM (which has to source ethylene to a considerable extent from third parties on the ARG+ and whose production sites are directly supplied by parties to the transactions). Borealis has Western European market shares of approximately [10 to 20]* % for LDPE, around [2 to 8]* % for LLDPE and [10 to 20]* % for HDPE. Parts of these volumes are produced in Borealis' PE plant linked to the ARG+. DSM's market shares are [between 10 to 20]* % for LDPE, LLDPE and HDPE, respectively. DSM is vertically integrated only as regards

its plant in Geleen, whereas its PE production site in Germany, producing LLDPE and HDPE, is supplied with considerable volumes of ethylene from the merchant market. A further PE producer linked to the ARG+ and not vertically integrated in the ARG+ area is Polimeri with a production site in Oberhausen.

(91) These companies would therefore be in direct competition with the PE businesses of Shell and BP, on the one hand, and would be dependent on ethylene supply from the ARG+ on the other, either as non-vertically integrated companies upstream into ethylene or net ethylene buyers on the ARG+. These downstream competitors are [*inter alia*, supplied by parties to the transactions]* With regard to these companies the said entities would share the incentives not to support their direct downstream competitors by the supply of economically priced ethylene. The interests of the combined entities are already now rather similar even if Shell's position (via Basell) currently is slightly stronger than BP's position in the markets for the different forms of PE in general. The similarity in market shares and structure has been very much reinforced by the Solvay/BP Chemicals/HDPE JV as this will lead to nearly identical market shares of Shell and BP in the field of HDPE. The contribution of Solvay's HDPE plant in the ARG+ to the JV may be seen as a consequence of the lack of upstream integration into ethylene in a market which is already now rather concentrated.

(92) The strong position of the parties to the transactions with regard to the supply of ethylene to downstream PE competitors is strengthened by BP's and Shell's position in linear alpha olefins (LAOs). LAOs, a further ethylene downstream product for which 3 % of the ethylene produced on the ARG+ is used, are a necessary copolymer for the production of HDPE. BP and Shell are the only producers of LAOs in Western Europe, having market shares between 30 % and 40 % for the year 2000 if the market is considered to be Western European-wide in scope (the remaining share relates to imports). The strong position in this field gives BP and Shell a further advantage over the downstream HDPE competitors and reinforces the similarity of the incentives as regards the ethylene supply in the ARG+.

2.5.2. Ethylene oxide/ethylene oxide derivatives

(93) Ethylene oxide (EO) is a highly reactive ethylene downstream product, produced by the catalytic oxidation of ethylene at elevated temperature and pressure. 15 % of the ethylene produced on the ARG+ is employed for the production of EO, 73 % of the Western European EO/EO derivatives capacity is linked to the ARG+. Ethylene cost as a percentage of the total EO cost amounts to approximately 70 %. After BASF, which is not active on the merchant market, BP, with a

⁽¹⁵⁾ See Case COMP/M.1671 — DOW Chemical/Union Carbide, OJ L 245, 14.09.2001, pp. 1 to 25.

⁽¹⁶⁾ Case COMP/M.2299 — BP Chemicals/Solvay/HDPE JV, 29.10.2001.

capacity of [400 to 500]* kt, including Erdölchemie, and Shell, with a capacity of [300 to 400]* kt, are the largest producer of EO in Western Europe. EO is mainly used to produce ethylene glycol (EG), comprising mono-ethylene glycol (MEG) (ethylene cost amounting to approximately 63 % of the total production cost) and the by-products di-ethylene glycol and tri-ethylene glycol. Other EO derivatives are ethoxylates, ethanolamines, glycol ethers and akoxylates (ethylene cost amounting to approximately 63 % of the total production cost). There is also, compared to total capacity of approximately 2 600 kt in western Europe, a relatively small merchant market for sales of EO in western Europe, of [less than 1 000]* kt.

market share of around [35 to 45]* % of synthetic ethanol in a Western European market, the next competitor is Sasol, which has a market share of around [15 to 25]* % and produces synthetic ethanol in a plant linked to the ARG+. The structural situation and the corresponding incentives would not change if, as submitted by the parties, agricultural ethanol were to be included in a general ethanol market. In these circumstances, BP's market share would be around [10 to 20]* %.

2.5.4. Arguments of the Parties, conclusions

(94) Shell's and BP's market shares in the Western European EO merchant market are around [25 to 35]* % (Shell) and [40 to 50]* % (BP, including Erdölchemie). The next competitors in the EO merchant market are Ineos and Sasol with market shares in the range of [5 to 15]* %. Both undertakings produce the EO in plants linked to the ARG+ and, hence, are direct competitors of Shell and BP and dependent on ethylene supply within the ARG+ network.

(98) The parties submit that the vertical integration arising from the mergers does not create incentives to raise the ethylene prices to the detriment of downstream competitors. According to the parties there are no appreciable incentives to raise downstream competitors' costs as the benefit for Shell/DEA and BP/Veba would be very small since such incentives arise only for downstream markets in which they themselves are active and with regard to volumes which are supplied to the ARG+ merchant market.

(95) Shell/DEA and BP/Veba are also active in the production of MEG, as the most important EO downstream product. According to the Commission's market investigation their market shares each lie between approximately [5 to 15]* % on a Western European merchant market for MEG and they directly compete with Ineos (having a market share of around [15 to 25]* %), producing MEG in a plant in the ARG+ area and being, *inter alia*, supplied by parties to the transactions. The same situation applies to di-ethylene glycol and tri-ethylene glycol as all producers of MEG produce, and sell, these petrochemicals as bi-products.

(99) First, it should be clarified that the Commission has not analysed whether the parties will, after the merger, achieve a dominant position in the downstream markets which would enable them to raise prices in the ethylene derivatives markets. The analysis of the collective dominance of the two entities in the ethylene market refers to the alignment of the merged entities' incentives in the (upstream) market for ethylene, which arises from their activities in the ethylene derivatives market. This incentive does not necessarily imply that the merged entities will be able to raise prices in the downstream markets. Such incentives already derive from the possibility to carry out a strategy to reduce the competitiveness of the competitors in ethylene derivatives by increasing their ethylene supply costs, thus squeezing their margins.

(96) According to the Commission's investigation Shell and BP are active in further markets for EO derivatives and compete there with non-integrated ethylene consumers linked to the ARG. This is the case, for example, for the sale of forms of akoxylates for which they compete with Ineos and Sasol which have linked their correspondent production sites to the ARG+.

(100) Second, the ARG+ accounts for 42 % of the ethylene production capacity in Western Europe and, accordingly, for a major part of the ethylene derivatives production capacity in Western Europe. Downstream competitors of the merged entities which are not vertically integrated into ethylene on the ARG+ account for considerable market shares in the ethylene derivatives markets.

2.5.3. Ethanol

(97) The proportion of the ethylene production on the ARG+ used for ethanol, a further product downstream to ethylene, is somewhat lower compared to PE and EO. BP is active in the production of ethanol, having a

(101) The fact that the situation seems to be different with regard to further products such as acetylene dichloride/VCM does not alter the conclusion that BP and Shell are to vertically integrated to a similar degree and share similar incentives with regard to the supply of ethylene producers on the ARG+.

(102) In conclusion, it has been shown for several of the ethylene downstream products that due to the similar degree of vertical integration of Shell and BP the combined entities would share similar incentives with regard to the supply of ethylene in the ARG+ area. A comparison of the parties' market shares, and those of their respective competitors' demonstrates that the new entities would be in a position where it would be both plausible and feasible to exercise competitive pressure on their competitors downstream in order to weaken their competitive potential and to gain additional market share on a long term basis. Furthermore, such pressure would have a high probability of success.

2.6. The competitive situation on the downstream markets for ethylene derivatives does not limit the two entities' ability for joint pricing strategy

(103) The parties submit that there is a limit to the potential increase in ethylene prices on the ARG+ as most of the ethylene derivatives markets may be considered as Western European-wide in scope, some of them even as global. For this reason, the producers of ethylene derivatives linked to the ARG+ will not be able to pass the increased raw material costs on to their customers since they are exposed to competition from producers having their production site outside the ARG+ and in particular from imports into Western Europe. The parties submit that this, in turn, would limit the potential for an increase of ethylene prices in the ARG+ by ethylene producers.

(104) According to the Commission's market investigation it may be the case that the producers of ethylene derivatives in certain market situations will not be able to pass the increased raw material cost on to their customers due to the competition which they face from producers located outside the ARG+ and imports of the ethylene downstream product. However, such a limit for the increase of ethylene prices does not change the general incentives of the merged entities. Even if the ethylene prices cannot be increased above a certain limit the merged parties would share the incentives to increase prices up to this limit, gain the profits of the downstream derivatives producers and reduce their competitiveness compared to their own ethylene derivative units.

2.7. Competition between the two new entities risks to lapse on the basis of a tacit allocation of contracts

(105) In light of the contractual and geographical situation on the ARG ethylene market, there is a clear and easy to handle mechanism at the two new entities' disposal to tacitly divide the market among them according to two closely related criteria (i) continuity in long term contracts and (ii) geographical proximity.

(106) The vast majority of ethylene supplies are based on long term contracts, spot sales do not play any role in this market. As will be explained in more detail (recitals 112 to 115), there is a high market transparency in terms of the parties to individual contracts and the volumes and reference prices involved. The ethylene production capacity is published in journals as CMAI, the volumes and the corresponding ethylene need of the respective derivative plants are known, and the owners of the infrastructure may also learn about actual throughput to individual customers.

(107) The Commission's market investigation has revealed that transport costs on the core ARG are a non-negligible factor. Therefore, contracts are primarily entered into by those ethylene producers and consumers which are located close to each other. This close relationship is often supported by the transport of the supplied quantities via privately/producer owned extensions of the ARG pipeline in order to economise on transportation costs arising from the use of the core ARG. This allocation of customer supply contracts among the producers based on the proximity of the buyer to the own ethylene production site can also be applied to new customers. Such a strategy will be significantly facilitated by the market structure post mergers. Whereas until now buyers in the Gelsenkirchen/Cologne area usually dual-sourced their supply from Veba (having a cracker in Gelsenkirchen) and BP (with Erdölchemie's cracker in Cologne), after the merger BP/Veba will control the total supply of those customers, supplying them partly by pipelines owned or under control of the merged entity. DEA, on the other hand, mainly supplies the Wesseling area and plants further to the south of Germany being directly linked to their Wesseling production site by extension pipeline, whereas Shell has natural access to consumption sites located in Rotterdam from its ethylene cracker and sea terminal in Moerdijk.

(108) The parties argue that the continuity of existing long term contracts and a preference for closely located suppliers is already a result of the general economic circumstances of the ethylene supply market such as high transport costs and physical links between certain supplier/customer combinations. In their view, the mergers therefore would not add any further elements to the prevailing circumstances.

(109) However, the fact that competition for certain customers is already limited for geographical and duration reasons does not mean that this situation will not be worsened. There is currently a certain degree of competition for contracts over the whole of the ARG, and also long term contracts do actually change hands. [...] * Several parties and third parties stated at the hearing that they consider suppliers/customers in the

whole ARG area, and not only those closely located to their sites. In addition, third parties like BASF indicated a significant number of contracts which they won or lost over the past years. It is true that Shell's and DEA's production sites are located at the ends of the ARG area. However, this does not mean that, after termination of DEA's CPO contract, they would not become competitors for contracts all over the ARG+. Furthermore, the possibility of swaps currently also enables suppliers to reach customers further away without incurring significant transport costs. Therefore, there is currently still a considerable degree of competition for expiring and new contracts throughout the ARG which could and would be eliminated.

(110) Besides and in addition to the tacit allocation of contracts, which affects the competition for new contracts, it has to be expected that there will also be a tacit alignment of the duopolists' behaviour as regards the quarterly contract price negotiations with their current customers. Due to the similarity of incentives not to enhance downstream competitors' potential through cheap supplies of ethylene, any initiatives to lower prices, in order to keep the nominated volumes at the upper end of the possible ranges, will become unlikely after the merger.

(111) To conclude, it is likely that the market will be tacitly shared on the basis of the mechanisms described above.

2.8. The ethylene market is sufficiently transparent to allow for tacit coordination between the two new market leaders

(112) The parties argue that there is not sufficient transparency in the market. Although the vast majority of contracts contain a reference to the published ICIS quarterly contract price, the actual prices paid are secret as the individual discounts from the basic contract price are not disclosed.

(113) The Commission nevertheless takes the view that the ethylene market on the ARG+ is sufficiently transparent to allow for tacit coordination and the lapse of competition between the two new market leaders. Although the exact terms of individual contracts are not openly accessible, there is a high degree of transparency with regard to price trends and contract participants. The Commission's concerns mainly relate to the fear that the two new entities will not actively compete for the other's current customers, which are mainly linked by long-term contracts, and therefore engage in a market sharing based on continuity and geographic proximity. For this kind of tacit market sharing, no

individually detailed contract data and transparency is necessary. It was confirmed by several third parties that due to the very limited number of players in the market, the published data together with general market intelligence make it possible to determine whether contracts changed the supplier and who won them.

(114) The same holds true with regard to the lapse of any downward price initiatives in the quarterly price negotiations. Price reporting agencies publish reference prices for spot and longer term sales on a quarterly to weekly basis. These prices closely reflect the result of individual negotiations and apply to the majority of the contracts. Furthermore, for example ICIS-LOR in its weekly market overviews reports individual negotiations that allow experienced market players, due to the high concentration of the merchant market and the limited number of participants, to identify even the individual parties to a contract. In ICIS-LOR's reports of last year, the following passages have been published: 'A major German producer agreed a price of EUR 705, an increase of +EUR 20/mt over Q3 ⁽¹⁷⁾, with a major German consumer. The contracts represent large volumes and involve traditional price settlers', 'Additional support was registered this week for the Q2 contract price agreed initially last week between a German producer and Benelux/Med consumer at EUR 640 FD', 'news came late today of an agreement in Germany between several major players for a Q1 price decrease of EUR 40/mt to EUR 665 FD', 'a German producer indicated that it had offered a EUR 30/mt decrease to all its customers, though by late Friday, these had failed to respond favourably'. Market participants declared that this information can easily be interpreted in a way that reveals the parties to the contract in question. In the light of this type of information available through publication to all market participants, activities of other competitors and price trends are transparent in the ethylene market.

(115) It further has to be noted that the tacit coordination and the lapse of competition between the players does not require the entire transparency of all contract details. In order to monitor whether the other group follows the general price trend and the tacit pattern not to compete through price cuts, the data published by ICIS appear to be sufficient. The parties argue that if the ICIS price and reporting system were to be 'abused' by the parties to coordinate pricing strategies, and the contract partners considered that it no longer reflected market conditions, it would simply not be used any more and thus disappear as an element of transparency. However, the vast majority of contracts contain a reference to the ICIS price and are concluded for a long term. Any change in the pricing reference would only be possible at the end of the contract. During the lifetime of the contract, any change of the ICIS reference is generally foreseen in the

⁽¹⁷⁾ I.e. the published contract price for the third quarter.

contracts only in case ICIS does not publish a reference price any longer, and not in case this price is no longer considered as credible.

2.9. There are sufficient means of retaliation at the two players' disposal

(116) The parties argue that there are no credible and efficient means of retaliation at the new entities' disposal to deter the other new entity from deviating from a pricing or market sharing pattern. Due to the long term nature of the contractual relations in the ethylene market, opportunities to retaliate come up infrequently and with significant delay after the deviation. According to the parties, any attempt to retaliate via aggressive pricing would leave the retaliator with a costly low or zero margin contract for a long term making the measure disproportionately harmful in relation to the gain from deterring the deviating rival. The costs for retaliation and the disproportion are further increased by high transport costs which would occur if retaliation involved targeting a customer located further away.

(117) The Commission takes the view that the two combined new entities have sufficient means of retaliation to deter the other entity from deviating from parallel behaviour, both with regard to the tacit allocation of contracts and with the lapse of downward pricing initiatives in quarterly negotiations.

(118) Through the detailed pricing and negotiation information which is openly published by ICIS or CMAI, there is a high transparency of the pricing and contracting activities of the other competitors on the market. Consequently, it will be possible for both parties to closely monitor whether the other party follows an initiative to increase prices and, more generally, to monitor the duopolistic behaviour according to the criteria set out recitals 105 to 111.

(119) Both new entities will dispose of sufficient accessible volumes to be able to compete for the other's customers. In addition to its capacity on the ARG, Shell has privileged access to imports from outside the ARG area through its import terminal. In addition, Shell could shift the capacity which was used by third parties to own imports. As an ethylene producer, BP has preferred access to other producers' import terminals, as it can offer swap agreements between the Antwerp area and its production sites which are located at the Eastern end of the ARG. In addition, BP plans to increase the capacity of its Erdölchemie crackers in 2001/2002.

(120) Despite the mainly long-term nature of contractual agreements for the supply of ethylene, there is sufficient room for immediate reaction in response to any deviation from a parallel trend. There are a large number of contracts running in the market, which overlap in terms and expire on consecutive dates. Therefore, in addition to contracts for new volumes and involving new market participants, there are permanently contracts which terminate or need re-negotiation, and where one of the two new leaders could aggressively attack the other to retaliate for deviation from parallel behaviour.

(121) Moreover, as a general point, the necessity and sophistication of a retaliation mechanism cannot be analysed without taking the incentives and abilities to deviate from a behavioural pattern into account. The retaliation mechanism must be sufficiently plausible and effective to counterbalance the existing degree of probability and incentives to deviate in the market situation of the individual case. In the present case, the parties' argument related to the long term nature of the contracts also applies to the possibilities to deviate. The possibilities for retaliation occur with the same frequency as the possibilities deviation, and therefore are sufficiently frequent and effective. In addition, if in the parties' view market interaction is relatively slow and infrequent compared to other markets, then the possibilities for deviation in the first place are as well, and underpin the probability and stability of the market sharing pattern. The same applies to the cost argument. If the parties take the view that retaliation is costly, then the cost of deviating by winning a contract in deviation from a coordinated pattern in the first place is very high, too, and reduces the likelihood of such action. This is particularly true in the light of the likely market sharing pattern based on continuity and proximity to be followed by the two new entities. Any deviation from that pattern would mean that the deviating entity would bid for a contract which has been in the hands of the other competitor for a long time and where he has preferred competitive ability to supply. Consequently, the deviator would have to invest considerably to bid for this contract where he has a less favourable supply position, which decreases his incentives to do so.

(122) Retaliation is also possible with regard to the quarterly negotiations on the basic contract price in long term contracts. At that stage, a change of the supplier and therefore an attempt to win the contract itself is not possible. However, due to the two new entities' strong influence in the published price setting mechanism, retaliation is possible in the form of the agreement and publication of a lower quarterly contract price, which then results in a significant pressure on the other party to follow this trend, as its customers will refer to the

lower price agreed by the other party with its customers.

- (123) Moreover, BP/Veba will be able to use its influence over the ARG company as a deterring factor vis-à-vis Shell/DEA. Due to its ability to block essential decisions on the use of the ARG, BP/Veba is in a position to [...]*, which could harm Shell/DEA's competitive position. Shell currently is an active user of the ARG pipeline, and DEA has to be considered as a potential user after the expiry of its contract with CPO.

- (124) On the other hand, Shell controls one of the import terminals linked to the ARG. [...]*. Thus, Shell/DEA could react to any deviation by BP/Veba through restricting the access to its terminal and blocking the actual handling of incoming BP loads, which would have an immediate impact on BP/Veba's position on the market.

- (125) In conclusion, there is a variety of retaliation means at the future duopolists' disposal, which could be used separately and in different combinations. They are sufficient to monitor, support and penalise any deviation from tacit parallel behaviour of the two new entities.

2.10. There are high barriers to entry given the limited possibilities of imports and the control of the necessary facilities

- (126) Imports are not likely to counterbalance the two new entities' market position. In 2000 imports amounted to a peak of approximately 15 % of the overall consumption due to unscheduled cracker downtimes, whereas they usually account for around 10 % of total (captive and merchant) demand. A large proportion of these imports are related to ARG producers and consumers that import material from their own production sites outside the ARG for captive use, such as Exxon, BP and Borealis. Ethylene imports into the ARG-pipeline have to pass via one of the five import terminals located at the North Sea coast. There are no other economically viable means of transport to feed consumers linked to the ARG pipeline. All five import terminals are owned by ethylene producers: Shell, BASF, Exxon, Atofina (via FAO) and Dow. There are no independent terminal and storage providers that could offer capacity for third parties. Of the existing overall capacity, only a small proportion is made available for third parties, whereas the majority of the terminals' capacity was used for the owners' own imports. Of the total volumes imported via the individual terminals, only 10 to 20 % were terminalled for third parties.

- (127) The spare capacity which the terminal owners do not use for their needs is furthermore primarily reserved for swaps with other terminal owners. By these exchange agreements terminal owners allow other owners to use their terminal in case of capacity bottlenecks, and acquire in turn the right to use the other's terminal in case they themselves do not have enough spare capacity to handle incoming import volumes. [...]*. Due to these agreements, the capacity available for third parties is further reduced.

- (128) In addition, the storage facilities of most of the import terminals are to a significant extent used for the storage of the owners' production at the crackers nearby, and only a proportion is used to store imported material. There are indications that the storage capacity was not expanded in parallel with production capacity increases, which results in a decreasing trend of available capacity for third party imports. There are no indications that the terminal capacity will be significantly increased in the foreseeable future. In addition to the considerable cost for a large scale terminal estimated at around EUR 30 million, environmental regulations restrict the building of additional capacity at the coast.

- (129) Furthermore, ethylene consumers, especially those which are not vertically integrated upstream into ethylene and therefore are not in a position to offer product swaps, indicated that on the basis of their agreements with the terminal owners they are not in a position to secure their demand for ethylene by imports on a long-term basis. Even if such consumers have terminalling contracts, for contractual and practical reasons they are not able to enter into corresponding long-term supply contracts. Practical problems may arise in particular from the order of berthing of ships and ship vetting. In contractual terms, it appears to be very common that terminalling contracts are linked to the existence and duration of a supply agreement with the terminal owner and that the volumes for which the terminal is made available are at a certain ratio with the volume directly supplied by the terminal owner. In addition, such contracts partly provide for certain rights of the terminal owners whereby the ethylene purchaser is obliged to negotiate with the terminal owner upon direct supply instead of using the terminal. Therefore, even if this type of consumer has concluded a terminalling agreement, it can make use of imports only on a case by case basis for spot volumes. There was agreement among the majority of the ethylene consumers that it is not possible to import significant volumes of ethylene on a long-term basis into the ARG. Imports are considered only as a buffer for additional spot volumes, but not as an alternative to cover a large proportion of basic demand.

(130) In addition to the bottleneck situation in terms of availability of terminal capacity, terminalling and transport cost are another significant obstacle to imports. Transport cost have been estimated at between EUR 15 to 55/t from European sources up to EUR 150/t from sources in the Middle East. Whilst according to third parties these transportation costs can partly be compensated by lower purchasing prices for ethylene supplied from regions with low feedstock and production cost, this is not the case for the additional costs to be incurred for further transporting these imports from the port onwards. To the shipping costs, terminalling fees between [approximately EUR 25 and 45/t]* have to be added. For consumers that are not located close to the import terminal, transport costs on the ARG pipeline also have to be taken into account, which may reach EUR 70/t for the longest transports according to the published ARG throughput tariffs for third parties ⁽¹⁸⁾. Numerous ethylene consumers, including one of the most important purchasers on the merchant market, qualified these costs as prohibitive and indicated that they considered imports not to be an economically viable alternative. The remaining consumers agreed that apart from smaller spot volumes imports were not economic on a larger scale.

(131) It can therefore be concluded that imports will not be able to put sufficient competitive pressure on the two new entities.

2.11. New market entry through the building of new capacity is not expected to a significant degree

(132) Ethylene production capacity utilisation rates are estimated at around 96 % in Western Europe and even higher in the ARG area. Therefore, significant volumes to exercise competitive pressure on the market could only derive from new capacity to come on stream in the near future and which would not be absorbed by increased captive use, but would be available for the merchant market. However, this is not the case for the ARG-area.

(133) Due to extremely high investment costs, which are estimated at over [EUR 500]* million for an economically viable [...] kt ethylene cracker, the building of an entirely new cracker on the ARG pipeline, either by a completely new entrant in the market or by an existing supplier is highly unlikely. The parties agree that a large scale new entry cannot be expected in the foreseeable future.

(134) However, the parties submit that there are constant capacity increases and debottleneckings of existing

plants, which exercise significant pressure on the market. According to the parties, although a large proportion of these capacity extensions will be committed to captive use in the medium and long term, they would effectively constrain existing suppliers' market power during the time lag between ethylene capacity expansion and the corresponding increase in derivatives production.

(135) As a general point, any debottlenecking of existing plants does not increase the number of existing suppliers on the market, and in particular does not provide a new, independent force on the merchant market. Furthermore, as accepted by the parties, ethylene supplies mainly rely on long-term contracts. Consequently, volumes which are on the market only for a limited period of time until the downstream consumption of the respective supplier is increased accordingly, cannot be considered a competitive constraint with regard to the usual long term supply relations.

(136) The most important foreseeable increase in existing capacity is an additional 600 kt at Dow's Terneuzen facility scheduled for the end of 2001. However, according to the Commission's market investigation these new volumes are intended for captive use in DOW's downstream derivatives capacity and it is expected that [...]*. Also the limited number of other projects is driven by the enlarged captive demand of the respective undertaking. This is the case for the projects of the net buyers [...] as well as the capacity increases of integrated producers with captive consumption [...]*. The latter projects, in addition, only relate to smaller volumes.

(137) As the huge majority of these new volumes will, at least in a medium term perspective, be captively used and not sold on the merchant market the envisaged capacity increases will not be able to counter the joint dominance of the merged entities. Furthermore, there are several new projects of non-integrated producers which will increase ethylene demand, such as a new propylene oxide/styrene monomer plant at Rotterdam, which Bayer will operate through a joint venture with Lyondell and which is expected to come on stream in the second half of 2003 ⁽¹⁹⁾. Therefore, the remaining volumes of the increases in capacity will be absorbed by new downstream ethylene production sites and will not be suitable to significantly alter the competitive situation on the market in the short and medium term.

⁽¹⁸⁾ Third parties [...] can obtain [...] discounts from these figures. [...]*.

⁽¹⁹⁾ The Port Authority of Rotterdam is currently building a pipeline link from Rotterdam to the ARG on the basis of Shell's Moerdijk pipeline, see the Article 'Investing in pipelines' in ACN/CMR/ECN, Port of Rotterdam supplement, September 2001, pp. 21 and 22.

2.12. There is no sufficient countervailing buying power

(138) There are a number of net ethylene purchasers connected to the ARG pipeline. The demand of the five leading net buyers (Solvay, Borealis, Basell, Celanese, and LVM) accounts for around [50 to 60]* % of the total merchant market. Joint purchasing agreements are limited to CPO, which negotiates ethylene supplies for Celanese, Clariant and Basell, and Degussa's handling of Vestolit's and Sasol's requirements. The Degussa arrangements will cease [...]*. As regards CPO, the respective agreements are a result of the divestment of former members of the Hoechst group, for which economic supplies had been secured at the time. CPO's contracts with its customers [...]*. Furthermore, nearly half of CPO's demand [...]*. Basell today has its own ethylene cracker and is likely to be able to procure remaining demand on economic terms via its parents. Against this background, CPO itself expressed the expectation that it will not continue to exist in the present form after the expiry of its supply contracts with DEA and Veba.

(139) The parties submit that ethylene consumers have a significant flexibility in their demand, whereas ethylene suppliers are forced to sell their volumes on the market, due to limited storage capacities for ethylene and pressure for high utilisation rates as a result of high investment costs. Consequently, ethylene customers could resist any price increase by lowering their off-take volumes, fulfilling their derivatives contracts from their stocks and putting ethylene producers under significant pressure to sell their product which they are not able to store. However, the consumer's situation does not appear to counterbalance the new entities' power.

(140) First, ethylene crackers on the ARG are running at extremely high utilisation rates of 97 % and more. Therefore, ethylene producers do not appear to be in a situation where they already suffer from low capacity utilisation and would need to keep existing levels at any price to avoid significant losses. In addition, consumers of ethylene share the interest of high utilisation rates of their ethylene processing facilities to minimise average unit costs with the ethylene producers. Derivatives producers confirmed that their plants are also designed to run at a capacity utilisation of 90 % or higher in order to be profitable. Therefore, consumers do not enjoy greater flexibility than the ethylene producers in that respect. Furthermore, ethylene producers do in fact enjoy a certain flexibility in output by maintaining high utilisation rates. Imports are one means of flexibility, as

they could be reduced in the short term to react to a reduction in demand. Another option to buffer demand movements are time swaps. There are always some crackers out of production due to scheduled or unscheduled maintenance works. Suppliers could agree to supply the other's customers during its cracker's downtime, while getting the product back at a later stage in the year.

(141) Second, the usual long term contracts allow only for limited decreases of the contract volumes. In general, there is a range of approximately [...] % variation in the volumes actually purchased in relation to the initially agreed contract figure, whilst other contracts only provide for hardship clauses which allow for adjustments only in exceptional situations. The potential for ethylene customers to respond to a joint price raising strategy by the new entities by threatening to reduce demand is therefore limited.

(142) Third, the allegedly greater difficulty in storing ethylene than derivatives produced by ethylene customers does not create a sufficient demand flexibility. This argument is based on the assumption that ethylene consumers would lower their production and consequently their demand for ethylene while fulfilling their supply obligations with their derivatives customers out of their stock. However, there are several elements contradicting this assumption. In general, keeping stocks to a larger degree than is necessary for own operational purposes and buffering movements in derivatives demand, is also costly and uneconomic for derivatives producers. Investment in huge additional storage capacity in order to be able to react to a possible attempt to raise prices (of which the occurrence and timing is unknown) by ethylene producers therefore does not seem a viable and economic option for derivatives producers. To counterbalance an attempt to raise the quarterly contract price in a negotiable contract, it would be necessary to work three months off stocks. However, the usual stocks of ethylene derivatives producers are currently of a maximum 30 days. Even higher stock volumes would be required to resist price rises at the point of the negotiation of a long term contract running for several years. Furthermore, derivatives producers cannot anticipate when ethylene producers will start their attempt to increase prices. On the other hand, they need their stock for their own operational purposes to buffer unexpected production and demand movements. Therefore, an attempt to raise prices may occur at a point in time when derivatives producers' stocks are low, due to unexpected demand increases or unscheduled production downtime. In such a situation, the ability to lower ethylene demand and derivatives production is even more limited. It therefore has to be concluded that the incentives and possibilities for a lasting reduction of demand are limited and therefore

are not suitable to counterbalance an attempt to increase prices.

2.13. Conclusion on collective dominance

- (143) It is therefore concluded that the two proposed concentrations would result in the creation of a collective dominant position of the two new entities Shell/DEA and BP/E.ON on the market for the supply of ethylene on the ARG+ pipeline network.

3. Commitments

- (144) On 28 November 2001 the parties in this case and of case M.2533 BP/E.ON offered certain commitments to remove the competition concerns which the Commission had identified in its Statements of Objections of 24 October 2001. The commitments will be summarised and assessed in the following points.

- (145) The full text of the commitments of the parties is set out in the Annex.

3.1. Commitments offered by Shell/DEA

- (146) Shell and DEA commit to make available access to Shell's terminal facilities at Moerdijk, Netherlands, and to Ethylen Pijpleiding Maatschappij BV (EPM)'s pipeline from Moerdijk to Lillo (Antwerp) to one or more users for a total aggregate ethylene volume of up to 250 thousand metric tonnes per annum. The terms on which such access is to be made available are outlined in an attached model Ethylene Terminalling Agreement. This access will be made available from 1 January 2003 until at least 31 December 2012 on fair and non-discriminatory terms to any one or more existing or prospective competitor(s) or customer(s) for ethylene on the ARG+. Preference will be given to such competitors and customers who do not own a terminal connected to the ARG Pipeline.

3.2. Commitments offered by BP/E.ON

- (147) BP and E.ON undertake to divest any two of the three BP/Veba Oel shareholdings in the ARG, together with all equity and voting interests attached to such shareholdings to a suitable independent purchaser approved by the Commission.
- (148) For an interim period, until the shareholding in the ARG is divested, the parties undertake not to exercise their blocking minority with regard to decisions requiring a [special]* majority. The parties undertake to vote any two of their shareholdings in the ARG in accordance with the unanimous decisions of the other shareholders, with regard to all decisions which require a [special]* majority. As long as E.ON continues to hold

a controlling interest in Degussa, the parties further undertake that BP and/or E.ON will also vote the rights attached to all three of the BP/Veba Oel shareholdings in accordance with the unanimous decisions of the other shareholders in relation to decisions requiring a [special]* majority.

- (149) BP/E.ON undertakes that they will guarantee to [an ethylene customer]* that ethylene delivered via the ARG pipeline to Gelsenkirchen will be made available at [that customer's]* plant in the event of the supply contract between [...] being terminated with effect from [...] or thereafter. This guarantee is made regardless of the source from which [that customer]* may decide to purchase ethylene. It will last for a period of [...]*, with an option exercisable by [that customer]* to renew for a further period of [...]*.

3.3. Assessment

- (150) The major competition concern identified by the Commission is that the elimination of two independent ethylene suppliers on the merchant market will lead to a collective dominant position of the two new entities. The underlying infrastructure in the ARG+ area, namely import terminals and pipelines, is a key factor in that concern in two respects. The access to and influence in the infrastructure strongly enhances the market power of the two new entities, [...]*. Thus, the infrastructure is a decisive factor for competitive interaction in the present market for ethylene, and its degree depends very strongly on the open accessibility of the infrastructure means. Both commitments taken together provide and guarantee the openness of this essential infrastructure.
- (151) The opening of Shell's import terminal for third party import volumes of up to 250kt annually will strongly enhance the availability of ethylene on the ARG market from competitive and independent sources. Several third parties identified the non-accessibility of import terminals on a long term basis, for considerable amounts and for competitive prices as the major obstacle for imports. Due to the fact that in the light of extremely high investment costs the entry of a completely new supplier on the market is highly unlikely in the foreseeable future, imports are the only source of additional, independent ethylene supplies into the ARG+ market. The volumes covered by the commitment are of a size which is suitable to considerably constrain the new entities' competitive potential. 250 kt equal the annual capacity of one whole smaller sized cracker, such as the ones operated by DEA. If all volumes were contracted and imported, this would equal the installation of a new independent ethylene production site on the ARG. It would also represent an increase of the current third party imports by nearly 400 %. The terms of access proposed by Shell will allow for non-discriminatory, long-term access to the terminal at competitive prices, and will give a preference to non-terminal owners as terminal owners dispose of their own importing facilities.

(152) There is a high probability that these volumes will be imported as several third parties were interested in imports on a long-term basis and sufficient volumes of ethylene are available in particular from Saudi Arabian sources.

(153) The divestiture of the import terminal to a third party, which in theory would completely eliminate the control of Shell/DEA over this infrastructure facility, does not appear to be a viable option. First, the terminal is not workable without inter-linked storage facilities. These ethylene tanks are themselves integrated in the cracker facilities and operations. A large proportion of the terminal storage therefore is used at unforeseeable rates for fluctuations in cracker output and demand.

(154) Second, open and non-discriminatory access to the terminal would only be guaranteed by a buyer who is not active in ethylene or ethylene derivatives, and thus does not have any own business interests related to the terminal. In light of the high cost of the terminal and the need for significant market intelligence in relation to ethylene to economically operate the terminal, it is highly unlikely that such an independent buyer could be found.

(155) The influence of BP/Veba in the core ARG pipeline through its shareholding and its blocking rights in the operating company is another element restricting open access to infrastructure and thus enhancing the parties' market power. In addition, these shareholdings restrict the competitive potential of other non-shareholder suppliers. The divestiture of two of the three shareholdings of a combined BP/E.ON will entirely eliminate the decisive influence of this group in the ARG company. After this divestiture, BP/Veba will no longer hold any preferred blocking rights and its position will be reduced to that of the other shareholders. In addition, the entry of new shareholders into the ARG company will broaden the different interests which are represented by the shareholders in the company and thus guarantee the common carrier character of the ARG, without preferring any particular supplier's or customer's interests. The interim undertaking offered by BP/Veba will provide for an immediate elimination of BP's veto right with regard to essential decisions on [...]*. This will reduce BP's position to that of a normal shareholder until the divestment procedure is completed and thus will immediately remove the substantive concerns related to BP/Veba's combined shareholding in the ARG company. The commitment also removes any concerns resulting from the shareholding of Degussa, which belongs to the E.ON group and is not part of the present transactions.

carrier will have two major effects which will considerably improve the competitive situation in the ARG area and thus counterbalance the new entities' market position. First, it will enhance competition through existing suppliers on the ARG. The open access to the pipeline at competitive cost should allow existing suppliers to actively compete for customers over the whole of the ARG area, increase customer's choice between suppliers and remove the ability of the two new entities to share customers according to the criteria set out above. Second, and equally important, the competitive potential of Shell's commitment to open the import infrastructure can only become fully effective if it is ensured that the additional volumes obtained from independent outside sources can be transported economically to locations all over the ARG up to its eastern end.

(157) BP/Veba's commitment to provide access to ARG supplies for the ethylene customers located at [a site in the Rhine/Ruhr area]* (currently [...]*) removes the remaining bottleneck infrastructure which is under control of BP/Veba. It eliminates any possibility that BP/Veba will remain protected from competitive constraints originating from alternative ARG suppliers with regard to these customers. BP/Veba will no longer be able to cut off these customers from the ARG via the denial of access to the proprietary pipeline linking these customers with the ARG. This will allow for competition on equal grounds also for these buyers, and will remove another instrument that would facilitate tacit market sharing between the two new entities. There are no other ARG+ connection pipelines under the control of the future duopolist entities which could be used to cut off ethylene consumers from competitive supplies over the ARG.

3.4. Conclusion

(158) It is concluded that the commitments offered by the parties assessed in combination will remove one of the major bases of their market power. They allow for sufficient new competitive constraints which will (i) counterbalance the new entities' market position, (ii) deprive them of their possibility to refrain from competing actively on the market and (iii) eliminate the possibility of tacit market sharing. On that basis, it is concluded that no collective dominant position will be created on the market for ethylene in the ARG+ network and that the competition concerns expressed in the Statements of Objections are resolved.

PART 2: TOLUENE

A. RELEVANT PRODUCT MARKET

(156) Apart from eliminating BP/Veba's strong foothold in infrastructure as a strengthening element of their market power, the reconstitution of the ARG as a common

(159) Toluene is one of the three so called aromatics chemicals (alongside benzene and xylene) extracted from

reformed naphtha or from pyrolysis gasoline (pygas). Toluene is a liquid used for the production of toluene di-isocyanate (TDI), which in turn is used to manufacture polyurethanes, which are used in a variety of goods such as foams, coatings and waterproof clothes. It is further used for nylon production and as a solvent in the chemical and pharmaceutical industries for paints and greases. Toluene is also converted into the other aromatics benzene and xylene. Finally, due to its octane enhancing qualities, toluene is also blended into gasoline, which can have a toluene content between 1,5 % and 25 %.

(160) According to the application, toluene is produced in a variety of different grades of purity. In the market, several denominations for typical purity grades are used. The most common are 'TDI-grade' toluene which is of a high purity required for the production of TDI. On a lower level there are 'industry' or 'DSM-grade', named after the major customer who set this specification, and 'nitration grade', which are mainly used for nylon production, solvents and gasoline blending. In the following, the term 'TDI-grade toluene' is used for toluene of a suitable purity for the production of TDI, which is 99,80 %.

(161) In its Statement of Objections, the Commission reached the preliminary conclusion that TDI-grade toluene forms a distinct product market. The parties strongly dispute this finding on the basis of the following arguments: They submit that TDI-grade is not a fixed specification but several customers have their own differing specifications. Only a small proportion of TDI-grade toluene is sold to customers who need this high purity, whereas more than two thirds of the parties' production is sold to customers who could switch to lower qualities. According to the parties, there is also a high supply side substitutability as producers of lower grades could upgrade their equipment for the production of TDI-grade toluene with moderate investment. The fact that most producers replied to the Commission that this was not economically feasible results from the fact that only a small, or even non-existent premium is payable in respect of TDI-grade toluene compared to lower grades. The parties calculate that only a [small]* price premium would be required in order to allow the recovery of costs required to upgrade toluene production facilities to TDI-grade production. Only one of the several price quotation organisations publishes a spot price for TDI-grade toluene, but no contract prices are published. This is a further indication that no separate market exists for TDI-grade toluene. The parties further argue that there is an extremely high degree of correlation between the prices for the different grades (0,91 to 0,99). Although the published spot price shows periods of price premiums for TDI-grade, this does not reflect market realities. The spot market for TDI-grade is

quite illiquid and only very small volumes are traded on this market. The parties' sales prices show that TDI-producers pay less than other customers of TDI-grade toluene, inter alia due to higher volume packages purchased.

(162) The arguments brought forward by the parties and the Commission's further investigation indicate that there might indeed be only one market comprising all different grades of toluene. A large volume of TDI-grade toluene appears to be sold to producers for example of solvents which do not need the high purity and could switch to lower grades. Several producers indicated that due to limited price differences it was not economic to produce and store several grades of toluene. DEA for instance only produces TDI-grade toluene, and Shell does so at its Godorf plant. However, they sell [a large proportion]* of that production to customers other than TDI-producers. Another producer sells 100 % of its production to solvent producers where the high quality is not required. Some producers even sell TDI-grade toluene as a lower grade without indicating the higher quality, due to the lack of outlet for the product.

(163) This is also an indication that there is only a very limited price premium, if any at all, for the higher grades of toluene. The parties' sales prices show that TDI-producers pay less than those customers for which such a high quality is not indispensable. Due to the apparently low volumes traded on the spot market, the published prices which indicate some periods of price premiums are in fact of limited significance. On the other hand, a high correlation between the prices for the different grades of toluene can be observed.

(164) The parties estimate the costs of upgrading a toluene production facility for higher grades of purity at [less than EUR 15 million]*. This appears moderate and indicates a relevant supply side substitutability, which would increase if prices for TDI-grade toluene rise.

(165) However, it can be left open whether there is a separate market for TDI-grade toluene or whether toluene forms one single product market comprising all grades of purity. TDI-grade toluene would have to be defined as toluene suitable for the production of TDI. It appears that a purity of 99,80 % (or higher) is sufficient for the production of TDI. If all suppliers producing toluene of this purity are considered, no competition concerns arise, either on the narrower market for TDI-grade toluene or on an overall toluene market. It can also be

left open whether the lower grades of toluene might form together a product market or whether each grade forms a distinct product market, as DEA only produces TDI-grade and therefore there is no overlap between the parties' activities outside TDI-grade toluene.

B. RELEVANT GEOGRAPHIC MARKET

- (166) The parties submit that the relevant geographic market for toluene is western Europe (EEA+Switzerland). Toluene is traded actively within this area. It is a liquid which is readily transportable by ship, rail or road. Transportation costs account for around 5 to 10 % of the sales price, with a maximum of 15 to 20 % for ship transport from southern-Europe (Iberian peninsula) production sites to north-European customers. However, this does not appear to act as a barrier to trade between these areas, as producers located on the Iberian peninsula sell an important part of their production (up to 30 %) to northern Europe. In the light of this, it can be concluded that the relevant geographical market is at least western Europe. As the parties do not export any of the toluene they produce to destinations outside western Europe, it can be left open whether the geographical market is wider than western Europe.

C. COMPETITIVE ASSESSMENT

- (167) The current structure of the market for toluene suitable for TDI-production is as follows: Besides the parties, BP, Atofina, Exxon, Petrogal, Enichem and Aral Aromatics are active on the market ⁽²⁰⁾. Atofina and Exxon both produce TDI-grade toluene at [...]*. Enichem until last year used TDI-grade toluene only captively but became active on the merchant market after the divestiture of a TDI-production unit to a third party. Aral Aromatics was formerly part of the E.ON group, but since January 2001 has been a subsidiary of Redestillationsgemeinschaft GmbH ⁽²¹⁾. The volumes sold by Aral Aromatics are obtained [...]*.

- (168) The market shares are calculated as follows: All sales data are based on the year 2000 figures. However,

Enichem is considered as a competitor on the merchant market, as this reflects its actual and future market situation. The market share figures are based on the year 2000 volumes supplied to the recently divested TDI plant. Similarly, Aral Aromatics is considered as an independent competitor on the merchant market, in accordance with the actual situation in 2001. On that basis, the parties' combined share would be [25 to 35]* % (DEA [15 to 25]* %, Shell [5 to 15]* %). They are followed by strong competitors like Exxon [15 to 25]* %, Petrogal [10 to 15]* %, BP, Enichem, Atofina [all 5 to 10]* % and Aral Aromatics [below 5]* %. On an overall toluene market, the parties' combined share would be even lower, as additional suppliers like Cepsa and Huntsman would be active on that market.

- (169) Therefore, the parties will be subject to competition by strong other suppliers of toluene. Although [a large part]* of Enichem's volumes and [a large proportion]* of BP's volumes are committed to one customer on a long term basis, these volumes will be available in the medium term and constrain the parties' position on the market. With regard to the market for TDI-grade toluene, the absence of some suppliers seems to be motivated by a lack of sufficient price premiums for the higher grades of toluene. Any attempt to increase prices for TDI-grade toluene would attract further potential suppliers as the resulting price premiums would make the upgrading of current low grade production facilities economic. Finally, toluene is used for gasoline blending with a certain flexibility in required toluene proportion, as well as for the conversion into other aromatics. Rising prices for TDI-grade toluene would ultimately also attract volumes from these application to be switched to sales on the toluene merchant market.

- (170) The fact that a large proportion of TDI-grade toluene is sold to non-TDI-producers and that some volumes are not even marketed as high quality indicates that there is a certain oversupply of TDI-grade toluene with regard to the demand of producers who actually require this high quality. In addition, there are five major TDI producers in western Europe (Lyondell, Bayer, BASF, Dow and BSI) which due to their buying power appear able to balance the parties' market position. With regard to the parties, this is supported by the fact that the TDI producers seem to obtain lower toluene prices than non-TDI customers for the same quality of product.

- (171) It can therefore be concluded that the transaction does not give rise to competition concerns, either on a market for toluene suitable for TDI production or on an overall toluene market comprising all different qualities of toluene.

⁽²⁰⁾ The difference to the Commission's findings in the Statement of Objections with regard to the players on the market and their market shares relates to apparently different interpretations in relation to the term 'TDI-grade toluene'. Whereas several toluene suppliers initially indicated that they are not active in 'TDI-grade toluene', further investigation revealed that they either currently sell toluene to TDI producers for TDI-production, or that they did so in the past and their toluene produced today is still of a purity which would suit TDI-producers.

⁽²¹⁾ Redestillationsgemeinschaft is a joint venture of Thyssen KruppStahl, RAG AG, EBV AG, Rüttgers AG, Salzgitter AG and Hüttenwerke Krupp Mannesmann GmbH.

VII. CONDITIONS AND OBLIGATIONS

- (172) This chapter concerns the commitments offered by the parties as regards ethylene (recital 143).
- (173) Pursuant to the first sentence of the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
- (174) The achievement of each measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands; where the undertakings concerned commit a breach of an obligation, the Commission may revoke its clearance decision, acting pursuant to Article 8(5)(b) of the Merger Regulation, and the Parties may also be subject to fines and periodic penalty payments in accordance with Articles 14(2)(a) and 15(2)(a) of the Merger Regulation ⁽²²⁾.
- (175) In view of the foregoing, this Decision must be conditional upon full compliance by Shell with the commitment to grant access to its terminal for third parties as provided in paragraphs 1 and 3 of the commitments in the Annex. These commitments are given in order to remedy the collective dominance of Shell/DEA and BP/E.ON on the ethylene market on the ARG+ and to provide for competition on this market. The terms of use of the terminal as set out in paragraphs 2 and 4 to 7 of the Annex as well as in the draft terminalling agreement shall be obligations upon Shell them, as they aim at implementing the structural change of the market.

VIII. CONCLUSION

- (176) For the reasons set out above, and subject to full compliance with the commitments given by the Parties, it must be concluded that the proposed concentration

does not create nor strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. The concentration is therefore to be declared compatible with the common market pursuant to Article 8(2) of the Merger Regulation and with the EEA Agreement pursuant to Article 57 thereof, subject to compliance with the commitments set out in the Annex,

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Deutsche Shell GmbH would acquire sole control within the meaning of Article 3(1)(b) of the Merger Regulation of the undertaking DEA Mineraloel AG is declared compatible with the common market and the EEA Agreement.

Article 2

Article 1 is subject to compliance with the conditions set out in paragraphs 1 and 3 of the Annex.

Article 3

Article 1 is subject to compliance with the obligations set out in paragraphs 2 and 4 to 7 of the Annex as well as in the agreement in relation to the terms of access to the sea terminal.

Article 4

This decision is addressed to:

Deutsche Shell GmbH
Suhrenkamp 71-77
D-20355 Hamburg.

RWE Aktiengesellschaft
Opernplatz 1
D-45128 Essen.

Done at Brussels, 20 December 2001.

For the Commission

Mario MONTI

Member of the Commission

⁽²²⁾ See the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 2.3.2001, p. 3.

ANNEX

The full English text of the commitments referred to in Article 1 may be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html
