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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 and Article 53 of the EEA Agreement

(Case COMP/E-1/37.027 – Zinc phosphate)

(notified under document number C(2001) 4237)

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

(Text with EEA relevance)

(2003/437/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

1. THE FACTS

Having regard to the Treaty establishing the European Community,

1.1. SUMMARY OF THE INFRINGEMENT

Having regard to the Agreement on the European Economic Area,

- (1) This Decision imposing fines for an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement is addressed to the following undertakings:

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 thereof,

— Britannia Alloys & Chemicals Limited (Britannia),

— Dr Hans Heubach GmbH & Co. KG (Heubach),

Having regard to the Commission's decision of 2 August 2000 to initiate proceedings in this case,

— James M. Brown Limited (James Brown),

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

— Société Nouvelle des Couleurs Zinciques SA (SNCZ),

— Trident Alloys Limited (Trident),

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

- (2) The infringement consists of the participation of the producers of zinc phosphate in a continuing infringement and/or concerted practice contrary to Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, covering the whole of the Community and Norway, Austria, Sweden and Finland, by which they:

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

— fixed the price for the product,

Whereas:

- agreed on and implemented a mechanism for implementing price increases,
- allocated markets and market share quotas,
- allocated specific customers.

(3) The undertakings participated in the infringement during the following periods:

- Britannia: from 24 March 1994 until 15 March 1997,
- Heubach: from 24 March 1994 until 13 May 1998,
- James Brown: from 24 March 1994 until 13 May 1998,
- SNCZ: from 24 March 1994 until 13 May 1998,
- Trident: from 15 March 1997 until 13 May 1998,
- Waardals: from 24 March 1994 until 13 May 1998.

1.2. ZINC PHOSPHATE INDUSTRY

1.2.1. THE PRODUCT

- (4) The present proceedings concern zinc orthophosphates. Though they may have slightly differing chemical formulas (they can be 'dihydrated' or 'tetrahydrated'), zinc orthophosphates form a homogeneous chemical product hereafter generically referred to as 'zinc phosphate'.
- (5) Zinc phosphate is derived from zinc oxide and phosphoric acid. It is a non-toxic product and usually comes in the form of a non-cohesive, micronised white powder.
- (6) Zinc phosphate is widely used as an anti-corrosion mineral pigment in protective coating systems. Paint manufacturers use it for the production of anti-corrosive industrial paints such as automotive, aeronautic or marine paints.

1.2.2. THE PRODUCERS

- (7) Zinc phosphate has traditionally been essentially manufactured in Europe. As it became a high performance product for export in the past years, five producers located in Western Europe hold virtually the whole of the world market. The rest is produced by two US-based companies and by a few small producers, generally located in Asian countries.

1.2.2.1. *Dr Hans Heubach GmbH & Co. KG*

- (8) Dr Heubach GmbH & Co. KG (Heubach) is headquartered in Langelshiem (Lower Saxony), Germany. The company employs approximately 1 000 people and

is engaged in the manufacture and distribution of specialised organic and mineral pigments, mainly used as ingredients in the manufacture of inks, plastics and paints.

- (9) Heubach's worldwide turnover was EUR 71,02 million in 2000.

- (10) Heubach sells zinc phosphate, including modified types. Standard zinc phosphate is marketed under the name 'ZP10'. Modified types are marketed as 'Heucophos'. The production of zinc phosphate started in 1981.

1.2.2.2. *James M. Brown Limited*

- (11) James M. Brown Limited (James Brown) is a small company located in Stoke-on-Trent, Staffordshire, United Kingdom. The company has approximately 100 employees.

- (12) James Brown is engaged in the production of mineral pigments such as cadmium pigments, zinc oxide, metallic stearates or zinc phosphate. Whilst James Brown has been producing zinc oxide for many years, zinc phosphate represents a minor part of its production. The company entered this market in 1990 after the acquisition of a company named Diroval. James Brown's zinc phosphate is marketed under the Diroval brand name.

- (13) James Brown's worldwide total turnover was GBP 7,38 million (EUR 12,12 million) in 2000.

- (14) James Brown manufactures only standard zinc phosphate. The product is available as a standard grade, as a micronised grade or as a water-system grade.

1.2.2.3. *Société Nouvelle des Couleurs Zinciques SA*

- (15) Société Nouvelle des Couleurs Zinciques (SNCZ) is headquartered in Beauchamp (Val d'Oise), France. SNCZ, which currently employs 40 people, was created in 1984 through the buy-out of the Société des Couleurs Zinciques (SCZ). The Société Chimique Prayon-Rupel SA (Prayon), a Belgian chemicals group, acquired a 50 % share and presently runs the company (the rest of the shares are privately owned by a family).

- (16) Prayon comprises some 20 subsidiaries. It specialises in phosphoric acids, phosphate derivatives, fertilisers and pigments. With 10 manufacturing subsidiaries and 10 sales subsidiaries, Prayon had a consolidated turnover of BEF 11,32 billion (EUR 278,80 million) in 1998 ⁽⁵⁾.

- (17) Former SCZ produced zinc oxide, painting pigments and zinc dust. It enjoyed acknowledged know how in

these activities. Today, SNCZ has abandoned the production of zinc oxide and produces mainly zinc phosphate, zinc chromates, strontium and barium chromates. All these products are mineral, anti-corrosive pigments used in the paint and coatings industry.

- (18) SNCZ shares its offices in Beauchamp with a 'sister' company named Silar SA (Silar) and controlled by the family holding a 50 % stake in SNCZ. The two companies share the same administrative staff, although they have distinct sales and marketing departments. Silar's main task is to market the zinc oxide produced by Silox SA (Silox), a subsidiary of Prayon located on its Belgian site.
- (19) SNCZ is today the second largest anti-corrosive pigments producers in the world. Its worldwide turnover was EUR 17,08 million in 2000.
- (20) SNCZ produces both standard and modified types of Zinc phosphate. Standard types are marketed under the name PZ20 (tetrahydrated) and PZ W2 (dihydrated). Modified types are marketed under the name Novinox PZ02; Phosphinal PZ04 and Phosphinox PZ06.

1.2.2.4. **Trident Alloys Limited (formerly Britannia Alloys and Chemicals Ltd)**

- (21) Zinc-based activities currently conducted by Trident Alloys Limited (Trident) have been carried out for over a hundred years at a site in Bloxwich, near Walsall in the West Midlands of the United Kingdom.
- (22) During this period, zinc-based activities have undergone several ownership changes. During the 1980s, the zinc-based business was owned by the Australian metal and mining group Rio Tinto Zinc Corporation plc (RTZ). Within RTZ, it was run by ISC (Alloys) Ltd. In 1990, part of RTZ (including the zinc-based business) was floated on the Australian stock exchange and dissociated from the group. It was then taken over by the Australian group Pasminco and became Pasminco Europe (ISC Alloys) Ltd (Pasminco Europe-ISC Alloys). As Pasminco group withdrew from Europe in the early 1990s, the zinc business of Pasminco Europe-ISC Alloys was sold in October 1993 to MIM Holdings Ltd (MIM), another Australian company, which assigned it to its wholly owned British subsidiary Britannia Alloys and Chemicals Ltd (Britannia). Britannia's zinc business was put on sale by MIM in 1996. In early 1997, the management team of the zinc business unit of Britannia launched a management buy-out funded by Lloyds Development Capital, a venture capital subsidiary of the Lloyds TSB group. The management buy-out was

successfully completed on 15 March 1997, via the acquisition of the Bloxwich site and related business by the newly incorporated company Trident Alloys Limited ⁽⁶⁾.

- (23) Britannia, which carried out the zinc products business at the Bloxwich site from 29 October 1993 to 15 March 1997 is still in existence, as a wholly-owned subsidiary of MIM.
- (24) Trident is an independent company. Its original management team included six directors, owning together 45 % of the share capital, the majority of the remaining capital being held by the Lloyds group. Since the management buy-out, several directors have left the company. The current Managing Director took over his position in February 1999.
- (25) Trident produces commodities derived from zinc metal ⁽⁷⁾. Its three areas of business are die-casting alloys, sacrificial anode cathodic protection products, and zinc based pigments, collectively referred to as 'zinc products'. These products include zinc oxide, zinc dust, zinc phosphate and zinc powder.
- (26) Trident currently employs 170 people. The company had a worldwide consolidated turnover of GBP 48,75 million (EUR 76,07 million) in financial year 1999 to 2000 ⁽⁸⁾.
- (27) Trident supplies four formulations of Delaphos zinc phosphate: 'D2', 'D4' (higher water content), D2 with a low lead content and micronised D2. These types are all used as paint pigments but cater for specific needs of the customer. Trident does not produce modified types of Zinc phosphate.

1.2.2.5. **Waardals Kjemiske Fabrikker A/S**

- (28) Waardals Kjemiske Fabrikker A/S (Waardals) is headquartered in Bergen, Norway. It was founded in 1947 and currently employs around 30 people.
- (29) Waardals originally produced organic pigments used in the paint and ink industry. Later, the company shifted to inorganic substances and produced primarily zinc chromate. Because of the negative effects on the environment, the importance of this product has progressively decreased. In 1975, the company started to produce zinc phosphate and modified types of zinc phosphate. Waardals also produces zinc borate.

(30) The worldwide turnover of the company was NOK 57,52 million (EUR 7,09 million) in 2000.

(31) Waardals produces both standard and modified types of zinc phosphate. Standard types are the so-called ZP-BS-M and ZP-M. Modified types are marketed under the names Wacor ZBP-M, Wacor ZBA and Wacor ZAP.

1.2.2.6. *Other producers of zinc phosphate in the world*

(32) Beside the abovementioned companies, a few small companies sell small quantities of zinc phosphate at a local level⁽⁹⁾. These sales can be deemed to be insignificant at the EEA level.

(33) American companies Mineral Pigments Limited and Wayne Pigment Limited also produce zinc phosphate (including modified types) but are essentially confined to their domestic market.

(34) Asian zinc phosphate producers include Hanil (Korea), Kikuchi (Japan), and some Chinese producers. Together, these producers hold an insignificant share of the EEA zinc phosphate market.

1.2.3. TRADE ASSOCIATIONS

(35) Over the time period considered in this Decision, the five main European producers of zinc phosphate exchanged information and met within trade associations. These trade associations collected and compiled the sales data of each individual company and informed them in return about the size of the market. Meetings also aimed at discussing a number of subjects of common interest such as environment protection, transportation or regulatory issues.

1.2.3.1. *The Zinc Phosphates Producers Association (ZIPHO).*

(36) The Zinc Phosphates Producers Association subgroup (ZIPHO) was informally established in May 1994, as a 'statistical sub-group' of the Zinc Oxide Producers Association (ZOPA), a sector group of the European Chemical Industry Council (CEFIC)⁽¹⁰⁾. A representative of CEFIC was in charge of ZIPHO as a sector group manager.

(37) ZIPHO was originally and primarily created as for the collection and monitoring of statistical figures on the zinc phosphate market. ZIPHO collected and processed

statistical data for zinc phosphate until 1997, when the zinc phosphate producers decided to stop resorting to CEFIC.

(38) Zinc phosphate producers also met within ZIPHO to discuss subjects of common interest. During the period considered in this Decision, three ZIPHO technical meetings were organised, taking place in the CEFIC Offices in Brussels⁽¹¹⁾. ZIPHO members discussed the implications for zinc phosphate of Community initiatives to examine the risks of existing chemicals to humans and the environment.

1.2.3.2. *Verband der Mineralfarbenindustrie e.V. (VdMI)*

(39) The Verband der Mineralfarbenindustrie e.V (VdMI) is the German producers' association for inorganic pigments, printing ink and printing ink additives, carbon black, white reinforcing fillers, chemicals for enamels, glass and ceramics, artists and school colours and food colorants. It is located in Frankfurt, Germany.

(40) For many of the abovementioned products, VdMI compiles internal statistics. VdMI processed the zinc phosphate producers' sales figures from 1997 to 1999.

(41) In 1998, VdMI convened three meetings between zinc phosphate producers. The first two meetings took place on 31 July 1998 and 6 October 1998 in the VdMI offices. The third meeting took place in Barcelona, Spain, on 9 November 1998. At this occasion, zinc phosphate producers discussed the setting-up of a new trade association named European Manufacturers of Zinc Phosphate (EMZP).

1.2.3.3. *European Manufacturers of Zinc Phosphates Association (EMZP)*

(42) The association was established on 31 July 1998 by Heubach, SNCZ, Trident and James Brown. According to its Statutes, the objectives of the EMZP are 'to promote the common welfare of those engaged in the manufacture of zinc phosphates and their employees and customers; to promote the safe production and use of these pigments and to do such other things in the interests of its members and of the trade as may be lawful and proper'⁽¹²⁾.

(43) The EMZP was organised by the VdMI, whose Secretary also held the position of secretary of EMZP. A

representative from Heubach was the chairman of the newly created association, a representative of Trident being appointed as deputy-chairman.

1.2.4. RELEVANT MARKET

1.2.4.1. *Relevant product market*

- (44) In the past, the most efficient and most commonly used anti-corrosion pigment in the paint industry was zinc chromate. Consumption of this product has strongly declined in the past two decades, as it is a toxic, environmentally unfriendly product. As a non-toxic and efficient substitute, zinc phosphate has encountered growing success in the industry and has progressively replaced zinc chromate, which is almost no longer used in the Western countries, except for the production of paints destined for export to the Far East or Latin America countries.
- (45) A number of mineral or even organic products are partially substitutable to zinc phosphate for anti-corrosive purposes⁽¹³⁾. Today, the main substitute for zinc phosphate is calcium phosphate, whose paint grade is approximately 30 % cheaper than zinc phosphate⁽¹⁴⁾.
- (46) Modified (or activated) types of zinc phosphate⁽¹⁵⁾ can also be substituted for standard zinc phosphate. These modified grades are usually 30 % to 60 % more expensive than normal zinc phosphate⁽¹⁶⁾, but their anti-corrosive properties are better and smaller volumes are required as a paint addition for the equivalent

performance. Modified types of zinc phosphate are produced in limited quantities and were not subject to the anti-competitive behaviours this Decision refers to. Therefore, unless otherwise indicated, subsequent figures and considerations will refer exclusively to standard zinc phosphate.

1.2.4.2. *The relevant geographical market*

- (47) As indicated above, five European producers control the quasi-totality of the worldwide production of zinc phosphate. Most of the product is manufactured in Europe. The relevant geographical market can therefore be deemed to be global, and is in any event at least EEA-wide.

1.2.4.3. *Supply of zinc phosphate*

- (48) During the five years 1994 to 1998, the size of the EEA-wide standard zinc phosphate market in volume was in the region of 9 400 metric tonnes⁽¹⁷⁾. The world market can be estimated at 13 000 to 14 000 tonnes⁽¹⁸⁾ and the US market at 1 600 tonnes. Over the same years, average price in the EEA was in the range of ECU 1 600/tonne; therefore total European market value approximates EUR 15 to 16 million. At western European prices, the world market value approximates EUR 22 million.
- (49) The European market for zinc phosphate is mature. There was no significant growth in the past years.

- (50) The following table presents the overall size, in year 2000, of each of the five main producers of zinc phosphate, as well as an indication of their relative importance on the EEA-wide zinc phosphate market during the last year of their respective infringement⁽¹⁹⁾. The figures provided are based on the companies' responses to request for information from the Commission⁽²⁰⁾.

(in EUR)

Undertaking	Total worldwide turnover		EEA-wide product turnover	
	Year	Turnover	Year	Turnover
Britannia	1996 ⁽²¹⁾	55 713 550	1996	[...]* (*)
Heubach	2000	71 018 442	1998	[...]*
James Brown	2000	12 118 226	1998	[...]*
SNCZ	2000	17 080 851	1998	[...]*
Trident	2000	76 066 402	1998	[...]*
Waardals	2000	7 092 182	1998	[...]*

1.2.4.4. *Demand for zinc phosphate*

- (51) Customers for zinc phosphate are the main paint manufacturers. The paint market, though highly specialised and segmented, is dominated by a few multinational chemical groups. The sector has recently undergone a major process of concentration, with 10 major players controlling approximately 80 % of the worldwide paint production ⁽²²⁾. In the medium term, it is foreseen that Europe's top 10 producers will increase their market share substantially from the current 50 % to a concentration of nearly 80 %.
- (52) In western Europe today, the main paint producers are Akzo Nobel, ICI, Dupont, BASF, SigmaKalon (belonging to TotalFinaElf), Becker, Tikkurila, Jotun and Teknos.
- (53) Worldwide sales of paint in 1997 amounted to 25 million tonnes, representing a global market value of approximately ECU 50 billion. In Western Europe, the paint market was estimated to 6.2 million tonnes in 1997, representing a value of ECU 17,7 billion ⁽²³⁾.

1.3. PROCEDURE

- (54) On 13 to 14 May 1998, simultaneous and unannounced investigations under Article 14(2) of Regulation No 17 were carried out by the Commission at the premises of Heubach, SNCZ and Trident.
- (55) On 13 to 15 May 1998, at the request of the Commission under Article 8(3) of Protocol 23 to the EEA Agreement, a simultaneous and unannounced investigation under Article 14(2) of Chapter II of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, was carried out by the EFTA Surveillance Authority (ESA) at the premises of Waardals.
- (56) Documents indicating that the zinc phosphate producers participated in arrangements infringing Article 81 of the EC Treaty and/or Article 53 of the EEA Agreement were found during the investigations.

oral account of the cartel, record of which was taken by the Commission. By letter of 30 October 1998, the company provided additional documents. By fax of 13 November 1998, the Commission sent to Waardals its draft minutes of the meeting of 2 September 1998. By fax of 23 December 1998 and 27 September 1999, Waardals gave its comments on the draft minutes. On 3 December 1999, the Commission received from Waardals a declaration on the content of the minutes.

- (58) On 5 March 1999 the Commission addressed requests for information under Article 11 of Regulation No 17 to Heubach, James Brown, SNCZ and Trident. The requests required the undertakings in question to provide additional information and documentation.
- (59) Following the receipt of the request for information, Trident informed the Commission by letter of 12 April 1999 of its intention to cooperate fully with the investigation. This letter was followed by a statement of 23 April 1999 supplementing Trident's reply to the Commission's request for information.
- (60) On 8 October 1999 the Commission addressed additional requests for information to Heubach, James Brown, SNCZ, Trident and Waardals.
- (61) On 2 August 2000, the Commission initiated proceedings in the present case and adopted a Statement of Objections against the undertakings to which this Decision is addressed. All parties submitted written observations in response to the Commission's objections.
- (62) At the request of certain addressees of the Statement of Objections, an oral hearing was held on 17 January 2001.
- (63) On 12 October 2001, additional requests for information were sent to Britannia, Heubach, James Brown, SNCZ, Trident and Waardals, in order to collect additional turnover figures.

1.4. THE CARTEL

- (57) Waardals approached the Commission on 17 July 1998 and announced its intention to fully cooperate with the Commission under the Commission Notice on the non-imposition or reduction of fines in cartel cases ⁽²⁴⁾, (hereinafter; the Leniency Notice). At a meeting on 2 September 1998 the company gave the Commission an
- (64) This Decision is based on the documentary evidence found at some of the addressees' premises during the Commission and ESA investigations, on documents provided by the undertakings in reply to the Commission's requests for information, as well as on the declaration of Waardals and the written statement submitted by Trident.

1.4.1. SUMMARY OF THE INFRINGEMENTS OBJECTED TO BY THE COMMISSION

- (65) A cartel of five zinc phosphate producers, namely Britannia (Trident as from 15 March 1997 onwards), Heubach, James Brown, SNCZ and Waardals, existed from 24 March 1994, until 13 May 1998. The aim pursued was the elimination of competition in the EEA-wide zinc phosphate market. This was to be obtained by means of a market sharing agreement (allocation of and adherence to market shares to/by each producer), by the fixing of bottom and/or 'recommended' prices and, to some extent, by the allocation of specific customers.
- (66) The allocation of sales quotas was the cornerstone of the cartel. Respective market shares were initially calculated in 1994 on the basis of the figures for the years 1991 to 1993. Each cartel member had to adhere to its allocated market share. Sales quotas were in principle allocated at the European level.
- (67) The cartel members also agreed on 'bottom' or 'recommended' prices to be charged for zinc phosphate. At each meeting a price per tonne was set in GBP for the market in the United Kingdom and in DEM for the German market. The German price was then converted into local currency prices for the other European countries. The leading company in a particular territory had the main input in deciding what the appropriate price for that country should be, for instance Trident for the United Kingdom, Heubach for Germany and SNCZ for France. This lead was generally followed ⁽²⁵⁾.
- (68) During the meetings, information about specific customers was exchanged. On some occasions, this resulted in customer allocation. There were in particular regular discussions about the Finnish customer Teknos Winter (Teknos) which was successively 'allocated' to the respective members of the cartel ⁽²⁶⁾.
- (69) In order to ensure that allocated market shares were adhered to, a monitoring system was set up. Each producer sent its sales volumes data on a monthly basis to the CEFIC and later to the VdMI, which compiled the figures and sent them to all the five producers concerned. Being in possession of the exact size of the market, the producers met and provided each other with their individual sales volumes, thereby verifying via this exchange of information their mutual adherence to the agreed market shares.
- (70) From March 1994 onwards until May 1998, the cartel members held regular multilateral meetings. During this period, sixteen such cartel meetings have been identified.

- (71) The usual representatives of the companies in the cartel meetings were the following individuals ⁽²⁷⁾:

- Heubach: the Managing Director and a Sales Executive,
- James Brown: the Managing Director,
- SNCZ: the successive Chairmen, and Commercial Directors, (a Commercial Director became Managing Director in 1995 to 1996),
- Britannia Alloys/Trident: the General Manager (1994 to 1997), who became Managing Director (1997 to 1998); the Sales & Marketing Manager (1993 to 1997), who became Commercial Director (1997 to 1998); the Sales Executive Zinc products (1994 to 97) who became Sales Manager Zinc products (1997 to 1998),
- Waardals: the Director and the International Sales Manager.

- (72) The agreement on sales and quotas was in the nature of a 'gentlemen's agreement', in that the members did not put into practice any specific kind of enforcement mechanism. Enforcement of the sales quotas was achieved through pressure brought to bear on the members during cartel meetings. Customer allocation was used as a form of compensation in the event of a company not having achieved its allocated quota ⁽²⁸⁾. On an annual basis, the real market shares of the five producers closely followed their allocated share ⁽²⁹⁾.

1.4.2. BACKGROUND AND PRE-1994 ANTI-COMPETITIVE CONTACTS

- (73) Prior to 1994 the zinc phosphate market was undergoing a period of low prices and aggressive price cutting and targeting of mutual competitor's traditional customers.
- (74) Waardals, for instance, which enjoyed a 55 % share of the market in the United Kingdom and a 80 % share of the Nordic market in the 1980's, was confronted in 1990 with two simultaneous phenomena: a reduction in the zinc phosphate consumption in the Nordic countries, as many Scandinavian companies decided to build up their production plants in the United Kingdom, and a severe economic decline in Finland following the collapse of the Soviet Union. In addition, Pasmenco Europe had started to enter the Norwegian market in 1990 with very low prices. Waardals declares that it was consequently 'forced to protect its market' ⁽³⁰⁾.

- (75) In this context competitors began to contact each other in order to work out a 'solution' and put an end to price-cutting practices.
- (76) According to Trident's statement, there was already regular communication between Pasminco Europe-ISC Alloys and its competitors in the zinc phosphate market in the period 1989 to 1994. A sales executive of Pasminco Europe-ISC Alloys had a direct telephone line which was not routed through the switchboard and which he used for contacting competitors. Trident believes that these conversations with competitors involved discussion about the market and price levels ⁽³¹⁾.
- (77) It is further believed that a Pasminco Europe-ISC Alloys sales executive met competitors on a one-to-one basis. One sales executive of Trident, a former employee of Pasminco-Europe-ISC Alloys and later of Britannia, remembers taking part in a meeting involving a higher executive from Heubach ⁽³²⁾. The purpose of the meeting was to complain about aggressive behaviour by another competitor.
- (78) Documents found during the investigation also indicate that improper, anti-competitive contacts between the European zinc phosphate producers already took place in the period from 1980 to 1994.
- (79) A 'visit report' found during the investigation at Waardals shows that as early as 1980 meetings between competitors took place, during which sensitive information was exchanged. The report, written by a sales executive of Waardals after he met the Managing Director and the Marketing Manager of Pasminco Europe-ISC Alloys, reads as follows ⁽³³⁾: 'Visit report ISC Alloys — Visit 18.12.1980: — (...) Alloys asked us not to offer lower than £ 630.- in the first quarter of '81, which should be raised to £ 650-660 in the second quarter. They promised to go up to that level themselves when old contracts had been fulfilled. If we would not raise our prices, Alloys would drastically decrease its own prices on all markets, including Scandinavia. In return for our higher prices they are willing to do the following: 1. to buy 60 tonnes of ZP from us in 1981 2. to buy 100 tonnes of ZP from us in 1982'.
- (80) Another report, written at the end of 1991 and reporting on a meeting having taken place at the Resins and Pigments Exhibition in November 1991 in Brussels reveals similar contacts, as it reads ⁽³⁴⁾. '(...) Our competitors in ZP: Alloys, SNCZ and Heubach all had stands of their own and agreed that the price level was at an unacceptably low level. They blamed each other and the bad times in general. I got the impression that they defend their market shares by all means and would hold out as long as possible. Just before the Exhibition ZP had been sold in Germany at DM 2.— per kg, presumably both by Heubach and SNCZ. In comparison our price to [...] is at the time [...]*. (Name of SNCZ chairman) expressed deep concern — maybe because of problems? I replied that a voluntary reduction in produced quantities was, in my opinion, the only way to obtain stability in the market — and thus better prices. He seemed to agree with this argument and will take the initiative for a meeting with the other producers. (...)'.
- 1.4.3. MARKET SHARING, PRICE FIXING AND CUSTOMER ALLOCATION FROM 1994 TO MAY 1998
- (81) As far as the Commission is aware, the zinc phosphate cartel was set up in March 1994. Regular meetings between competitors ensued over a period of at least four years. In May 1998, the Commission and ESA investigations led the cartel members to cancel a further cartel meeting that had been planned for July 1998 in Amsterdam.
- 1.4.3.1. *The set-up of the cartel in 1994*
- (82) Prior to 1994 there was no organised forum for the zinc phosphate manufacturers to meet to discuss

matters of common interest. Zinc dust and zinc oxide manufacturers had trade associations organised by the CEFIC but there was no equivalent sector group for zinc phosphate manufacturers.

Trident that the first multilateral meeting between the five zinc phosphate producers was held at the latest on 24 March 1994.

- (83) According to Trident ⁽³⁵⁾, it is not quite clear how the first meeting of all the five manufacturers came about or when this meeting occurred. It seems that a representative of Pasminco Europe-ISC Alloys suggested to James Brown, SNCZ, Waardals and Heubach that they meet to discuss the benefits of forming a trade association. The first meeting was held around October 1993 and was attended by representatives of Heubach, James Brown, Pasminco Europe-ISC Alloys, SNCZ, and Waardals.
- (84) Trident states that the purpose of the initial meeting was to discuss ways in which some order could be brought into the market with a view to ending the prevailing price wars. The representative of Pasminco-Europe-ISC Alloys suggested that one way this could be done was to develop a system whereby the companies could obtain information about their individual market share. He suggested using a system such as that organised by CEFIC for the zinc dust producers. CEFIC acted as an 'honest broker' for the zinc dust producers. Each producer provided information about the volumes produced and sold. CEFIC would draw this information together and provide the producers with a picture of the total market from which each producer could then derive its own market share.
- (85) Trident continues that the view of the representative of Pasminco-ISC Alloys, as expressed at the initial meetings in late 1993 and early 1994, was that if the producers knew their own individual market share then, provided that no one was losing significant market share, prices would naturally drift upwards as the need for aggressive targeting of customers at low prices would no longer exist. Having access to accurate information about a company's own market position would prevent a company from taking aggressive action on the basis of mistaken belief that it had lost market position.
- (86) Waardals contests its participation in the meeting of October 1993 and states on its part that it was contacted by the Managing Director of Heubach in early 1994. The representative of Heubach invited Waardals to London for an informal meeting to talk about zinc phosphate. The invitation was made also on behalf of Britannia ⁽³⁶⁾.
- 1.4.3.2. **The Cartel in operation: March 1994 to May 1998**
- (87) It is established from documentary evidence as well as from the declaration of Waardals and the statement of
- (88) Regular meetings were held between representatives of Britannia (Trident as from 15 March 1997), Heubach, James Brown, SNCZ and Waardals from 24 March 1994 until 13 May 1998. This has been confirmed by all the five undertakings concerned in their respective replies to the Commission's requests for information or statements. Sixteen different multilateral cartel meetings have been identified by the Commission.
- (89) Waardals says that information exchanged was limited to Europe, as the 'club' was not concerned about the American market and the rest of the world, where the club would have little influence due to local competitive contexts.
- (90) As to the contents of these meetings, Trident states that they followed essentially the same format. The meetings lasted about an hour to an hour-and-a-half and involved comparison of each participant's West European market share ⁽³⁷⁾ for the last quarter (or annually at the first meeting in each year) by reference to historic market shares; discussion of price levels, in GBP for the market of the United Kingdom and in DEM for Germany, the German prices being converted into local currency for other European countries; discussion of supplies to Teknos; and general discussions about who was new in the market, such as new importers, new entrants or new competing products such as dicalcium phosphate ⁽³⁸⁾.
- (91) The market shares of each company were definitely agreed upon and assigned at the meeting of 9 August 1994. At each subsequent meeting each participant revealed its west European market share, which was compared with the figure initially agreed. The annual west European market shares of each participant were discussed at the first meeting of each year (usually in January or February) ⁽³⁹⁾.
- (92) Price levels were also discussed at each meeting, where a price per tonne was set in GBP for the market of the United Kingdom and in DEM for the German market. At the initial meetings local currency prices for each territory were set. Later the DEM price was converted into local currency for the other European territories. Reference prices discussed were applicable to quantities of one to five tonnes and represented the price 'delivered to customer' (that is to say, including freight costs). At some meetings the discussions were limited to 'no change'. Trident states that its internal price lists reflected the price discussed at the last meeting ⁽⁴⁰⁾.

- (93) According to Trident, the discussions varied little over the years except in relation to pricing. Latterly the view was taken that pricing levels were of less importance as long as market shares did not vary. Trident states that this view was originally put forward by the representative of James Brown and was not contradicted by other participants. Trident believes that this change in attitude happened during 1997.
- (94) Waardals declares ⁽⁴¹⁾ that year after year, the 'results' of the cartel turned out to be a better coherence in prices, except in the Nordic countries. Prices in the Scandinavian countries were lower than the 'recommended' prices. The 'recommended' prices were prices, modelled on the German market, which were used as standard 'recommended' prices for the remaining countries.
- (95) The notion of 'recommended' prices aimed at preventing the risk of major shifts of products across national borders. There was an implicit agreement that prices should be broadly in line with the German prices ⁽⁴²⁾.
- (96) Trident declares that during the meetings, there was regular discussion about sharing the Finnish customer Teknos. It was agreed that the producers would share this account. The price to be quoted to this customer was agreed and it was agreed that no one other than the particular producer whose turn it was to have this business would quote a price below that agreed ⁽⁴³⁾.
- (97) According to Trident's statement, this arrangement arose because historically Teknos was one of Waardals' main customers in Scandinavia and that they were sensitive about losing this customer, in particular to Britannia. Therefore, in order to avoid a price war over Teknos it was agreed that Britannia, Heubach, SNCZ and Waardals would take it in turns to supply this customer. The supplier for the next period was discussed at each meeting.
- (98) Waardals give on its part a slightly different account of the sharing out of Teknos. It says that it did not initially participate to the sharing of this customer, but that it suspected the three other companies of such a collusion. Waardals states that it was only after a meeting in 1995 'where Heubach, (Britannia), and SNCZ admitted that they had shared Teknos, that supplies to Teknos became the subject of regular discussions at meetings attended by Waardals' ⁽⁴⁴⁾.
- (99) Waardals further submits that it participated only exceptionally in the Teknos arrangement. It states that it was 'only once that the three decided unilaterally that Waardals should deliver a container to Teknos in order to make sure that Teknos did not become suspicious of the arrangement' ⁽⁴⁵⁾.
- (100) This last statement is in any event consistent with Trident's one that 'the companies were aware that Teknos could become suspicious of the collusion in this respect if a regular rotation was put in place. The cartel participants companies therefore followed a more flexible system, for example at one stage SNCZ was the Teknos designated supplier three times in succession' ⁽⁴⁶⁾.
- (101) Over the period 1994 to 1998, there were two types of cartel meetings 'full group informal meetings' and producers' 'ad hoc meetings'. The cartel members also regularly met under other lawful auspices, such as 'technical CEFIC meetings'. Market sharing, prices fixing and customer allocation agreements were usually concluded during the 'full group informal meetings'.

1.4.3.3. *Full group cartel meetings 1994 to 1998*

Year 1994

- (102) The foundation for the market sharing, price fixing and customer allocation agreements was set in 1994 between the zinc phosphate producers. The first meeting of the cartel (sometimes referred to by the cartel participants as the Club) took place on 24 March 1994 in London at the Holiday Inn Heathrow Airport Hotel. Representatives of Britannia, Heubach, James Brown, SNCZ and Waardals attended the meeting ⁽⁴⁷⁾.
- (103) One of the reasons for the organisation of the meeting was that low prices in the Nordic countries and in the

United Kingdom started to be felt all over Europe, due to increasing internationalisation of prices and purchasing policies.

- (104) During the discussion, it was decided to fix a 'status quo' on quantities of zinc phosphate supplied in Europe. According to Waardals, the cartel was based on the principle 'only quantities, no prices', but it was also decided that prices should not be too different from one country to another, so that products would not be shifted across borders ⁽⁴⁸⁾. Handwritten notes of later meetings put in evidence that national 'recommended' prices were widely used ⁽⁴⁹⁾.
- (105) For the monitoring of the system, it was decided to send all figures to CEFIC, which would aggregate the sales data and send back overall figures. The reference shares would be agreed upon on the basis of the 1991 to 1993 figures regarding Germany, the United Kingdom, Scandinavia and France ⁽⁵⁰⁾.
- (106) A report of 21 April 1994 written by a representative of Waardals concerning a visit by Waardals to clients [...] on 11 to 13 April 1994, also shows contacts between producers and refers to a general suspicion of price cooperation between the zinc producers ⁽⁵¹⁾: 'As a reply to the direct question why we could not offer [...] delivered in [...]*, I answered that this is due to the higher freight from [...]* to [...]* compared to [...]*. This was accepted. [...] stressed that he would like to have W. as main supplier of ZP provided, of course, that we were competitive. I think this is due to a general suspicion of the zinc producers regarding agreed price-cooperation. [...] Finally, it can be mentioned that [...] on purpose plays the suppliers off against one another by showing data-outprints of competitors' offers. From oral conversations with Alloys/J. Brown I know that the above-mentioned offers are correct.'
- (107) The next meeting took place in London on 3 May 1994 at the Hotel Excelsior Heathrow Airport. Representatives

of Britannia, Heubach, James Brown, SNCZ and Waardals attended the meeting.

- (108) The final agreement on sending the sales figures to CEFIC was reached at the latest at this meeting as on the following day, on 4 May 1994, a representative of Britannia sent a fax to CEFIC confirming the acceptance of the producers of CEFIC's quotation, giving names and contact details of the five producers and asking CEFIC to send questionnaires to each of them concerning the years 1991, 1992, 1993 annually and 1994 monthly ⁽⁵²⁾.
- (109) By letter of 26 May 1994 addressed to representatives of Britannia, Heubach, James Brown, SNCZ and Waardals, CEFIC referred to the creation of the zinc phosphate statistical group in the frame of CEFIC Sector Groups and asked for 'historical statistics 1991, 1992, 1993' to be provided to it by 15 June 1994 ⁽⁵³⁾. On 15 June 1994 CEFIC sent a reminder to Waardals to provide the information requested for the years 1991 to 1993 and for the months January to May 1994 ⁽⁵⁴⁾.
- (110) All five producers sent their respective figures to CEFIC. For instance, Waardals did so by fax of 15 June 1994 and SNCZ by letter of 14 June 1994 ⁽⁵⁵⁾.
- (111) A letter of 28 July 1994 addressed to representatives of Britannia, Heubach, James Brown, SNCZ and Waardals and titled 'Statistics – historical investigation 1991 – 1993' confirms that CEFIC had produced an analysis of the total market size for those years and sent it to the five zinc phosphate producers by the end of June 1994 ⁽⁵⁶⁾.
- (112) The respective market shares of each of the cartel members were allocated at the meeting held on 9 August 1994 in London at the Hotel Ramada Heathrow Airport. Representatives of Britannia, Heubach, James Brown, SNCZ and Waardals attended the meeting ⁽⁵⁷⁾.

- (113) Contemporaneous notes of a representative of Britannia and of a representative of Waardals (both notes on Ramada Hotel paper) show a table of each undertaking's market share for the years 1991, 1992, 1993 and 1994. These market shares were rounded up for the allocation of market shares as follows: Heubach 24 %, Britannia 24 %, SNCZ [...]*, Waardals [...]* and James Brown 6 %. The similarities between the two documents are particularly striking:

Extract of original document No 1: handwritten notes of Britannia's representative

		91	92	93	4td
[...]*	Heubach	[...]*	[...]*	[...]*	[...]*
[...]*	James Brown	[...]*	[...]*	[...]*	[...]*
[...]*	W.	[...]*	[...]*	[...]*	[...]*
[...]*	BAC	[...]*	[...]*	[...]*	[...]*
[...]*	SNCZ	[...]*	[...]*	[...]*	[...]*
107.71					
Heu [...]*					
BAC [...]*					
SNCZ [...]*		10 000			
W [...]*		5 500			
B [...]*					

Extract of original document No 2: handwritten notes of Waardals' representative

	1991	1992	1993	1994	
Heubach	[...]*	[...]*	[...]*	[...]*	[...]*
J. Brown	[...]*	[...]*	[...]*	[...]*	[...]*
W.	[...]*	[...]*	[...]*	[...]*	[...]*
Alloys	[...]*	[...]*	[...]*	[...]*	[...]*
SNCZ	[...]*	[...]*	[...]*	[...]*	
			[...]* All.		
			[...]* Heub.		
			[...]* SNCZ		
			[...]* W		
			6		

- (114) Britannia's representative expressed the view at the meeting of 9 August 1994 that if all the companies were satisfied with their existing market shares and if these market shares had been consistent over a number of years, then, as long as these shares were not substantially altered, there would not be need for the aggressive price cutting of earlier years⁽⁵⁸⁾.

- (116) Another cartel meeting was held 25 November 1994 in London at the Novotel Heathrow Airport Hotel. It was attended by representatives of Britannia, Heubach, James Brown, SNCZ and Waardals⁽⁶⁰⁾.

1995

- (115) According to Trident this view was accepted by all the participants at the meeting. The result was that each of the five undertakings agreed to use their historic European market share levels as benchmark for their future market position⁽⁵⁹⁾.

- (117) At the beginning of 1995, a 'trilateral' meeting was held on 9 January 1995 at the Manchester Airport Forte Crest Hotel (United Kingdom). Representatives of James Brown, Britannia and Waardals attended this meeting.

James Brown had arranged the meeting to attempt to broker better relations between Britannia and Waardals.

(118) James Brown attempted to broker an arrangement whereby Waardals would agree to stop targeting customers in the United Kingdom with low prices, in particular International Paint, and Britannia Alloys would restrict its activities in Scandinavia, particularly in respect of a Norwegian customer, Jotun. According to Trident, no such agreement was reached.

(119) Waardals confirms the meeting and its content, as well as the failure to find the agreement that was sought. Waardals adds as a result, it 'lost Jotun, its biggest customer, to Britannia Alloys' ⁽⁶¹⁾.

(120) The first 'full group' cartel meeting in 1995 took place in London at the Novotel Heathrow Airport Hotel on 27 March 1995. Waardals was in charge of the organisation ⁽⁶²⁾. Representatives of Britannia, Heubach and Waardals took part in the meeting. According to Waardals, also a representative of James Brown and SNCZ respectively attended all meetings ⁽⁶³⁾. James Brown states that its representative was not present at this meeting ⁽⁶⁴⁾. SNCZ has not indicated that its representative attended this meeting. However, an agenda for this cartel meeting was found in SNCZ's premises during the Commission investigation ⁽⁶⁵⁾. The document has many scribbles on it indicating the presence of the person who made them at the meeting where the document was discussed. It can therefore be concluded that also SNCZ was represented at this meeting.

(121) The agenda of the meeting reads as follows: 'AGENDA — MEETING 27.3.95 — (1)1994: Total sales and market shares in West Europa; (2) 1994: Sales, competition, price development in Germany, France, Benelux, UK, Nordic countries, USA, Rest of the world; (3) Development 1st Quarter -95 and prospects for rest of -95; (4) New production of phosphate in Australia by Larvik- capacity?; (5) Question/answers; (6) Summary; (7) Date for new meeting'.

(122) A note dated 30 March 1995 ⁽⁶⁶⁾ found in Waardals and addressed to the higher management of the company gives an account of the meeting and reveals that

Waardals has claimed for an increase of its allocated market share. The note says: 'In our last meeting, 27.03.95, they were not willing to discuss larger market share for our company' ⁽⁶⁷⁾. 'They' in this quote means obviously the other cartel members. Indeed, Waardals had apparently planned to make the following request: '(1) [...]*; (2) [...]*(3) [...]*; (4) full member with allocation of clients'; (5) our contribution: reduced activity ton for ton ⁽⁶⁸⁾. These words refer obviously to the possibility to sell to [...]*, to getting [...]* of the market share of Finland and a market share of [...]* of the total market, and to becoming a full member of the cartel with allocated customers.

(123) However, the request for an increase in market share was opposed by the other participants, and the rest of the proposals were not communicated during the meeting ⁽⁶⁹⁾.

(124) The meeting and negative attitude of the other companies gave Waardals additional reasons to believe that the others were cheating on them. Waardals says that during the meeting of 27 March 1995, it was explicitly admitted that Heubach, Britannia and SNCZ had shared the Finnish customer Teknos, each supplier delivering in turn the quantities corresponding to one quarter of the year ⁽⁷⁰⁾. The note of Waardals' representative of 30 March 1995 reports: '(3) Our market share, [...]*, is too low. Alloys, Heubach and SNCZ have [...]* each. The remaining 6 % go to James Brown. (4) Our competitors, who are all manufacturers of ZnO, have an internal cooperation within the "club". They have shared customers/markets between them at our cost. They have themselves admitted that this cooperation has taken place a.o. in Finland and this is also the reason why all three have [...]* ⁽⁷¹⁾.'

(125) The note of 30 March 1995 also evaluated the advantages (e.g. 'have obtained higher prices in 1st quarter -95') and disadvantages (e.g. 'Illegal. Can have large, negative consequences for us if we are discovered.') ⁽⁷²⁾ of being a member of the cartel. Resentment vis-à-vis the other producers led to

Waardals' temporary withdrawal of the cartel in April 1995, when Waardals announced to CEFIC that they would no longer communicate their sales figures ⁽⁷³⁾.

(126) CEFIC informed the other zinc phosphate producers of Waardals' decision not to provide sales figures on 3 May 1995 ⁽⁷⁴⁾. SNCZ sent a fax ⁽⁷⁵⁾ to CEFIC on 2 June 1995 stating that it would inform CEFIC of its position as to continuing sending the statistics on 13 June 1995, i.e. one day after the date on which the following cartel meeting was to be held. The documentary evidence shows that it continued sending information to CEFIC ⁽⁷⁶⁾.

(127) According to Trident, another cartel meeting was held in London on 12 June 1995 at a hotel at Heathrow Airport, with two of its representatives participating ⁽⁷⁷⁾.

(128) The Commission has evidence that representatives of Waardals were in London, at Hotel Novotel, Heathrow on 11 to 12 June 1995 ⁽⁷⁸⁾. According to the notes of an employee of Waardals who wrote in his diary that a representative of Heubach was also present at this meeting.

(129) Waardals confirms in its reply to the statement of objections that it actually took part in a meeting with a representative of Heubach in London on the said date, but Waardals adds that it 'did not attend any club meeting that day' ⁽⁷⁹⁾.

(130) The documentary evidence shows that Waardals finally sent the requested market figures to CEFIC for 1995. Waardals and the other producers sent to CEFIC compiled figures for the period running from January to June 1995 ⁽⁸⁰⁾. From July 1995 onwards, the sales volumes were once again provided on a monthly basis. Thus, Waardals' withdrawal from the cartel, if it occurred at all, lasted only for a very limited period of time. This is admitted by Waardals in its reply to the statement of objections.

(131) Waardals further submits however that 'after having pulled out of the Club in April 1995, Waardals did obtain an order from Teknos, on its own and outside the sharing agreement operated by the others, and delivered a container to Teknos on week 16' ⁽⁸¹⁾.

(132) The next cartel meeting was held in London on 15 September 1995 at the Novotel Heathrow Airport Hotel. Representatives of Waardals, Britannia, Heubach, James Brown and SNCZ participated in this meeting ⁽⁸²⁾.

Year 1996

(133) In 1996, cartel meetings were held, on 22 January ⁽⁸³⁾ in Paris at Hotel Mercure, on 21 May ⁽⁸⁴⁾ and on 10 September ⁽⁸⁵⁾ in London at the Novotel Heathrow Airport Hotel. They were all attended by representatives of Britannia, Heubach, SNCZ and Waardals. James Brown was represented at the meetings of 22 January and 10 September 1996 ⁽⁸⁶⁾. The discussions at these meetings followed the normal format, including, *inter alia*, the disclosure and comparison of each participant's individual sales and the set up of 'recommended' prices ⁽⁸⁷⁾.

(134) Handwritten notes ⁽⁸⁸⁾ found at the investigation in a folder titled 'Cefic 21.5.96' show a calculation of zinc phosphate sold by Waardals in 1995 and concludes with the total amount of zinc phosphate sold by it in Europe [...]*. It then sets out the total figure of zinc phosphate sold by all the producers in Europe during that year [...]*, which matches with CEFIC's statistics for 1995) and breaks it further into volumes sold by each of the five producers, as well as states their respective market shares. The figures stated before 'SNCZ' and '(Alloys)' (Britannia) match exactly with the figures that these companies sent to CEFIC concerning the year 1995 ⁽⁸⁹⁾. The notes also contain bottom prices for various European countries. A date '21.5.' (that is to say, the date of the meeting) is written at the bottom of the page.

Extract of original document No 3 ⁽⁹⁰⁾: handwritten notes of Waardals' representative

ZP — [our sales]:			
...			
[total Europe]	[...]*	[...]*	[...]*
	[...]*	(Alloys)	[...]*
	[...]*	Heubach	[...]*
	[...]*	SNCZ	[...]*
	[...]*	Brown	[...]*
Fr.	[...]*		
Ital	[...]*		
NLG	[...]*		
DK	[...]*	[Belgium]	[...]*
N	[...]*		
S	[...]*		
SF	[...]*	[...]*	

(135) In 1996, CEFIC informed the companies that ZIPHO, under which the compilation of the statistics was done, needed to be formally established. The companies were unwilling to incur the additional expense resulting from this ⁽⁹¹⁾, which led them to look for other possibilities for compiling the statistics.

Year 1997

- (136) The next cartel meeting had initially been planned for 22 January 1997: on 5 December 1996, Waardals made a reservation for a meeting room for eight people in the Hotel Novotel Heathrow. However, the meeting had to be postponed and the reservation was cancelled by Waardals on 9 January 1997 ⁽⁹²⁾.
- (137) The meeting was finally organised on 4 February 1997 at the Holiday Inn Crowne Plaza, London Heathrow ⁽⁹³⁾. The boardroom was booked by Britannia. Representatives of Britannia, Heubach, James Brown, SNCZ and Waardals took part in the meeting ⁽⁹⁴⁾.
- (138) Notes handwritten on Holiday Inn paper ⁽⁹⁵⁾ reveal that the European sales of zinc phosphate in 1996 were discussed and that the respective market shares of the companies were calculated. In his statement during the investigation, a representative of Waardals indicated that this document was probably written in London in January 1997, during a meeting with the five producers of zinc phosphate. The figures stated after 'SNCZ' and 'BA' (for Britannia) match with the figures that these companies had sent to CEFIC concerning the year 1996 ⁽⁹⁶⁾.

Extract of original document No 4 ⁽⁹⁷⁾: handwritten notes of Waardals' representative

W:	[...]* [...]*	Teknos: SNCZ [for] 6 [months]
H	[...]* [...]* FIM [...]* —	[now] [...]*
BA	[...]* [...]*	
SNCZ	[...]* [...]* FIM: [We] [...]*	Teknos DK!
J.B	[...]* [...]*	

- (139) SNCZ seemed to have undersold and was 'allocated' Teknos for 6 months. SNCZ's price to Teknos was to be [...]* and Waardals' [...]*.
- (140) Bottom prices were suggested for various European countries. In Germany, it was suggested to apply immediately DEM 3,30/kg (DEM 3,40/kg under five

tonnes). In the United Kingdom, suggested price was GBP 1,20 (1,24 for less than five tonnes). In France it was FRF 10,80 (11,10 for less than five tonnes). In Belgium the price to be charged was BEF 62 immediately, then BEF 65 from the second quarter onwards. Similarly in the Netherlands immediate price of NLG 3,35 (3,65 under five tonnes) was set to be increased to NLG 3,50 (3,80 under five tonnes) during the second quarter. Whereas Denmark was to follow the German price, suggested price was FIM 10 in Finland and ITL 3 000 in Italy. No price was apparently suggested for Norway.

- (141) The said prices match exactly with Britannia's internal price instructions for February 1997 ⁽⁹⁸⁾ regarding sales of zinc phosphate for '1 000 to 4 999 kilos' and 'above 5 000 kilos'. It is also indicated in these instructions that the prices are 'minimum price levels' and that they 'should not be reduced without prior discussions with (name of employee)', whose name refers to the person who attended the cartel meetings on behalf of Britannia.
- (142) In addition to the matters related to zinc phosphate, other topics such as calcium phosphate or zinc oxide prices were also discussed, as indicated in the handwritten notes ⁽⁹⁹⁾.
- (143) Another undated handwritten note ⁽¹⁰⁰⁾, of the representative of Waardals concerning market share calculations was also found at the investigation. It was in all likelihood written just before or at this meeting. It shows a comparison of the actual and allocated market share of Waardals in 1996. The table first sets out the total sales of zinc phosphate for each calendar month, together with Waardals' sales and then shows that Waardals has sold 25 tonnes above its market share of [...]*, as allocated to it at the meeting of 9 August 1994.

Extract of original document No 5 ⁽¹⁰¹⁾: handwritten notes of Waardals' representative

[Total]		[Our sales] %
...	...	...
...	...	...
[...]*MT	[...]*	[...]*
[...]*	[...]*	
	+ 25 t	

- (144) Following the initial provision of 'historical figures' to the CEFIC in June 1994, the zinc phosphate producers regularly sent data to CEFIC concerning their zinc phosphate sales volumes at least until January 1997. The deadlines set by CEFIC for the producers to send in their monthly data were very short. In return, the zinc

phosphate producers received the compiled data from CEFIC very quickly, in most cases around the 20th of the following month. Thus, the producers were at all times well informed of the volumes sold on the market.

(145) The disagreements with CEFIC in 1996 concerning the extra cost for its service resulted, on 14 February 1997, in a representative of Heubach sending a fax to Britannia, James Brown, SNCZ and Waardals informing that Heubach had decided to stop transmitting any further data to CEFIC and asking the other producers to do the same⁽¹⁰²⁾. At the same time Heubach asked for the other producers' views on assigning the statistical processing task to VdMI. A representative of Heubach and a representative of VdMI were due to discuss the details shortly⁽¹⁰³⁾.

(146) Heubach sent on 6 March 1997, a fax to CEFIC informing that it did not wish to continue any activities in ZIPHO neither on a statistical nor on a sector group basis and that it would therefore not submit any further statistical data from that day on. A copy of this fax was sent to Waardals, Britannia, SNCZ and James Brown⁽¹⁰⁴⁾.

(147) Trident informed CEFIC by fax of 25 March 1997 that it did not wish to continue any activities in ZIPHO⁽¹⁰⁵⁾.

(148) On 29 March 1997, Heubach sent a fax to Waardals informing the latter of the address and name of an employee of VdMI, the organisation to which the market data from then on was to be sent. Data concerning the first quarter of 1997 was to be sent there at the beginning of April⁽¹⁰⁶⁾.

(149) The task previously fulfilled by CEFIC was taken over by the VdMI in April 1997. Already on 1 April 1997, the VdMI asked by fax that the producers send their figures for the first quarter of 1997 by 14 April 1997⁽¹⁰⁷⁾.

(150) On 14 April 1997, a representative of VdMI sent a fax to Trident (copied to all the other zinc phosphate producers) introducing the association and explaining its tasks⁽¹⁰⁸⁾.

(151) The following cartel meeting took place on 22 April 1997 in Paris at the Hotel Novotel of Roissy-Charles de Gaulle Airport. The boardroom was booked under the name of 'Silar', the 'sister' company of SNCZ. Silar also booked rooms for two representatives of Waardals in the Roissy Charles De Gaulle Airport Ibis Hotel⁽¹⁰⁹⁾. Representatives of Heubach, James Brown, SNCZ, Trident and Waardals took part in the meeting⁽¹¹⁰⁾.

(152) Notes and travel documents show that the two Waardals' representatives were in Paris Hotel Ibis on 21 to 22 April 1997 and met representatives of Trident and Heubach⁽¹¹¹⁾.

(153) Handwritten notes⁽¹¹²⁾ taken by a representative of Waardals found at the investigation show that sensitive sales information was exchanged during this meeting. The figures and market shares concern sales during the first calendar quarter of 1997.

Extract of original document No 6: Handwritten notes of Waardals' representative

22.4.	Paris:	SNCZ:	[...]*	— [...]*
		Trident	[...]*	— [...]*
		Heubach	[...]*	— [...]*
		Waard.	[...]*	— [...]*
		J.B.	[...]*	— [...]*
			[...]*	

(154) In his statement regarding these notes made during the course of the investigation of 13 May 1998, a representative of Waardals confirms they refer to a meeting in Paris, Charles de Gaulle Airport, Hotel Novotel on 22 April 1997.

(155) The figures given under 'SNCZ', 'Trident' and 'Heubach' in these notes correspond exactly with the numbers these companies had sent to VdMI for the relevant quarter for the compilation of the statistics⁽¹¹³⁾.

(156) Handwritten notes of a representative of SNCZ dated 6 March 1997 read 'Réunion 22.4.97 de coordination à Paris'⁽¹¹⁴⁾.

(157) On 17 July 1997 the zinc phosphate producers held a meeting at Hotel Skandinavia in Copenhagen⁽¹¹⁵⁾. Representatives of Heubach, James Brown, SNCZ, Trident and Waardals took part in the meeting⁽¹¹⁶⁾.

(158) A representative of Waardals had the following notes in his diary of 1997 concerning this meeting⁽¹¹⁷⁾:

(159) 16 July 1997: 'Departure to Copenhagen, Hotel Skandinavia'

(160) 17 July 1997: 'ZP meeting in Copenhagen. We are the hosts! No critics.'

(161) Handwritten notes⁽¹¹⁸⁾ show that sensitive sales figures were exchanged and discussed and that minimum prices were fixed at this meeting. The first two rows of the notes refer to the first and second calendar quarter of

1997. Individual sales volumes for the same year indicated in these notes after ‘H.’ (Heubach), ‘T.A.’ (Trident) and ‘SNCZ’ match exactly with the figures that these companies had sent to VdMI for the compilation of the statistics ⁽¹¹⁹⁾.

Extract of original document No 7 ⁽¹²⁰⁾: handwritten notes of Waardals’ representative

	[Total]		[Our share]	
1. [QTR.]	[...]*	[...]*	[...]*	[...]*
2. [QTR.]	[...]*	[...]*	[...]*	[...]*
	[...]*	[...]*	[...]*	[...]*
	<u>+ 245</u>	<u>+ 245</u>		
	[...]*			
H.:	[...]*	[...]*	[...]*	≡ [...]*
T.A.:	[...]*	[...]*	27	[...]*
SNCZ:	[...]*	[...]*	[...]*	[...]*
J.B.	[...]*	[...]*	[...]*	<u>[...]*</u>

(162) The same notes indicate that bottom prices were fixed for various European countries (Germany, France, the United Kingdom, the Netherlands, Belgium, Sweden, Norway, Finland, Denmark and Italy). The first price column concerns volumes above 5 tonnes.

Extract of original document No 8: Handwritten notes of Waardals’ representative

[...]*

(163) Exactly the same prices are indicated on Trident’ internal price instructions for July to August 1997 ⁽¹²¹⁾. It is also indicated in these instructions that the prices are ‘minimum price levels’ and that they ‘should not be reduced without prior discussions with (name of employee)’, whose name refers to the person in Trident who attended the cartel meetings.

(164) According to the same notes, Teknos was allocated to Heubach at the price of DEM 3,35: ‘Teknos: Heub.: Dem 3,35’.

(165) The last cartel meeting of year 1997 was held at the Airport Hotel Gavinch, in Hamburg on 16 October. It was attended by representatives of Heubach, James Brown, SNCZ, Trident and Waardals ⁽¹²²⁾.

(166) Waardals’ representative’s handwritten note on a file folder indicates: ‘Hamburg, 16.10.97...’ ⁽¹²³⁾.

(167) Handwritten notes ⁽¹²⁴⁾ found at the investigation show that sensitive sales information was exchanged by the producers. The notes compare zinc phosphate sales figures for the first three calendar quarters of 1996 and 1997, first for Waardals and then the total figures. At the bottom of the document, each of the five companies’ individual sales volumes for the third quarter of 1997 are indicated, together with a market share calculation for each of them. Individual sales volumes indicated after ‘Trident’ (Trident), ‘Heub’ (Heubach) and ‘SNCZ’ correspond exactly with the figures that these companies had sent to VdMI for the compilation of the statistics ⁽¹²⁵⁾.

Extract of original document No 9 ⁽¹²⁶⁾: handwritten notes of Waardals’ representative

Trident	[...]*	[...]*	[...]*- (acc.)	[...]*
Heub.	[...]*	[...]*	[...]*	”
W	[...]*	[...]*	[...]* %	[...]*
SNCZ	[...]*	[...]*	[...]*	”
B	[...]*	- [...]*	<u>[...]*</u>	
			[...]*	

Year 1998

(168) The cartel meetings continued with the next one being held in London on 19 January 1998 at the Jarvis Hotel at Heathrow airport. A boardroom was booked and invoiced to Trident ⁽¹²⁷⁾. James Brown, Heubach, SNCZ, Trident and Waardals attended this meeting ⁽¹²⁸⁾.

(169) A note in the diary of the representative of Waardals on 2 January 1998 reads: ‘Meeting in London, Monday 19.1.’ ⁽¹²⁹⁾. He informed another representative of Waardals on 12 January 1998 of this meeting: ‘Meeting in London Monday 19.1.98. ... The meeting starts at 10 o’clock and the meeting room is reserved under the name Trident’ ⁽¹³⁰⁾.

(170) Waardals’ representative’s handwritten note on a file folder indicates: ‘... London 19.1.98...’ ⁽¹³¹⁾.

(171) The diary of a representative of SNCZ on 19 January 1998 reads: ‘London, coordination’ ⁽¹³²⁾.

- (172) Pocket diary of 1998 of a representative of Heubach reads on 19.1.1998: 'London, Jarvis' ⁽¹³³⁾. Also, another diary reads on the same date states 'UK' ⁽¹³⁴⁾.

- (173) Information on quantities of zinc phosphate respectively sold in Europe in the fourth calendar quarter of 1997 was also exchanged and the market share of each competitor was calculated. A document handwritten on Jarvis Hotel paper ⁽¹³⁵⁾ contains calculation of market shares regarding zinc phosphate and apparently compare real market shares to previously agreed market shares. Individual sales volumes indicated after 'Trident' (Trident), 'Heubach' and 'SNCZ' correspond exactly with the figures that these companies had sent to VdMI for the compilation of the statistics ⁽¹³⁶⁾.

Extract of original document No 9 ⁽¹³⁷⁾: handwritten notes of Waardals' representative

4. (QTR.)				
Trident:	[...]*	—	[...]*	—
	[...]*			
Heubach:	[...]*	—	[...]*	—
SNCZ:	[...]*	—	[...]*	—
J.B.:	98		405	[...]*
W:	_____	[...]*	_____	[...]*
				[...]*

- (174) Another handwritten document ⁽¹³⁸⁾ found at the investigation at the office of the representative of Waardals reads as follows:

Extract of original document No 10 ⁽¹³⁹⁾:

ZP [in Europe]-97		
	[Total]	[Our share]
1. [QTR.]	[...]*	[...]*
2. "	[...]*	[...]*
3. "	[...]*	[...]*
4. " _____	[...]* _____	[...]* _____
	[...]*	[...]*
[...]* [of]	[...]*	[...]*
[Too much sold]	<u>83 t</u>	
...		

- (175) The first column on the top left of the document sets out the aggregated total volumes of zinc phosphate sold by the five producers during each calendar quarter in 1997, and the total aggregated amount sold in 1997. The right-hand column of the table sets out the

corresponding volumes sold by Waardals and the percentage they represent of the total volumes sold.

- (176) The table shows that the total volumes sold by all the five producers in 1997 is [...]* (tonnes). Waardals had sold [...]* (tonnes) which represents [...]* of the total. Then follows a calculation of [...]* of the total volumes [...]* equalling [...]*; and a conclusion 'too much sold 83 t'.

- (177) According to the calculation made by the cartel members at the meeting of 9 August 1994, Waardals was allocated a [...]* share of the market ⁽¹⁴⁰⁾. The [...]* mentioned in the present handwritten notes refers to that figure and it is concluded that Waardals has exceeded its share by 83 tonnes [...]*.

- (178) It is also clear from documents found at the investigation that the companies also fixed bottom zinc phosphate prices at this meeting for various European countries (the United Kingdom, France, Sweden, Norway, Finland, Denmark, Italy, Belgium and the Netherlands). Handwritten notes ⁽¹⁴¹⁾ found at Waardals first state that January was unstable: ./ DEM 0,20, and then sets out bottom prices:

Extract of original document No 11 ⁽¹⁴²⁾: handwritten notes of Waardals' representative

[Jan. unstable]: ./ [...]*DEM		
[...]*		
GBP [...]*	Norw. [...]*	
FRF [...]*	SF: [...]*	
Sw. [...]*	DK [...]*	
	It [...]*	
	Belg.: [...]*	
	NLG: [...]*	

- (179) Trident's internal price instructions for February 1998 ⁽¹⁴³⁾ contained exactly the same prices as the abovementioned Waardals' note for the sale of zinc phosphate of '1 000 to 4 999 kilos' and 'above 5 000 kilos'. It is also indicated in these instructions that the prices are 'minimum price levels' and that they 'should not be reduced without prior discussions with (name of employee)', whose name refers to the employee of Trident who attended the cartel meetings.

(180) Customer allocation also took place at this meeting; small customers and International Paint were allocated to James Brown (reference to the name of an employee). The price for the latter was also fixed (at GBP 1 240) ⁽¹⁴⁴⁾, as the document shows: 'United Kingdom – (small customers to) ⁽¹⁴⁵⁾ (name of employee) + Intern. 1 240'.

(181) The next cartel meeting was held on 20 April 1998 in Paris at Hotel Novotel of Roissy-Charles de Gaulle airport. The boardroom reservation was made under the name of Silar. Heubach, James Brown, SNCZ, Trident and Waardals attended this meeting ⁽¹⁴⁶⁾.

(182) A handwritten note on a file folder of the representative of Waardals indicates: '... Paris 20.4.98' ⁽¹⁴⁷⁾.

(183) Pocket diary '98 of a representative of Heubach reads on 20 April 1998: 'Paris (Novotel)' ⁽¹⁴⁸⁾. Also, the diary of another usual representative of Heubach indicates on Monday 20 April 1998: 'WE + (name of above mentioned Heubach's employee), Paris' ⁽¹⁴⁹⁾.

(184) Handwritten notes found at the investigation contain market share calculations for the first quarter of 1998 and show that sensitive information was exchanged by the producers ⁽¹⁵⁰⁾.

Extract of original document No 12: handwritten notes of Waardals' representative

J.B.	[...]*	[...]*
W	[...]*	[...]*
Trident	[...]*	[...]*
Heubach	[...]*	[...]*
SNCZ	[...]*	[...]*
		[...]*

(185) Individual sales volume indicated after 'Trident' (Trident Alloys) and 'SNCZ' match exactly with the figures that these companies sent to VdMI for the compilation of the statistics ⁽¹⁵¹⁾.

(186) The same notes indicate that bottom prices were fixed for various European countries (the United Kingdom (the first row), Germany, France, Belgium, the Netherlands, the Nordic countries and Italy). The first price column concerns volumes above five tons. Where two prices have been fixed, the latter concern small quantities (1 000 to 4 999 kilos).

Extract of original document No 13 ⁽¹⁵²⁾: handwritten notes of Waardals' representative

not below	[...]*	[[small quantities]]
Germany:	[...]*	(- “ -)
France:	[...]*	
[Belgium]	[...]*	
Holland:	[...]*	
[The North]:	[as before]	
[Italy]:	[...]*-	

(187) The said prices correspond exactly with Trident's internal price instructions for May 1998 ⁽¹⁵³⁾ for the sale of zinc phosphates of 1 000 to 4 999 kilos and above 5 000 kilos. It is also indicated in these instructions that the prices are 'minimum price levels' and that they 'should not be reduced without prior discussions with (name of employee)', whose name refers to the employee of Trident who attended the cartel meetings.

(188) A meeting of the cartel had been planned for 22 July 1998 in Amsterdam. Waardals was in charge of the organisation and had booked a meeting room in the Schiphol Airport Hilton Hotel. ⁽¹⁵⁴⁾ However, after the Commission and ESA investigations were carried out, the reservation was cancelled ⁽¹⁵⁵⁾.

2. LEGAL ASSESSMENT

2.1. COMPETENCE

(189) The arrangements set out above applied to the whole territory of the EEA, as the cartel members had sales in practically all the Member States and in the EFTA countries which were parties to the EEA Agreement ⁽¹⁵⁶⁾.

(190) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994. This Decision therefore includes the application of the rules on competition of the EEA Agreement (in particular Article 53(1)) to the arrangements to which objection is taken ⁽¹⁵⁷⁾.

(191) In so far as the arrangements appreciably affected competition and trade between Member States, Article 81 of the Treaty is applicable. In so far as the cartel operations had an appreciable effect on trade between EFTA countries being parties to the EEA Agreement and the Community, Article 53 EEA is applicable.

- (192) If an agreement or practice affects only trade between Member States, the Commission retains competence and applies Article 81 of the Treaty. On the other hand, if an agreement affects only trade between the EFTA States, the EFTA Surveillance Authority (ESA) alone is competent and will apply the EEA competition rules under Article 53 of the EEA Agreement ⁽¹⁵⁸⁾.
- (193) In this case, the Commission is the competent authority to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement on the basis of Article 56 of the EEA Agreement since the cartel had an appreciable effect on trade between the Member States of the Community ⁽¹⁵⁹⁾.
- 2.2. APPLICATION OF ARTICLE 81 OF THE EC TREATY AND ARTICLE 53 OF THE EEA AGREEMENT
- 2.2.1. ARTICLE 81(1) OF THE EC TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT
- (194) Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement respectively prohibit as incompatible with the common market and with the functioning of the EEA Agreement, all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States or trade between the Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the common market or the territory covered by the EEA Agreement and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.
- 2.2.2. AGREEMENTS AND CONCERTED PRACTICES
- (195) Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement prohibit agreements, decisions of associations and concerted practices.
- (196) An agreement can be said to exist when the parties adhere to a common plan which limits or tends 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.
- (197) In its PVC II judgment, the Court of First Instance ⁽¹⁶⁰⁾ stated that 'it is well established in the case-law that for there to be an agreement within the meaning of Article 81(1) of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way' ⁽¹⁶¹⁾.
- (198) Thus, an agreement for the purposes of Article 81(1) of the Treaty or Article 53(1) of the EEA Agreement does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term 'agreement' can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose.
- (199) Article 81 of the Treaty and Article 53 EEA distinguish between 'agreements between undertakings', 'concerted practices' and 'decisions by association of undertakings'. The object of the notion of concerted practice is to bring within the prohibition of that Article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition ⁽¹⁶²⁾.
- (200) The criteria of coordination and cooperation laid down by the case-law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty and the EEA Agreement, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market ⁽¹⁶³⁾.
- (201) Thus conduct may fall under Article 81(1) of the EC Treaty or under Article 53(1) of the EEA Agreement as a 'concerted practice' even where the parties have not subscribed to a common plan defining their action in the market but adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour ⁽¹⁶⁴⁾.

(202) Although in terms of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary to be provided by the parties concerned, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period ⁽¹⁶⁵⁾.

(203) It is not necessary that the Commission be obliged to categorise an infringement as exclusively an agreement or a concerted practice. The concepts are fluid and may overlap. Indeed, it may not even be possible realistically to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while considered in isolation some of its manifestations could accurately be described as one rather than the other. It would, however, be artificial analytically to subdivide what is clearly a continuing common enterprise having one and the same overall objective into several discrete forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time ⁽¹⁶⁶⁾.

(204) Each participant in the agreement and/or the concerted practice may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating, will not, however, prevent the arrangement from constituting an agreement or concerted practice for the purposes of Article 81(1) of the EC Treaty or Article 53(1) of the EEA Agreement where there is a single common and continuing objective. A complex cartel may properly be viewed as a single continuing infringement for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments.

(205) Whilst not contesting the facts set out in the Statement of Objections, Heubach contends in its written reply that the Commission has not sufficiently established the existence of an agreement in the meaning of Article 81 of the EC Treaty and Article 53 of the EEA Agreement. According to Heubach, the Commission has demonstrated that there was an intention to behave in a certain way and that it resulted in a restriction in the independence of the undertakings concerned.

(206) This contention must be emphatically rejected. In the light of the facts, which are not contested by Heubach, nor by any other addressee of this Decision, there was, as early as on 24 March 1994, an explicit joint intention to cartellise the zinc phosphate market and to act

accordingly. This resulted in the concrete implementation, over four years, of an overall plan to eliminate competition in the product market, which as described below constituted a single continuing infringement.

2.2.3. NATURE OF THE INFRINGEMENT IN THE PRESENT CASE

(207) Following preliminary contacts in early 1990's, the five producers of zinc phosphate — Britannia, James Brown, Heubach, SNCZ and Waardals — met on 24 March 1994 in London and agreed the basic principles by which they would cartelise the European market for zinc phosphate. They subsequently met on 3 May and on 9 August 1994 in the same city and agreed on the details of the implementation of the cartel.

(208) This plan, to which they all subscribed, was implemented over a period of more than four years employing the same mechanisms and pursuing the same common purpose of eliminating competition.

(209) The working out of the plan in regular meetings did not give rise to discrete 'agreements' but constitutes the implementation of the same overall and illegal scheme.

(210) Given the common design and common objective which the producers steadily pursued of eliminating competition in the zinc phosphate industry, the Commission considers that the conduct in question constituted a single continuing infringement of Article 81(1) of the EC Treaty and of Article 53(1) of the EEA Agreement.

2.2.4. RESTRICTION OF COMPETITION

(211) The agreement in the present case had the object and effect of restricting competition.

(212) Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement expressly mention as restrictive of competition agreements which, *inter alia*:

— directly or indirectly fix selling prices or any other trading conditions,

— limit or control production, markets or technical development,

— share markets.

- (213) These are the essential objectives and characteristics of the horizontal arrangements under consideration in the present case. Price being the main instrument of competition, in particular with respect to homogenous products, the various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at increasing the price to their benefit and above the level which would be determined by undistorted market conditions. Market sharing and price fixing by their very nature restrict competition within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.
- (214) The present cartel has to be considered as a whole and in the light of the totality of the circumstances, but the principal aspects of the complex of agreements and arrangements which can be characterised as restrictions of competition are:
- allocating market share quotas,
 - fixing of prices,
 - allocating customers.
- (215) These principal aspects were implemented by the cartel members mainly by:
- devising and applying a reporting and monitoring system to ensure the implementation of restrictive agreements, notably through the mutual exchange of individual sales data,
 - adapting individual conduct and pricing in order to ensure the maintenance of the agreed quotas,
 - participating in regular meetings and having other contacts in order to agree the above restrictions and to implement and/or modify them as required.
- (216) The argument, put forward by Heubach, that the goals of the cartel were not systematically achieved in the way the cartel participants would have liked, and that no specific enforcement mechanism was set up, other than the mutual pressure brought to bear on the respective members of the cartel, must be considered as irrelevant. Even if the cartel members have not at all times respected their agreement, it does not mean that the agreement did not exist. As the Court of Justice has confirmed in its case-law, the participation by undertakings in meetings that have an anti-competitive object has the effect *de facto* of creating or strengthening a cartel and the fact that an undertaking does not act on the outcome of those meetings is not such as to relieve it of responsibility for the fact of its participation in the cartel, unless it has publicly distanced itself from what was agreed in them ⁽¹⁶⁷⁾.
- (217) In any case, in the present case, the cartel members did enforce, monitor and respect their agreement.
- 2.2.5. EFFECT ON TRADE MEMBER STATES AND BETWEEN EEA CONTRACTING PARTIES
- (218) The continuing agreement between the producers had an appreciable effect on trade between Member States and between EEA contracting parties.
- (219) Western Europe has traditionally been the most important market for zinc phosphate. Sales in Europe represent more than 60 % of the worldwide output. With the exception of James Brown, who sells most of its production in three Member States, the four other European zinc phosphate producers sell in virtually all countries of the EEA. Heubach, SNCZ and Trident all export over 60 % of their total zinc phosphate turnover ⁽¹⁶⁸⁾. Waardals being an important producer of zinc phosphate with a market share of over 20 % of the west European market and significant sales in many Member States of the Community ⁽¹⁶⁹⁾, there is also significant zinc phosphate trade between the contracting parties to the EEA.
- (220) As between the cartel members themselves, the allocation of sales quotas must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed.
- (221) Therefore, over the period considered, the continuing cartel agreement between the zinc phosphate producers had an appreciable effect upon trade between the Member States and between the Contracting Parties to the EEA.
- 2.2.6. PROVISIONS OF THE COMPETITION RULES APPLICABLE TO AUSTRIA, FINLAND, ICELAND, LIECHTENSTEIN, NORWAY AND SWEDEN
- (222) In the period from 1 January to 31 December 1994, the provisions of the EEA Agreement applied to the four EFTA Member States which had joined the EEA; the cartel thus constituted an infringement of Article 53(1) of the EEA Agreement as well as of Article 81(1) of the EC Treaty, and the Commission is competent to apply both provisions. The operation of the cartel in these four EFTA States during this one-year period falls under Article 53(1) of the EEA Agreement.
- (223) After the accession of Austria, Finland and Sweden to the Community on 1 January 1995, Article 81(1) of the EC Treaty became applicable to the cartel in so far as it affected those markets. The operation of the cartel in Norway remained an infringement of Article 53(1) of the EEA Agreement.
- (224) In practice, it follows from the foregoing that in so far as the cartel operated in Austria, Finland, and Sweden, it constituted a violation of the EEA competition rules for

the first months of operation of the cartel (i.e from March 1994 to 31 December 1994) and a violation of the Community competition rules from 1 January 1995.

2.2.7. DURATION OF THE INFRINGEMENT

(225) Although there are indications that anti-competitive contacts between zinc phosphate producers did take place before the initial multilateral meeting on 24 March 1994, the Commission has in the present case limited its assessment under the competition rules and the application of any fines to the period from 24 March 1994, the date of the first multilateral cartel meeting, until 13 May 1998, the date of the Commission and ESA investigations.

(226) The participation in the infringement of Britannia (until 15 March 1997, when it was replaced by Trident), Heubach, James Brown, SNCZ and Waardals from 24 March 1994 onwards is established by the participation in the first multilateral cartel meeting of their respective higher executives, including Chairmen, General Managers and Managing Directors and Managers as the case may be (see recital 71).

(227) On 24 March 1994, it was decided to fix a 'status quo' on quantities of zinc phosphate supplied in Europe. It was also decided that the allocated market shares would be agreed upon with reference to the sales figures of 1991 to 1993. The setting-up of a monitoring system that would allow to control the respect of the agreement was also decided. It was also decided that prices should not be too different from one country to another, so that the product would not be shifted across borders. Finally, there was an agreement to have another meeting in the future.

(228) The Commission concludes from the foregoing that the addressees of this Decision entered into an anti-competitive agreement on 24 March 1994.

(229) The cartel continued at least until the simultaneous Commission and ESA investigations on 13 May 1998. All five producers were present at the last identified cartel meeting in April 1998. The fact that the next cartel meeting was due to take place in Amsterdam on 22 July 1998 demonstrates that the infringement continued in any event until the date on which the investigations took place.

(230) Waardals contends that it pulled out from the cartel in April 1995 'and was out of the club for five or six months' ⁽¹⁷⁰⁾. The company contends that this should be taken into consideration by the Commission, although

'admittedly it did not take long before Waardals concluded it had to cooperate and started providing sales volumes again' ⁽¹⁷¹⁾. Waardals further submits however that 'after having pulled out of the Club in April 1995, Waardals did obtain an order from Teknos, on its own and outside the sharing agreement operated by the others, and delivered a container to Teknos on week 16' ⁽¹⁷²⁾.

(231) The Commission takes the view that the arguments put forward by Waardals in respect of its temporary withdrawal do not suffice to get to the conclusion that Waardals did not infringe Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement during that period of time.

(232) First, Waardals took part in a meeting with Heubach on 12 June 1995, on the same date as a cartel meeting, the existence of which is not contested by the other addressees of this Decision. Whilst it is true that the date in question corresponds with the period during which Waardals claims it pulled out of the meeting, the presence of a representative of Waardals on the same date in London, and the fact that he met a representative of Heubach show that Waardals did not really withdraw from the cartel.

(233) Secondly, in any event, the 'withdrawal' of Waardals, if it occurred at all, was of very short duration. The sole cartel meeting which, allegedly, was not attended by Waardals was that of 12 June 1995, as Waardals attended the preceding (27 March 1995) and subsequent (15 September 1995) cartel meetings. Moreover, as already mentioned in the preceding paragraph, its non-attendance was not real. Moreover, the company has not established that it resulted in a totally autonomous commercial behaviour. The knowledge that the zinc phosphate cartel was still in place, must have had a bearing, over this period, on the commercial decisions made by Waardals.

(234) The Commission therefore concludes that Waardals participated in the infringement from 24 March 1994 until 13 May 1998.

2.2.8. ADDRESSEES

(235) In order to identify the addressees of this Decision, it is necessary to determine to which legal entities the responsibility for the infringement should be imputed.

2.2.8.1. *Principles applicable*

- (236) In order to determine whether a parent company should be held responsible for the unlawful conduct of a subsidiary, it is necessary to establish that the subsidiary 'does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company' ⁽¹⁷³⁾.
- (237) When an infringement of Article 81(1) of the Treaty or Article 53(1) of the EEA Agreement is found to have been committed over a given period of time, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed, so that it can answer for it.
- (238) When an undertaking committed an infringement of Article 81(1) of the EC Treaty or Article 53(1) of the EEA Agreement and when this undertaking later disposed of the assets that were the vehicle of the infringement and withdrew from the market concerned, the undertaking in question will still be held responsible for the infringement if it is still in existence ⁽¹⁷⁴⁾.
- (239) If the undertaking which has acquired the assets carries on the violation of Article 81(1) of the EC Treaty or Article 53(1) of the EEA Agreement, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets ⁽¹⁷⁵⁾.
- (243) In its reply to the Statement of Objections, Britannia says that it ceased all economic and trading activities after the business assets were transferred to Trident. Britannia says it continued to exist as a legal entity, but claims to be a mere shell company, an not a functioning economic entity. Britannia says that in accordance to the 'succession' principle to be applied in such case, pursuant to Community case-law, the economic and functional successor Trident should be held liable for the entire period of infringement.
- (244) In addition, Britannia purports that any contrary conclusion from the Commission would amount to unfair and unequal treatment: if instead of operating a transfer of assets, Britannia had been merged into the newly created Trident, the legal personality of Britannia would have disappeared, thus passing on the totality of the liability to Trident. Furthermore, if the management buy-out had been structured as a share sale, so that the management of the zinc phosphate business had purchased the shares of Britannia, then the Trident would have been held responsible for the entire period of the infringement.
- (245) Trident opposes Britannia's analysis. According to Trident, in view of the continuing legal existence of its predecessor Britannia and in conformity with the current case-law of the Court, liability for the infringement should be apportioned between Britannia and Trident on the basis of the duration of their respective involvement in the infringement.

2.2.8.2. *Addressees*

- (240) Over the entire period of reference for the establishment of the infringement, Heubach, James Brown, SNCZ and Waardals participated directly in the cartel. They will consequently be addressees of this Decision.
- (241) From 15 March 1997 onwards, Trident participated actively in the cartel. Therefore, the latter will be an addressee of this Decision.
- (242) Prior to 15 March 1997, Britannia, the predecessor of Trident, was actively involved in the cartel operations. Although Britannia sold its zinc phosphate business on 15 March 1997, it is still in existence. Over the period March 1994 to 15 March 1997 Britannia's zinc phosphate business did not have any separate legal personality. The company can therefore not claim that it was not aware of anti-competitive activities in the zinc phosphate business. Consequently, Britannia will be held responsible for the infringement from March 1994 until 15 March 1997 when the zinc phosphate business was divested and acquired by Trident.
- (246) Trident submits nevertheless that even if the Commission took the view that the basic amount of any fine should be set separately with regard to Trident and Britannia, 'it would be unfair if it meant that the sum of the two fines were higher than any fine which would have been imposed on a single owner for the whole period of Trident and Britannia's combined alleged infringements' ⁽¹⁷⁶⁾.
- (247) The Commission must reject the arguments put forward by Britannia. It is clear from the case-law of the Court that the 'economic continuity' test is to be applied exclusively in the case where the entity which committed the infringement has ceased to exist in law. When such entity is still in existence, it must be held liable for the infringement, irrespective of the nature of its current activities in the market.
- (248) Over the period where it actively took part in the infringement, Britannia and its shareholders benefited from its illegal behaviour. Although Britannia ceased to

trade after 15 March 1997, it still has assets. It must therefore bear responsibility for the infringement committed over the relevant period of time. The fact that the transfer of the 'infringing assets' could have been operated in a different way, leading to differing conclusions as to the attribution of liability, has no bearing on that conclusion.

- (249) The argument of Trident according to which the sum of the two fines that might be imposed should not be higher than any single fine which would have been imposed on a single owner for the whole of the infringement must also be rejected. In setting the amount of any fine, the Commission takes into account the period of time during which the infringement was committed by each undertaking. Moreover, when two distinct undertakings commit an infringement, even in the case where one undertaking had succeeded to the other, they must separately endorse responsibility for the infringement committed, and the fine applicable to them must be calculated in accordance to the normal practice of the Commission. Any 'splitting' of the fine between the two would confer on them an unjustifiable advantage.
- (250) When the management buy-out of the zinc phosphate business was completed and as Trident was created on 15 March 1997, a new legal entity was formed and a business strategy was defined. The management of Trident could at this occasion have decided to put an end to the participation of the business into the cartel. It did not do so. A new decision to keep on with the illegal behaviour was then at least implicitly made. This fully justifies the imposition of a fine on both Britannia and Trident.
- (251) On the basis of the considerations set out above, this Decision will be addressed to the following undertakings:
- Britannia Alloys & Chemicals Limited,
 - Dr. Hans Heubach GmbH & Co. KG,
 - James M. Brown Limited,
 - Société Nouvelle des Couleurs Zinciques SA,
 - Trident Alloys Limited,
 - Waardals Kjemiske Fabrikker A/S.

2.3. REMEDIES

2.3.1. ARTICLE 3 OF COUNCIL REGULATION No 17

- (252) Where the Commission finds that there is an infringement of Article 81 of the EC Treaty or Article

53 of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Council Regulation No 17 ⁽¹⁷⁷⁾.

- (253) In the present case the participants in the cartel went to considerable lengths to conceal their unlawful conduct. Virtually all documentary traces of the activities of the cartel were suppressed: no minutes, records, lists of participants or invitations were maintained.
- (254) The participants in the cartel continued to provide the trade association with statistical information for months after the Commission had carried out its investigations. Four of the five cartel members (Heubach, SNCZ, Trident and James Brown) established a new association in which market outlooks and statistics were discussed.
- (255) In these circumstances, the Commission stated in its Statement of Objections that it was not possible to say with certainty that the infringement had ceased as regards all the participants in the cartel.
- (256) In their replies to the Statement of Objections, Heubach, SNCZ and Trident claim that they put an end to their participation in the cartel as soon as investigations were carried out. Heubach and SNCZ also state that the meeting that took place after the investigation had perfectly legitimate goals and were totally lawful.
- (257) Notwithstanding these assertions and for the avoidance of doubt, it is necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end, if they have not already done so, and henceforth to refrain from any agreement or concerted practice which may have the same or similar object or effect.

2.3.2. ARTICLE 15(2) OF COUNCIL REGULATION No 17

2.3.2.1. *General considerations*

- (258) Under Article 15(2) of Council Regulation No 17 ⁽¹⁷⁸⁾, the Commission may by decision impose upon undertakings fines of 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 participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the EC Treaty or Article 53(1) of the EEA Agreement.
- (259) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and the duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation No 17.

- (260) 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 mitigating circumstances and will apply, as appropriate, the Notice on the non-imposition or reduction of fines in cartel cases (the 'Leniency Notice') ⁽¹⁷⁹⁾.

2.3.2.2. *Basic amount of the fines*

- (261) The basic amount is determined according to the gravity and duration of the infringement.

Gravity

- (262) In assessing the gravity of the infringement, the Commission will take account of its nature, its actual impact on the market and the size of the relevant geographic market.

Nature of the infringement

- (263) It follows from the foregoing that the present infringement consisted mainly of market-sharing and price-fixing, which are by their nature very serious violations of Articles 81(1) of the Treaty and 53(1) of the EEA Agreement.

- (264) The cartel constituted a deliberate infringement of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement. With the full knowledge that their actions restrict competition, the producers combined to set up a secret and institutionalised system designed to restrict competition in the zinc phosphate market. In any event, to conclude that an infringement was intentional, it is not even necessary for an undertaking to have been aware that it was infringing Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement ⁽¹⁸⁰⁾. It is sufficient that it could not have been unaware that the contested conduct had as its object the restriction of competition. This was doubtless the case as far as the zinc phosphate cartel is concerned.

- (265) The cartel arrangements involved all major operators in the EEA and were conceived, directed and encouraged at high levels in each participating company and operated entirely to the benefit of the participating producers and to the detriment of their customers.

- (266) In their replies to the Statement of Objections, the addressees of this Decision have put forward a number of arguments according to which the Commission should conclude that in view of its nature, the anti-competitive agreement constituted only a serious,

but not a very serious infringement of the competition rules.

- (267) Britannia, Heubach and Trident submit that the Commission should take in consideration the fact that that market share quotas were not allocated in the EEA on a country-by-country basis. Volume allocations were in the form of western Europe-wide quotas, and there was no subdivision for different countries within Europe.

- (268) Heubach contends that it is only from 1996 onwards that the cartel participants discussed and fixed the prices for the product. In support of this assertion, Heubach quotes a sentence of paragraph 99 of the Commission's Statement of Objections, which reads: 'Handwritten notes of later meetings put in evidence that national "recommended" prices were widely used'. As the first contemporaneous document showing specific prices fixed country by country quoted by the Commission consists of handwritten notes taken at a meeting on 21 May 1996, Heubach jumps to the conclusion that price-fixing started only from that date.

- (269) Britannia states on its part that the cartel generally aimed at setting a European benchmark price, by reference to the DEM price, which was converted into local currency: 'the general aim was to create a uniform European benchmark price and not separate national prices' ⁽¹⁸¹⁾. As to Trident, it contends that 'the exact prices for zinc phosphate were not rigidly fixed', although it 'agrees that prices were discussed and that it reflected the recommended prices discussed at the meetings in its internal price list' ⁽¹⁸²⁾.

- (270) Britannia, Heubach and Trident, also submit that the allocation of customers was not a systematic feature of the cartel agreement, and that this practice occurred only with regard to one customer, namely Teknos. Heubach submits that this customer was shared out because it was a traditional customer of Waardals, which did not accept that the other cartel participants supplied it. However, Trident submits that 'allocation of Teknos at the meetings arose partly because Teknos demanded particularly low prices' ⁽¹⁸³⁾.

- (271) Finally, Britannia, Heubach, SNCZ and Trident submit that no 'enforcement' mechanism was used and that this should be taken into account in so far as this made it easier for some cartel participants to cheat upon the others.

- (272) The Commission rejects the contention that the above elements should lead to the conclusion that the infringement was only of a serious nature.

- (273) It is clear that price-fixing and market-sharing cartels by nature jeopardise the proper functioning of the single market and therefore constitute one of the worst infringements of competition law. There can be no distinction, with regard to their gravity, between price and sales quotas fixed on a transnational/European basis and those fixed on a national basis.
- (274) Heubach's assertion that price-fixing occurred only from 1996 onwards must be rejected. Firstly, the quotation of the Commission's sentence referred to in recital 268 is clearly misleading. The Commission stated here that concrete illustrations of the price-fixing practice can be found in contemporaneous handwritten notes of later cartel meetings. This in no way contradicts the Commission's finding that discussion on prices was a feature of the cartel agreement as early as in 1994. Secondly, whilst it is true that the initial rationale of the cartel was to secure price rises through compliance to the allocated market shares, Waardals declares that as early as the first cartel meeting on 24 March 1994 it was 'decided that prices should not be too different from one country to another so those products would not be shifted across borders' ⁽¹⁸⁴⁾. As for Trident, it says in its statement that 'price levels were also discussed at each meeting. At each meeting a price per tonne was set in sterling for the market of the United Kingdom and a price in deutschmarks was set for the German market. At the initials meetings, local currency prices for each territory were set (...)' ⁽¹⁸⁵⁾.
- (275) The fact that the prices agreed upon during the cartel meetings might have been, from time to time, subject to negotiations with customers can in no way lead to the conclusion that the infringement was of a lesser gravity. The implementation of a cartel agreement, which is a plan to artificially raise prices above the level they would have attained under normal competitive conditions, inherently meets resistance from customers.
- (276) The absence of a mechanism of enforcement does not mitigate the gravity of the infringement. Even if the cartel agreement was of the nature of a 'gentlemen's agreement', the cartel participants were clearly expected to strictly adhere to their market shares and a rather sophisticated system was put in place, via successive trade organisations, to render possible the mutual control of each member's behaviour on the market. The fact that the enforcement of the sales quotas was solely achieved through pressure brought to bear on the members during the cartel meetings does not allow to draw the conclusion that the infringement was of a lesser gravity.
- (277) Finally, the fact that customer allocation may have happened sporadically, or indeed only in the case of one single customer, does not detract from the conclusion that the cartel agreement in question was of a very serious nature. Moreover, there is evidence that customers allocation did not occur solely in the case of Teknos. For example, as mentioned in recital 122, notes of Waardals show that allocation of customers and the possibility of selling to Jotun were discussed in that meeting. Also, as referred to in recital 180, handwritten notes from the cartel meeting of 19 January 1998 reveal that small customers as well as International Paint were allocated to James Brown.
- (278) The Commission therefore considers that the present infringement constituted by its nature a very serious infringement of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.
- The actual impact of the infringement on the zinc phosphate market in the EEA*
- (279) The actual impact in the market of an anti-competitive arrangement cannot always be measured in a reliable manner. In the case of a collusion consisting, *inter alia*, of a collaborative strategy of higher pricing, the fact that a number of external factors may simultaneously have affected the price development of the product makes it extremely difficult to draw conclusions of the relative importance of all possible causal effects.
- (280) In any event, the actual impact of a complex of agreements in the market depends on, firstly, whether these arrangements were implemented and, secondly, whether the implementation of these arrangements produced an effect in the market.
- (281) In so far as the complex of agreements were implemented, the Commission is well founded to consider that this had an actual impact in the market. There is no need to quantify in detail the extent of this actual impact when this is not feasible in regard of the facts concerned.
- (282) To the greatest extent possible, a distinction is drawn between the question of the implementation of the agreements and the question of their actual impact in

the market. None the less, there is, understandably, some overlap between the evidence used to reach conclusions on these two points.

Implementation of the illegal scheme

- (283) The cartel agreements considered above were carefully implemented.
- (284) From 9 August 1994 onwards (the day on which the market shares were allocated) and at the occasion of each subsequent cartel meeting, the actual sales of each company were disclosed and compared to the quotas initially agreed. The first meeting of each year was the occasion of updating the annual western European market share allocated to each cartel participant.
- (285) Price levels were discussed at each cartel meeting, where a price per tonne was set in the local currency of each relevant territory. Initially a price was set for each country, but later on the price in DEM set for Germany was simply converted into the relevant currencies. Trident confirmed that its internal price list reflected the price agreed at the latest cartel meeting.
- (286) The allocation of at least a customer was implemented: the account of the Finnish company Teknos was effectively shared out by the cartel participants (see recital 277).
- (287) The parties devised and applied a detailed reporting and monitoring system to ensure implementation of the quotas. Each individual firm's level of compliance was regularly monitored.

Effect of the infringement on the zinc phosphate market

- (288) With regard to what precedes and in the light of the efforts put by each participant into the organisation of the cartel, the effectiveness of the practical implementation cannot be questioned.
- (289) Since it was carefully implemented, the Commission considers that the infringement, committed by undertakings which during the period covered by this Decision covered over 90 % of the EEA-wide market, had a real impact on this market. As the arrangements were specifically aimed at restricting sales quantities, and raising prices higher than they would otherwise have been and restricting sales to certain customers, they must have altered the normal pattern of market behaviour and therefore have had an actual impact in the market.

- (290) Britannia and Trident, however, contend that the infringement has a very limited impact on the market as the cartel participants did not respect the market-sharing agreement.

- (291) Failure to adhere to the agreed prices is also put forward by Britannia, Heubach, SNCZ, Trident and Waardals. All of them contend that there was no impact on the market, as the fixed prices were not respected and competition continued to prevail. Waardals states in particular that its price war with Britannia (later Trident) never really stopped.
- (292) Britannia, Heubach and Trident submit that the setting of the prices for zinc phosphate was largely dependent on the variations in price of metal zinc, used as a raw material for the production of zinc phosphate. Given that the raw material represents some 50 % of the sales price, the strong variation in the price of metal zinc would have made it impossible to artificially increase the sales margin.
- (293) Britannia, Heubach, James Brown, SNCZ and Trident submit that their clients, which are primarily multinational companies, enjoy strong buying power. This allegedly had a 'capping effect' on the prices, which made their increase virtually impossible.
- (294) Trident further submits that exchanges rate fluctuations may have hindered the control of prices.
- (295) Heubach contends that the infringement had no impact on the final consumers, as zinc phosphate represent only a small ingredient in paints.

- (296) Finally, SNCZ submits that the potential substitutability of other products to zinc phosphate demonstrates that the infringement has no actual impact.

- (297) All these arguments must be dismissed. The fact that the results sought by the cartel participants were not entirely achieved does not prove in any way that the implementation of the cartel agreements had no effects in the market. In particular, the potential substitutability of other products for zinc phosphate is not demonstrated. SNCZ refers merely to the fact that one customer would have replaced zinc phosphate by calcium phosphate, but does not support this assertion by any concrete elements. SNCZ even acknowledges at the same time that though the use of calcium is developing, it is still 'used in relatively small quantities' ⁽¹⁸⁶⁾.

(298) Finally, it is inconceivable that the parties would have repeatedly agreed to meet in locations across the world to allocate sales quotas, fix prices and allocate customers over such a long period, having regard, *inter alia*, to the risks involved, if they had perceived the cartel as having no, or only a limited, impact on the zinc phosphate market.

The size of the relevant geographic market

(299) The cartel covered the whole of the EEA, nearly every part of which was under the influence of the collusion. For the purposes of calculating gravity, the Commission therefore considers the entirety of the EEA to have been affected by the cartel.

Conclusion of the Commission on the gravity of the infringement

(300) Taking into account the nature of the behaviour under scrutiny, its actual impact on the zinc phosphate market and the fact that it covered the whole of the common market and, following its creation, the whole EEA, the Commission considers that the undertakings concerned by this Decision have committed an infringement of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement, which was very serious.

(301) Britannia, Heubach, SNCZ Trident and Waardals contend in their replies that the product market is of very small size, with an annual value of approximately EUR 15 to 16 million annually. Britannia submits in particular in this respect that the infringement should be considered as serious, and not very serious.

(302) The Commission underlines that a clear distinction must be made between the question of the size of the product market and that of the actual impact of the infringement on this product market. It is not the practice of the Commission to consider the size of the product market as a relevant factor to assess gravity.

(303) Nevertheless, without prejudice to the very serious nature of an infringement, the Commission will in this case take into consideration the limited size of the product market.

Differential treatment

(304) Although the infringement constitutes a very serious infringement, it is possible for the Commission 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, as well as to set the fine at a level which ensures it has sufficient deterrent effect.

(305) In the circumstances of this case, which involves several undertakings, it will be necessary, in setting the basic amount of the fines, to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition.

(306) For this purpose, the undertakings can be divided into two categories according to their relative importance in the market concerned.

(307) As the basis for comparing the relative importance of an undertaking in the market concerned, the Commission considers it appropriate in the present case to take the EEA-wide product turnover. The comparison is made on the basis of the EEA-wide product turnover in the last year of the infringement.

(308) It is clear from the table at recital 50 and from the information available to the Commission that Britannia (before 15 March 1997), Trident (from March 1997 onwards), Heubach, SNCZ and Waardals were the major producers of zinc phosphate in the EEA, with rather similar market shares above or around [...]%. They will therefore be placed in the first category. James Brown, which had a significantly lower market share in the EEA market, will be placed in the second category.

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

— Britannia, Heubach, SNCZ, Trident and Waardals: EUR 3 million,

— James M. Brown: EUR 750 000.

Duration of the infringement

(310) As mentioned in recitals 225 to 229, the Commission considers that Heubach, James Brown, SNCZ and Waardals infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement from 24 March 1994 until 13 May 1998. They committed an infringement of medium duration, of four years and one month. The starting amount of the fines determined for gravity is therefore increased by 40 % for each company.

(311) Britannia infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement from 24 March 1994 until 15 March 1997. It committed a infringement of medium duration, of two years and eleven months. The starting amount of the fine determined for gravity is therefore increased by 25 %.

(312) Trident infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement from 15 March 1997 until 13 May 1998. It committed an infringement of medium duration, of one year and one month. The starting amount of the fine determined for gravity is therefore increased by 10 %.

Conclusion on the basic amounts

(313) The Commission accordingly sets the basic amounts of the fines as follows:

- Britannia: EUR 3,75 million,
- Heubach: EUR 4,2 million,
- James Brown: EUR 1,05 million,
- SNCZ: EUR 4,2 million,
- Trident: EUR 3,3 million,
- Waardals: EUR 4,2 million.

2.3.2.3. *Aggravating circumstances*

Role of leader in, or instigator of, the infringement

(314) The Commission is in possession of elements indicating that certain of the addressees of this Decision took initiatives to launch the cartel.

(315) As mentioned in recital 79, it appears that as early as 1980, Pasminco Europe-ISC Alloys, the predecessor of Britannia, suggested setting up anti-competitive price arrangements in the zinc phosphate market. It seems also, as was seen in recital 84, that Pasminco Europe-ISC Alloys was the initiator of the first meeting in October 1993, whose aim was to end the price war and bring some order in the market.

(316) On the other hand, in a written report of a meeting at the end of 1991, an employee of Waardals, confesses that he said to the chairman of SNZ 'that a voluntary reduction in produced quantities was in [his] opinion, the only way to obtain stability in the market — and thus better prices' ⁽¹⁸⁷⁾.

(317) The same document reports that the Chairman of SNCZ would then have indicated that he would 'take initiative for a meeting with the other producers' ⁽¹⁸⁸⁾.

(318) Waardals, contends that, for its part, it was contacted by the Managing Director of Heubach in early 1994, and that the latter invited representatives of Waardals in London to an informal meeting (the cartel meeting of 24 March 1994) to talk about zinc phosphate. Waardals mention that 'the invitation was also made on behalf of Britannia' ⁽¹⁸⁹⁾.

(319) In the light of the above, the Commission considers that the cartel was a joint initiative of most of the competitors in the zinc phosphate sector, and that no specific ringleader can therefore be identified.

2.3.2.4. *Attenuating circumstances*

Exclusively passive, or 'follow my leader' role in the infringement

(320) James Brown submits that it was 'in the position of a very minor producer approached and pressurised to join the trade association' and that the Commission should bear in mind 'the obvious repercussion if [it] had not done so' ⁽¹⁹⁰⁾. However, James Brown has not provided the Commission with any evidence to show that it was subject to any pressure or coercion by the other cartel participants.

(321) The Commission likewise has no reason to consider that James Brown played a passive or 'follow my leader' role in the infringement. James Brown participated in the vast majority of the cartel meetings that have been identified and took part directly and actively in the infringement.

(322) For example, on 9 January 1995, James Brown organised a meeting in Manchester with Britannia and Waardals, in an attempt to broker better relations between the two firms, which were often in conflict in the cartel meetings. As already described in recital 118, the representative of James Brown tried to persuade Waardals to stop targeting customers in the United Kingdom with low prices, whilst Britannia would restrict its activities in Scandinavia. This has not been contested by James Brown.

(323) The Commission therefore concludes that James Brown is not in a position of benefit from a reduction in fine in respect of its allegedly purely passive or 'follow my leader' role in the cartel.

Non-implementation in practice of the offending agreements

- (324) As already mentioned in recitals 290 to 298, Britannia, Heubach, SNCZ, Trident and Waardals claim that they did not fully implement the cartel agreements, in particular with respect to the minimum prices set, which were allegedly rarely complied with.
- (325) SNCZ claims that it kept some 'margin of manoeuvre' throughout the cartel and declares that it purposely underestimated, by 15 % approximately, the sales figures that were reported to the trade associations ⁽¹⁹¹⁾.
- (326) Trident declares for its part that from the start of its activity on 15 March 1997 (after completion of the management buy-out), it developed a new strategy of increasing sales and was not restrained any more by the cartel agreements.
- (327) As discussed above, even if on the hypothesis that the parties to the cartel did not always charge the minimum prices they had agreed, it cannot be considered by the Commission as an attenuating circumstance. It is inherent in a cartel that its participants do not fully trust each other and, assuming for the sake of argument that some companies sold under the recommended price, it simply illustrates a willingness to maximise individually the gain obtained from the unlawful agreement.
- (328) The fact that SNCZ reported 'false' figures to the trade association in charge of collecting sales data, or that Trident did not feel constrained any longer by the agreement after March 1997 cannot be considered a mitigating factor. As the Court of First Instance underlined in its *Cascades* judgment, 'an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit' ⁽¹⁹²⁾.
- (331) Britannia and Trident submit that they have adopted antitrust law compliance programmes and that this should be taken into account as an attenuating circumstance.
- (332) The Commission welcomes the fact that the above companies set up antitrust law compliance policies. It cannot, however, as a prevention tool, release the Commission from its duty to punish the infringement of the competition rules that Britannia and Trident committed in the past.
- (333) Heubach submits that zinc phosphate can damage human health and the environment when not properly handled, and that zinc phosphate producers have to comply in this regard with numerous laws. It further states that this leads to very frequent, legitimate contacts between the competitors in the market, which would have as a consequence that 'the step towards unlawful contacts is easily made' ⁽¹⁹³⁾.
- (334) The Commission must vigorously dismiss this argument. The fact that the industry has a duty to comply with the legislation regarding the handling of a given product can in no way exonerate those companies operating in the market from their obligation to comply strictly with the existing rules on competition.
- (335) Trident finally says that it participated in the infringement only from March 1997 until May 1998, and therefore that its participation had an insignificant impact on the cartel and on the market.
- (336) The Commission must reject this argument. Firstly, over the period in question, Trident was actively involved in the cartel and participated in the cartel meetings as a full member. Secondly, the duration of the infringement is duly taken into account by the Commission in the calculation of any fine, and cannot in any case be construed to constitute a mitigating circumstance.

Other attenuating circumstances

- (329) Trident submits that it has not made any significant profit from its involvement in the cartel and that this should constitute a mitigating circumstance.
- (330) The Commission, however, does not consider that, in general, either non-benefit from a cartel or any economic disadvantage suffered due to participation in a cartel constitutes attenuating circumstances in the fixing of a fine. The argument of Trident must therefore be dismissed.

2.3.2.5. Specific economic context

- (337) Heubach, SNCZ and Trident submit that the Commission should taken into account, in determining the fines to be imposed, the poor economic context in which the infringement took place.
- (338) Heubach submits that the zinc phosphate market is a mature market in a critical situation, and that the producers are currently confronted with cheap imports from Asia, CEEC ⁽¹⁹⁴⁾ and Australia. Heubach, Trident

and SNCZ also say that the strong fluctuations of the price of zinc metal, combined with the buying power of multinational customers renders, the situation even more critical, all the more so since calcium phosphate tends increasingly to compete with zinc phosphate as a substitutable product. Heubach and Trident conclude that [...] and Heubach submits that the Commission should take this into account as it did in Decision 98/247/ECSC (Alloy Surcharge) ⁽¹⁹⁵⁾.

(339) The Commission accepts that in view of the maturity of the market, of its strong dependence on the price of zinc metal and of the buying power enjoyed by the customers, the economic context in which the infringement took place was difficult.

(340) Nevertheless, the Commission takes the view that some of those elements should not be overestimated. Firstly, according to Waardals' declaration, imports from third countries are still limited, notably due to the cost of freight, and the quality of the product is significantly lower ⁽¹⁹⁶⁾. Secondly, the fluctuations of the zinc metal during the period of infringement do not necessarily constitute a relevant argument as the strong increase in the price of zinc metal occurred only in 1997, whereas the cartel was in force from 1994 onwards.

(341) The argument relating to the bad economic context must therefore be dismissed.

2.3.2.6. *Specific characteristics of the undertakings in question*

(342) All the addressees of this Decision submit that they are very small companies and that this should be taken into account by the Commission when setting the fines.

(343) The Commission rejects this argument. The fact that the addressees of this Decision are small or medium enterprises does not exempt them from their strict duty to comply with the competition rules. Setting up a cartel can under no circumstances be considered a legitimate way to compensate for the difficulty of doing business with customers enjoying strong purchasing power.

Conclusion on the amounts of fines prior to any application of the Commission notice on the non-imposition or reduction of fines in cartel cases (The Leniency Notice)

(344) The Commission accordingly sets the amounts of the fines prior to any application of the Leniency Notice as follows:

— Britannia: EUR 3,75 million,

— Heubach: EUR 4,2 million,

— James Brown: EUR 1,05 million,

— SNCZ: EUR 4,2 million,

— Trident: EUR 3,3 million,

— Waardals: EUR 4,2 million.

(345) However, since the final amounts calculated according to the above method may not in any case exceed 10 % of the worldwide turnover of the addressees (as laid down by Article 15(2) of Regulation No 17), the fines will be set as follows, in order to not exceed the permissible limit:

— Britannia: EUR 3,75 million ⁽¹⁹⁷⁾,

— Heubach: EUR 4,2 million,

— James Brown: EUR 1,05 million,

— SNCZ: EUR 1,7 million,

— Trident: EUR 3,3 million,

— Waardals: EUR 700 000.

2.3.2.7. *Application of the Leniency Notice*

(346) Certain addressees of this Decision have cooperated with the Commission, at different stages of the investigation into the infringement for the purpose of receiving the favourable treatment set out in the Leniency Notice. In order to meet the legitimate expectations of the undertakings concerned as to the non-imposition or reduction of fines on the basis of their cooperation, the Commission examines in the following section whether the parties concerned satisfy the conditions set out in the notice.

Opportunity to file an application under the Leniency Notice

(347) Britannia and James Brown submit that they were not informed of the proceedings before they received the Statement of Objections. In this regard, they claim that they have not been put in a position to be able to file an application under the leniency Notice.

(348) This argument must be dismissed. The fact that certain addressees of this Decision were subject to on-the-spot investigations or received requests for information from the Commission did not confer on them any advantage, not did that hinder Britannia's or James Brown's right of

defence. Inspections and request for information are investigatory steps which, as such, are not meant to be any specific vehicle of the exercise by an undertaking of its right of defence.

(349) Britannia also contends that it could not have been aware of the infringement because all the people involved in the infringement at the time where Britannia participated in the cartel were transferred to Trident as a result of the management buy-out.

(350) This argument must equally be dismissed. As Britannia rightly points out in its reply to the Statement of Objections, the objective of the Leniency Notice is to encourage enterprises involved in cartel activities to come forward and cooperate on a voluntary basis. The argument according to which the undertaking was no longer aware of the infringement cannot exempt it from its responsibilities. Whilst it was active in the cartel, Britannia had every opportunity to file an application under the Leniency notice

Non-imposition of a fine or very substantial reduction of its amount (Section B)

(351) During the investigations carried out on 13 and 14 May 1998 pursuant to Article 14(2) of Regulation No 17, the Commission and the ESA collected sufficient information to established the evidence of the zinc phosphate cartel.

(352) None of the addressees of this Decision was therefore in a position to fulfil condition (b) of Section B of the Leniency Notice, which is therefore not applicable.

Substantial reduction of a fine (Section C)

(353) As mentioned above, the Commission collected decisive evidence of the cartel's existence before any undertaking filed an application under the Leniency Notice. None of the addressees of this Decision was therefore in a position to fulfil condition (b) of Section B of the Leniency Notice. Section C of the Leniency Notice is therefore not applicable.

Significant reduction of a fine (Section D)

Waardals

(354) Waardals approached the Commission on 17 July 1998, and announced its intention to cooperate fully with the

Commission under the Leniency Notice. At a meeting on 2 September 1998, Waardals provided the Commission with a detailed oral account of the cartel's activities. The Commission sent to Waardals the draft minutes of the meeting, the content of which was finally confirmed by a written declaration from Waardals on 3 December 1999.

(355) The account of the cartel given by Waardals, which included, *inter alia*, a list of the cartel meetings held between 1994 and 1998, allowed the Commission to form a clearer idea of the history and mechanisms of the cartel, and to interpret the documents in its possession in a more accurate way. The explanations given by Waardals enabled the Commission to send to the other cartel participants very detailed requests for information.

(356) On the basis of the above, the Commission concludes that Waardals fulfils the conditions as set out in Section D(2), first indent, of the Leniency Notice and grants Waardals a 50 % reduction of the fine that would have been imposed if it had not cooperated with the Commission.

Trident

(357) It was only after it had received the first request for information from the Commission, dated 5 March 1999, that Trident informed the Commission, by letter of 12 April 1999, of its intention to cooperate fully with the investigation under the Leniency Notice. Trident then provided the Commission with a written statement giving a detailed account of the cartel, as well as a number of documents relevant to the case.

(358) The Commission accepts that the statement and the documents submitted by Trident enabled the Commission to cross-check the information in its possession and to get a clearer picture of some factual aspects of the cartel. The Commission notes, however, that Trident approached the Commission only after it had received a request for information under Article 11 of Regulation No 17, sent on 5 March 1999. This reluctance to come forward to the Commission spontaneously and before any further investigatory measure was taken will be taken into account. The Commission also takes note that at least one of the documents provided under the Leniency Notice corresponded in fact to the type of information that Trident was requested to supply to the Commission in response to the request for information of 5 March 1999, pursuant to Regulation No 17 ⁽¹⁹⁸⁾.

- (359) On the basis of the above, the Commission concludes that Trident fulfils the conditions as set out in Section D(2), first indent, of the Leniency Notice and grants Trident a 40 % reduction of the fine that would have been imposed if it had not cooperated with the Commission.

Britannia, Heubach, SNCZ

- (360) Britannia, Heubach and SNCZ stated in their written replies to the Statement of Objections that they do not substantially contest the facts as set out in the latter.

- (361) Britannia submits that 'Trident has cooperated with the Commission in respect of the business operated by [Britannia] and then by Trident as a whole, and [that Britannia] should benefit from this cooperation and receive at least the same amount of reduction in any fine as is granted to Trident' ⁽¹⁹⁹⁾. For its part Trident puts forward the same argument and states that any reduction in fine arising from its cooperation should also extend to benefit Britannia because Trident's cooperation also related to Britannia's period of operation in the zinc phosphate market ⁽²⁰⁰⁾.

- (362) The Commission must dismiss this argument. The fact that Trident submitted to the Commission information regarding Britannia's involvement in the cartel does not create any entitlement on the part of Britannia to benefit from the same reduction in fine as Trident. As already mentioned, Britannia had the opportunity the file an application under the Leniency Notice at any time and did not do so.

- (363) Britannia, Heubach and SNCZ will therefore receive, pursuant to Section D(2), second indent of the Leniency Notice, a reduction of their fine of 10 %.

James Brown

- (364) It is quite unclear from the correspondence received from James Brown whether or not it contests the facts as set out in the Statement of Objections. Nevertheless, the Commission concludes from a careful reading of such correspondence that the responses from James Brown imply that this company does not, as a matter of fact, contest the facts as set out in the Statement of Objections.

- (365) James Brown will therefore receive, pursuant to Section D(2), second indent of the Leniency Notice, a reduction of its fine of 10 %.

Conclusion of the application of the Leniency Notice

- (366) In conclusion, with regard to the nature of their cooperation and in the light of the conditions set out in the Leniency Notice, the Commission will grant to the addressees of this Decision the following reductions of their respective fines:

- Waardals: a reduction of 50 %,
- Trident: a reduction of 40 %,
- Britannia: a reduction of 10 %,
- Heubach: a reduction of 10 %,
- James Brown: a reduction of 10 %,
- SNCZ: a reduction of 10 %.

2.3.2.8. Ability to pay

- (367) [...] ⁽²⁰¹⁾.

- (368) [...] ^{*}.

- (369) [...] ^{*}.

2.3.2.9. The final amounts of the fines imposed in the present proceedings:

- (370) In conclusion, the fines to be imposed, pursuant to Article 15(2)(a) of Regulation No 17, are to be as follows:

- Britannia Alloys & Chemicals Limited:
EUR 3,37 million,
- Dr Hans Heubach GmbH & Co. KG:
EUR 3,78 million,
- James M. Brown Limited: EUR 940 000 EUR,
- Société Nouvelle des Couleurs Zinciques SA: EUR 1,53 million,
- Trident Alloys Limited: EUR 1,98 million,
- Waardals Kjemiske Fabrikker A/S: EUR 350 000 EUR.

HAS ADOPTED THIS DECISION:

Article 1

Britannia Alloys & Chemicals Limited, Dr Hans Heubach GmbH & Co. KG, James M. Brown Ltd, Société Nouvelle des

Couleurs Zinciques SA, Trident Alloys Ltd. and Waardals Kjemiske Fabrikker A/S have infringed the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating in continuing agreement and/or concerted practice in the zinc phosphate sector.

The duration of the infringement was as follows:

- (a) in the case of Dr Hans Heubach GmbH & Co. KG, James M. Brown Limited, Société Nouvelle des Couleurs Zinciques SA and Waardals Kjemiske Fabrikker A/S: from 24 March 1994 until 13 May 1998;
- (b) in the case of Britannia Alloys & Chemicals Limited: from 24 March 1994 until 15 March 1997;
- (c) in the case of Trident Alloys Limited: from 15 March 1997 until 13 May 1998.

Article 2

The undertakings referred to in Article 1 shall immediately bring to an end the infringements referred to in that Article, in so far as they have not already done so.

They shall refrain from repeating any act or conduct referred to in Article 1, and from adopting any measure having equivalent object or effect.

Article 3

For the infringement referred to in Article 1, the following fines are imposed:

- (a) Britannia Alloys and Chemicals Limited: EUR 3,37 million,
- (b) Dr Hans Heubach GmbH & Co. KG: EUR 3,78 million,
- (c) James M. Brown Limited: EUR 940 000,
- (d) Société Nouvelle des Couleurs Zinciques SA: EUR 1,53 million,
- (e) Trident Alloys Limited: EUR 1,98 million,
- (f) Waardals Kjemiske Fabrikker A/S: EUR 350 000.

Article 4

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

Account No 642-0029000-95
European Commission
Banco Bilbao Vizcaya Argentaria (BBVA)
SWIFT code: BBVABEBB —
IBAN code: BE 76 6420 0290 0095
Avenue des Arts/Kunstlaan, 43
B-1040 Brussels

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3,50 percentage points, namely 6,77 %.

Article 5

This Decision is addressed to:

- (a) Britannia Alloys & Chemicals Limited
Botany Road
Northfleet
Gravesend,
Kent DA11 9BG
United Kingdom;
- (b) Dr Hans Heubach GmbH & Co. KG
Heubachstraße 7
D-38685 Langelsheim
Germany;
- (c) James M. Brown Limited
Napier Street
Fenton
Stoke-on-Trent
Staffordshire ST4 4NX
United Kingdom;
- (d) Société Nouvelle des Couleurs Zinciques SA
F-59111 Bouchain
France;
- (e) Trident Alloys Limited
Alloys House
Willenhall Lane
Bloxwich
Walsall
West Midlands WS3 2XW
United Kingdom;
- (f) Waardals Kjemiske Fabrikker A/S
Strandgaten 223
N-5004 Bergen
Norway.

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

Done at Brussels, 11 December 2001.

For the Commission

Mario MONTI

Member of the Commission

Notes

(*) The square brackets marked with an asterisk denote confidential information which has been deleted from the text.

(¹) OJ L 13, 21.2.1962, p. 204/62.

(²) OJ L 148, 15.6.1999, p. 5.

(³) OJ L 354, 30.12.1998, p. 18.

(⁴) OJ C 144, 20.6.2003.

(⁵) Dun & Bradstreet Comprehensive Report on the company.

(⁶) See letter from Trident of 3.8.1999 (5769).

(⁷) This product is quoted daily on the London Metal Exchange (LME).

(⁸) To 31.3.2000 (exchange rate calculated on the average monthly exchange rate from April 1999 until March 2000).

(⁹) For instance in 1992, Colores Hispanias (Spain) and ICS (Italy) were reported to have sold a few hundred tonnes in their respective domestic markets. Inspection 13.5.1998 (SNCZ), document CRO22A (1801 and 1802).

(¹⁰) CEFIC, created in 1972, presents its mission as follows: 'to provide forum for structured discussion of supra-national issues affecting chemical companies operating in Europe and represent the chemical industry's position on such issues'. ZIPHO meeting 12.12.1995, insp. 13.5.1998 (Waardals), document JR1 [1062]. CEFIC sector groups are specialised, product-oriented forums. As presented by CEFIC, the mission of ZOPA is to 'represent, promote and defend the zinc oxide and zinc dust industries at national and international levels, and to ensure that industry has the opportunity to give its opinion and input to the competent bodies on all regulatory matters pertaining to health, safety, environment and trade issues concerning zinc oxide and zinc dust'.

(¹¹) Respectively on 12.12.1995, 13.2.1996 and 11.3.1996.

(¹²) Draft statutes of EMZP, enclosed with VdMI's letter of 6.7.1998 to Trident: document 13, Annex IB to Trident reply of 15.4.1999 to the request for information of 5.3.1999 (2981 to 2992).

(¹³) E.g. *inter alia*: zinc chromates, polyphosphates, borates, silicates.

(¹⁴) See Trident statement of 23.4.1999 (4977).

(¹⁵) i.e. their chemical formula is modified in order to improve some properties of the product.

(¹⁶) See for instance: Trident statement of 23.4.1999 (4976); Waardals reply of 22.10.1999 to the request for information of 8.10.1999 (5892); documents on prices collected at SNCZ, *inter alia* document collected at the inspection of 13.5.1998 (Inspection 13.5.1998 document) CRO13 A (1706) and CRO19A (1745 and 1746); Heubach reply of 29.10.1999 to the request for information of 8.10.1999 (5928).

(¹⁷) Estimates calculated from the figures supplied by Heubach, James Brown, SNCZ, Trident Alloys and Waardals.

(¹⁸) All tonnage figures hereafter are given in metric tonnes.

(¹⁹) As will be seen below, 1998 is considered to be the last year of the infringement subject to the present Decision, with the exception of the case of Britannia, which ceased the infringement in March 1997. As far as Britannia is concerned, 1996 is the last year for which figures are available on an full annual basis.

(²⁰) Replies to the requests for information of 12 October 2001: (7994), (8019 and 8020), (8029 and 8030), (8128), (8211), (8229 to 8232).

(²¹) To 30.6.1996 (exchange rate calculated from the average monthly exchange rates from July 1995 until June 1996).

(²²) Including anti-corrosion and decorative paint.

(²³) European Chemical News, 5 to 11 April 99 issue, p. 22. (Statistical source: European Council of Printing Ink and Artist's Colour Industry).

(²⁴) OJ C 207, 18.7.1996, p. 4.

(²⁵) Trident statement of 23.4.1999 (4984).

(²⁶) Trident statement of 23.4.1999 (4983). Waardals oral statement of 2.9.1998 (see minutes of meeting, points 63 and 67 (5993)).

(²⁷) Trident reply of 15.4.1999 to the request for information of 5.3.1999 (2870 to 2872); Heubach reply of 13.4.1999 to the request for information of 5.3.1999 (2765 to 2767); James Brown

reply of 26.3.1999 to the request for information of 5.3.1999 (2703); SNCZ reply of 19.4.1999 to the request for information of 5.3.1999 (5036 to 5037); Waardals statement of 30.10.1998 (2620).

(²⁸) Waardals oral statement of 2.9.1998: see minutes of meeting, point 67 (5993).

(²⁹) Inspection 13.5.1998 (Waardals): in 1996 the biggest deviation was 0,5 % (document BB2f (45)); in 1997 James Brown undersold by 1,3 % (document BB2e (44)).

(³⁰) Waardals oral statement of 2.9.1998: see minutes of meeting, point 39 to 42 (5989).

(³¹) Trident statement of 23.4.1999 (4978).

(³²) Trident statement of 23.4.1999 (4979).

(³³) Inspection 13.5.1998 (Waardals), document BB49 (762 and 763) (translated from Norwegian).

(³⁴) Inspection 13.5.1998 (Waardals), document W7 (1395 to 1397) and BB49 (738 to 740) (translated from Norwegian).

(³⁵) Trident statement of 23.4.1999 (4979).

(³⁶) Waardals oral statement of 2.9.1998: see minutes of meeting, point 44 (5990).

(³⁷) The Commission has collected evidence, as is shown below, that detailed sales figures were also exchanged at these occasion.

(³⁸) Trident statement of 23.4.1999 (4985).

(³⁹) Trident statement of 23.4.1999 (4982). Waardals oral statement of 2.9.1998: see minutes of meeting, point 55 (5991).

(⁴⁰) Trident statement of 23.4.1999 (4984).

(⁴¹) Waardals oral statement of 2.9.1998: see minutes of meeting, points 73 and 74 (5994 and 5995).

(⁴²) Waardals oral statement of 2.9.1998: see minutes of meetings, point 74 (5995).

(⁴³) Trident statement of 23.4.1999 (4983).

(⁴⁴) Waardals' reply to the Statement of Objections (7878).

(⁴⁵) Waardals oral statement of 2.9.1998: see minutes of meeting, point 69 (5994), and Waardals' reply to the Statement of Objections (7878).

(⁴⁶) Trident statement of 23.4.1999 (4983).

(⁴⁷) See above footnote 26.

(⁴⁸) Waardals oral statement of 2.9.1998: see minutes of meeting, points 50 and 51 (5991).

(⁴⁹) See for instance Inspection 13.5.1998 (Waardals), document BB2a (38 and 39), BB13 (592), BB2f (45) and BB32 (677).

(⁵⁰) Waardals oral statement of 2.9.1998: see minutes of meeting, point 51 (5991).

(⁵¹) Inspection 13.5.1998 (Waardals), document BB 49 (751 and 752) R.W. are the initials of the Purchase Director of International Paint (translated from Norwegian).

(⁵²) Trident reply of 15.4.1999 to the request for information of 5.3.1999, Annex 6, Part I-B, No 152 (4131 and 4132).

(⁵³) SNCZ reply of 19.4.1999 to the request for information of 5.3.1999, Annex to Question 8 (5304).

(⁵⁴) Inspection 13.5.1998 (Waardals), document BB 50 (842).

(⁵⁵) Inspection 13.5.1998 (Waardals), document BB 50 (857). Also SNCZ reply of 19.4.1999, annex to Question 8 (5293).

(⁵⁶) Inspection 13.5.1998 (Waardals), document BB 50 (785).

(⁵⁷) See footnote 26.

(⁵⁸) Trident statement of 23.4.1999 (4981).

(⁵⁹) Trident statement of 23.4.1999 (4982).

(⁶⁰) See footnote 26.

(⁶¹) Waardals reply to the Statement of Objections (7880).

(⁶²) Inspection 13.5.1998 (Waardals), document BB31 (670).

- ⁽⁶³⁾ Trident reply of 15.4.1999 to the request for information of 5.3.1999 (2870 to 2872), Heubach reply of 13.4.1999 to the request for information of 5.3.1999 (2775 to 2777) and Waardals letter of 30.10.1998 (2620).
- ⁽⁶⁴⁾ James Brown reply of 26.3.1999 to the request for information of 5.3.1999 (2703).
- ⁽⁶⁵⁾ Inspection 13.5.1998 (SNCZ), document CRO6B (1833).
- ⁽⁶⁶⁾ Inspection 13.5.1998 (Waardals), document BB50 (874).
- ⁽⁶⁷⁾ Idem.
- ⁽⁶⁸⁾ Inspection 13.5.1998 (Waardals), document BB31 (670): Waardals employee's diary on 27.3.1995.
- ⁽⁶⁹⁾ Idem: '1 to 5 not communicated' (translated from Norwegian).
- ⁽⁷⁰⁾ Waardals oral statement of 2.9.1998: see minutes of meeting, point 63 (5993).
- ⁽⁷¹⁾ [...]*.
- ⁽⁷²⁾ Translated from Norwegian.
- ⁽⁷³⁾ Inspection 13.5.1998 (Waardals), document BB50 (786): fax of 24.4.1995.
- ⁽⁷⁴⁾ SNCZ reply of 19.4.1999 to the request for information of 5.3.1999, Annexes to question 8, monthly declarations (5282).
- ⁽⁷⁵⁾ SNCZ reply of 19.4.1999 to the request for information of 5.3.1999, Annexes to question 8, monthly declarations (5279).
- ⁽⁷⁶⁾ SNCZ reply of 19.4.1999 to the request for information of 5.3.1999, Annexes to question 8, monthly declarations (5258 to 5276).
- ⁽⁷⁷⁾ Trident reply of 15.4.1999 to the request for information of 5.3.1999 (2870).
- ⁽⁷⁸⁾ Waardals oral statement of 2.9.1998: see minutes of meeting point 66 (5993). Inspection 13.5.1998 (Waardals), document BB31 (671) (translated from Norwegian), document RA3 (918) and document RA4 (929).
- ⁽⁷⁹⁾ Waardals's reply to the Statement of Objections (7881).
- ⁽⁸⁰⁾ Inspection 13.5.1998 (Waardals), document BB7 (518).
- ⁽⁸¹⁾ Waardals's reply to the Statement of Objections, (7881).
- ⁽⁸²⁾ See above footnote 26. A representative of Waardals was in London Heathrow, Novotel. Inspection 13.5.1998 (Waardals), document RA3 (915) (travel expenses mentioning: Hotel Novotel Heathrow). His diary on 15.9.1995 indicates 'Meeting Novotel'. Inspection 13.5.1998 (Waardals), document BB31 (672).
- ⁽⁸³⁾ Waardals employees' travel expenses forms indicate that they were in Hotel Mercure on 21 to 22 January. Inspection 13.5.1998 (Waardals), document RA3 (919-920). The travel expenses form regarding a representative of Heubach indicate that the latter was in Paris on 22 January, Inspection 13.5.1998 (Heubach), document EF18 (2538).
- ⁽⁸⁴⁾ The diary of the representative of Waardals indicates on 20.5.1996 'Departure for London Heathrow Hotel' and on 21.5.1996: 'Meeting London'. Inspection 13.5.1998 (Waardals), document BB30 (661). On day 10.9.1996, The diary of the representative of Heubach indicates 'London!'. Inspection 13.5.1998 (Heubach), document EF6 (2239). Also the travel expenses form confirms that this person was in London. Inspection 13.5.1998 (Heubach), document EF18 (2544).
- ⁽⁸⁵⁾ The diary of a representative of Waardals indicates on 9.9.1996 'Departure for London, Novotel' and on 10.9.1996: 'London Meeting'. Inspection 13.5.1998 (Waardals), document BB30 (662). The travel expenses forms of the two representatives of Waardals indicate that they were in Hotel Novotel, United Kingdom on 9 to 10.9.1996; document RA4 (927 and 928) The diary of the representative of Heubach reads on 10.9.1996: 'London!'. Also, travel expenses form indicates his presence in London on 10.9.1996. Inspection 13.5.1998 (Heubach), document EF6 (2239) and document EF18 (2550).
- ⁽⁸⁶⁾ See footnote 26.
- ⁽⁸⁷⁾ See Trident statement of 23.4.1999 (4981 to 4987) and Waardals oral statement of 2.9.1998: see minutes of meeting, points 73 to 76 (5994 and 5995).
- ⁽⁸⁸⁾ Inspection 13.5.1998 (Waardals), document BB32 (676 and 677).
- ⁽⁸⁹⁾ SNCZ reply of 19.4.1999, Annexes to question 8 (5270 to 5276); Trident reply of 15.4.1999, Annex 6, file 3, part 3, document 5 and 6 (4464 to 4476).
- ⁽⁹⁰⁾ Words in square brackets translated from Norwegian.
- ⁽⁹¹⁾ Trident statement of 23.4.1999 (4986). Letters from CEFIC: of 27.2.1996, Inspection 13.5.1998 (Waardals), document BB7 (567); of 2.7.1996, Inspection 13.5.1998 (Waardals), document BB7 (547); of 5.12.1996, Inspection 13.5.1998 (Waardals), document BB7 (535). Fax of 9.7.1996 from Heubach to CEFIC: SNCZ reply of 19.4.1999 to the request for information of 5.3.1999, Annexes to question 2 (5393); Trident reply of 15.4.1999 to the request for information of 5.3.1999, Annex 6, file 2, document No 166 (4172).
- ⁽⁹²⁾ Inspection 13.5.1998 (Waardals), document DBW6 (985) and DBW7 (986).
- ⁽⁹³⁾ Inspection 13.5.1998 (Waardals), document BB43 (702).
- ⁽⁹⁴⁾ See footnote 26. Travel expenses: the representative of Heubach was in London on 4.2.1997: inspection 13.5.1998 (Heubach), document EF17 (2526).
- ⁽⁹⁵⁾ Inspection 13.5.1998 (Waardals), document BB2f (45).
- ⁽⁹⁶⁾ SNCZ reply of 19.4.1999 to the request for information of 5.3.1999, Annexes to question 8 (5258 to 5269); Trident reply of 15.4.1999 to the request for information of 5.3.1999, Annex 6, file 3, part 3, document 12 (4511 to 4523).
- ⁽⁹⁷⁾ Words in square brackets translated from Norwegian.
- ⁽⁹⁸⁾ Inspection 13.5.1998 (Trident), document FWP11 (1520).
- ⁽⁹⁹⁾ Inspection 13.5.1998 (Waardals), document BB2f (45).
- ⁽¹⁰⁰⁾ Inspection 13.5.1998 (Waardals), document BB2c (42).
- ⁽¹⁰¹⁾ Words in square brackets translated from Norwegian.
- ⁽¹⁰²⁾ Inspection 13.5.1998 (Waardals), document BB7 (532).
- ⁽¹⁰³⁾ Waardals oral statement of 2.9.1998: see minutes of meeting, point 78 (5995).
- ⁽¹⁰⁴⁾ Inspection 13.5.1998 (Waardals), document JR1 (1033).
- ⁽¹⁰⁵⁾ Trident reply of 15.4.1999 to the request for information of 5.3.1999, Annex 6, file 2, document No 172 (4182).
- ⁽¹⁰⁶⁾ Inspection 13.5.1998 (Waardals), document BB9 (585).
- ⁽¹⁰⁷⁾ See the standard form used by VdMI for the collection of sales data.
- ⁽¹⁰⁸⁾ Inspection 13.5.1998 (Waardals), document BB9 (588).
- ⁽¹⁰⁹⁾ Inspection 13.5.1998 (SNCZ), document PFPA2 (1838) and document FPFC5 (2068).
- ⁽¹¹⁰⁾ See footnote 26.
- ⁽¹¹¹⁾ A reimbursement claim mentions: '5 representasjon: Alloys; 5 representasjon: (name of an employee of Heubach). Inspection 13.5.1998 (Waardals), document BB2h (49), document DBW1 (942 and 943); document DBW2 (954), document DBW4 (971). The travel expenses forms of the two representatives of Heubach for April 1997 indicate 'Paris » on 22.4.1997 (departure 5.30 am, return same day). Inspection 13.5.1998 (Heubach), document EF17 (2532) and document EF18 (2554).
- ⁽¹¹²⁾ Inspection 13.5.1998 (Waardals), document BB2h (50). Same information also in document BB2a (38).
- ⁽¹¹³⁾ SNCZ reply of 19.4.1999 to the request for information of 5.3.1999, Annexes to question 9 (5943). Heubach reply of 13.4.1999 to the request for information of 5.3.1999, Annex 11 (2858). Trident reply of 15.4.1999 to the request for information of 5.3.1999, annex 7 part B, document 2 (4619).
- ⁽¹¹⁴⁾ Inspection 13.5.1998 (SNCZ), document CRO 1A (1629).
- ⁽¹¹⁵⁾ Waardals says the Hotel name was 'Scandinavia', whereas Trident says it was 'Scandic'.

- ⁽¹¹⁶⁾ See footnote 26. Travel expense forms: a representative of Waardals was in Copenhagen on 16 to 20.7.1997: Inspection 13.5.1998 (Waardals), document DBW1 (946). The representative of Trident was in Denmark on 16-17 July 1997: Inspection 13.5.1998 (Trident), document FWP3 (1480 to 1484). The representative of Heubach was in Copenhagen on 17.7.1997: Inspection 13.5.1998 (Heubach), document EF18 (2565). A representative of SNCZ was in Copenhagen on 17.7.1997: Inspection 13.5.1998 (SNCZ), document FPFC7 (2070 to 2073). Apparently (diary: Inspection 13.5.1998 (Trident), document FWP5 (1489)) there was a CEFIC meeting on 17.7.1997 in Copenhagen, Hotel Dan Kastруп.
- ⁽¹¹⁷⁾ Translated, original in Norwegian. Inspection 13.5.1998 (Waardals), document BB29 (654).
- ⁽¹¹⁸⁾ Inspection 13.5.1998 (Waardals), document BB2a (38 and 39). An employee of Waardals stated at the investigation that he had written these notes at around the end of July 1997, after having received the 'statistics'.
- ⁽¹¹⁹⁾ Heubach reply of 13.4.1999 to the request for information of 5.3.1999, Annex 11 (2858 and 2859). Trident reply of 15.4.1999 to the request for information of 5.3.1999, Annex 7, part B, document 2 (4619 and 4620). SNCZ reply of 19.4.1999 to the request for information of 5.3.1999, Annexes to question 9 (5492 and 5493).
- ⁽¹²⁰⁾ Words in square brackets translated from Norwegian.
- ⁽¹²¹⁾ Inspection 13.5.1998 (Trident), document FWP11 (1514).
- ⁽¹²²⁾ See footnote 26. Travel expense form: a representative of Waardals was in Hamburg, Hotel Reichshof on 15 to 19.10.1997: Inspection 13.5.1998 (Waardals), document DBW1 (947-bis).
- ⁽¹²³⁾ Inspection 13.5.1998 (Waardals), document BB51 (875).
- ⁽¹²⁴⁾ Inspection 13.5.1998 (Waardals), document BB10 (589).
- ⁽¹²⁵⁾ Inspection 13.5.1998 (Trident), document FWP8 (1500 and 1501); Heubach reply of 13.4.1999 to the request for information of 5.3.1999, Annex 11 (2860). SNCZ reply of 19.4.1999 to the request for information of 5.3.1999, Annexes to question 9 (5491).
- ⁽¹²⁶⁾ Words in square brackets translated from Norwegian.
- ⁽¹²⁷⁾ Inspection 13.5.1998 (Trident), document FWP12 (1526).
- ⁽¹²⁸⁾ See footnote 26. Travel documents: a representative of Waardals was in London on 18.1.1998 and 19.1.1998: inspection 13.5.1998 (Waardals), document MH2 (889). Also document JR25 (1289) and JR26 (1290). Also another representative of Waardals was in London on 18.1.1998: inspection 13.5.1998 (Waardals), document DBW4 (974). A representative if Trident was in London on 19.1.1998: inspection 13.5.1998 (Trident), document FWP12 (1521). A representative of Heubach was on the same date on a one-day mission starting at 7.00 and ending at 22.30: inspection 13.5.1998 (Heubach), document EF18 (2577).
- ⁽¹²⁹⁾ Translated, original in Norwegian. Inspection 13.5.1998 (Waardals), document BB29 (655).
- ⁽¹³⁰⁾ Translated, original in Norwegian. Inspection 13.5.1998 (Waardals), document BB12 (591), document JR27 (1291).
- ⁽¹³¹⁾ Inspection 13.5.1998 (Waardals), document BB51 (875).
- ⁽¹³²⁾ Inspection 13.5.1998 (SNCZ), document CRO1B (1817).
- ⁽¹³³⁾ Inspection 13.5.1998 (Heubach), document EF4 (2223).
- ⁽¹³⁴⁾ Inspection 13.5.1998 (Heubach), document EF5 (2227).
- ⁽¹³⁵⁾ Inspection 13.5.1998 (Waardals), document BB2e (44).
- ⁽¹³⁶⁾ Heubach reply of 13.4.1999 to the request for information of 5.3.1999, Annex 11 (2861). Trident reply of 15.4.1999 to the request for information of 5.3.1999, Annex 7, part B, document 2 (4622). SNCZ reply of 19.4.1999 to the request for information of 5.3.1999, Annexes to question 9 (5490).
- ⁽¹³⁷⁾ Words in square brackets translated from Norwegian.
- ⁽¹³⁸⁾ Inspection 13.5.1998 (Waardals), document BB2d (43). An employee of Waardals stated at the investigation that he had written this document in the beginning of January 1998.
- ⁽¹³⁹⁾ Words in brackets translated from Norwegian.
- ⁽¹⁴⁰⁾ See recitals 112 to 115.
- ⁽¹⁴¹⁾ Inspection 13.5.1998 (Waardals), document BB13 (592).
- ⁽¹⁴²⁾ Words in square brackets translated from Norwegian.
- ⁽¹⁴³⁾ Inspection 13.5.1998 (Trident) document FWP11 (1507).
- ⁽¹⁴⁴⁾ Inspection 13.5.1998 (Waardals), document BB2e (44).
- ⁽¹⁴⁵⁾ Words in brackets translated from Norwegian.
- ⁽¹⁴⁶⁾ See footnote 26. Travel expense forms: a representative of Waardals was in Denmark, France and the Netherlands between 17.4.1998 and 21.4.1998, invoice from Hotel Novotel dated 20.4.1998, flight ticket and hotel invoice proves that he arrived in Paris CDG on 19.4.1998 and left on 20.4.1998. Inspection 13.5.1998 (Waardals), document MH3 (890 to 894). A representative of Heubach was on 20.4.1998 on a one day-mission starting at 5.30 am and ending at 22.30: Inspection 13.5.1998 (Heubach), document EF18 (2580). A representative Trident was in France and Holland between 19 and 22.4.1998: Inspection 13.5.1998 (Trident), document FWP2 (1474 to 1479).
- ⁽¹⁴⁷⁾ Inspection 13.5.1998 (Waardals), document BB51 (875).
- ⁽¹⁴⁸⁾ Inspection 13.5.1998 (Heubach), document EF4 (2225).
- ⁽¹⁴⁹⁾ Inspection 13.5.1998 (Heubach), document IK2 (2163).
- ⁽¹⁵⁰⁾ Inspection 13.5.1998 (Waardals), document BB2b (410).
- ⁽¹⁵¹⁾ Trident reply of 15.4.1999 to the request for information of 5.3.1999, Annex 7, part B, document 7 (4643). SNCZ reply of 19.4.1999 to the request for information of 5.3.1999, Annexes to question 9 (5489).
- ⁽¹⁵²⁾ Words in brackets translated from Norwegian.
- ⁽¹⁵³⁾ Inspection 13.5.1998 (Trident), document FWP11 (1504).
- ⁽¹⁵⁴⁾ Inspection 13.5.1998 (Waardals), document JR42 (1325) and document BB 46 (718) (identical). This document is a reservation for a meeting room in Hilton Schiphol on 22.7.1998, for 10 persons. Reserved under the name of Waardals.
- ⁽¹⁵⁵⁾ Waardals oral statement of 2.9.1998: see minutes of meeting, point 80 (5995).
- ⁽¹⁵⁶⁾ See forms sent to CEFIC for the collection of sales data.
- ⁽¹⁵⁷⁾ See Final Act of the Agreement on the European Economic Area, OJ L 1, 3.1.1994, p. 3.
- ⁽¹⁵⁸⁾ Pursuant to Article 56(1)(b) of the EEA Agreement, and without prejudice to the competence of the EC Commission where trade between EC Member States is affected, the ESA is also competent on cases where the turnover of the undertakings concerned in the territory of the EFTA States equals 33 % or more of their turnover in the territory of the EEA.
- ⁽¹⁵⁹⁾ See below under 'Effect on trade Member States and between EEA contracting Parties'.
- ⁽¹⁶⁰⁾ The case-law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement.
- ⁽¹⁶¹⁾ Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others v Commission*, 20.4. 1999 (1999) ECR II-9831, at paragraph 715.
- ⁽¹⁶²⁾ Case 48/69, *Imperial Chemical Industries v Commission* (1972) ECR 619.
- ⁽¹⁶³⁾ Joined Cases 40 to 48/73, etc. *Suiker Unie and others v Commission* (1975) ECR 1663.
- ⁽¹⁶⁴⁾ See judgment in Case C-49/92 P *Commission v Anic Participazioni SpA* (1999) ECR I-4125.
- ⁽¹⁶⁵⁾ Judgment in case C-199/92 P *Hüls AC v Commission*, (1999) ECR I-4287, paragraphs 158 to 166.
- ⁽¹⁶⁶⁾ See judgment in Case T-7/89 *Hercules v Commission*, (1991) ECR II-1711, paragraph 264.
- ⁽¹⁶⁷⁾ Case T-141/89 *Tréfileurope v Commission*, (1995) ECR II-791, paragraph 85. See also, *inter alia*, case T-334/94 *Sarrió v Commission*, ECR II-1439, paragraph 118. Judgment upheld by the ECJ in Case C-291/98 P *Sarrió v Commission* of 16.11.2000, (2000) ECR I-9991, at paragraph 50.
- ⁽¹⁶⁸⁾ The majority of which is exported in countries of the EEA.
- ⁽¹⁶⁹⁾ See for instance reply of Waardals of 22.10.99 to the request for information of 8.10.99 (5892 to 5897).
- ⁽¹⁷⁰⁾ Waardals's reply to the Statement of Objections (7881).
- ⁽¹⁷¹⁾ Waardals' reply to the Statement of Objections (7881).

- (¹⁷²) Waardals's reply to the Statement of Objections (7881).
- (¹⁷³) Case 48/69 *Imperial Chemical Industries* (1972) ECR 619, paragraphs 132 and 133.
- (¹⁷⁴) Case T-80/89 *BASF and others v Commission* (polypropylene), (1995) ECR II 729. Judgment upheld by the ECJ in case C-49/92 P *Commission v Anic Partecipazioni SpA*, ECR I-4125. See also case T-327/94 *SCA Holding v Commission* of 14.5.1998 (1998) ECR II-1373. Judgment upheld by the ECJ in Case C-297/98 P *SCA Holding v Commission* of 16.11.2000 (not yet reported).
- (¹⁷⁵) Commission Decision PVC case of 21 December 1988 in Case IV.31.865, OJ L 74, 17.3.1989, p. 1 at paragraph 43.
- (¹⁷⁶) Trident's reply to the Statement of Objections (6814).
- (¹⁷⁷) OJ L 13, 21.2.1962, p. 204. Under Article 5 of Council Regulation (EC) No 2894/94 concerning arrangements of implementing the Agreement on the European Economic Area, 'the Community rules giving effect to the principles set out in Articles 85 and 86 (now Articles 81 and 82) of the EC Treaty [...] shall apply *mutatis mutandis*' (OJ L 305, 30.11.1994 p. 6).
- (¹⁷⁸) Idem.
- (¹⁷⁹) OJ C 207, 18.7.1996, p. 4.
- (¹⁸⁰) See Joined Cases T-305/94 etc *LVM v Commission*, (1999) ECR II-931, at paragraphs 1111 and 1112; Case T-143/89, *Ferriere Nord v Commission*, (1995) ECR II-917, paragraph 41; Case 19/77, *Miller*, (1978) ECR 131, paragraphs 17 and 18; Case 246/86, *Belasco* (1989) ECR 2117, paragraph 41.
- (¹⁸¹) Britannia's reply to the Statement of Objections (7033).
- (¹⁸²) Trident's reply to the Statement of Objections (6083).
- (¹⁸³) Trident's reply to the Statement of Objections (6084).
- (¹⁸⁴) Waardals oral statement of 2.9.1998: see minutes of meeting, paragraph 51 (5991).
- (¹⁸⁵) Trident Statement of 23.4.1999, p. 19 (4984).
- (¹⁸⁶) SNCZ's reply to the Statement of Objections (7630). Translated from French.
- (¹⁸⁷) Inspection 13.5.98, Waardals, document BB49 (762 and 763).
- (¹⁸⁸) Idem.
- (¹⁸⁹) Waardals oral statement of 2.9.1998: see minutes of meeting, point 44 (5990).
- (¹⁹⁰) Letter of James Brown of 22 November 2000 (6794).
- (¹⁹¹) SNCZ's reply to the Statement of Objections (7627). Translated from French.
- (¹⁹²) Case T-308/94 *Cascades SA v Commission* (1998) ECR II-925, at paragraph 230.
- (¹⁹³) Heubach's reply to the Statement of Objections (7686). Translated from German.
- (¹⁹⁴) Central east European Countries.
- (¹⁹⁵) OJ L 100, 1.4.98, p. 55.
- (¹⁹⁶) Waardals oral statement of 2.9.1998: see minutes of meeting, point 33 (5988).
- (¹⁹⁷) For the purpose of calculating the upper limit applicable to the fine of Britannia, the Commission took into account its global turnover for the business year ending 30 June 1996, which is the last available figure reflecting an entire year of normal economic activity.
- (¹⁹⁸) (5011).
- (¹⁹⁹) Britannia's reply to the Statement of Objections (7045 to 7047).
- (²⁰⁰) Erwiderung von Trident auf die Mitteilung der Beschwerdepunkte (6816).
- (²⁰¹) [...]*

COMMISSION DECISION**of 16 October 2002****on the aid scheme C 50/2001 (ex NN 47/2000) — Finance companies — implemented by Luxembourg***(notified under document number C(2002) 3741)***(Only the French version is authentic)****(Text with EEA relevance)***(2003/438/EC)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾,

Whereas:

(3) By letter of 25 April 2000 (D/51738), the Commission asked for further information in view of the fact that, although it had been withdrawn, the scheme might have produced effects and/or still be producing effects. The information was supplied to the Commission by letter from the Luxembourg authorities dated 10 May 2000 (A/34012).

(4) By letter SG(2001) D/289743 of 11 July 2001, the Commission informed Luxembourg that it had decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty in respect of the tax scheme for finance companies. By letter of 14 September 2001 (A/37233), Luxembourg submitted its comments concerning the Commission's decision.

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the measure. It received no comments from interested parties.

I. PROCEDURE

(1) In 1997 the Ecofin Council adopted a code of conduct on direct business taxation with a view to putting a stop to unfair practices in this area ⁽²⁾. Further to the undertaking contained in the code, the Commission in 1998 published a notice on the application of the state aid rules to measures relating to direct business taxation ⁽³⁾ (hereinafter referred to as the notice), in which it reaffirmed its determination to apply those rules rigorously and in accordance with the principle of equality of treatment. This procedure is covered by that notice.

(2) By letter of 12 February 1999 (D/50716), the Commission asked Luxembourg for information concerning the Luxembourg scheme for finance companies. By letter of 26 March 1999 (A/32604), the Luxembourg authorities informed the Commission that the scheme had been withdrawn on 20 February 1996.

(6) By letter of 21 March 2002 (D/51274), the Commission asked Luxembourg for further information that was provided by letter of 11 April 2002 (A/32745).

II. DESCRIPTION OF THE MEASURE

(7) The status of finance companies is governed by Circular LIR No 120 of 14 July 1989 (hereinafter referred to as Circular 120 or the Circular). The Circular was repealed by Circular LIR No 1120 of 20 February 1996. A total of nine companies were approved as finance companies, of which seven became operational.

(8) An international group finance company is a resident limited company which is fully liable to tax, is part of

⁽¹⁾ OJ C 306, 31.10.2001, p. 2.

⁽²⁾ OJ C 2, 6.1.1998, p. 1.

⁽³⁾ OJ C 384, 10.12.1998, p. 3.

⁽⁴⁾ See footnote 1.

an international group and has as its sole purpose the granting of loans to companies within the group that are refinanced using financial mechanisms and instruments such as public issues, private borrowings or bank loans. The bulk of the loans must be granted by the finance company to companies within the same group situated abroad. Within the meaning of the Circular, a foreign international group refers to companies that are financially linked and incorporated in at least two countries other than Luxembourg. The finance company's parent company must be one of the companies in the group and must have capital of at least LUF 7,5 billion (approximately EUR 187,5 million) or equivalent.

(9) Finance-company status was, in principle, granted for an unlimited duration.

(10) The Circular states that, for corporation tax purposes, the loans granted by finance companies to companies within the same group must generate an appropriate trading profit in line with the normal behaviour of a prudent manager in his relations with independent third parties. To that end, the minimum acceptable commercial profit of a Luxembourg finance company for tax purposes is $\frac{1}{4}$ % (0,25 %) of the amount of loans granted and, if the financial risk is covered by statutory collateral, may be further reduced to $\frac{1}{8}$ % (0,125 %). Each time a finance company enters margins resulting in a trading profit greater than the minimum profit, it is this trading profit that has to be used for the purpose of taxing the finance company.

(11) Neither the borrowings taken up for financing loans to group members nor the interest paid on those borrowings are to be included for the purposes of municipal trade tax, which is assessed on the basis of either operating capital or income.

(12) Outside finance available to the finance company temporarily may be entered into productive accounts only on an exceptional basis and for a maximum of eight days: any interest accruing must be added to the commercial profit.

(13) A finance company can deduct from its taxable profit withholding taxes imposed in other countries on interest payments to it. Tax on interest paid abroad by group companies cannot be taken into account for the purposes of Luxembourg corporation tax and/or deducted from trading profit.

III. GROUNDS FOR INITIATING THE PROCEDURE

(14) In its evaluation of the information supplied by the Luxembourg authorities, the Commission examined whether the method of determining the margin, the exclusion of refinancing from the calculation of municipal tax and the exercise of possible discretionary power by the administration might confer an advantage on finance companies. It also took the view that such an advantage might have been granted from State resources, might affect competition and trade between Member States, and might be selective. Finally, it felt that none of the exceptions to the general principle that State aid is prohibited seemed to be applicable. These doubts led the Commission to initiate the formal investigation procedure in this case.

IV. COMMENTS FROM LUXEMBOURG

(15) The comments submitted by the Luxembourg authorities may be summarised as follows.

(16) Since the scheme had been withdrawn, it was no longer producing any effects other than in respect of enterprises to which the provisions of Circular 120 applied up to the end of 2001. The Luxembourg authorities also pointed to the problems posed by transfer prices and defended the solution adopted ⁽⁵⁾. Finally, they did not consider the measure to constitute aid within the meaning of Article 87 of the Treaty.

Transfer prices

(17) The links which exist between two enterprises within a particular group enable them (at least in theory) to determine conditions for supplying goods and services between them which differ from those which would have applied if the two parties had acted as independent enterprises operating on free markets. Enterprises may thus be tempted to allocate their profits within the group in such a way as to minimise the total tax burden on the group as a whole. In the case of multinational groups, allocating profits in this way often results in the tax base being increased in one country and reduced in another. This explains the concern of governments to ensure that transfer prices within a group are as close as possible to market prices.

⁽⁵⁾ Transfer prices are the prices at which a company invoices goods or services to associated companies.

- (18) Within the Organisation for Economic Cooperation and Development (OECD), to which the Member States belong, the principle of full competition was adopted to eliminate the impact of special conditions on the level of profits. This principle, set out in Article 9 of the OECD Model Tax Convention, serves a dual objective: to ensure that tax is correctly assigned to each country and, as far as possible, to avoid double taxation. It also enables multinational enterprises and independent enterprises to be treated as equally as possible. The methods used to determine transfer prices include the 'comparable prices on the free market' method and the cost-plus pricing method.
- (19) Referring to the need to prevent tax avoidance and to the principle of full competition, the Luxembourg authorities point out that Article 164 of the Law of 4 December 1967 on income tax constitutes the legislative basis for transfer prices. It was in this context that Circular 120 was adopted to facilitate the taxation of the administrative activities of finance companies. The Luxembourg administration normally tries to compare prices charged within the same group with prices charged for comparable transactions between independent enterprises. This is not always possible, however, because the relevant comparative data are not available.
- (20) Consequently, the Luxembourg administration opted in this case for the cost-plus pricing method with a view to determining transfer prices for the intra-group services provided by finance companies of multinational groups. On the basis of a uniform method such as that recommended by the OECD, a minimum threshold for determining taxable income equal to 0,25 % of the amount of loans granted (0,125 % if the financial risk incurred is covered by statutory collateral) was laid down. Nevertheless, if a finance company realised a trading profit greater than the minimum amount resulting from the application of Circular 120, the higher trading profit had to be taken into account for the purposes of corporation tax.
- Circular 120 did not involve State aid within the meaning of Article 87 of the Treaty*
- The measure must give rise to an advantage**
- (21) The measure did not set out to lighten the tax burden normally borne by finance companies but solely to determine as accurately as possible a market price for intra-group services by applying the cost-plus pricing method. Luxembourg points out that, in paragraph 13 of its notice, the Commission stressed that tax measures of a purely technical nature, such as provisions to prevent double taxation or tax avoidance, do not constitute State aid. Given that Circular 120 was a general measure designed to prevent tax avoidance and to produce an appropriate and fair trading profit for finance companies, it did not constitute State aid.
- (22) The requirement that finance companies belong to a large international group with own funds of at least LUF 7,5 billion (approximately EUR 187,5 million) made it possible to ensure that, in most cases, the amount of payments was not too low because a higher rate would otherwise be necessary to guarantee consistency with market conditions.
- (23) Luxembourg notes that the Commission is merely questioning the way in which the principle of full competition is complied with and the consideration percentages are fixed and whether it is justified to exclude refinancing from the calculation of municipal tax.
- (24) The Luxembourg authorities consider that the Commission is criticising two aspects of the advantage enjoyed by finance companies: on the one hand, the practical application of the cost-plus pricing method as compared with the use of the transfer prices actually paid and, on the other, the fact that refinancing is excluded from the calculation of municipal tax.
- (25) As far as the first aspect is concerned, Luxembourg stresses that it was only where the transfer prices charged by the enterprise were higher than those resulting from the application of the cost-plus pricing method that the use of that method could have led to an advantage for the enterprise as a result of a smaller tax base being applied to it. Luxembourg takes the view that, in fact, the minimum margin referred to in Circular 120 was, at most, greater than the margin resulting from market conditions with the result that the arrangements presented no attraction in tax terms to finance companies. Should the Commission conclude that the application of Circular 120 in such cases constituted unlawful State aid and demand its recovery, the enterprises concerned would have to be identified and an individual calculation made for each enterprise on the basis of the real transfer prices.
- (26) Luxembourg would point out that the Commission accepts the use of methods such as the cost-plus pricing method and that there would not be any advantage if using such alternative methods resulted in taxation

equal or at least comparable to that which could have been arrived at between two independent operators applying the traditional method whereby taxable profit is calculated on the basis of the difference between the enterprise's income and charges. According to Luxembourg, the Commission considers that an advantage should be deemed to exist where the result of applying the cost-plus pricing method is not sufficiently comparable to that which would have been obtained by means of the traditional method. However, the Commission is not concerned with the extent of any such advantage, and Luxembourg considers that the cost-plus pricing method does not in any case give rise to any advantage to the point where the taxable income would no longer be comparable to that which could have been obtained between two independent operators by means of the traditional method.

- (27) As for the second aspect, Luxembourg considers that the Commission seems to be claiming that, by not including refinancing in the municipal trade tax base, an advantage might be conferred on finance companies. However, the Luxembourg authorities consider such exclusions to be justified. This is due to the fact that, until 1990, such charges were non-deductible for the purpose of calculating municipal trade tax. The result determined in accordance with the corporation tax rules also serves, with a few additions and exclusions, as a basis for municipal trade tax. Before 1990, financial charges were added to that end. Including financial charges led to absurd situations in which the amount of tax exceeded the actual profit. This justifies excluding financial charges from the taxable income for the purposes of municipal trade tax.

The advantage must be granted from State resources

- (28) Luxembourg acknowledges that, if any advantage was conferred by Circular 120, it came from state resources.

The measure must be selective

- (29) As for the alleged selectivity stemming from the application of a discretionary practice, the Luxembourg authorities confirm that the administration does not have any discretion to grant or refuse application of the scheme for finance companies. On the contrary,

although such selectivity results from a legislative or administrative exception to the tax provisions, they assert that the State aid rules have never been applied to a situation comparable to this case. The Commission has not cited any precedent.

- (30) Luxembourg points out that, in paragraph 20 of the notice, the Commission explains that some tax benefits are on occasion restricted to certain types of undertaking, to some of their functions or to the production of certain goods and may therefore constitute State aid. However, Luxembourg indicates that there is no example of a decision or judgment of the Court of Justice of the European Communities in which a measure has been deemed to be selective because it applied only to some types of undertaking or to some of their functions.

- (31) According to Luxembourg, the specificity criterion is not met because Circular 120 stems from the normal application of the Luxembourg tax rules. The Circular applies to all international groups of a sufficient size and forms part of efforts to combat abnormally low transfer prices. The only conditions imposed relate to the size of the group and to its establishments in several countries. Such limitations are necessary in order to guarantee that serious operations are managed from Luxembourg in a volume which is sufficient to give rise to difficulties in determining the transfer prices of the enterprises concerned. The principles to be applied in determining the taxable result of a finance company, as proposed in the Circular, are based on the rules for transfer prices set out by the OECD, which are general in scope and applicable to all taxpayers encountering intra-group invoicing. The Circular does not involve the application of a lower tax rate to finance companies but, at most, lays down how the tax base is to be calculated, taking account of the specific characteristics of multinational companies.

- (32) As an ancillary argument, Luxembourg takes the view that, even if the arrangements for finance companies were considered by the Commission to be a derogation from the normal arrangements, they are justified by the nature and general scheme of the system. The Luxembourg authorities wanted to reconcile the principles of linking the tax balance sheet to the commercial balance sheet and of legal certainty with that of full competition. For the reasons outlined above, they chose the cost-plus pricing method in order to give the taxpayers concerned a point of reference by laying down a minimum threshold for declaring profits earned on internal operations.

The measure distorts competition and affects trade between Member States

- (33) Since the rules on transfer prices are designed to prevent disguised transfers of profits abroad by means of inappropriate invoicing methods, Circular 120 was addressed to international groups. The aim was not to permit an overall reduction of taxable profits within international groups but to prevent tax avoidance. Therefore, according to Luxembourg, the Circular cannot be considered to confer an advantage which improves the competitive position of the enterprises making up such groups within the common market.

The principle of legitimate expectations

- (34) In Luxembourg's view, the taxpayers to which Circular 120 was applicable had legitimate expectations which militate against the repayment of any State aid resulting from application of the Circular. There is no precedent for applying the State aid rules to the choice of methods for calculating the tax base. Applying them in this way would involve a radical and unforeseeable extension of the current scope of Article 88 of the Treaty.
- (35) Moreover, the Commission considered at the time that rules governing the taxation of European headquarters of multinational groups did not fall within the scope of the Treaty's provisions on State aid ⁽⁶⁾. Consequently, Luxembourg had legitimate grounds for believing that the Circular was legal.
- (36) Moreover, until publication of the notice in 1998, Community policy on State aid was unclear. Recovery could at most extend to the advantages obtained after the date on which the notice was published.

The principle of non-retroactivity of tax laws

- (37) Luxembourg takes the view that a request for recovery of the alleged aid would be tantamount to a retroactive amendment of the ordinary tax rules that would run counter to the basic constitutional principle of non-retroactivity of tax laws. The Commission cannot reasonably impose recovery where aid results from a general tax scheme contested after the event by the Commission.

Impossibility of recovering the alleged aid

- (38) Luxembourg considers that there is consistent case law to the effect that, where it is in fact impossible to recover illegal aid, a Member State may not be required to recover it. This is the situation in which Luxembourg finds itself in this case. A figure cannot be put on the amount of the aid because it would not be possible to establish the real transfer prices which should have been charged by finance companies or to envisage using any other of the methods described by the OECD.

V. ASSESSMENT OF THE MEASURE

- (39) After considering the comments submitted by the Luxembourg authorities, the Commission would confirm its initial position as set out in its letter to Luxembourg of 11 July 2001 initiating the formal investigation procedure laid down in Article 88(2) of the Treaty ⁽⁷⁾. It takes the view that the comments submitted by Luxembourg have not enabled the doubts it expressed in that letter to be dispelled and, consequently, that the tax scheme under review constitutes State aid within the meaning of Article 87(1) of the Treaty. Moreover, it deems the aid in question to be illegal and to constitute operating aid which cannot be declared compatible with the common market. Nevertheless, it considers that, in this case, Luxembourg and the recipient enterprises were justified in having legitimate expectations and that the aid need not therefore be recovered.
- (40) To begin with, the Commission is able to accept Luxembourg's comments concerning the problems posed by transfer prices in an international context. There is nothing to prevent tax administrations from using a cost-plus pricing method to determine the tax base for intra-group services provided by finance companies. This system can be likened to a tax measure of a technical nature, as referred to in the second indent of paragraph 13 of the notice. Nevertheless, some of the rules for applying the method in this case suggest that the possible granting of aid cannot be ruled out.
- (41) In order to be regarded as aid within the meaning of Article 87(1) of the Treaty, a measure must meet all of the four criteria set out below.

Advantage

- (42) Firstly, the measure must confer on recipients an advantage which relieves them of charges that are

⁽⁶⁾ Written Question No 1735/90 (OJ C 63, 11.3.1991, p. 37).

⁽⁷⁾ See footnote 1.

normally borne from their budgets. The objective of using alternative methods of determining taxable income in order to prevent certain transactions from hiding undue advantages or donations with the sole purpose of avoiding taxation must normally be to achieve taxation comparable to that which could have been arrived at between independent operators on the basis of the traditional method, whereby the taxable profit is calculated on the basis of the difference between the enterprise's income and charges. This complies with the principle of full competition. In the area of transfer prices, this international principle is set out in Article 9 of the OECD Model Tax Convention (and, in more detail, in the 1995 OECD Transfer Pricing Guidelines). Since an analysis requires individual facts and circumstances to be taken into account, the OECD Guidelines do not recommend the use of 'safe harbours' (such as fixed margins).

(43) The Luxembourg authorities have not provided any information on how the margins used to establish the tax base for finance companies under the cost-plus pricing method are determined in practice. While the Commission can accept the argument that the administration did not have any discretionary power to grant or refuse the application of the scheme for finance companies, it is clear from the answers given by Luxembourg that the administration did have such power when it came to determining the margins to be applied. Circular 120 laid down a minimum rate of 0,25 % of the amount of loans granted (0,125 % if the financial risk incurred was covered by statutory collateral). Nevertheless, it did not lay down any rules or guidelines on how to determine the margin in practice. Indeed, the Luxembourg authorities expressly indicated that only the minimum rates (0,25 % in one case and 0,125 % in six cases) recommended in the Circular were applied. The Commission thus concludes that finance companies and the groups to which they belong were able to derive an advantage by dint of the fact that, in practice, Luxembourg systematically granted the minimum rate without checking whether it corresponded to the economic reality of the underlying services.

(44) It should be noted that, in the case of cross-border intra-group services, it is not necessary to compare the cost-plus pricing system with real transfer prices but to ensure that the system results in taxation which is comparable to what would have been obtained by means of the traditional method. The extent of the advantage derived from the system need not be determined at this stage of the analysis but only for the purpose of recovering the aid, if this proves necessary: the Commission notes that the minimum rate of 0,25 % of the amount of loans granted (0,125 % if the financial risk incurred was covered by statutory collateral) was systematically applied in this case. Luxembourg has not provided any indication of the existence of checks to ensure that the application of the minimum rate tallied

with the level of taxation which would have resulted from the application of the traditional method. Consequently, the Commission takes the view that the conduct of the tax administration had the effect of conferring an advantage.

(45) As for the exclusion of refinancing from the municipal trade tax base, the Commission is able to accept the arguments put forward by Luxembourg.

Competition and trade between Member States are affected

(46) This criteria is met in that the bulk of loans had to be granted by the finance company to companies within the same group situated abroad. Moreover, in accordance with the case law of the Court of Justice ⁽⁸⁾ and as stressed in paragraph 11 of the notice, the mere fact that a measure strengthens a firm's position compared with other firms competing in intra-Community trade is enough for it to be concluded that trade has been affected. In this particular case, finance companies or enterprises in the groups to which they belong might have found their position to have been strengthened as a result of the reduced tax burden of their company in Luxembourg. Assuming this to be the case, and taking account of the possibility that the groups in question are active in sectors characterised by the existence of trade between Member States, the Commission takes the view that the measure is liable to affect such trade.

(47) Even if, as the Luxembourg authorities claim, the main objective of Circular 120 was not to allow an overall reduction in taxable profit but rather to prevent disguised transfers, a measure must be assessed according to its effects and not according to its objectives. As consistently confirmed by case law ⁽⁹⁾, the objective pursued by the scheme in question cannot prevent it from being classified as State aid within the meaning of Article 87(1) of the Treaty.

Selectivity

(48) Given that the tax provisions in question concerned only finance companies belonging to multinational

⁽⁸⁾ Case 730/79 Philip Morris v Commission [1980] ECR 2671.

⁽⁹⁾ Case C-75/97 Belgium v Commission [1999] ECR I-3671, paragraph 25.

groups present in at least two countries other than Luxembourg, only some enterprises had access to the advantages described above. As for the requirement that finance companies belong to a large international group with a minimum capital, the Commission notes that Luxembourg has not provided any proof demonstrating that, without such a threshold, a higher rate would be necessary to guarantee consistency with market conditions. Moreover, as stated in paragraph 20 of the notice, some tax advantages are on occasion restricted to certain functions, such as intra-group services. This also holds for the Luxembourg scheme for finance companies. The criterion of selectivity is thus met.

(49) Another aspect of selectivity stems from the fact that the finance company's parent company must have own funds of at least LUF 7,5 billion (approximately EUR 187,5 million). This implies selectivity in favour of large groups in so far as groups which had been unable to achieve the minimum capital expenditure threshold would have been excluded from equal treatment under the cost-plus pricing method. The Luxembourg authorities themselves admit that the requirement that finance companies belong to a large international group was such as to ensure a sufficient volume of activity in Luxembourg.

(50) The Commission considers these aspects of selectivity to be unjustified by the nature or general scheme of the Luxembourg tax system. In particular, it does not consider such limitations to be necessary to ensure that serious operations are managed from Luxembourg in a volume sufficient to give rise to difficulties in determining the transfer prices of the enterprises concerned ⁽¹⁰⁾. The difficulties linked to the determination of transfer prices apply in principle to all services or goods supplied between associated companies. While the international nature of such supplies is likely to increase those difficulties, they are faced not only by companies belonging to a large-scale multinational group. In any case, the difficulties in question are not relevant since the Luxembourg authorities systematically applied a minimum rate to calculate cost-plus prices.

(51) As regards Luxembourg's comment to the effect that there is no precedent in the form of a Court decision or judgment, the Commission would merely point out that such precedents are not necessary. Classification of the scheme for finance companies as State aid stems directly from Article 87(1) of the Treaty. However, it should be noted that, according to recent case law, tax measures are selective and constitute State aid where they apply

solely to undertakings which carry out investments exceeding a certain amount or create a certain number of jobs ⁽¹¹⁾. The Commission takes the view that the same reasoning must be applied in this case.

(52) When it comes to reconciling the principles of linking the tax balance sheet to the commercial balance sheet and of legal certainty with that of full competition and providing taxpayers with a point of reference, there is nothing to prevent tax administrations from opting for the cost-plus pricing formula. The Commission is not criticising the use of that system as a means of facilitating the determination of transfer prices for transactions between associated entities. Nevertheless, in the case at issue, the systematic application of the minimum rate must be regarded as a derogation from the correct use of the cost-plus pricing method which is liable to have conferred an advantage on some enterprises without being justified by the nature or general scheme of the system.

State resources

(53) In this case, the reduction in the amount of tax resulting from the application of Circular 120 involves a reduction in tax revenues, which constitute State resources.

Compatibility

(54) The Luxembourg authorities have not challenged the preliminary assessment of the compatibility of the scheme for finance companies, which is set out in the decision to initiate the formal investigation procedure ⁽¹²⁾ and which the Commission hereby confirms. That assessment may be summarised as follows:

(55) The derogations provided for in Article 87(2) of the Treaty regarding aid having a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences, and aid granted to certain regions of the Federal Republic of Germany are not applicable in this case.

⁽¹¹⁾ Joined Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Álava — Diputación Foral de Álava and others v Commission*, paragraph 157, and Joined Cases T-92/00 and T-103/00, paragraphs 39 and 40 and 49 and 50, not yet published.

⁽¹²⁾ See footnote 1.

⁽¹⁰⁾ See recital 31: argument put forward by Luxembourg.

- (56) The derogation provided for in Article 87(3)(a) regarding aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment is also not applicable.
- (57) Likewise, the scheme for finance companies does not fall within the category of important projects of common European interest eligible for the derogation provided for in Article 87(3)(b) and, given that it is not designed to promote culture and heritage conservation, cannot qualify for the derogation provided for in Article 87(3)(d).
- (58) It should also be examined whether the scheme is eligible for the derogation provided for in Article 87(3)(c), which authorises aid to facilitate the development of certain economic activities or of certain economic areas in cases where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The tax advantages granted under the scheme are not linked to investment, job creation or specific projects. They merely constitute ongoing tax relief and must consequently be classified as operating aid. The Commission thus takes the view that the aid in question is liable to adversely affect trading conditions to an extent contrary to the common interest.

Recovery

- (59) The measures in question may not be regarded as existing aid within the meaning of Article 88(1) of the Treaty and Article 1(b) of Council Regulation (EC) No 659/99 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹³⁾ (now Article 88 of the EC Treaty). This is because they were implemented after the entry into force of the Treaty, have never been notified to the Commission as required by Article 88(3) of the Treaty, are not covered by a limitation period and constituted aid from the moment they were put into effect. They therefore constitute new aid. Where State aid granted illegally is found to be incompatible with the common market, the natural consequence is that the aid must be recovered from the recipients in accordance with Article 14 of Regulation (EC) No 659/99. The purpose of recovery is to restore as far as possible the competitive situation which existed before the aid was granted. Neither the absence of precedent for applying the State aid rules to

choices concerning methods of calculating the tax base nor the alleged lack of clarity of Community State aid policy would justify an exemption from this basic principle.

- (60) As for the claim that it would be impossible to recover the aid and the principle of the non-retroactivity of tax laws, the relevant case law indicates that, even if recovery of a tax credit presents difficulties from an administrative point of view, that fact is not such as to enable recovery to be deemed to be technically impossible ⁽¹⁴⁾. Moreover, as consistently confirmed by case law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law. In particular, a provision laying down a time-limit for the revocation of an administrative act must, like all the relevant provisions of national law, be applied in such a way that the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration ⁽¹⁵⁾. If this were not the case, Member States could escape effective monitoring of State aid by not complying with their obligation under Article 88(3) of the Treaty to notify in advance plans to grant aid.

Legitimate expectations

- (61) Nevertheless, Article 14(1) of Regulation (EC) No 659/1999 lays down that 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. The case law of the Court of Justice and the Commission's own practice in previous decisions have established that recovery would be contrary to a general principle of Community law if, following the Commission's action, the recipient had legitimate expectations that the aid was granted in accordance with Community law.
- (62) In *Van den Bergh and Jurgens* ⁽¹⁶⁾ the Court stated that:

'The Court has consistently held that any trader in regard to whom an institution has given rise to

⁽¹³⁾ OJ L 83, 27.3.1999, p. 1.

⁽¹⁴⁾ Case C-280/95 *Commission v Italy* [1998] ECR I-259, paragraph 23, and Case 378/98 *Commission v Belgium* [2001] ECR I-5107, paragraph 42.

⁽¹⁵⁾ Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraphs 18 and 19.

⁽¹⁶⁾ Case C-265/85 *Van de Bergh and Jurgens and others v Commission* [1987] ECR 1155, paragraph 44.

justified hopes may rely on the principle of the protection of legitimate expectation. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted.'

- (63) In Commission Decision 2001/168/ECSC of 31 October 2000 on Spain's corporation tax laws ⁽¹⁷⁾, the Commission noted the similarities between the Spanish system and a French system it had approved on the basis that it did not constitute aid within the meaning of Article 92(1) of the EEC Treaty (now Article 87(1) of the EC Treaty). In the present case, it notes that, in some respects, the Luxembourg scheme for finance companies resembles the scheme introduced in Belgium by Royal Decree No 187 of 30 December 1982 on the taxation of coordination centres. Both schemes relate to intra-group activities and use the cost-plus pricing method to determine the tax base. In its decision of 2 May 1984, the Commission took the view that the scheme did not involve state aid within the meaning of Article 92(1) of the EEC Treaty. Even though that decision was not published, the fact that the Commission did not raise any objection to the Belgian scheme was made public at the time in the XIVth Report on Competition Policy and in an answer to a Parliamentary question ⁽¹⁸⁾.

- (64) In this connection, the Commission notes that its decision on the Belgian scheme for coordination centres was adopted before the entry into force of the Luxembourg scheme for finance companies. It also notes that all the beneficiaries of the scheme were approved as finance companies before the Commission's decision of 11 July 2001 to initiate the formal investigation procedure. It would further point out that Circular 120 was repealed on 20 February 1996 and that it has not applied to the beneficiaries since 31 December 2001. Consequently, the Commission accepts the arguments put forward by Luxembourg concerning the 'beneficiaries' legitimate expectations and waives recovery of the aid granted.

VI. CONCLUSION

The Commission finds that the Luxembourg scheme for finance companies constitutes State aid within the meaning of Article 87(1) of the Treaty and that none of the derogations provided for in Article 87(2) or (3) are applicable. It also finds that Luxembourg unlawfully implemented the system in question in breach of Article 88(3) of the Treaty. Nevertheless, it notes that the system was withdrawn on 20 February 1996 and that the tax advantages granted to beneficiaries ceased on 31 December 2001. Lastly, it acknowledges that the beneficiaries had legitimate expectations such as to rule out recovery of the State aid found to be incompatible with the common market. Consequently, it is not requiring that the aid be recovered,

HAS ADOPTED THIS DECISION:

Article 1

The tax scheme for finance companies implemented by the Grand Duchy of Luxembourg by means of Circular LIR No 120 of 12 June 1989 constitutes State aid which is incompatible with the common market.

Article 2

This Decision is addressed to the Grand Duchy of Luxembourg.

Done at Brussels, 16 October 2002.

For the Commission

Mario MONTI

Member of the Commission

⁽¹⁷⁾ OJ L 60, 1.3.2001, p. 57.

⁽¹⁸⁾ See footnote 6.

COMMISSION DECISION**of 13 November 2002****on the State aid which Germany is planning to implement for Capro Schwedt GmbH***(notified under document number C(2002) 4364)***(Only the German version is authentic)****(Text with EEA relevance)**

(2003/439/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) On 3 August 2001, the German authorities notified an aid proposal for an investment project in the town of Schwedt, Brandenburg, to be led by a new company Capro Schwedt GmbH (Capro Schwedt) and including three other companies. The notification was made under the multisectoral framework on regional aid for large investment projects ⁽²⁾ (MSF), in view of the level of the proposed aid and of the investment cost.
- (2) By letter dated 17 January 2001, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid. Germany sent its comments by letter dated 17 April 2002.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽³⁾. The Commission invited interested parties to submit their comments on the aid.

- (4) The Commission received three sets of comments from interested parties, which it forwarded to Germany. Germany gave its reaction to these comments by letters dated 20 June 2002 and 14 August 2002.

II. DETAILED DESCRIPTION OF THE MEASURE**1. The beneficiary and the project**

- (5) The investment is planned to take place in Schwedt, Germany, an industrial town dominated by an existing petrol refinery, around which the local authorities want to centre its industrial redeployment, transforming the area into a big chemical complex. A public infrastructure company, Infra Schwedt GmbH, was created by the city, which is to re-deploy part of the land in the vicinity of the refinery for use by potential chemical companies. The chemical complex is to be developed in five steps, of which the caprolactam project is the first.
- (6) Capro Schwedt GmbH is a new company owned by Aquafil, an Italian synthetic fibre producer. Caprolactam constitutes the main raw material for the production of synthetic fibres and, at present, Aquafil buys it from chemical producers. Aquafil decided to integrate its production chain and start producing caprolactam itself. Together with Capro Schwedt, the main investor, three other companies, who will supply some of the necessary products/services for the production of caprolactam, will be established in its direct vicinity.
- (7) These companies (hereinafter referred to as supplying companies) and their respective production are: AmmoSulf GmbH (oleum/sulphuric acid), CycloChem GmbH (cyclohexane) and P&F Flockungsanlage Service and Medien GmbH (hydrogen). At present they are only 'project companies', owned by the public authorities. Germany has, however, communicated the names of three big companies that would be interested in buying them, but will join the project only after the Commission approves the aid for the whole project. These acquiring companies would be Krebs-Speichim SA

⁽¹⁾ OJ C 63, 12.3.2002, p. 18

⁽²⁾ OJ C 107, 7.4.1998, p. 7.

⁽³⁾ See footnote 1.

(France), specialised in the engineering and construction of sulphuric acid/oleum plants, *Infrastruktur e Gestioni SpA* (Italy), specialised in erecting, operating and maintaining industrial plants, and *Kinetics Technology International SpA* (Italy), specialised in building plants, but also in the production of hydrogen and synthetic gases.

- (8) According to the notification, the project will lead to the creation of 528 new jobs, of which 448 in *Capro Schwedt*. The new investment project will be located in Schwedt, Brandenburg, an assisted area under Article 87(3)(a), in which the maximum allowable aid intensity is 35 % gross.

2. The notified aid

- (9) Germany notified its intention to grant aid amounting to EUR 92,71 million (28 % (GGE) of the eligible project costs of EUR 331,11 million). The proposed aid consists of investment aid in the form of a non-reimbursable grant amounting to EUR 50,617 million (15,287 %) granted under the 28th outline plan for the joint Federal Government/Länder scheme for improving regional economic structures approved by the Commission⁽⁴⁾. Furthermore an investment premium (*Investitionszulage*) amounting to EUR 41,108 million (12,415 %) is to be granted on the basis of the Investment Premium Law 1999, approved by the Commission⁽⁵⁾, and 0,298 % (EUR 986 000) as a guarantee⁽⁶⁾ on part of a loan granted by a commercial bank.

III. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (10) The Commission raised doubts as to the precise scope of the project, as there was little information on the part of the supplying 'project companies'. Point 7.2 of the MSF states that 'an investment project should not be artificially divided into sub-projects in order to escape the notification obligation'.
- (11) As regards the infrastructure company, the Commission raised the question whether the provision of infrastructure did not mean aid for the project (genuine character of the infrastructure, whether the infrastructure company would supply a number of connections not justified in the case of a single project developer and whether the tariffs corresponded to market prices).

⁽⁴⁾ 28. Rahmenplan der Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur'.

⁽⁵⁾ *Investitionszulagengesetz* 1999, C 72/98 (ex N 702/97), SG (98) D/12438 of 30.12.1998 and SC (2001) D/286551 of 2.3.2001.

⁽⁶⁾ Granted on the basis of an approved scheme (*Bundesbürgschaftsprogramm*, N 297/91).

- (12) As regards the capital-labour factor, the Commission raised doubts whether the project would create 528 new jobs (leading to a capital-labour factor of 0,8), as claimed by Germany. The Commission estimated that the level of job creation would in fact be only around 400, which would reduce the capital-labour factor to 0,7.

- (13) On the basis of data on capacity utilisation, Germany considered the competition factor to be neutral. The Commission, however, considered it useful to assess the data on the apparent consumption of caprolactam, before taking a position on the market.

- (14) Germany stated that the aid will be granted on the basis of regional aid schemes approved by the Commission. One of these schemes, the investment premium (*Investitionszulage*)⁽⁷⁾ provides for automatic tax breaks for investments made by companies (in the area of Schwedt amounting to 15 % of the investments). Germany declared that the project will receive only 12,415 % of aid under this tax scheme. The Commission had doubts that an automatic application of the investment premium could lead to the result that the declared aid intensity of 28 % is exceeded.

IV. COMMENTS FROM INTERESTED PARTIES

- (15) Two competitors and one agricultural association submitted comments.
- (16) The 'Industrieverband Agrar', representing the interests of pesticide and fertiliser producing companies in Germany, explained that, as a by-product of producing caprolactam, ammonia-sulphate is produced and sold as a nitrogen fertiliser to agriculture. Therefore, the German fertiliser industry would be adversely affected by the caprolactam production. The 'Industrieverband Agrar' also stressed the continuous restructuring process the fertiliser industry had been going through since 1980 in a shrinking market. Although the aid might create some jobs, it would jeopardise other jobs in the fertiliser industry.
- (17) DSM Fibres Intermediates BV stressed that the project appeared to be artificially structured to circumvent the MSF. In particular, there appeared to be no business rationale for the involvement of 'supplying companies' other than circumventing the MSF. The provision of infrastructure by *InfraSchwedt* appeared to involve state aid elements. As regards the competition factor, DSM Fibres Intermediates BV considered that it should not be regarded as neutral but as negative, since there was structural overcapacity in the caprolactam market and this situation was likely to deteriorate in the near future.

⁽⁷⁾ *Investitionszulagengesetz* 1999 (*InvZulG* 1999).

In addition, the capital-labour factor appeared to be overstated, while the regional impact factor was considered correct. Finally, the project would raise technological and environmental concerns, and the loan guarantees granted by the German authorities should be scrutinised.

- (18) Domo NV considered that the competition factor and the capital-labour factor should be re-assessed downwards. Taking into account the structural overcapacity in western Europe, the competition factor should be set at 0,75. As regards the capital-labour factor, Domo NV explained that a greenfield investment of the size proposed and with the technology used led to the creation of approximately 350 jobs (and an absolute maximum of 400 jobs). On the assumption of 400 jobs, the capital-labour factor should be set at 0,7. As a result, the maximum aid intensity should be set substantially below the level of 28 % proposed by Germany, at 18,375 %. Finally, Domo NV observed that the creation of InfraSchwedt GmbH might contain additional aid elements and that the artificial set-up of the three satellite companies could lead to a circumvention of state aid rules.

V. COMMENTS FROM GERMANY

- (19) As regards the doubts raised by the Commission on the form of the proposed aid, Germany explained that any automatic, excessive granting of aid through combining the investment premium with the other aid was prevented by the applicable award rules in the German legal system (Nr 2 der Allgemeinen Nebenbestimmungen für Projektförderungen zu §44 der Bundes/Landeshaushaltsordnungen). Germany confirmed that any combining of aid from the investment premium with other aid that exceeded the allowable aid intensity would be offset by a proportional reduction of the grant under the joint Federal Government/Länder scheme for improving regional economic structures (Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur).
- (20) The German authorities considered that the development of the infrastructure into a chemical complex did not include an additional aid element for the project. Germany explained that the infrastructure was being built not only in the interests of Capro Schwedt and the supplying companies. It also confirmed that Capro Schwedt and the three supplying companies were to be considered as a single unit in the project. As to the nature of the supplying companies, Germany explained that they were not only needed for the caprolactam production, but also to provide basic chemicals needed for the planned development of the chemical complex as such. As to the tariff system for the services of InfraSchwedt, Germany stated that prices charged by InfraSchwedt for its products/services were market prices.
- (21) As regards the capital-labour factor, Germany considered that the assumption of 528 new jobs for the operation of the facility producing caprolactam and feedstock and for the provision of services was realistic.

As the caprolactam production in Schwedt was not integrated into a production network of a large chemicals producer with corresponding synergies, it could not be compared to such companies when calculating the required workforce. The capital-labour factor should consequently be set at 0,8. However, Germany offered to base the calculation of the aid initially on a capital-labour factor of 0,7 and to pay out the last instalment only after the Commission had verified the correct implementation of the project as regards the announced direct and indirect job creation and after the Commission had agreed to the payment of the last instalment.

- (22) As regards the competition factor, Germany considered that sufficient data as regards the capacity utilisation of the relevant product was available. By letter dated 14 August 2002, Germany submitted additional information on the apparent consumption of caprolactam during the period 1995 to 1999 ⁽⁸⁾. As regards the future market development, based on forecasts on the development of the caprolactam market by SRI International, Germany considered that the apparent consumption of the product would increase from 708 000 tonnes in 1999 to 770 000 tonnes in 2004. As regards the regional impact factor, Germany agreed with the Commission's assessment.

- (23) In response to the comments received from third parties, Germany reconfirmed that the capital-labour factor should be set at 0,8. As regards the competition factor, Germany reconfirmed its earlier view and referred to the increase of apparent consumption as of 2005. It also explained that the Asian market was an important sales area for the investor. With respect to an analysis of capacity utilisation, Germany considered the relevant reference period to be the last five years. Germany explained that the guarantees granted were in accordance with the State aid rules. Finally, Germany considered that the project did not raise technological or environmental concerns as the company used the 'state of art' technology. Germany explained that there was no technology that produced less ammonia sulphate as a by-product. With a production of 120 000 tonnes of caprolactam, around 165 000 tonnes of ammonia sulphate are produced as a by-product, which would be only around half of the amount indicated by the 'Industrieverband Agrar'. The most environmentally friendly way to dispose of ammonia sulphate would be its further use as fertiliser, as is planned by Capro Schwedt.

VI. ASSESSMENT

1. Form of the aid

- (24) As regards the doubts raised by the Commission on the form of the proposed aid, Germany explained that the

⁽⁸⁾ Data from CEH Marketing Research Report 'Caprolactam', Chemical Economics Handbook.

applicable award rules in the German legal system (Nr 2 der Allgemeinen Nebenbestimmungen für Projektförderungen zu §44 der Bundes/Landeshaushaltsordnungen) ensure that the permissible aid intensity will not be exceeded. Any cumulation of aid from the investment premium with other aid that could exceed the allowable aid intensity would be automatically offset by a proportional reduction of the grant under the joint Federal Government/Länder scheme for improving regional economic structures (Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur). On the basis of this confirmation, the Commission considers that it can be ensured that no aid will be granted that goes beyond the aid ceiling approved by the Commission.

2. The infrastructure project

- (25) In response to the doubts raised by the Commission in its decision to initiate the formal investigation procedure, Germany provided substantial additional information as to the nature of the infrastructure set up by Infra Schwedt. Germany indicated that the Capro Schwedt project is part of the development of the chemical complex of Schwedt. The development is split into five phases, of which the Capro Schwedt project is to be the first. The Capro Schwedt project will make use of only part of the available land (total 100 ha). For the other four development phases, it is planned to establish producers of plastics and other chemicals in the complex. The infrastructure layout could therefore take into account not only the needs of Capro Schwedt. InfraSchwedt, in providing this infrastructure, needed also to take into account the needs of the other companies which were to be established in the complex. To support its view, Germany pointed out that the power transformation plants, for example, will be needed for the production of plastics and the wastewater installations for the cracker (phase 5).
- (26) Germany provided additional information on the nature of the supplying companies. They were to act independently from the caprolactam producer. Germany stated that they were not just needed for the caprolactam production, but that their products (oleum/sulphuric acid, cyclohexane and hydrogen) were needed for the planned development of the chemical complex as such. In contrast to already existing chemical complexes, the chemical complex in Schwedt was a newly created complex, where the supply of basic chemical products needed to be established.
- (27) Germany agreed with the Commission that the Capro Schwedt project should be considered as a single project. Capro Schwedt and the supplying companies were to receive only one set of infrastructure connections. InfraSchwedt would not cover connection costs between Capro Schwedt and the supplying companies.
- (28) As to the tariff system of InfraSchwedt, Germany stated that all prices charged by InfraSchwedt for its products/services were to be market prices, covering the

operating and capital costs, including depreciation, refinancing and reinvestments. The tariff system would be based on costs and would not produce profits for InfraSchwedt. It did not allow for cross-subsidisation between loss-making and profitable activities in InfraSchwedt.

- (29) The Commission notes that Capro Schwedt is to use only a small part of the total chemical complex of Schwedt. Other chemical companies, independent of the caprolactam project, are also to establish themselves at the complex during the five development phases. The infrastructure provided by InfraSchwedt to the caprolactam project must accordingly also satisfy the needs of these other companies.
- (30) The Commission notes further that the project is to be considered a single project, receiving from InfraSchwedt only one set of infrastructure connections to its premises. All the infrastructure costs within the Capro Schwedt area are to be covered by Capro Schwedt and the three supplying companies.
- (31) In view of the above and by taking into account the fact that Germany confirmed that InfraSchwedt will charge competitive prices for its products/services on a non-discriminatory basis, the Commission concludes that Capro Schwedt does not benefit from any specific infrastructure measures provided by InfraSchwedt.
- (32) The Commission concludes that there is no element of state aid involved in the provision of infrastructure by InfraSchwedt to the Capro Schwedt project.

3. Notification requirement

- (33) Germany indicated total eligible investment costs of EUR 311,11 million. The planned cumulative aid intensity is 28 % of the eligible investment costs and the indicated aid per job created is EUR 589 223. Therefore, pursuant to point 2.1 of the MSF, the aid is notifiable individually and has to be assessed accordingly.

4. The relevant market

- (34) The relevant product market for determining the market share comprises the product covered by the investment project and any substitutes. The Commission has noted that, as a by-product of producing caprolactam, ammonia-sulphate is produced, which can be sold as a nitrogen fertiliser to agriculture. However, as the main purpose of the project is to produce caprolactam (as a raw material for synthetic fibres production), which the company at present buys externally, the Commission considers caprolactam to be the relevant product

market. (No separate NACE classification exists for this market. The lowest available segmentation of the NACE classification for caprolactam is the NACE code 24.14 (Manufacture of other organic basic chemicals)).

(35) Under point 7.6 of the MSF, the relevant geographic market comprises usually the EEA or, alternatively, any significant part of it if the conditions of competition in that area can be sufficiently distinguished from other areas in the EEA. As caprolactam is an interchangeable commodity product, regardless of its provenance, and as transport costs are relatively low, the EU as a whole, for which reliable data is available, is regarded as the relevant geographic market.

(36) As regards the development of apparent consumption in value terms (in EUR), Germany submitted the following data ⁽⁹⁾:

(EUR million)

Year	EEA	Worldwide (price/US, price/EEA)	
1995	756	3 910	4 130
1996	708	3 890	3 550
1997	863	4 800	4 270
1998	949	4 910	4 280
1999	742	4 860	3 540

5. Assessment under the multisectoral framework

(37) Point 7.2 of the MSF states that 'an investment project should not be artificially divided into sub-projects in order to escape the notification obligation'. The notified project comprises four companies, the main producer of caprolactam and three of its direct suppliers. The three supplying companies, which so far exist only as 'project companies', will be set up in direct vicinity to Capro Schwedt with the purpose to supply to it some of the necessary products/services for the production of caprolactam. In notifying the project as a single investment project, Germany thus complied with the requirement laid down in point 7.2 of the MSF not to divide the project artificially.

(38) Under point 3.1 of the MSF, in order to determine the maximum allowable aid intensity for the proposal to award aid, the Commission has to identify the maximum aid intensity (regional aid ceiling) which a company could obtain in the assisted area concerned within the context of the authorised regional aid system valid at the moment of the notification.

(39) Taking into account the overall project, Capro Schwedt GmbH has to be considered a large undertaking. The maximum allowable aid intensity (R) in the present case is 35 % gross ⁽¹⁰⁾. A range of adjustment factors then have to be applied to that percentage figure in accordance with three specific assessment factors, in order to calculate a maximum allowable aid intensity for the project in question, namely the competition factor (T), the capital-labour factor (I), and the regional impact factor (M).

6. Competition factor (T)

(40) The Commission notes that the market share of Capro Schwedt AG does not exceed 40 % in the relevant market and will not exceed this percentage as a result of the new investment.

(41) The authorisation of aid to companies operating in sectors that are in structural overcapacity poses particular risks for the distortion of competition. Any capacity expansion not offset by capacity reductions elsewhere will exacerbate the problem of structural overcapacity. The sector or sub-sector will be established at the lowest available segmentation of the NACE classification.

(42) The NACE code corresponding to the production of caprolactam is 24.14, which comprises the manufacture of a whole range of other organic basic chemicals. No separate NACE classification exists for the sub-sector of caprolactam. Caprolactam represents only a small share in the relevant NACE code. Therefore, the Commission considers that capacity data concerning NACE code 24.14 are not representative for the appraisal of the capacity situation for caprolactam. Pursuant to point 3.4 of the MSF, the Commission will base its assessment of the competition factor on the data for apparent consumption and will consider whether the investment takes place in a declining market.

(43) For this purpose, the Commission compares the apparent consumption of the products in question with the growth rate of EEA manufacturing industry as a whole. A market is deemed to be declining if, over the last five years, the average annual growth rate of apparent consumption of the product is more than 10 % below the annual average of EEA manufacturing industry as a whole, unless there is a strong upward trend in the relative growth rate of demand for the product. The market is deemed to be absolutely declining if the average annual growth rate of apparent consumption over the last five years is negative (point 7.8 of the MSF).

(44) The MSF refers to the average annual growth rate over the last five years. It is therefore the Commission's practice to look at apparent consumption over a period of six years in order to calculate five growth rates. The average annual growth rate of the EEA manufacturing

⁽⁹⁾ Data from CEH Marketing Research Report 'Caprolactam', Chemical Economics Handbook.

⁽¹⁰⁾ OJ C 340, 27.11.1999, p. 8.

industry as a whole comes to 6,12 % for the years 1995 to 2000.

- (45) Germany provided data derived from CEH Marketing Research Report 'Caprolactam', Chemical Economics Handbook on the apparent consumption for the period 1995 to 1999. On the basis of these data, the average growth rate of apparent consumption on the market for caprolactam was 5,42 %. The average annual growth rate of manufacturing industry as a whole in the EEA for the same period comes to 5,79 %. According to the definition in the MSF, the sector would not be in decline and the competition factor would remain unchanged at 1,0.
- (46) However, more recent data from Eurostat, covering the period 1995 to 2000, lead to the conclusion that the caprolactam market is in relative decline. According to this information, the apparent consumption of caprolactam (in EUR) for the years 1995 to 2000 is:

(EUR)	
Apparent consumption of caprolactam	
1995	754 355 927
1996	594 031 089
1997	821 433 942
1998	776 641 984
1999	694 245 630
2000	923 249 239

- (47) On the basis of these figures, the average growth rate of apparent consumption on the market for caprolactam was 4,12 %. The average annual growth rate of manufacturing industry as a whole in the EEA for the same period comes to 6,12 %. The Commission has based its assessment on these more recent data from EUROSTAT. Consequently, pursuant to point 7.8 of the MSF, the market for caprolactam is regarded as being in relative decline, as the average annual growth rate is significantly (more than 10 %) below that of manufacturing industry as a whole. In the light of the above considerations, the Commission applies a competition factor of 0,75.

7. Capital-labour factor (I)

- (48) The capital-labour factor is used to adjust the maximum aid intensity so as to promote those projects which make a more effective contribution to the reduction of unemployment through the creation of a larger number of new jobs.
- (49) According to Germany, the overall project will lead to the creation of 528 permanent jobs, of which 448 will be in Capro Schwedt and 80 with the suppliers. In the

initiation of the procedure, the Commission took the view that, for a company to produce 120 000 tonnes per year, a more normal level of job creation would be around 400, which is well below the declared level of 528. This raised doubts, in particular as such a number would result in the capital-labour factor being reduced to 0,7.

- (50) In its comments on the initiation of the procedure, Germany agreed to calculate the aid initially on the basis of a capital-labour factor of 0,7 and to pay out the last instalment only after the Commission had verified the correct implementation of the project as regards the creation of jobs and after the Commission had agreed to the payment of the last instalment. The Commission agrees to this approach.
- (51) Consequently, in accordance with point 3.10.2 of the MSF, the capital-labour factor (I) for the adjustment of the maximum aid intensity for the project at stake is, up to the payment of the last aid instalment, to be calculated at 0,7 (resulting from the ratio new capital/jobs of EUR 827 775). Any additional aid amount, based on the creation of 528 jobs and consequently a capital-labour factor (I) of 0,8, may be granted only after the Commission has verified the creation of 528 jobs and has agreed to the payment of the last instalment.

8. Regional impact factor (M)

- (52) The regional impact factor takes into account the beneficial effects of a new aided investment on the economies of the assisted regions. The Commission considers that job creation can be used as an indicator of a project's impact in terms of development of a region. A capital-intensive investment may create a significant number of indirect jobs in the assisted region concerned and any adjacent assisted region. Job creation in this context refers to jobs created directly by the project together with jobs created by first-tier suppliers and customers in response to the aided investment.
- (53) As the project does not contribute directly to the creation, by other companies in the same region, of new jobs in a number exceeding 50 % of the jobs created by the project itself, the regional impact factor is set at 1,0.

9. Maximum allowable aid

- (54) In view of the foregoing, the maximum allowable aid intensity is calculated as follows:
 $35 \% \times 0,75 \times 0,8 \times 1,0 = 21,00 \%$ gross (point 3.10 of

the MSF). The proposed aid of EUR 92,71 million, equivalent to an aid intensity of 28 % gross, that Germany intends to grant to Capro Schwedt is therefore not in conformity with the maximum allowable aid intensity, calculated on the basis of the MSF.

10. *Ex post* monitoring

- (55) In view of the sensitive nature of the large mobile investments involved, it is essential that a mechanism exists which helps to ensure that the level of aid actually disbursed to the beneficiary conforms to the Commission decision.
- (56) For each aided project approved by the Commission under the MSF, the Commission requires either that any aid contract between the relevant authority of the Member State and the aid recipient contains a reimbursement provision in the event of non-compliance with the contract or that the final significant payment of the aid will be made only when the aid beneficiary has satisfied the Member State that the execution of the project is in compliance with the Commission decision and on condition that the Commission, on the basis of information provided by the Member State concerning implementation of the project, has, within 60 working days, indicated its agreement or raised no objections to the final payment of the aid.
- (57) Germany has agreed to calculate the aid intensity initially on the basis of 400 created jobs and a capital-labour factor of 0,7. The allowable aid intensity will thus initially be 18,375 % ($35 \% \times 0,75 \times 0,7 \times 1,0$). The Commission notes that the final payment of the aid, based on the creation of 528 jobs and a capital-labour factor of 0,8, will be made only when Capro Schwedt has satisfied the Commission that the execution of the project as regards the announced creation of 528 jobs has been implemented and after the Commission has agreed to the payment of the last instalment.
- (58) The Commission further notes that the undertaking concerning the *ex post* monitoring given by Germany complies with the obligations laid down in point 6 of the MSF, in particular as regards the obligation to communicate to the Commission a copy of the decision granting the aid as well as an annual report on the project and the other information and documents to which point 6.4 of the MSF refers.

VII. CONCLUSION

- (59) In the light of the above considerations, the Commission concludes that the part of the notified aid exceeding the maximum allowable aid intensity calculated for this project according to the provisions of the MSF does not fulfil the conditions to be considered compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The aid which Germany is planning to implement for Capro Schwedt GmbH, amounting to EUR 92,71 (aid intensity: 28 %), is incompatible with the common market in so far as it exceeds the maximum allowable aid intensity for the project of 21 %.

The aid may accordingly not be implemented above the aid intensity of 21 %.

Article 2

The payments, with the exception of the final payment, shall be made on the basis of an aid intensity of 18,375 %.

The final payment on the basis of an aid intensity of 21 % may be made only when Capro Schwedt GmbH has demonstrated to the Commission that 528 jobs have been created by the project and after the Commission has agreed to payment of the last instalment.

Article 3

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 13 November 2002.

For the Commission

Mario MONTI

Member of the Commission