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Legislation

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COUNCIL

COUNCIL DECISION

of 22 December 1994

on the conclusion of the Second Additional Protocol to the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, and to the Interim Agreement on trade and trade-related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Bulgaria, of the other part

(94/981/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 113 in conjunction with Article 228 (2), first sentence thereof,

Having regard to the conclusions of the European Council which took place in Essen on 9 and 10 December 1994,

Having regard to the proposal from the Commission,

Whereas the Commission has negotiated on behalf of the Communities a Second Additional Protocol to the Interim Agreement [1] on trade and trade-related matters and to the Europe Agreement with the Republic of Bulgaria,

Whereas it is necessary to approve this Second Additional Protocol,

HAS DECIDED AS FOLLOWS:

Article 1

The Second Additional Protocol to the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Bulgaria of the other part, and to the Interim Agreement on trade and trade-related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Bulgaria of the other part, is hereby approved on behalf of the European Community.

The text of the Second Additional Protocol is attached to this Decision.

Article 2

Provisions for the application of Article 3 of the Second Additional Protocol concerning agricultural products falling within Annex II to the Treaty and subject, in the framework of the common market organization to a system of levies, or to customs duties, and concerning products falling within CN codes 0711 90 40, 2003 10 20 and 2003 10 30 shall be adopted in accordance with the procedure provided for in Article 26 of Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products [2], or in the corresponding provisions of other Regulations establishing a common organization of the agricultural markets. Where the application of the Agreement calls for close cooperation with Bulgaria, the Commission may take any measures necessary to ensure such cooperation.

Article 3

The President of the Council is hereby authorized to designate the person empowered to sign the Second Additional Protocol on behalf of the European Community.

The President of the Council shall give the notification provided for in Article 8 of the Second Additional Protocol on behalf of the European Community.

Done at Brussels, 22 December 1994.

For the Council

The President

H. SEEHOFER

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[1] OJ No L 323, 23. 12. 1993, p. 2.

[2] OJ No L 148, 28. 6. 1968, p. 13. Regulation as last amended by Regulation (EC) No 1880/94 (OJ No L 197, 30. 7. 1994, p. 21).

SECOND ADDITIONAL PROTOCOL

to the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, and to the Interim Agreement on trade and trade-related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Bulgaria, of the other part

THE EUROPEAN COMMUNITY AND THE EUROPEAN COAL AND STEEL COMMUNITY, hereinafter referred to as 'the Community',

of the one part, and

THE REPUBLIC OF BULGARIA,

of the other part,

WHEREAS the Europe Agreement establishing an association between the European Communities and their Member States and the Republic of Bulgaria (hereinafter referred to as 'the Europe Agreement') was signed in Brussels on 8 March 1993, and has not yet entered into force;

WHEREAS; pending the entry into force of the Europe Agreement, provisions thereof on trade and trade-related matters have been put into force since 31 December 1993 by the Interim Agreement on trade and trade-related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Bulgaria, of the other part (hereinafter called 'the Interim Agreement'), signed in Brussels on 8 March 1993;

WHEREAS, the Europe Agreement and the Interim Agreement have been amended by the Additional Protocol signed on 21 December 1993, hereinafter referred to as the First Additional Protocol;

RECOGNIZING the crucial importance of trade in the transition to a market economy;

BEARING IN MIND the willingness of the Community to align the Republic of Bulgaria's time-table of the trade provisions included in the Europe and Interim Agreements with that of the Visegrad associated countries;

BEARING IN MIND the objectives of the Europe Agreement and, in particular, those referred to in Article 1 thereof;

HAVING REGARD to the Interim Agreement,

HAVING DECIDED to conclude this Protocol and to this end have designated as their plenipotentiaries:

THE EUROPEAN COMMUNITY:

Dietrich von KYAW

Ambassador,

Permanent Representative of the Federal Republic of Germany,
Chairman of the Permanent Representatives Committee

THE REPUBLIC OF BULGARIA:

Evgeni IVANOV

Ambassador,

Head of the Bulgarian Mission to the European Communities

WHO, having exchanged their full powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

Article 1

Article 4 (3) of the Interim Agreement and Article 10 (3) of the Europe Agreement as amended by the First Additional Protocol shall be replaced by the following text:

'3. The products of Bulgarian origin listed in Annex III shall benefit from a suspension of customs duties on imports within the limits of annual Community tariff quotas or ceilings increasing progressively in accordance with the conditions defined in that Annex so as to arrive at a complete abolition of customs duties on imports of the products concerned by the end of the second year after the date of entry into force of the Agreement.

At the same time customs duties on imports applicable to import quantities in excess of the quotas or ceilings provided for above shall be progressively dismantled from the entry into force of the Agreement by annual reductions of 15 % of the basic duty. By the end of the second year, remaining duties shall be abolished.'

Article 2

The footnotes of Annex III to the Interim Agreement and of Annex III to the Europe Agreement are no longer applicable.

Article 3

The following text shall replace point 1(b) of the introductory paragraph introduced into Annexes XIa, XIIIa and XIIIb to the Interim Agreement and to Annexes XIa, XIIIa and XIIIb to the Europe Agreement by the First Additional Protocol:

'1.(b) The quantities in tonnes set out for year 4 shall not apply and the quantities set out for year 5 shall be applicable for year 4 which begins on 1 July 1995.'

Article 4

1. In the introductory paragraph to Article 2 (1) of Protocol 1 on textile and clothing products to the Interim Agreement and Protocol 1 on textile and clothing products to the Europe Agreement as amended by the First Additional Protocol, 'elimination at the end of a period of five years' shall be replaced by 'elimination at the end of a period of four years'.

2. The last two indents of Article 2 (1) of Protocol 1 on textile and clothing products to the Interim Agreement and of Protocol 1 on textiles and clothing products to the Europe Agreement as amended by the First Additional Protocol, shall be replaced by the following text:

'at the start of the fifth year the remaining duties shall be eliminated'.

Article 5

In Annex I of Protocol 3 on processed agricultural products to the Interim Agreement and of Protocol 3 on processed agricultural products to the Europe Agreement, the number of years after which the final rate of duty is applicable, as set out in column 7, shall be changed from 4 to 3 years for the products falling under CN codes 1803, 1804 00 00 and 1805 00 00.

In Annex II of Protocol 3 on processed agricultural products to the Interim Agreement and of Protocol 3 on processed agricultural products to the Europe Agreement, the quantities in tonnes set out for 1996 shall be deleted and the quantities in tonnes set out for 1997 onwards shall be applicable from 1996 onwards.

Article 6

In Annex II and in the Annex to Appendix B of the Additional Protocol to the Europe Agreement on trade in textile products between the European Economic Community and the Republic of Bulgaria, the quantitative limits set out for 1998 shall be deleted. In the Agreed Minute No 5, 'a five year period starting from 1 January 1994' shall be replaced by 'a four year period starting from 1 January 1994'.

Article 7

This Protocol shall form an integral part of the Interim Agreement and of the Europe Agreement.

Article 8

This Protocol shall enter into force on the first day of the month following the date upon which the Parties notify each other of the completion of the procedures necessary for that purpose. This Protocol shall apply from 1 January 1995.

If this Protocol should enter into force after 1 January 1995, any duties paid which would not have been payable if the Protocol had entered into force and its provisions had been implemented on that date shall be refunded and such refund shall be deemed to constitute full compliance with the obligation not to impose such duties.

Article 9

This Protocol shall be drawn up in two copies in the Danish, Dutch, English, French, German, Greek, Italian, Portuguese, Spanish and the Bulgarian languages, each of these texts being equally authentic.

Hecho en Bruselas, el treinta de diciembre de mil novecientos noventa y cuatro.

Udfærdiget i Bruxelles, den tredivte december nitten hundrede og fireoghalvfems.

Geschehen zu Brüssel am dreißigsten Dezember neunzehnhundertvierundneunzig.

Έγινε στις Βρυξέλλες, στις τριάντα Δεκεμβρίου χίλια εννιακόσια ενενήντα τέσσερα.

Done at Brussels on the thirtieth day of December in the year one thousand nine hundred and ninety-four.

Fait à Bruxelles, le trente décembre mil neuf cent quatre-vingt-quatorze.

Fatto a Bruxelles, addì trenta dicembre millenovecentonovantaquattro.

Gedaan te Brussel, de dertigste december negentienhonderd vierennegentig.

Feito em Bruxelas, em trinta de Dezembro de mil novecentos e noventa e quatro.

НАПРАВЕНО В БРЮКСЕЛ НА 30 ДЕКЕМВРИ 1994 ГОДИНА

Por la Comunidad Europea

For Det Europæiske Fællesskab

Für die Europäische Gemeinschaft

Για την Ευρωπαϊκή Κοινότητα

For the European Community

Pour la Communauté européenne

Per la Comunità europea

Voor de Europese Gemeenschap

Pela Comunidade Europeia

За Република България

COUNCIL DECISION

of 22 December 1994

on the conclusion of the Second Additional Protocol to the Europe Agreement between the European Communities and their Member States, of the one part, and Romania, of the other part, and to the Interim Agreement on trade and trade-related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and Romania, of the other part

(94/982/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 113 in conjunction with Article 228 (2) first sentence thereof,

Having regard to the conclusions of the European Council which took place in Essen on 9 and 10 December 1994,

Having regard to the proposal from the Commission,

Whereas the Commission has negotiated on behalf of the Communities a Second Additional Protocol to the Interim Agreement [1] on trade and trade-related matters and to the Europe Agreement with Romania,

Whereas it is necessary to approve this Second Additional Protocol,

HAS DECIDED AS FOLLOWS:

Article 1

The Second Additional Protocol to the Europe Agreement between the European Communities and their Member States, of the one part, and Romania, of the other part, and to the Interim Agreement on trade and trade-related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and Romania, of the other part, is hereby approved on behalf of the European Community.

The text of the Second Additional protocol is attached to this Decision.

Article 2

Provisions for the application of Article 3 of the Second Additional Protocol concerning agricultural products falling within Annex II to the Treaty and subject, in the framework of the common market organization to a system of levies, or to customs duties, and concerning products falling within CN codes 0711 90 40, 2003 10 20 and 2003 10 30 shall be adopted in accordance with the procedure provided for in Article 26 of Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products [2], or in the corresponding provisions of other Regulations establishing a common organization of the agricultural markets. Where the application of the Agreement calls for close cooperation with Romania, the Commission may take any measures necessary to ensure such cooperation.

Article 3

The President of the Council is hereby authorized to designate the person empowered to sign the Second Additional Protocol on behalf of the European Community.

The President of the Council shall give the notification provided for in Article 9 of the Second Additional Protocol on behalf of the European Community.

Done at Brussels, 22 December 1994.

For the Council
The President
H. SEEHOFER

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[1] OJ No L 81, 2. 4. 1993, p. 2.

[2] OJ No L 148, 28. 6. 1968, p. 13. Regulation as last amended by Regulation (EC) No 1880/94 (OJ No L 197, 30. 7. 1994, p. 21).

SECOND ADDITIONAL PROTOCOL

to the Europe Agreement between the European Communities and their Member States, of the one part, and Romania, of the other part, and to the Interim Agreement on trade and trade-related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and Romania, of the other part

THE EUROPEAN COMMUNITY AND THE EUROPEAN COAL AND STEEL COMMUNITY, hereinafter referred to as 'the Community',

of the one part, and

ROMANIA,

of the other part,

WHEREAS the Europe Agreement establishing an association between the European Communities and their Member States and Romania (hereinafter referred to as 'the Europe Agreement') was signed in Brussels on 1 February 1993, and has not yet entered into force;

WHEREAS, pending the entry into force of the Europe Agreement, provisions thereof on trade and trade-related matters have been put into force since 1 May 1993 by the Interim Agreement on trade and trade-related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and Romania of the other part, (hereinafter called 'the Interim Agreement'), signed in Brussels on 1 February 1993;

WHEREAS the Europe Agreement and the Interim Agreement have been amended by the Additional Protocol signed on 21 December 1993, hereinafter referred to as the First Additional Protocol,

RECOGNIZING the crucial importance of trade in the transition to a market economy,

BEARING IN MIND the willingness of the Community to align the Romanian timetable of the trade provisions included in the Europe and Interim Agreements with that of the Visegrad associated countries,

BEARING IN MIND the objectives of the Europe Agreement and, in particular, those referred to in Article 1 thereof,

HAVING REGARD to the Interim Agreement,

HAVING DECIDED to conclude this Protocol and to this end have designated as their plenipotentiaries:

THE EUROPEAN COMMUNITY

Dietrich von KYAW,

Anbassador,

Permanent Representative of the Federal Republic of Germany,
Chairman of the Permanent Representatives Committee,

ROMANIA:

Constantin ENE,

Ambassador extraordinary and plenipotentiary,

Head of the Romanian Mission to the European Union,

WHO, having exchanged their full powers found in good and due form,

HAVE AGREED AS FOLLOWS:

Article 1

Article 4 (3) of the Interim Agreement and Article 10 (3) of the Europe Agreement as amended by the First Additional Protocol shall be replaced by the Following text:

'3. The products of Romanian origin listed in Annex III shall benefit from a suspension of customs duties on imports within the limits of annual Community tariff quotas or ceilings increasing progressively in accordance with the conditions defined in that Annex so as to arrive at a complete

abolition of customs duties on imports of the products concerned by the end of the second year after the date of entry into force of the Agreement. At the same time customs duties on imports to be applied when the quotas have been exhausted or when the levying of customs duties has been re-established with respect to products covered by a tariff ceiling, shall be progressively dismantled from the entry into force of the Agreement by annual reductions of 15 % of the basic duty. By the end of the second year, remaining duties shall be abolished.'

Article 2

The footnotes of Annex III to the Interim Agreement and of Annex III to the Europe Agreement are no longer applicable.

Article 3

The following text shall replace point 1 (b) of the introductory paragraph introduced into Annexes XIa, XIIIa and XIIIb to the Interim Agreement and to Annexes XIa, XIIa and XIIb to the Europe Agreement by the First Additional Protocol:

'1. (b) The quantities in tonnes set out for year 4 shall not apply and the quantities set out for year 5 shall be applicable for year 4 which begins on 1 July 1995.'

Article 4

1. In the introductory paragraph to Article 2 (1) of Protocol 1 on textile and clothing products to the Interim Agreement and Protocol 1 on textile and clothing products to the Europe Agreement as amended by the First Additional Protocol, 'elimination at the end of a period of five years' shall be replaced by 'elimination at the end of a period of four years'.

2. The last two indents of Article 2 (1) of Protocol 1 on textile and clothing products to the Interim Agreement and of Protocol 1 on textiles and clothing products to the Europe Agreement as amended by the First Additional Protocol, shall be replaced by the following text:

'at the start of the fifth year the remaining duties shall be eliminated'.

Article 5

Article 2 (2) of Protocol 2 on ECSC products to the Interim Agreement and of Protocol 2 on ECSC products to the Europe Agreement as amended by the First Additional Protocol shall be replaced by the following text:

'2. Further reductions to 60, 40 and 0 % of the basic duty shall be made at the beginning of the second, third and fourth years respectively after the entry into force of the Agreement.'

Article 6

In Annex A of Protocol 3 on processed agricultural products to the Interim Agreement and of Protocol 3 on processed agricultural products to the Europe Agreement, the number of years after which the final rate of duty is applicable, as set out in column 7, shall be changed from four to three years for the products falling within CN codes 1803, 1804 00 00 and 1805 00 00 and 1806 10 10 — other.

In Annex B of Protocol 3 on processed agricultural products to the Interim Agreement and of Protocol 3 on processed agricultural products to the Europe Agreement, the quantities in tonnes set out for 1996 shall be deleted and the quantities in tonnes set out for 1997 onwards shall be applicable from 1996 onwards.

Article 7

In Annex II and in the Annex to Appendix B of the Additional Protocol to the Europe Agreement on trade in textile products between the European Economic Community and the Republic of Romania, the quantitative limits set out for 1998 shall be deleted.

In the Agreed Minute No 5, 'a five-year period starting from 1 January 1994' shall be replaced by 'a four-year period starting from 1 January 1994'.

Article 8

This Protocol shall form an integral part of the Interim Agreement and of the Europe Agreement.

Article 9

This Protocol shall enter into force on the first day of the month following the date upon which the Parties notify each other of the completion of the procedures necessary for that purpose. This Protocol shall apply from 1 January 1995.

If this Protocol should enter into force after 1 January 1995, any duties paid which would not have been payable in the Protocol had entered into force and its provisions had been implemented on that date shall be refunded and such refund shall be deemed to constitute full compliance with the obligation not to impose such duties.

Article 10

This Protocol shall be drawn up in two copies in the Danish, Dutch, English, French, German, Greek, Italian, Portuguese, Spanish and the Romanian languages, each of these texts being equally authentic.

Hecho en Bruselas, el veintidós de diciembre de mil novecientos noventa y cuatro.

Udfærdiget i Bruxelles, den toogtyvende december nitten hundrede og fireoghalvfems.

Geschehen zu Brüssel am zweiundzwanzigsten Dezember neunzehnhundertvierundneunzig.

Έγινε στις Βρυξέλλες, στις είκοσι δύο Δεκεμβρίου χίλια εννιακόσια ενενήντα τέσσερα.

Done at Brussels on the twenty-second day of December in the year one thousand nine hundred and ninety-four.

Fait à Bruxelles, le vingt-deux décembre mil neuf cent quatre-vingt-quatorze.

Fatto a Bruxelles, addì ventidue dicembre millenovecentonovantaquattro.

Gedaan te Brussel, de tweeëntwintigste december negentienhonderd vierennegentig.

Feito em Bruxelas, em vinte e dois de Dezembro de mil novecentos e noventa e quatro.

Făcut la Bruxelles la douăzeci şi doi decembrie una mie nouă sute nouăzeci si patru.

Por la Comunidad Europea

For Det Europæiske Fællesskab

Für die Europäische Gemeinschaft

Για την Ευρωπαϊκή Κοινότητα

For the European Community

Pour la Communauté européenne

Per la Comunità europea

Voor de Europese Gemeenschap

Pela Comunidade Europeia

Pentru Rômania

COMMISSION

COMMISSION DECISION

of 22 December 1994

concerning the conclusion on behalf of the European Coal and Steel Community of the Second Additional Protocol to the Europe Agreement between the European Communities and their Member States of the one part, and Romania, of the other part, and to the Interim Agreement on trade and trade-related matters between the European Community and the European Coal and Steel Community and Romania

(94/983/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular the first paragraph of Article 95 thereof,

Having regard to the conclusions of the European Council which took place in Essen on 9 and 10 December 1994,

Whereas the Commission has negotiated on behalf of the Commission a Second Additional Protocol to the Europe Agreement with Romania and to the Interim Agreement on trade and trade-related matters with Romania;

Whereas it is necessary to approve this Second Additional Protocol;

Whereas the conclusion of the Second Additional Protocol is necessary to attain the objectives of the Community set out in particular in Articles 2 and 3 of the Treaty establishing the European Coal and Steel Community;

Whereas the Treaty did not make provision for all the cases covered by this Decision,

Having consulted the Consultative Committee and with the unanimous assent of the Council,

HAS DECIDED AS FOLLOWS:

Article 1

The Second Additional Protocol to the Europe Agreement between the European Communities and their Member States, of the one part, and Romania, of the other part, and to the Interim Agreement on trade and trade-related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and Romania, of the other part, is hereby approved on behalf of the European Coal and Steel Community.

This text is attached to this Decision [1].

[1] See page 6 of this Official Journal.

Article 2

The President of the Commission shall give the notification provided for in Article 9 of the Second Additional Protocol on behalf of the European Coal and Steel Community.

Done at Brussels, 22 December 1994.

For the Commission
The President
Jacques DELORS

COMMISSION DECISION

of 20 December 1994

laying down animal health conditons and veterinary certificates for the importation of fresh poultrymeat from certain third countries

(Text with EEA relevance)

(94/984/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 91/494/EEC of 26 June 1991 on animal health conditions governing intra-Community trade in and imports from third countries of fresh poultrymeat [1], as last amended by Directive 93/121/EC [2], and in particular Articles 11 and 12 thereof,

Whereas Commission Decision 94/85/EC [3], as last amended by Decision 94/453/EC [4], established a list of third countries from where importation of fresh poultrymeat is authorized;

Whereas Commission Decision 94/438/EC [5] has laid down the general requirements for the classification of third countries with regard to avian influenza and Newcastle disease in relation to imports of fresh poultrymeat;

Whereas it is appropriate to restrict the scope of this Decision to poultry species covered by Council Directive 71/118/EEC [6], as last amended and updated by Directive 92/116/EEC [7] and to lay down the animal health conditions and veterinary certification for other poultry species in a separate Decision;

Whereas therefore the animal health conditions and the veterinary certificates have to be laid down; whereas, since there are different groups of similar health situations between two or more third countries, it is appropriate to establish different health certificates in the light of those situations;

Whereas it is now possible, in accordance with information received from the third countries concerned and with the results of inspections carried out by the Commission services in some of these countries, to lay down two categories of certification;

Whereas the situation of the other third countries for which it is not yet possible to lay down a certificate is being studied attentively in order to see if they comply with the Community criteria or not; whereas this Decision shall be reviewed at the latest on 31 October 1995 to authorize or prohibit imports from those countries;

Whereas this Decision applies without prejudice to measures taken for poultrymeat imported for other purposes than human consumption;

Whereas, since a new certification scheme is being established, a period of time should be provided for its implementation;

Whereas the measures provided for in this Decision are in accordance with the opinion of the Standing Veterinary Committee,

HAS ADOPTED THIS DECISION:

Article 1

Member States shall authorize the importation of fresh poultrymeat from third countries or from parts of third countries listed in Annex I, provided that it meets the requirements of the corresponding animal health certificate set out in Annex II and that it is accompanied by such a certificate, duly completed and signed. The certificate shall include the general part conforming to Annex II, Part 1, and one of the specific health certificates conforming to Annex II, Part 2, in accordance with the model referred to in Annex I.

Article 2

This Decision shall apply from 1 May 1995.

(1) OJ No L 268, 24. 9. 1991, p. 35.
(2) OJ No L 340, 31. 12. 1993, p. 39.
(3) OJ No L 44, 17. 2. 1994, p. 31.
(4) OJ No L 187, 22. 7. 1994, p. 11.
(5) OJ No L 181, 15. 7. 1994, p. 35.
(6) OJ No L 55, 8. 3. 1971, p. 23.
(7) OJ No L 62, 15. 3. 1993, p. 1.

Article 3

This Decision shall be reviewed no later than 31 October 1995.

Article 4

This Decision is addressed to the Member States.

Done at Brussels, 20 December 1994.

For the Commission
René STEICHEN
Member of the Commission

ANNEX I

Third countries or parts of third countries which are allowed to use the certificates laid down in Annex II for imports of fresh poultry meat into the Community

ISO code	Country	Parts of the territory	Model to be used
AU	Australia		A
BR	Brazil	The States of Rio Grande do Sul and Sante Catarina	A
CA	Canada		A
CH	Switzerland		A
CL	Chile		A
CY	Cyprus		A
CZ	Czech Republic		A
HR	Croatia	The provinces of Zagrebacka, Krapinsko-Zagorska, Varazdinska, Koprivnicko-Krizevacka, Bjelovarsko-Bilogorska, Primorsko-Goranska, Viroviticko-Podravska, Pozesko-Slavonska, Istarska, Medimurska, Grad Zagreb	A
HU	Hungary		A
IL	Israel		B
NZ	New Zealand		A
PL	Poland		A
RO	Romania		A
SK	Slovakia		A
TH	Thailand		B
US	United States of America		A

Note: The characters A and B refer to the model established in Part 2 of Annex II.

ANNEX II

PART 1

ANIMAL HEALTH CERTIFICATE FOR FRESH POULTRYMEAT FOR HUMAN CONSUMPTION (1)

Note for the importer: This certificate is only for veterinary purposes and the original has to accompany the consignment until it reaches the border inspection post.

1. Consigner (name and address in full):	2. HEALTH CERTIFICATE No ORIGINAL 2.1. No of relevant public health certificate:
	3.1. Country of origin: 3.2. Region of of origin (2):
4. Consignee (name and address in full):	
	5. COMPETENT AUTHORITY:
8. Place of loading:	6. COMPETENT AUTHORITY (LOCAL LEVEL):
9.1. Means of transport (3): 9.2. Number of the seal (4):	7. Address of establishment(s): 7.1. Slaughterhouse:
10.1. Member State of destination: 10.2. Final destination:	7.2. Cutting plant (5): 7.3. Cold store (5):
12. Poultry species:	11. Approval number(s) of the establishment(s): 11.1. Slaughterhouse:
13. Nature of cuttings:	11.2. Cutting plant (5):
14. Consignment identification details:	11.3. Cold store (5):
Notes: *A separate certificate must be provided for each consignment of fresh poultrymeat.*	15. Quantity: 15.1. Net weight (kgs): 15.2. No of packages:

(1) Fresh poultrymeat means any parts of domestic fowl, turkeys, guinea fowl, geese and ducks, which are fit for human consumption and which have not undergone any treatment other than cold treatment to ensure its preservation; vacuum wrapped meat or meat wrapped in a controlled atmosphere must also be accompanied by a certificate according to this model.

(2) Only to be completed if the authorization to export to the Community is restricted to certain regions of the third country concerned.

(3) Indicate means of transport and registration marks or registered name, as appropriate.

(4) Optional.

(5) Delete if not applicable.

PART 2

Model A

16. **Health attestation:**

I, the undersigned official veterinarian, hereby certify, in accordance with the provisions of Directive 91/494/EEC:

1. that ..... [1], region ..... [2] is free from avian influenza and Newcastle disease, as defined in the International Animal Health Code of OIE;

2. that the meat described above is obtained from poultry which:

   (a) have been held in the territory of ..... [1], region ..... [2] since hatching or have been imported as day-old chicks;

   (b) came from holdings:

   — which have not been placed under animal health restrictions in connection with a poultry disease,

   — around which, within a radius of 10 km, there have been no outbreaks of avian influenza or Newcastle disease for at least 30 days;

   (c) have not be slaughtered in the context of any animal health scheme for the control or eradication of poultry diseases;

   (d) have/have not [3] been vaccinated against Newcastle disease using a live vaccine during the 30 days preceding slaughter;

   (e) during transport to the slaughterhouse did not come into contact with poultry suffering from avian influenza or Newcastle disease;

3. that the meat described above:

   (a) comes from slaughterhouses which, at the time of slaughter, are not under restrictions due to a suspect or actual outbreak of avian influenza or Newcastle disease and around which, within a radius of 10 km, there have been no outbreaks of avian influenza or Newcastle disease for at least 30 days;

   (b) has not been in contact, at any time of slaughter, cutting, storage or transport with meat which does not fulfil the requirements of Directive 91/494/EEC;

Done at ..... on .....

.....

Seal [4] (signature of official veterinarian) [4]

.....

(name in capital letters, qualifications and title)

[1] Name of the country of origin.

[2] Only to be completed if the authorization to export to the Community is restricted to certain regions of the third country concerned.

[3] Delete the unneccessary reference. If the poultry have been vaccinated within 30 days before slaughter, the consignment cannot be sent to Member States or regions thereof which have been recognized in accordance with Article 12 of Council Directive 90/539/EEC (currently Denmark, Ireland and, in the United Kingdom, Northern Ireland).

[4] Stamp and signature in a colour different to that of the printing.

Model B

16. **Health attestation:**

I, the undersigned official veterinarian, hereby certify, in accordance with the provisions of Directive 91/494/EEC:

1. that ..... [1], region ..... [2] is free from avian influenza and Newcastle disease, as defined in the International Animal Health Code of OIE;
2. that the meat described above is obtained from poultry which:
   (a) have been held in the territory of ..... [1], region ..... [2], since hatching or have been imported as day-old chicks;
   (b) come from holdings:
      — which have not been placed under animal health restrictions in connection with a poultry disease,
      — around which, within a radius of 10 km, there have been no outbreaks of avian influenza or Newcastle disease for at least 30 days;
   (c) have not been slaughtered in the context of any animal health scheme for the control or eradication of poultry diseases;
   (d) have/have not [3] been vaccinated against Newcastle disease using a live vaccine during the 30 days preceding slaughter;
   (e) during transport to the slaughterhouse did not come into contact with poultry suffering from avian influenza or Newcastle disease;
3. that the commercial slaughter poultry flock from which the meat is issued,
   (a) has not been vaccinated with vaccines prepared from a Newcastle disease virus Master Seed which shows a higher pathogenicity than lentogenic strains of the virus; and
   (b) has undergone at slaughter, on the basis of an at random sample of cloacal swabs of at least 60 birds of each flock concerned, a virus isolation test for Newcastle disease, carried out in an official laboratory, in which no avian paramyxoviruses with an Intracerebral Pathogenicity Index (ICPI) of more than 0,4 have been found; and
   (c) has not been in contact during the period of 30 days preceding slaughter with poultry which do not fulfil the guarantees mentioned under (a) and (b).
4. that the meat described above:
   (a) comes from slaughterhouses which, at the time of slaughter, are not under resrictions due to a suspect or actual outbreak of avian influenza or Newcastle disease and around which, within a radius of 10 km, there have been no outbreaks of avian influenza of Newcastle disease for at least 30 days;
   (b) has not been in contact, at any time of slaughter, cutting, storage or transport with meat which does not fulfil the requirements of Directive 91/494/EEC;

Done at ..... on .....

.....

Seal [4] (signature of official veterinarian) [4]

.....

(name in capital letters, qualifications and title)

---

[1] Name of the country of origin.
[2] Only to be completed if the authorization to export to the Community is restricted to certain regions of the third country concerned.
[3] Delete the unnecessary reference. If the poultry have been vaccinated within 30 days before slaughter, the consignment cannot be sent to Member States or regions thereof which have been recognized in accordance with Article 12 of Directive 90/539/EEC (Currently Denmark, Ireland and, in the United Kingdom, Northern Ireland).
[4] Stamp and signature in a colour different to that of the printing.

COMMISSION DECISION

of 21 December 1994

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

(IV/33.218 — Far Eastern Freight Conference)

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

(Text with EEA relevance)

(94/985/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway [1], as last amended by the Act of Accession of Greece, and in particular Articles 2, 5 and 11 (1) thereof,

Having regard to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [2], and in particular Articles 3 and 11 (1) thereof,

Having regard to the complaint lodged pursuant to Article 10 of Regulation (EEC) No 1017/68,

Having regard to the Commission Decision of 18 December 1992 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission and to present any other comments in accordance with Article 26 of Regulation (EEC) No 1017/68 and with Commission Regulation (EEC) No 1630/69 of 8 August 1969 on the hearings provided for in Article 26 (1) and (2) of Council Regulation (EEC) No 1017/68 of 19 July 1968 [3],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions in the Transport Industry on 23 November 1994,

Whereas:

[1] OJ No L 175, 23. 7. 1968, p. 1 (Special Edition 1968 I, p. 302).
[2] OJ No L 378, 31. 12. 1986, p. 4.
[3] OJ No L 209, 21. 8. 1969, p. 11.

THE FACTS

I. The complaint

(1) On 28 April 1989, the Commission received a complaint from the Bundesverband der Deutschen Industrie (BDI), the Deutscher Industrie- und Handelstag (DIHT) and the Bundesverband des Deutschen Gross- und Aussenhandels (BGA), the sponsoring organizations of the Deutsche Seeverladerkomitee (DSVK or German Shippers' Council), concerning certain price-fixing activities of the members of the Far Eastern Freight Conference (FEFC) relating to multimodal transport. The Annex contains a list of the members of the FEFC. (The Commission was informed on 21 November 1994 that Lloyd Triestino had ceased to be a member of the FEFC on 31 January 1994 and that Croatia Line had ceased to be a member of the FEFC on 28 May 1994.)

(2) The complainants listed the following five elements as making up a door-to-door, or multimodal, transport service:

(a) inland transport to the port;

(b) cargo handling in the port (transfer from the mode of inland transport to the vessel);

(c) sea transport (maritime transport from one port to another);

(d) cargo handling in the port of destination (transfer from the vessel to the mode of inland transport);

(e) inland transport from the port of destination to the place of final destination.

(3) The BDI/DSVK complained that the block exemption for liner conferences, contained in Article 3 of Regulation (EEC) No 4056/86, covered only the third of these five elements, namely sea transport, but that the members of the FEFC agreed between themselves prices not only for sea transport but also for inland transport and cargo handling operations.

(4) The complainants argued that since the scope of Regulation (EEC) No 4056/86 is 'international maritime transport services from or to one or more Community ports, other than tramp vessel services' (see Article 1 (2) of that Regulation), the scope of the block exemption contained in Article 3 thereof could not be wider than the scope of the Regulation itself. In their opinion, the applicable regulation was Regulation (EEC) No 1017/68, Article 2 of which prohibits restrictive practices including price-fixing and which does not grant an exemption for the type of price-fixing in respect of inland transport in which the members of the FEFC engaged.

(5) The complainants requested the Commission to take appropriate action in order to put an end to the price-fixing activities of the FEFC relating to the provision of inland transport services.

II. The parties

(6) The parties to whom this Decision is addressed are members of one or more of the individual liner conferences included under the overall umbrella of the Far Eastern Freight Conference. The maritime transport services they provide fall within the following geographic scope:

Eastbound

From certain ports in the United Kingdom, Ireland, Norway, Sweden, Finland, Denmark, Germany, Holland, Belgium, France (English Channel and Atlantic coast), Iceland and Poland to certain ports in Malaysia, Singapore, Thailand, Hong Kong, Japan, Taiwan, Republic of Korea, Democratic People's Republic of Korea, People's Republic of China (with transhipment), Macau, Indonesia (with transhipment), Democratic Kampuchea, Vietnam, Laos, Myanmar, Brunei, and the Philippines.

Westbound

From certain ports in Malaysia, Singapore, Thailand, Hong Kong, Japan, Taiwan, Republic of Korea, Democratic People's Republic of Korea, People's Republic of China (with transhipment), Macau, Indonesia (with transhipment), Democratic Kampuchea, Vietnam, Laos, Myanmar, Brunei, and the Philippines to certain ports in Europe, the Black Sea ports (other than CIS ports), all non-European ports on the Mediterranean Sea (other than Israeli ports) and Moroccan ports on the Atlantic Ocean.

III. The services in question

(i) *Services and geographic market*

(7) The services offered by the members of the FEFC are the following:

(a) maritime transport services;

(b) port handling services; and

(c) inland transport services.

(8) The third of these three services is, in principle, optional: shippers may decide whether to use the inland transport services offered by members of the FEFC ('carrier haulage') or those offered by inland hauliers or freight forwarders ('merchant haulage'): see point 16.

(9) This Decision does not call into question the fact that the members of the FEFC are permitted, pursuant to Article 3 of Regulation (EEC) No 4056/86, to operate under common or uniform rates for the provision of liner maritime transport services. Moreover, this Decision does not address the question whether price-fixing agreements relating to port handling services fall within the scope of application of Article 3 of Regulation (EEC) No 4056/86.

(10) The services to which this Decision relates are the inland transport services provided within the territory of the European Community to shippers as part of a multimodal transport operation for the carriage of containerized cargo between northern Europe and the Far East by shipping lines which are members of the FEFC.

(11) For present purposes, the geographic market for the supply of the services in question is that in which the inland carriage of containers is undertaken by or on behalf of the members of the FEFC between ports of operation in those countries listed in paragraph 6 and inland points served by those ports.

(ii) *The provision of inland transport services by shipowners*

(12) Traditionally, shippers were offered transport on a mode-by-mode basis, that is to say that transport providers did not usually provide more than one mode of transport. All charges until cargo was received on board ship were for the account of the shipper and maritime transport services were generally contracted for without inland services.

(13) This meant that, as a rule, shippers undertook the organization of the initial inland segment of a journey (namely delivery to the ship's rail) by obtaining their own road or rail transport or by turning to freight forwarders. Either the shipper or the consignee would do likewise in the country of destination.

(14) In the 1960's, containerization (and other forms of unitization) brought about a cargo-handling revolution. The use of containers made easier the

transfer from one mode of transport to another, thereby facilitating loading and unloading operations. This encouraged liner shipping companies to become involved in other modes of transport and to begin to offer door-to-door services, by adding inland services to maritime services. The cargo handling revolution had complicated the question of the attribution of liability, since damage to cargo was frequently only discovered once the container was opened at the place of destination. For this reason, shippers were in favour of door-to-door transport being carried out by a multimodal transport operator, such as a shipping line, as this solved the question of liability.

(15) Apart from the unitization of cargo and the consequent development of specialized equipment, one of the main characteristics of multimodal transport is a single through bill of lading covering the transport from door-to-door. This document records the terms of the contract between the shipper and the carrier and provides for clear attribution of liability, as well as clearly setting out total transport costs.

(16) The cargo-handling revolution has affected all modes of transport, but especially liner shipping. It has affected not only shippers and shipowners but also intermediaries such as freight forwarders which, since the development of widespread multimodal transport, are now in direct competition with shipping lines in the organization of all or part of a multimodal transport service. Inland carriage by or on behalf of shipping lines is known as 'carrier haulage' and inland carriage arranged by shippers, or by freight forwarders acting on behalf of shippers, is known as 'merchant haulage'.

(17) The choice between merchant haulage and carrier haulage is left open to shippers. This was described in the following terms in the expert report prepared for the FEFC and presented to the Commission during the course of the administrative proceedings in this case [1].

> '4.41. Optionality: Although carrier haulage is often the preferred option, the availability of merchant haulage has a number of very important aspects, many of which go back to the early days of containerization.
>
> 4.42. First, when the conferences first offered through-transport services in the late 1960's and early 1970's, they still carried the vast majority of liner cargoes on their respective routes and were in a dominant position. It was important that shippers did not consider that they were being asked to support services which abused this position. In addition, where the conferences moved into new commercial fields, such as inland transport, it was important that the service was offered under conditions which would attract customers and expand the idea of integrated distribution services. This included the offer of reasonable rates for carrier haulage. But this was not enough, and it was important that shippers should retain the option to carry on as before and continue to arrange their own merchant haulage if they so wished.
>
> 4.43. A second important point concerns foreign exchange costs. All importers of goods incur foreign exchange costs when buying abroad, and this includes sea freight costs. However, under the conventional system local inland transport costs were paid for in the national currency. Traders and national governments could reasonably have been expected to object to a system which, as a result of incorporation of local movements into a unified tariff system, inland costs would be transferred into a foreign currency. A separate inland tariff allows import legs to be invoiced separately and to be paid in local currency, without disturbing the physical and commercial through-transport attributes of the through journey and through bill of lading.
>
> 4.44. A third aspect concerns the position of fob buyers. Some importers, usually very large and powerful ones, choose to nominate their own ocean carriers, usually national lines of their own country. In choosing the carrier on the sea leg of a through journey, they influence the inland leg in their own country. They are not usually interested in how the exporter moves the goods to the port of exit in the exporting country, leaving it to him to determine whether to do it himself by merchant haulage or to arrange for the through-transport operator to do it by carrier haulage. Fob buying is neutral with respect to the choice between carrier or merchant haulage at either end of the route, but separate inland tariffs are necessary to make available this option.'

(18) One of the obligations attached to the group exemption for liner conferences is that shippers must have freedom of choice with respect to who carries out their inland haulage. This obligation is

[1] The Case for Conference Rate Making Authority in the Inland Sector, Report prepared for the FEFC by Professor S. Gilman and M. Graham, July 1990.

contained in Article 5 (3) of Regulation (EEC) No 4056/86 which provides as follows:

> 'Transport users shall be entitled to approach the undertakings of their choice in respect of inland transport operations and quayside services not covered by the freight charge or charges on which the shipping line and the transport user have agreed.'

(19) Where a shipper chooses carrier haulage, the transport of the container from the point of origin to the ship's rail is not normally physically carried out by the shipping line concerned or even by an associated undertaking of the shipping line concerned. Although the planning and tracking of the container's inland journey is carried out by the shipping line, the transport service itself is almost always subcontracted to an independent road or rail operator by the shipowner. A small number of maritime companies have also set up land transport subsidiaries.

(20) In the case of the FEFC, the price paid by the shipper for the inland movement is not that negotiated between the shipping line and the land transport undertaking to which it has subcontracted the task, but the rate which appears in the conference's inland tariff. That tariff also reflects charges for other inland activities undertaken for the shipper by or on behalf of the members of the FEFC. Customarily, inland rates are calculated in the local currency of the country where inland haulage takes place, and not in US dollars, the currency most commonly used for calculating sea rates.

(21) Merchant haulage, on the other hand, is undertaken in a variety of different ways. Unless a shipper carries out the inland transport itself, delivering the container to a terminal operator for loading onto a vessel, dealing with the paperwork and contracting directly with the shipping line for the maritime leg, it may use the services of a freight forwarder, a road haulier or a railway company.

(22) Freight forwarders offer a variety of services ranging from the preparation of documentation and the booking of cargo space on vessels to acting as fully-fledged non-vessel operating multimodal transport operators (NVO-MTOs). In the latter case, the freight forwarders offer the same services as liner shipping companies which offer multimodal services, but instead of operating vessels they charter slots from vessel operating carriers.

(23) The increase in competition between freight forwarders and liner shipping companies since the advent of containerization has been a marked feature of the industry and has been, in large part, brought about by the existence of excess vessel capacity which the lines have been willing to dispose of to freight forwarders at favourable rates.

(24) Freight forwarders may or may not operate inland transport services themselves: if they do not, they subcontract these services in the same way as do vessel operating multimodal transport operators. Freight forwarders play a particularly important role with respect to the consolidation and transport of smaller shipments (less-than-container-loads) into full container loads.

(25) The parties have argued in their reply to the Statement of Objections and at the oral hearing that the product that the FEFC lines provide is not an inland transport product but is either a port-to-port product or, more commonly, a through-transport product. In particular, the parties point out that they do not offer land transport services unless they are also supplying maritime transport services and terminal handling services.

(26) It is clear that for door-to-door or through-transport, shippers are free to choose whether to use merchant haulage or carrier haulage (see paragraphs 17 to 20). In making this choice they will take into account a number of factors, including price. As indicated above, the price of carrier haulage is always quoted in the tariff separately from the price of other services and indeed is quoted in another currency. However, the physical and technical characteristics of the two types of haulage are such that they are functionally interchangeable.

(27) The shipper is therefore uninterested in the question whether shipping lines supply carrier haulage services other than as part of a through-transport multi-modal service but chooses between what appear to him to be two substitutable products. In this respect, the FEFC lines are supplying to shippers an inland transport product.

(28) This analysis is borne out by the fact that the parties have emphasized the competitive nature of carrier haulage and merchant haulage prices. According to the FEFC [1], some 70 % of shippers using FEFC members for the maritime transport of containers use carrier haulage, although this proportion varies from time to time and from country to country. Gilman and Graham state at paragraph 6.04 of their Report that:

[1] Reply to the Statement of Objections, 31. 3. 1993, p. 104.

'The carrier haulage offered by conference lines has to remain broadly competitive in terms of the combination of service quality and price, with independent lines and merchant haulage.'

(29) This indicates that the responsiveness of sales of one type of haulage to price changes in the other is high, demonstrating that their demand substitutability is also probably high. The parties have argued that because of this pressure from merchant haulage, inland transport rates agreed within the framework of the FEFC tend to be those of the most efficient member.

(iii) *Competitive conditions in the provision of inland transport services*

(30) The FEFC tariff for maritime transport services sets different rates for different products on a basis related to their value, although the range of tariffs is considerably narrower than the range of commodity values. In other words, freight rates are higher for high-value commodities than for low-value commodities. On the other hand, inland rates are not quoted by commodity and do not vary according to the value of the contents of the container, although variations may be encountered, depending on whether the container is a 20-foot equivalent unit (TEU) or a 40-foot equivalent unit (FEU).

(31) Except for an exemption for certain agreements between small and medium-sized transport undertakings, no group exemption for price fixing by inland carriers has been granted pursuant to Regulation (EEC) No 1017/68. Moreover, competition has not permitted the maintenance of differentiated or discriminatory rates in those few cases in which they were imposed, such as national regulation of railway rates, where such rates had to be abandoned because of competition from road transport.

(iv) *The inland activities of the members of the FEFC*

(32) Apart from the collective fixing of prices and conditions for carrier haulage, no inland transport activities are directly or indirectly organized through the medium of the FEFC. The member lines of the FEFC negotiate individually the terms and conditions on which they buy inland transport. Until now, only some member lines of the FEFC have invested in an own inland transport infrastructure (such as depots) or equipment (such as tractors), the most notable being P&O's inland depots in the United Kingdom and the various carrier-owned road haulage companies (such as Nedlloyd, Maersk). However, many of them have made considerable investments in containers and logistical control systems which are used not only for the maritime transport services the lines provide but also for the inland transport services.

(33) According to the FEFC [1], its share of the liner trade for the routes within its geographic scope in 1992 was about 58 %. Again according to the FEFC, some 70 % of this share (that is to say, some 38,5 % of the whole trade) was in 1993 moved inland by carrier haulage. In 1991, carrier haulage in northern Europe by the member lines of the FEFC accounted for some 1 015 208 TEUs or approximately 9 276 653 weight tons. Approximately 89 % of this was carried wholly or in part within the territory of the European Community.

(34) The Commission has analysed data supplied by 10 of the largest members of the FEFC [2] in order to assess the importance of inland transport operations in relation to overall costs of providing multimodal transport services. The following table sets out an average for their cost structures on the north Europe/Far East trades:

Sea	36,5 %
Inland	18,6 %
Terminals	27,1 %
Sales	13,9 %
Others	3,9 %

(35) For the 10 lines whose data has been analysed the overall cost of supplying inland transport services in 1992 amounted to some ECU 477 200 000 (using exchange rates as at August 1994).

(36) In addition to direct inland transport costs, the figure for inland transport costs given above includes the capital costs of containers on land (typically, some 60 % of all containers) as well as the management of those containers on land and the costs of providing container yards. The direct inland transport costs probably account for some 8 % of total costs.

(37) Some part of the figures for terminals, sales and other costs should also be apportioned to the cost of supplying inland transport services since, for example, terminal costs include the cost of hauling containers between ports. Also, sales costs include the cost of selling carrier haulage services and other costs include administration costs.

[1] Reply to the Statement of Objections, pp. 38 and 105.
[2] CGM, Hapag-Lloyd, K Line, Lloyd-Triestino, Maersk, MISC, Mitsui, NYK, OOCL, P&O.

IV. The Agreement

(38) The Far Eastern Freight Conference is the name given to a series of associated liner shipping conferences [1] with a secretariat in the United Kingdom and area offices in Hong Kong, Korea, Tokyo, Singapore, Paris and Rotterdam.

(39) The shipping lines which are members of the FEFC have an agreed tariff as well as other matters such as agreed conditions of entry. The FEFC's tariff is currently contained in a document entitled NT90 which was introduced with effect from 1 January 1990. That document sets out the general terms and conditions of carriage including payment terms.

(40) NT90 sets out rates for the services provided by the members of the FEFC, including rates for maritime transport, inland transport and terminal handling and other charges. In respect of some charges, a rate is not specified but it is stated that member lines should not charge below the cost they incur in providing the service.

(41) Conference price fixing for maritime transport — the tariff — was extended to inland rates by the FEFC in a general manner at the outset of containerization, in around 1971. NT90 reflects this by setting out the tariff in five parts, two of which concern the inland transport components of a door-to-dor transport operation (that is, inland transport in the countries of origin and destination).

LEGAL ASSESSMENT

I. Article 85 (1)

(42) The member shipping lines of the FEFC are undertakings within the meaning of Article 85 (1) of the Treaty. Their price-fixing role in the inland transport services supplied within the territory of the Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerized cargo between northern Europe and the Far East [2] by shipping lines which are members of the FEFC ('carrier haulage services'), as set out in NT90, constitute an agreement between those undertakings falling within the scope of application of Article 85 (1).

(i) *Restriction, prevention or distortion of competition*

(43) Agreements which *directly or indirectly fix selling prices or any other trading conditions* are specifically referred to as a restriction of competition in Article 85 (1) (a). The European Court of Justice has held on the subject of price competition:

> 'The function of price competition is to keep prices down to the lowest possible level and to encourage the movement of goods between the Member States thereby permitting the most efficient possible distribution of activities in the matter of productivity and the capacity of undertakings to adapt themselves to change.' [3]

(44) There is no need to wait to observe the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition [4].

(45) In the present case, the restriction of competition between the members of the FEFC with regard to prices for the inland leg of a multimodal transport operation is likely to be appreciable because of the very large number of containers and the consequent costs involved (see paragraphs 33 to 37).

(ii) *Effect on trade between Member States*

(46) According to the case-law of the Court, the test of effect on trade between Member States is met whenever it is possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that the agreement or concerted practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade in goods or services between Member States [5].

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[1] Far Eastern Freight Conference, Europe/Japan & Japan/Europe Freight Conferences, Hong Kong/Europe Freight Conference, Philippines/Europe Conference, Sabah, Brunei & Sarawak Freight Conference.

[2] The scope of these services is described in paragraph 6 of this Decision.

[3] ICI-Dyestuffs, Case 48/69, [1972] ECR, p. 619, paragraph 115.

[4] Grundig/Consten, Joined Cases 56 and 58/64, [1966] ECR p. 299, paragraph 342. Zinc Producer Group, Commission Decision 84/405/EEC (OJ No L 220, 17. 8. 1984, p. 27): 'In any case, for Article 85 (1) to be applicable, it is sufficient for there to have been the intention to restrict competition; it is not necessary for the intention to have been carried out, in full or only in part, that is to say, for the restriction of competition to have been put into effect.'

[5] Grundig/Consten, cited above, p. 341.

(47) The Commission considers that the agreement between the members of the FEFC to fix prices for carrier haulage services is capable of appreciably affecting, and has appreciably affected, trade between Member States in the following ways. Such services frequently involve the carriage of goods between Member States.

(48) The agreement involves shipping lines operating in several Member States and restricts competition between such lines in respect of the price at which each of them offers transport services involving an element of inland carriage. The elimination or restricton of price competition in inland transport services between those companies reduces significantly the advantages which would accrue to the more efficient of them.

(49) This affects the number of multimodal transport operations undertaken by each shipping line which would be expected in the absence of the agreement. This restriction of competition between shipowners operating in several Member States consequently influences and alters trade flows in transport services within the Community, which would be different in the absence of the agreement.

(50) Those changes in the normal pattern of competitive behaviour by which more efficient companies enjoy increases in market share may also influence competition between ports in different Member States, by artificially increasing or decreasing the volume of cargo which flows through them [1] and the market shares of shipping lines operating out of those ports.

(51) The system of port equalization is likely to increase or decrease cargo flows at certain ports. Under this system carrier haulage rates are based on transport to the nearest conference-approved port regardless of the actual port of loading or unloading. This system may bring about changes in the capacity made available at each port. This may in turn cause deflections of trade between points in Europe and ports in northern Europe from some ports to other ports and may, in so doing, be capable of affecting trade between Member States.

(52) The effect on the supply of carrier haulage services described in the preceding paragraphs is likely to have repercussions on the supply of services ancillary to the supply of maritime transport and carrier haulage services. Such services include port services and stevedoring services. The effect on these services will principally be brought about by the alteration in the flow of transport services between Member States.

(53) The Commission thus considers that the agreement affects trade between Member States in relation to the supply of carrier haulage services and the supply of services ancillary to the supply of carrier haulage services. This effect is likely to be appreciable in view of the very large number of containers involved.

(54) An agreement such as the agreement of the members of the FEFC with respect to prices for inland transport, which has an effect on the cost of exporting to other countries goods produced within the Community, may affect the trade in those goods within the Community. This effect arises from the fact that manufacturers seek to find alternative markets to which the cost of transporting their goods is lower. Such alternative markets include the manufacturer's domestic market as well as other Community countries [2].

(55) The Commission therefore considers that the price fixing activities of the members of the FEFC relating to inland transport also has an effect on trade in goods between Member States.

II. Appropriate procedural regulation

(56) The FEFC has argued that all its price fixing activities, including those relating to inland transport services, are covered by Article 3 of Regulation (EEC) No 4056/86, which grants a group exemption to liner conferences. For the reasons set out in this Decision, the Commission does not consider that Regulation (EEC) No 4056/86 is the applicable regulation for the purpose of examining the complaint and has accordingly examined the complaint, and the

[1] See sixth recital of Regulation (EEC) No 4056/86 describing the effect which restrictive practices concerning international maritime transport may have on Community ports.

[2] Case 136/86, BNIC v. Aubert, [1987] ECR, p. 4789, paragraph 18. Similarly, the Court ruled pursuant to Article 92 in Joined Cases 67, 68 and 70/85, Kwekerij Gebroeders Van der Kooy BV and Others v. Commission (Dutch Natural Gas Prices I), [1988] ECR, p. 219, at paragraph 59, that subsidization of the price of natural gas to Dutch glasshouse crop producers by 5,5 % affected trade between Member States because of the importance of energy costs (25 to 30 % of the selling price) and of the market share (65 %) and the exports (91 %) of the firm receiving the State aid.

practices to which it relates, under the provisions of Regulation (EEC) No 1017/68.

(57) Article 1 of Regulation (EEC) No 1017/68 set out the scope of the Regulation, stating that it applies to certain agreements, decisions and concerted practices as well as to abuses of a dominant position 'in the field of transport by rail, road and inland waterway'.

(58) Carrier haulage is the transport of containers by rail, road or inland waterway (or by a combination of these modes of transport) by or on behalf of shipping lines in combination with other services as part of a multimodal transport operation. Consequently, agreements, decisions and related practices of the type described in the Regulation which concern carrier haulage fall within the scope of the Regulation.

(59) For the reasons set out below, the Commission considers that the price-fixing activities to which this Decision relates concerning the inland transport services supplied within the territory of the European Community to shippers in combination with other services and as part of a multimodal transport operation for the carriage of containerized cargo between northern Europe and the Far East by shipping lines which are members of the FEFC fall within the scope of Regulation (EEC) No 1017/68 and not Regulation (EEC) No 4056/86.

III. Regulation (EEC) No 1017/68

(i) *Relationship between Regulation (EEC) No 1017/68 and Articles 85 and 86 of the EC Treaty*

(60) Regulation (EEC) No 1017/68 applying rules of competition to transport by rail, road and inland waterway was the first regulation implementing competition rules in the transport sector. Having been adopted before the Court of Justice's express confirmation that the competition rules contained in the Treaty apply to the transport sector [1], Regulation (EEC) No 1017/68 reproduces with little variation the text of Articles 85 and 86 of the Treaty [2].

(61) As part of the Community's secondary legislation, Regulation (EEC) No 1017/68 cannot derogate from the provisions of the Treaty. Consequently, Regulation (EEC) No 1017/68 must be intepreted in the light of the case law of the Court [3], as providing the Commission with the necessary means to enforce Articles 85 and 86 of the Treaty in inland transport, without deviating from the basic competition rules contained in the Treaty [4].

(62) An agreement which does not comply with Article 85 (3) cannot be exempted pursuant to Regulation (EEC) No 1017/68. Articles 2, 5, 7 and 8 of Regulation (EEC) No 1017/68 should therefore be interpreted in the same way as Articles 85 and 86, in the light of the case law, and construed as adding nothing to them.

(ii) *Article 2 of Regulation (EEC) No 1017/68*

(63) Article 2 of Regulation (EEC) No 1017/68 is based on and reflects Article 85 (1) of the Treaty. It does not depart from the substantive content of Article 85 (1), and the comments made at paragraphs 42 to 55 concerning the applicability of Article 85 (1) apply equally to the applicability of Article 2 of Regulation (EEC) No 1017/68.

(64) According to Article 2 of Regulation (EEC) No 1017/68, agreements between undertakings, decisions by associations of undertakings and concerted practices liable to affect trade between Member States which have as their object or effect the prevention, restriction or distortion of competition within the common market, including, *inter alia*, those which directly or indirectly fix transport rates and conditions, shall be prohibited as incompatible with the common market, no prior decision to that effect being required.

(65) For the reasons set out in paragraphs 42 to 55 and in the light of the comments made in paragraphs 56 to 59, the agreement between the members of the FEFC with respect to the prices they charge for carrier haulage services (the inland tariff) provided in combination with other services as part of a multimodal transport service, is an agreement falling within the prohibition contained in Article 2 of Regulation (EEC) No 1017/68.

[1] French Seamen's Case No 167/73, [1974] ECR, p. 359, paragraph 32; Nouvelles Frontières, Cases, No 209—213/84, [1986], ECR, p. 1425, paragraphs 42 to 45; Ahmed Saeed, Case No 66/86, [1989] ECR, p. 803, paragraphs 32 to 33.

[2] Tariff Structures in the Combined Transport of Goods, Commission Decision 93/174/EEC of 24 February 1993, OJ No L 73, 26. 3. 1993, p. 38, paragraph 19.

[3] Ahmed Saeed, see footnote 15, paragraph 12 in relation to Regulation (EEC) No 3975/87.

[4] Ahmed Saeed, see footnote 15, paragraph 25.

(iii) *Article 3 of Regulation (EEC) No 1017/68*

(66) The agreement between the members of the FEFC concerning prices for carrier haulage services does not fall within the exception for technical agreements contained in Article 3 of Regulation (EEC) No 1017/68. Article 3 of Regulation (EEC) No 1017/68 is merely declaratory and lists a number of different kinds of agreement which do not fall within the scope of Article 85 (1) of the Treaty when their sole object and sole effect is to achieve technical improvements or technical cooperation [1].

(67) Agreements made between competitors concerning prices for the services they offer are commercial agreements and do not have the sole object and sole effect of applying technical improvements or of achieving technical cooperation.

(68) Article 3 (1) (c) refers exclusively to 'successive, complementary, substitute or combined transport operations' between inland modes, and not between inland transport and sea transport. The scope of Regulation (EEC) No 1017/68 — 'transport by rail, road and inland waterway' — means that the exception does not apply when the transport operations in question are not performed wholly inland.

(iv) *Article 4 of Regulation (EEC) No 1017/68*

(69) The exemption for groups of small and medium-sized undertakings which is contained in Article 4 of Regulation (EEC) No 1017/68 is not applicable for the following reasons:

(70) Firstly, the members of the FEFC do not, for the most part, carry on themselves (or wish to carry on themselves) inland transport activities. They do not therefore have the purpose described in the first indent of Article 4 (1) of the Regulation.

(71) Secondly, most of the members of the FEFC do not have the purpose described in the second indent of Article 4 (1) of Regulation (EEC) No 1017/68 of providing inland transport services, nor do most of them finance or acquire on a joint basis inland transport equipment or supplies.

(72) Thirdly, the thresholds of Article 4 (1) are not satisfied. On one hand, some of the FEFC members have no carrying capacity of their own, as would be necessary to fulfil this condition. On the other hand, if hired or subcontracted capacity is to be taken into account, the joint capacity of FEFC members would exceed the limits specified (see paragraph 33 for TEU and weight tons transported by or on behalf of FEFC members in 1991).

IV. Regulation (EEC) No 4056/86

(i) *Article 3 of Regulation (EEC) No 4056/86*

(73) The members of the FEFC have argued that multimodal transport falls within the scope of application of Regulation (EEC) No 4056/86 and that Article 3 of that Regulation (entitled 'Exemption for agreements between carriers concerning the operation of scheduled maritime transport services') exempts price fixing for inland transport services provided in combination with other services as part of a multimodal transport operation.

(74) The Commission does not accept this argument, for the following reasons:

(75) The scope of the exemption contained in Article 3 of Regulation (EEC) No 4056/86 cannot be wider than the scope of Regulation (EEC) No 4056/86 itself. Article 1 (2) of the Regulation provides that:

> 'it shall apply *only* to international maritime transport services from or to one or more Community *ports*' (emphasis added).

(76) It is clear from this wording that inland transport, including the inland leg of a multimodal transport service, does not fall within the scope of application of the Regulation and cannot therefore be covered by the group exemption contained in Article 3.

(77) In any event, the group exemption contained in Article 3 is restricted to port-to-port operations, as shown by the reference to maritime transport in its title: 'Exemption for agreements between carriers

[1] HOV SVZ/MCN, Commission Decision 94/210/EC of 29 March 1994, OJ No L 104, 23. 4. 1994, p. 34, paragraph 91. The English language version of Article 3 of Regulation (EEC) No 1017/68 has omitted the word 'sole', which is included in the original language versions of Regulation (EEC) No 1017/68 as well as in Regulations (EEC) No 4056/86 (Article 2) and (EEC) No 3975/87 (Article 2).

concerning the operation of scheduled maritime transport services' [1].

(78) This conclusion also follows from the wording of the 11th recital of Regulation (EEC) No 4056/86, which states that:

> 'whereas in this respect users must at all times be in a position to acquaint themselves with the rates and conditions of carriage applied by members of the conference since in the case of inland transports organized by *carriers* the latter continue to be subject to Regulation (EEC) No 1017/68 [2] (emphasis added).

(79) At the oral hearing in this case, it was suggested by Counsel for the FEFC that the 11th recital of Regulation (EEC) No 4056/86 could have been intended to address the question whether conferences which acted collectively as buyers of inland transport services were covered by the group exemption, by making it clear that such activities fall within the scope of Regulation (EEC) No 1017/86.

(80) The recital could not override the clear wording of Article 1 (2) of the Regulation. In addition, this interpretation of the recital could not be accepted. It does not make sense to suggest that shippers must 'be in a position to acquaint themselves with the rates and conditions of carriage applied by members of the conference' because those shipping lines may be acting as a cartel in the purchase of inland transport services.

(81) On the contrary, Article 5 (4) of Regulation (EEC) No 4056/86 is to be interpreted as imposing a formal requirement on the members of the conference to make available their terms and conditions, including their terms for carrier haulage, for the purpose of transparency in view of the fact that the price charged by individual shipping lines for inland transport services is not permitted to be a conference set price. Such prices would not therefore be apparent from the conference tariff.

(82) Moreover, there is nothing in Regulation (EEC) No 4056/86 which suggests that conferences which collectively negotiated the purchase of inland transport services would be covered by the group exemption. The wording of Article 3 of the Regulation is quite clear in this respect: the 'fixing of rates and conditions of carriage' can only refer to the setting of a selling price and not to the negotiation of a buying price in another kind of transport.

(83) These conclusions are fully supported by the fact that at the time of the consultations leading to the adoption of Regulation (EEC) No 4056/86, the European Parliament proposed the addition of the following words to Article 3 of the draft regulation proposed by the Commission:

> 'the aforesaid exemption shall also apply to "intermodal transport" (i.e. maritime transport including transport to and from ports)' [3].

(84) This proposed amendment was not adopted by the Council, indicating that it was the intention of the Council that price fixing agreements for inland transport services should not be covered by the group exemption contained in Article 3 of Council Regulation (EEC) No 4056/86.

(85) Provided that they satisfy the conditions set out in Article 5 of Regulation (EEC) No 1017/68 (that is to say, the four conditions of Article 85 (3)), the parties to such arrangements may, however, be granted individual exemption by the Commission pursuant to Article 11 (4) or Article 12 of Regulation (EEC) No 1017/68.

(ii) *Article 5 of Regulation (EEC) No 4056/86*

(86) An argument has been put forward by the FEFC to the effect that Article 5 (3) and (4) of Regulation (EEC) No 4056/86 contains indications that

[1] See Case T-9/92, Automobiles Peugeot SA, Judgment of 22 April 1993, not yet reported, paragraph 37. '...having regard to the general principle of the prohibition of agreements inhibiting competition contained in Article 85 (1) of the Treaty, derogating provisions in a regulation granting exemption by category could not be interpreted broadly...' See also the opinion of Advocate-General Van Gerven in Case C-234/89, Delimitis, [1991] ECR I, p. 955, point 5. '...when an agreement is not covered by the terms of the block exemption regulation, that block exemption, in itself a derogation from the prohibition pursuant to Article 85 (1), and therefore to be strictly interpreted, may on no account be extended.'

[2] The English language version of Regulation (EEC) No 4056/86 incorrectly uses the word 'shippers' instead of the correct word 'carriers'. That this is an error is clear for at least two reasons:
(i) the recital does not make sense in the English language version; and
(ii) the other language versions of the Regulation are unequivocal in referring to 'carriers' (e.g. 'transporteurs maritimes', 'trasportatori marittimi', 'Seeverkehrsunternehmen').

[3] See amendments to the proposal for a Council Regulation laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, OJ No C 255, 13. 10. 1986, p. 176, paragraph 177.

multimodal transport organized by liner conferences falls within the scope of Regulation (EEC) No 4056/86 and, by extension, within the scope of the group exemption contained in Article 3.

(87) This argument is not well-founded and arises from a misunderstanding on the part of the FEFC as to the nature of the obligations contained in Article 5 (3) and 5 (4). Those two provisions should not be interpreted as referring to a conference tariff but to the terms offered by individual shipping lines. They should not be interpreted as implying that price fixing for inland transport services supplied in combination with other services as part of a multimodal transport service is permitted pursuant to Article 3 of the Regulation. Those provisions simply contain express obligations on individual shipping lines which wish to have the benefit of the group exemption: they must allow merchant haulage, and they must publish their individual terms and conditions for carrier haulage.

(88) Article 5 therefore contains obligations which, as the heading of Article 5 and the 11th recital of the Regulation make clear, are obligations attached to the group exemption. It does not contain any express or implied extension to the group exemption contained in Article 3.

(iii) *Article 2 of Regulation (EEC) No 4056/86*

(89) The FEFC has also argued that a statement made by the Commission and noted in the minutes of the Council at the time of the adoption of Regulation (EEC) No 4056/86 [1] leads to the conclusion that price fixing for multimodal transport falls within the scope of Regulation (EEC) No 4056/86. Once again the FEFC has confused the question of the group exemption for liner conferences with a statement concerning the application of the Community's competition rules to individual shipping lines.

(90) The statement of the Commission expressly refers to the technical exceptions pursuant to Article 2 of Regulation (EEC) No 4056/86 and Article 3 of Regulation (EEC) No 1017/68. The statement, therefore, does not refer to the question of the group exemption, but conforms that both regulations apply in cases of multimodal sea/land operations; Regulation (EEC) No 4056/86 to the maritime segment and Regulation (EEC) No 1017/68 to the inland segment.

(91) Moreover, the statement relates only to agreements between individual sea carriers and individual inland carriers. This is because collective price fixing agreements with competitors for inland or for sea rates are commercially restrictive arrangements and do not have as their sole object and sole effect the achievement of technical improvements or technical cooperation within the meaning of Article 3 (1) of Regulation (EEC) No 1017/68 and Article 2 (1) of Regulation (EEC) No 4056/86. Since such agreements do, as a general rule, restrict competition, it follows, *inter alia* from the seventh recital of Regulation (EEC) No 4056/86, that they do not fall within the exception for technical agreements.

V. Possibility of individual exemption

(92) No application for individual exemption has been made in respect of price fixing by the members of the FEFC for carrier haulage services supplied in combination with other services as part of a multimodal transport service. However, in view of the Commission's obligation pursuant to Article 11 (4) of Regulation (EEC) No 1017/68 to issue a decision applying Article 5 of the Regulation where, whether acting on a complaint received or on its own initiative, it concludes that an agreement, decision or concerted practice satisfies the provisions both of Article 2 and Article 5 of the Regulation, it is necessary to assess whether the conditions of Article 5 are met in the present case.

(93) The Commission has set out at paragraphs 63 to 65 its reasons for considering Article 2 of Regulation (EEC) No 1017/68 to be applicable in the present case and sets out below its assessment as to the applicability of Article 5 of the Regulation.

(94) In carrying out this assessment, the Commission has had to distinguish between the arguments of the members of the FEFC as to:

— the merits of multimodal transport generally,

[1] 'The Commission states that multimodal sea/land transport operations are subject to the rules of competition adopted for land transport and to those laid down for sea transport. In practice, non-application of Article 85 (1) will be the rule as regards the organization and execution of successive or supplementary multimodal sea/land transport operations and the fixing or application of inclusive rates for such transport operations, since both Article 2 of this Regulation (Regulation (EEC) No 4056/86) and Article 3 of Regulation (EEC) No 1017/68 state that the prohibition laid down by Article 85 (1) of the Treaty shall not apply to such practices'. (Council Doc. No. 11584/86 MAR 84, Annex III, p. 5 (19. 12. 1986)).

— the necessity of conference inland rate fixing for the provision of multimodal transport services, and

— the necessity of conference inland rate fixing for the preservation of the conference system.

(95) The members of the FEFC have submitted extensive arguments on the merits of multimodal transport and the benefits which flow from multimodal transport; the Commission does not, however, dispute those benefits [1]. This Decision is concerned with price fixing, and the Commission has therefore considered only the second and third of these main themes of the FEFC regarding the possibility of an individual exemption.

(96) Article 5 of Regulation (EEC) No 1017/68 contains provisions which are modelled on and are essentially the same as the provisions of Article 85 (3) of the Treaty [2]. They are cumulative and each must be satisfied for the Commission to be able to grant an individual exemption.

(97) The equivalent provision in Article 5 of Regulation (EEC) No 1017/68 to the first and second conditions of Article 85 (3) of the Treaty [3], provides that the prohibition in Article 2 of the Regulation may be declared inapplicable by the Commission if the agreement, decision or concerted practice in question:

'contributes towards:

— improving the quality of transport services, or

— promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation, or

— increasing the productivity of undertakings, or

— furthering technical or economic progresses,

and at the same time takes fair account of the interests of transport users. . .'

(98) The third and fourth conditions of Article 85 (3) are to all intents and purposes reproduced in the second part of Article 5 of Regulation (EEC) No 1017/68.

(99) For the following reasons, the Commission does not consider that the price fixing practices of the FEFC with regard to inland transport fulfill the conditions set out in the first part of Article 5 of Regulation (EEC) No 1017/68 since they do not contribute to any of the objectives described in relation either to the provision of land transport services or in relation to the provision of maritime transport services. Furthermore, even if they did contribute to any of those objectives, the Commission does not consider that the conditions set out in the second part of Article 5 would be fulfilled since the practices in question involve restrictions of competition which would not be indispensable to the attainment of any of those objectives.

(a) *Improvement in the quality of transport services*

(100) As emphasized at paragraph 94, it is necessary to distinguish between the merits and benefits of multimodal transport generally and the contribution which price fixing by the members of the FEFC in respect of carrier haulage services supplied as part of a multimodal transport service is alleged to make to improving the quality of transport services. An assessment as to the applicability of Article 5 of Regulation (EEC) No 1017/68 concerns the latter.

(101) There is no evidence that the charging of a collectively agreed price for the provision of the carrier haulage services contributes to improving the quality of inland transport services. In this respect, it is important to note that, as was discussed at paragraph 19, the members of the FEFC do not, on the whole, undertake the inland carriage themselves but subcontract this task to inland carriers.

(102) Further, although the price for carrier haulage is established within the forum of the FEFC, the individual members negotiate with inland carriers on an individual basis. Improvements to the quality of the service in response to demand from shippers are not brought about by the price-fixing activities of the conference but by negotiations between individual shippers and individual lines.

[1] See for example the Report of the Commission to the Council dated 8 June 1994 concerning the application of the Community's competition rules to maritime transport where it is stated at paragraph 3.1 — 'The Commission is wholly in favour of the development of multimodal transport, a modern mode of transport that meets a specific demand from shippers, and wishes to contribute to its development.' Doc. SEC(94) 933 final.

[2] Tariff Structures, see footnote 16.

[3] '. . .which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. . .'

(103) Nor has it not been shown that price fixing by the members of the FEFC in respect of carrier haulage services contributes to improving the quality of the maritime transport services provided by the members of the FEFC.

(b) *Promotion of continuity and stability in markets with considerable temporal fluctuation*

(104) The question of stability in the market for containerized liner shipping services is discussed at paragraphs 123 to 137.

(105) No evidence has been supplied by the members of the FEFC to show that the market in which carrier haulage services are supplied is a market where supply and demand are subject to considerable temporal fluctuation. Even if the market in question could be so categorized, it has not been shown that the collective fixing of rates for inland transport by members of the FEFC would contribute to continuity and stability in that market.

(c) *Increase in the productivity of undertakings*

(106) No evidence has been supplied by the members of the FEFC to show that conference price-fixing for carrier haulage has led or is likely to lead to increases in productivity of the undertakings concerned. Once again, it is important to distinguish between the provision of multimodal transport services and price fixing in respect of the inland transport element of those services.

(107) So far as the actual providers of the inland transport services are concerned, price fixing by the FEFC has no direct bearing on the service they provide or the way in which they are provided, since they sell their services to members of the FEFC at prevailing market rates and not at the conference set price. So far as the members of the FEFC are concerned, they are not, on the whole, engaged in inland haulage themselves and the price-fixing agreement as to carrier haulage does not therefore directly affect any service which they actually provide themselves.

(108) Nor has it not been shown that price fixing by the members of the FEFC in respect of carrier haulage services contribues to increasing the productivity of the members of the FEFC with regard to the maritime transport services they provide.

(d) *Furthering technical or economic progress*

(109) No evidence has been furnished by the members of the FEFC to show that price fixing for carrier haulage contributes to furthering technical or economic progress, either in the provision of inland transport services or in the provision of multimodal transport services.

(110) The FEFC lines have argued that price fixing for carrier haulage permits them to invest in those elements of a through transport service which they undertake themselves (logistics, tracking etc. — see paragraph 19) because of the increased certainty this creates with regard to a return on the investments concerned.

(111) This argument is one which could be made for any price-fixing agreement. However, it is unsound. It is possible that rather than encouraging the introduction of new technology, the restrictions on competition resulting from the price-fixing activities of the members of the FEFC will discourage new investment by reducing the competitive advantages which would otherwise accrue to those companies which exploited their investments more successfully.

(112) This situation arises from the fact that the reduction or elimination of competition between the members of the FEFC with regard to prices is likely to prevent shipping lines from passing on cost savings resulting from new equipment and new technologies to their customers. Equally the fact that more efficient lines are less likely to benefit from their efficiencies and are less likely to increase market share as a result means that efficient lines are less likely to invest in new technologies.

(113) Accordingly, it has not been shown that the price-fixing activities of the members of the FEFC with regard to carrier haulage contribute to furthering technical or economic progress.

(114) Nor has it not been shown that price fixing by the members of the FEFC in respect of carrier haulage services contributes to furthering technical or economic progress with regard to the maritime transport services provided by those members.

(e) *Fair account of the interests of users*

(115) The Commission is of the opinion that the FEFC agreement does not take fair account of the interests of users [1] in so far as it concerns price fixing for inland haulage. Agreement by the

[1] Article 1 (3) (c) of Regulation (EEC) No 4056/86 refers to 'shippers, consignees and forwarders', among others, as transport users.

members of the FEFC of the price for carrier haulage services, without more, does not take adequate account of the interests of shippers and other transport users. It simply serves to ensure that prices are maintained at levels higher than they would otherwise be. This is directly contrary to the interests of users.

(116) Where individual carries are able to reduce their costs by organizing their container fleets more efficiently than other carriers, conference price fixing for carrier haulage services prevents the more efficient lines from passing on cost savings. This again is contrary to the interests of users.

(117) In considering whether the practices in question take fair account of the interests of users, the Commission has taken note of the complaints made by bodies representing the interests of the users of the inland transport services supplied by the members of the FEFC: the German Shipper's Council; supported by the British Shippers' Council, the French Shippers' Council (CNUT) and by the main representative body for shippers in Europe, the European Shippers' Councils. Freight forwarders have through their representative organization CLECAT (Comité de Liaison Européen des Commissionnaires et Auxiliaires de Transport) as well as the UIRR (Union Internationale des Sociétés de Transport Combiné Rail-Route) have expressed concern about distortions of competition in inland transport which are brought about by the practices to which this Decision is addressed.

(118) In the present case, the reservation of a fair share of the benefit to consumers implies the maintenance of a high level of competition in the supply of inland transport services to shippers: the Commission should seek to ensure that shippers have the widest choice of quality and price when buying inland transport services. In practice, the reservation to consumers of a fair share of the benefits of door-to-door transport would be more easily achieved in the absence of any price-fixing agreement such as the FEFC.

(f) *Indispensability of the restrictions*

(119) As explained at paragraph 94, it is necessary to consider whether the restrictions of competition resulting from the price-fixing activities of the FEFC with regard to carrier haulage are indispensable:

— for the provision of multimodal transport services, or

— for the preservation of the liner conference system of rate fixing for maritime transport.

(120) In respect of the first of these objectives, it must be stressed that the members of the FEFC do not, for the most part, provide inland transport services themselves. Nor does the FEFC undertake any inland transport activities other than providing the forum for fixing the prices of carrier haulage services provided in combination with other services as part of a multimodal transport service by members of the FEFC.

(121) Collective price fixing for carrier haulage is not essential for the provision of these services, as is demonstrated by the fact that many independent carriers and freight forwarders offer equivalent or similar services outside the framework of the FEFC, or any other conference, and without fixing prices in common with any other line for the provision of carrier haulage services.

(122) Freight forwarders are in direct competition with shipping lines for the provision of transport services and both of them act as intermediaries between actual providers and buyers of inland transport services. Moreover, freight forwarders have provided door-to-door services to shippers for as long as liner shipping companies, if not longer. Neither freight forwarders nor railway companies enjoy any exemption for price fixing in relation to their activities.

(123) So far as the second objective is concerned, the FEFC has argued that the stabilizing role of liner conferences [1] would be endangered in the absence of collective inland rate-fixing by liner conferences. The FEFC has contended that if their members set inland rates on an individual basis rather than collectively, they would be tempted to undermine the conference-set maritime rates by competing on price with regard to inland rates. This argument has been supported by the Gilman and Graham Report which states, *inter alia*, that:

> 'in an integrated intermodal environment, conferences can not perform their functions of stabilizing rates or promoting efficiency and rationalization unless their rate making authority extends to the inland sector.' [2]

[1] '. . .whereas liner conferences have a stabilizing effect, assuring shippers of reliable services;. . .' 8th recital of Regulation (EEC) No 4056/86.

[2] Gilman and Graham Report, paragraph 4.30.

(124) Gilman and Graham argue that the primary cause for loss of maritime freight rate stability lies in the relationship between sea freight and inland transport revenues.

> 'By competing for and securing the inland move a carrier also secures the sea freight. It is clear that, (so long as they had any spare slots on their vessels) it would pay conference carriers to absorb a considerable amount of the inland transport cost in order to obtain cargo.' [1]

(125) Gilman and Graham argue that the perishable nature of transport capacity contributes to this tendency towards price instability. Pointing to the fact that under the auspices of the conference system there has been considerable network rationalization [2], they also argue that competition might be extended 'across broad hinterlands using the inland modes' (paragraph 4.19).

(126) For the following reasons, the Commission does not accept that these arguments demonstrate the indispensability of price fixing for carrier haulage services for the preservation of the maritime rate stability achieved by conferences such as the FEFC. It must be noted that to satisfy the test of 'indispensability', it is incumbent on the parties to demonstrate that it would not be possible to achieve their objectives in a manner which was less restrictive of competition.

(127) A conference brings stability to the trades it affects by fixing a uniform tariff which serves as a reference point for the market. Prices set in this way are likely to remain unchanged for a longer period of time than if they are set by individual lines. This reduction in the price fluctuations which would be expected in a normally competitive market may benefit shippers by reducing uncertainty as to future trading conditions.

(128) The stability envisaged by Regulation (EEC) No 4056/86 has the consequent effect of assuring shippers of reliable services. Liner services are by their nature regular in the sense of following an evenly spread timetable. Reliable services are those which are of a reasonable quality, such that the shippers' goods come to no harm, and at the same price irrespective of which day and which line is chosen to carry the cargo. Reliability in the supply of transport services is the maintenance over time of a scheduled service, providing shippers with the guarantee of a service suited to their needs.

(129) The fact that the cartelization of one part of the activities of shipping lines is judged to be compatible with the competition rules is not in itself a justification for the exemption of all the activities of those companies. Such an argument would be tantamount to arguing that members of a liner conference should be permitted to fix prices in respect of any service which they chose to provide in combination with maritime transport services, lest price competition for such further services undermined the conference tariff for maritime transport.

(130) It would not be compatible with the Community's objective of achieving a system ensuring that competition in the internal market is not distorted if it were accepted that stability in respect of one revenue-producing activity could, under the Community's competition rules, justify an exemption in respect of price fixing for all other revenue-producing activities provided in combination with the exempted activity.

(131) Furthermore, it has not been shown that price fixing for carrier haulage is indispensable for the preservation of the 'stabilizing role' of conferences. Although the parties have argued at length that all activities undertaken by conference members must be subject to price fixing, they have failed to show that this is essential in order to preserve the rate discipline on the maritime leg from which the stability in question arises and that there is no less restrictive way of doing so.

(132) The FEFC is no exception to the general rule that all cartels are susceptible to 'cheating' or secret discounting at times when members of the cartel have spare capacity [3]. This was conceded by Counsel for the FEFC at the oral hearing, who acknowledged [4] the existence of both authorized rebating such as service contracts [5] and loyalty arrangements [6] as well as unauthorized rebating.

[1] Gilman and Graham Report, paragraph 4.16.

[2] That is to say, conference members have agreed between themselves to serve a limited number of ports in the interests of rationalization.

[3] 'Detecting and deterring cheating has been termed the central cartel problem, and, because solving it is often difficult, many economists argue that price-fixing cartels are inherently unstable.' F. M. Scherer and David Ross, Industrial Market Structure and Economic Performance (Houghton Mifflin, 1990, p. 245).

[4] See page 131 of the transcript of the oral hearing in this case.

[5] Service contracts are agreements between individual shippers and individual shipping lines, or groups of shipping lines, for the carriage of a minimum number of containers and provision of special services at an individually negotiated price.

[6] Such as those provided for in Article 5 (2) of Regulation (EEC) No 4056/86.

(133) This is a perfectly normal consequence of cartel behaviour. The members of the cartel seek not only to maximize profits by agreeing prices between themselves but also to maximize revenues by gainig market share from one another. Such behaviour normally results in a degree of instability even in the most disciplined cartel. Cartels also suffer the inevitable instability due to the fact that it always pays to be the one company operating outside the cartel.

(134) The FEFC therefore already faces a degree of instability in respect of both its maritime and inland tariffs, brought about by competitive discounting on the part of its members. It is not necessary to have absolute discipline in order to maintain the stability which the conference system brings about, that is to say, reliable services at prices which do not fluctuate greatly in the short-term. In particular, competitive discounting does not upset the stability envisaged by Regulation (EEC) No 4056/86, since it has not been shown that it leads to the absence of reliable services or of stable prices over a period of time.

(135) In this context, it is important to note that certain activities are undertaken not on the basis of an agreed conference price but on the much less restrictive basis of an agreement not to charge below cost (see paragraph 40). No evidence has been supplied by the parties that this system undermines stability to an excessive degree, or indeed at all.

(136) The Commission recognizes that, in the absence of collective price fixing for carrier haulage services, the members of the FEFC might charge shippers rates which are below their costs of buying in such services, the effect of which would be similar to offering a discount off the conference tariff for the maritime transport. There is a risk that this would undermine the stability brought about by the FEFC to a greater extent than it is already undermined by other means of discounting from the FEFC maritime transport tariff and by competition from shipping lines which are not members of the FEFC.

(137) However, even if it is accepted that permitting the FEFC to fix prices in respect of carrier haulage services offered by its members does contribute to the creation of stability, it has not been established that measures less restrictive of competition would not have sufficient impact to attain that objective. Measures which might be taken to ensure the stability of the conference maritime tariff are listed in Article 3 of Regulation (EEC) No 4056/86 and include the allocation of cargo or revenue amongst the members of a conference.

(138) In conclusion, price fixing for carrier haulage by the members of the FEFC does not appear indispensable to the attainment of the objectives claimed.

(139) This conclusion applies only to the existing practices of the FEFC in relation to price fixing for inland transport. In particular, this Decision does not consider whether and to what extent other kinds of agreement relating to multimodal transport might fulfill the conditions of Article 85 (3) [1].

(g) *Elimination of competition for a substantial part of the market*

(140) Since it has been established that the first three conditions of Article 85 (3) of the Treaty and of Article 5 of Regulation (EEC) No 1017/68 are not satisfied in the present case, it is not necessary to consider whether the parties are afforded the possibility of eliminating compoetition in respect of a substantial part of the services in question.

(h) *Conclusions*

(141) The above considerations lead to the conclusion that while the development of multimodal transport may constitute a means of improving transport services, collective price fixing for carrier haulage services does not. Furthermore, transport users do not obtain a fair share of the benefits of price fixing for carrier haulage services and the restrictions of competition are not indispensable. Accordingly, the conditions of Article 85 (3) and of Article 5 of Regulation (EEC) No 1017/68 are not fulfilled.

(142) Moreover, at a time when efforts are being made to liberalize and deregulate the provision of

[1] Note should be made of the Commission's statement in its Report to the Council concerning maritime transport: it considered:
'that, in certain circumstances, specific cooperation agreements between groups of shipowners or between shipowners and individual carriers could promote sufficient technical or economic progress to be allowed, by individual exemption, to set uniform inland rates.'
The Commission also stated in that Report that, if appropriate, it would be prepared to consider granting individual exemptions which also allowed:
'a provision to be included in the agreement of the conference of which the group lines (benefiting from the individual exemption) are members stipulating that the inland rates of the tariffs. . .may be not less than cost, thus largely avoiding any risk of destabilizing the conferences through cross subsidization between the inland and maritime segments.'

European inland transport services, it would be incoherent and would give rise to inconsistencies if conferences were granted an exemption to fix prices for some inland transport services but their competitors providing equivalent services were not so permitted [1].

VI. Article 22 (2) of Regulation (EEC) No 1017/68

(143) According to Article 22 (2) of Regulation (EEC) No 1017/68, the Commission may impose on undertakings fines from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently they commit an infringement of Article 2 or Article 8 of Regulation (EEC) No 1017/68. In fixing the amount of the fine the Commission will have regard both to the gravity and to the duration of the infringement.

(i) *Assessment as to gravity and duration*

(144) In considering the gravity and duration of the infringement in this case, the Commission has taken into account the following criteria:

(a) the nature of the infringement;

(b) the intentions of the parties;

(c) the failure of the parties to terminate the infringement;

(d) the nature and value of the services in question;

(e) the degree of each party's involvement in the infringement; and

(f) the duration of the infringement.

(a) The nature of the infringement

(145) The Commission considers that, in general, practices aimed at restricting price competition are a matter of indisputable gravity [2]. This follows both from the fact that price fixing is specifically referred to in Article 85 (1) and from the established case-law of the Court of Justice [3]. The infringement in question eliminates price competition between the members of the FEFC with respect to the inland transport services they provide.

(b) Intentions of the parties

(146) The Court of Justice has ruled that:

> 'it is not necessary for an undertaking to have been aware that it was infringing the competition rules in the Treaty for an infringement to be regarded as having been commited intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object the restriction of competition' [4].

(147) The Commission considers that the purpose of the members of the FEFC was to eliminate price competition between themselves with respect to the inland transport services they provide. Accordingly, they could not have been unaware that their price-fixing activities in relation to inland transport services had as their object the restriction of competition.

(c) The failure of the parties to terminate the infringement

(148) The members of the FEFC have been aware at least since the complaint submitted by the BDI/DSVK to the Commission was sent to them on 23 June 1989 that there was a possibility that the practices dealt with in this Decision constituted infringements of Article 85 (1) of the Treaty and Article 2 of Regulation (EEC) No 1017/68 and that they did not fall within the scope of the group exemption for liner conferences contained in Article 3 of Regulation (EEC) No 4056/86.

(149) Despite this complaint and in spite of repeated preliminary advice from the Commission (including a letter from the Member of the Commission then responsible for competition policy to the Chairman of the FEFC in June 1990) that the practices in question fell within the scope of Article 85 (1) and did not benefit from any exemption pursuant to Article 85 (3), the parties have maintained them in full force and effect. At no stage, even subsequent to the notification of the statement of objections in December 1992, have the parties formally notified their practices to the Commission for individual exemption.

(d) The nature and value of the services in question

(150) As indicated at paragraphs 34 to 37, in 1992 the cost of supplying inland transport services for 10 of the largest members of the FEFC was some ECU

[1] See also the Report of the Commission to the Council concerning the application of the Community's competition rules to maritime transport.

[2] HOV SVZ/MCN, cited above, paragraph 259.

[3] See, for example, Case 26/76, Metro v. Commission II [1977] ECR, p. 1875: 'price competition is so important that it can never be eliminated'.

[4] Case C-279/87, Tippex v. Commission [1990] ECR I, p. 261.

477 million. This amount is probably representative, in real terms, of the cost of supplying inland transport services by those 10 lines for years both before and since 1992. The annual value of the services in question is therefore considerable and represents a significant cost for the Community's industry.

(e) The degree of each party's involvement in the infringement

(151) With the exception of Wilh. Wilhelmsen, there is no indication that any individual line had a greater or lesser involvement in the collective decision to fix prices for the services with which this Decision is concerned. Wilh. Wilhelmsen is not an active member of the FEFC and does not operate vessels on the routes in question.

(f) The duration of the infringement

(152) As indicated at paragraphs 39, 40 and 41, price fixing for inland transport services by the FEFC commenced in a general manner around 1971 and has been in continuous effect since them. The current FEFC tariff for carrier haulage which is contained in NT90 was introduced with effect from 1 January 1990. Regulation (EEC) No 1017/68, the regulation applicable to the infringement in question, came into force on 1 July 1968.

(ii) *Conclusions as to the gravity and duration of the infringements*

(153) The Commission considers that the infringement in question is a very serious infringement of Community competition law and that it is likely to have had a significant economic impact. Furthermore, the infringement has been taking place in a general manner since 1971 and certainly since the submission of the DSVK's complaint to the Commission in April 1989.

(154) Although the parties have argued that the practices in question fall within the scope of the group exemption for liner conference price-fixing agreements laid down in Regulation (EEC) No 4056/86, the scope of that exemption could not possibly be wider than the scope of the Regulation itself. Article 1 (2) of the Regulation provides that:

> 'It shall apply only to international maritime transport services from or to one or more Community ports'.

(155) In construing the provisions of Regulation (EEC) No 4056/86, it is necessary to bear in mind the general principle of Community law that derogations, such as group exemptions, are not to be construed broadly (see footnote 20).

(156) Furthermore, the Commission's Report to the Council concerning the application of the Community's competition rules to liner shipping in June 1994 contained very clear indications of the Commission's conclusions concerning multimodal rate fixing in general. Representatives of the FEFC wrote to the Commission with its preliminary views on the Report on 12 August 1994.

(157) The Commission considers that the members of the FEFC could not have been unaware that the agreement fell within the scope of Article 85 (1) of the Treaty and that they should have been aware that it did not fall within the scope of the group exemption for liner conferences or any other exemption. The Commission considers that fines are appropriate in this case.

(158) Notwithstanding these conclusions as to the gravity and duration of the infringement, the Commission has taken into account the facts that the existence of the practices in question was widely known and that, for a variety of reasons, this Decision on those practices has taken longer to adopt than might otherwise have been the case. The Commission has also considered the following circumstances:

(i) the Commission's orientations with respect to multimodal price fixing by liner shipping conferences were not widely known until the submission of its Report to the Council referred to above;

(ii) the development of the Commission's orientations in this regard has taken some time to achieve, with the result that the prosecution of this case has taken longer than would normally have been the case and the members of the FEFC should not be penalized in respect of this additional period; and

(iii) the fact that the present Decision is the first decision applying the provisions of Regulation (EEC) No 1017/68 to the members of a liner shipping conference.

(159) In view of the above, the Commission considers that the level of fines in this case should be set at a symbolic level to make clear the existence of the infringement and the need for future compliance with the Community's competition rules by the undertakings in question and by other undertakings which may be engaged in equivalent practices. No fine should be imposed on Wilh. Wlhelmsen having regard to its non-involvement in the offence (see paragraph 151).

HAS ADOPTED THIS DECISION:

Article 1

The members of the Far Eastern Freight Conference listed in the Annex have infringed the provisions of Article 85 of the EC Treaty and Article 2 of Regulation (EEC) No 1017/68 by agreeing prices for inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerized cargo between northern Europe and the Far East.

Article 2

The conditions of Article 5 of Regulation (EEC) No 1017/68 are not fulfilled.

Article 3

The members of the Far Eastern Freight Conference listed in the Annex are hereby required to put an end to the infringement referred to in Article 1.

Article 4

The undertakings to whom this Decision is addressed are hereby required to refrain in future from any agreement or concerted practice having the same or a similar object or effect to the agreement referred to in Article 1.

Article 5

Fines as set out below are hereby imposed on the undertakings to whom this Decision is addressed in respect of the infringement of the provisions of Article 85 of the EC Treaty and Article 2 of Regulation (EEC) No 1017/68 referred to in Article 1.

Compagnie Générale Maritime	ECU 10 000
Hapag-Lloyd Aktiengesellschaft	ECU 10 000
Croatia Line	ECU 10 000
Kawasaki Kisen Kaisha Limited	ECU 10 000
Lloyd Triestino di Navigazione SpA	ECU 10 000
AP Møller-Maersk Line	ECU 10 000
Malaysian International Shipping Corporation Berhad	ECU 10 000
Mitsui OSK Lines Ltd	ECU 10 000
Nedlloyd Lijnen BV	ECU 10 000
Neptune Orient Lines Ltd	ECU 10 000
Nippon Yusen Kabushiki Kaisha	ECU 10 000
Orient Overseas Container Line	ECU 10 000
P & O Containers Ltd	ECU 10 000

Article 6

The fines imposed in Article 5 shall be paid, in ecus, within three months of the date of notification of this Decision, into bank account No 310-0933000-43 of the Commission of the European Communities, Banque Bruxelles Lambert, Agence Européenne, Rond-Point Schumann 5, B-1040 Brussels.

After expiry of that period, interest shall be automatically payable on the fine at the rate charged by the European Monetary Institute for transactions in ecus on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 9,25 %.

Article 7

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

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

Done at Brussels, 21 December 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX

Compagnie Générale Maritime
Quai Galliéni, 22
F-92158 Suresnes Cedex

Hapag-Lloyd Aktiengesellschaft
Postfach 102626
Ballindamm 25
D-20095 Hamburg

Croatia Line
8 Riva
5100 Rijeka
Republic of Croatia

Kawasaki Kisen Kaisha Ltd
Hibiya Central Building
2-9 Nishi-Shinbashi 1-Chome
Minato-Ku
Tokyo 105
Japan

Lloyd Triestino di Navigazionie SpA
Passaggio S Andrea 4
I-34123 Trieste

AP Møller-Maersk Line
Esplanaden 50
DK-1098 København K

Malaysian International Shipping Corporation Berhad
2nd Floor Wisma MISC
2 Jalan Conlay
PO Box 10371
50712 Kuala Lumpur
Malaysia

Mitsui OSK Lines Ltd
1-1 Toranomon 2-Chome
Minato-Ku
Tokyo 107
Japan

Nedlloyd Lijnen BV
Boompjes 40
NL-3011 XB Rotterdam

Neptune Orient Lines Ltd
456 Alexandra Road
No 06-00 NOL Building
Singapore 0511
Republic of Singapore

Nippon Yusen Kabushiki Kaisha
3-2 Marunouchi 2-Chome
Chiyoda-Ku
Tokyo
Japan

Orient Overseas Container Line
30th-31st Floor Harbour Centre
25 Harbour Rod
Wan Chai
Hong Kong

P&O Containers Ltd
Beagle House
Braham Street
UK-London E1 8EP

Wilh. Wilhelmsen Limited A/S
Olav V's G5
PO Box 1359
N-0161 Oslo

COMMISSION DECISION

of 21 December 1994

relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement

(IV/34.252 — Philips-Osram)

(Only the Dutch and German texts are authentic)

(Text with EEA relevance)

(94/986/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 2, 6, and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption submitted, pursuant to Articles 2 and 4 of Regulation No 17, on 3 March 1992,

Having regard to the request made by the parties on 15 February 1994, to extend the application and notification to Article 53 of the EEA Agreement,

Having regard to the summary of the application and notification [2] published pursuant to Article 19 (3) of Regulation No 17 and to Article 3 of Protocol 21 of the EEA Agreement,

After consultation with the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. Introduction

(1) On 3 March 1992, Philips International BV and Osram GmbH (hereinafter referred to as 'Osram') notified to the Commission a declaration of intent aimed at the conclusion between them of a joint venture agreement regarding the manufacture and sale of certain lead glass tubing (and components thereof) for incandescent and fluorescent lamps. The joint venture company to be so created will regroup and enhance the existing European activities of the parent companies in the lead glass tubing field and is expected to supply lead glass tubing products to its parent companies and to independent lamp manufacturers not having sufficient own internal production of lead glass.

(2) The joint venture company will be based in the current facilities of Philips Lighting Holding BV located in Lommel (Belgium). The three furnaces installed there will be fully dedicated to the production of lead glass for lamps, and new production lines will be installed. At the same time, Philips' current production lines of lead glass for television sets and for soda lime glass tubes in Lommel will be transferred to other Philips facilities.

The Lommel factory is equipped with the necessary equipment to reduce the emission problems inherent in the manufacture of lead glass (lead, nitrogen oxide and antimony emissions) consisting of electrostatic filters and complex and expensive equipment for the selective conversion of hazardous gaseous components.

(3) In addition, Osram has closed its existing facilities located in Berlin which had reached the end of their economic life, and which were not equipped with the abovementioned equipment to reduce polluting emissions.

(4) The parent companies currently operate two other joint ventures in the lighting field: one, also located in Lommel — Emgo — produces bulbs for incandescent lamps and the other, located in Argentina, produces glass. It should be noted that Emgo has been in operation for the last 25 years.

B. The parties

(5) *Philips Lighting Holding BV* (hereinafter referred to as 'Philips') is the holding company of the Philips Lighting group within the Philips group of companies.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 22, 26. 1. 1994, p. 4, and OJ No C 267, 24. 9. 1994, p. 3.

Philips Electronic NV, the ultimate parent company of the Philips group of companies, is one of the major electronics companies in the world. Its activities include lighting, consumer electronics, electronic components, communications systems, semi-conductors, personal care products, medical systems and small domestic appliances. Total turnover of Philips Electronic NV in 1991 was Fl 57 billion, of which lighting products accounted for 7,4 billion.

Philips has subsidiaries in all Member States involved in the manufacture and/or sale of lighting products.

As regards lead glass products, Philips currently produces lead glass tubing products for lamps in five factories all over the world. Lommel, the production facility to be transferred to the joint venture, is the only one located in Europe and is by far Philips' biggest lead glass production centre. According to Philips, its facilities located outside Europe (in the USA, Colombia, India and Pakistan) are, for reasons of production capacity, only aimed at local lamp manufacturing operations.

(6) *Osram* is a hundred percent subsidiary of the conglomerate company Siemens AG. Osram is engaged in the development, manufacture and sale of lamps and their consisting parts and materials. In 1990/91 the world-wide turnover of the Osram group was DM 2,971 billion.

In February 1993, Osram bought from GTE of the USA, the latter's lighting operations, GTE Sylvania International, which was renamed Osram Sylvania Inc. The deal did not include Sylvania's activities in Europe, which now constitute a separate company named Edil.

Osram has closed all of its lead glass tubing manufacturing facilities in Berlin. In addition it has sold, as of May 1994, its shares in the United Kingdom company GB Glass Lighting, formerly a joint venture company with GE-Thorn Lighting, which produces lead glass tubing and bulb products.

C. The market

Product market

(7) The product market for the joint venture is the free market for the manufacture and sale of lead glass for incandescent and fluorescent lamps; that is, the market where lamp manufacturers not having their own in-house lead glass production get their supplies. Lead glass is an intermediate product used in the manufacture of lamps. Typically, it constitutes a mere 2 % of the sales price of a fluorescent lamp and 3 % of the sales price of an incandescent lamp. Lead glass has other uses, and it seems technologically possible, at least to some extent, that facilities for the production of lead glass for television cathode ray tubes may also be able to produce lead glass for lamps. However, doing so seems to be uneconomic given, in particular, the scale of the production required.

Geographic market

(8) In assessing the relevant geographic market the following facts [1] have to be taken into account:

— lead glass is cheaply and easily transportable, it has a relatively high value to volume ratio with transport costs typically representing no more than 2 to 3 % of total cost price of lead glass, and does not deteriorate in quality over time like some other types of glass, which allows it to be stockpiled,

— on the demand side, these characteristics mean that lamp manufacturers are able to take advantage of particular market conditions world-wide with the result that continuity of supply is of lesser importance than might otherwise be the case and that price increases and variations in the relevant exchange rate are factors of great importance. In addition most lamp manufacturers maintain important buffer stocks because of the relatively low capital investment required, and for reasons of efficiency in transport,

— on the supply side, both Philips (from Lommel) and Osram (from Berlin, until its closing in September 1992) supply lead glass to third-party customers in the EEA (and outside it, mainly in North Africa and Asia). This is also the case for GB Glass (United Kingdom), Telux Spezialglas (Germany), and for GE (USA). The latter supplies lead glass to its own factories and to third-party customers in the EEA from the USA and Hungary (Tungsram). Finally, Slovenské Zadovy Technickeho Skla (Slovakia) and Toshiba (Japan) are also supplying lead glass in the EEA. In addition, Osram is now supplying substantial amounts of lead glass in the EEA from its subsidiary Osram Sylvania Inc. in the USA (mainly to former customers of GTE Sylvania International, and in particular to [. . .] [2]. Imports into the free

[1] For details about what follows, see recitals 9 and 10.

[2] Blanks between square brackets indicate business secrets deleted pursuant to Article 21 (2) of Regulation No 17.

market in the EEA account for 28 % (1) of the needs of independent lamp manufacturers (not including in this calculation imports from Osram Sylvania (2)).

European lamp manufacturers without access to in-house sources of lead glass obtain the lead glass they need, not only from existing suppliers in the EEA (Philips, Telux Spezialglas and/or GB Glass), but also increasingly from suppliers in the USA (in particular GE and even Osram Sylvania) and from central and eastern European suppliers (such as Slovenské Zadovy Technickeho Skla).

In conclusion, given the absence of significant barriers of trade of lead glass and the very small transport costs, the relevant geographic market to be considered covers at least the Community and the EEA. The issue whether the relevant geographic market is actually world-wide can be left open because the conclusions of the assessment do not change even when the narrowest geographic market (i.e. the EEA) is considered.

Market structure

(9) World production of lead glass in 1990 amounted to about 100 000 tonnes, and has been stable since then. European production is about 30 000 tonnes, worth about ECU 33 million at current market prices. Of that amount, Philips produced [...] tonnes in Lommel and Osram [...] tonnes in Berlin. In this respect Philips and Osram accounted for around 66 % of the European production of lead glass. The other most important manufacturers in Europe are Tungsram of Hungary, part of the GE group (3), [...] tonnes in 1993, GB Glass, [...] tonnes in 1993, Telux Spezialglas, [...] tonnes in 1991, and Slovenské Zadovy Technickeho Skla. All manufacturers listed here have spare production capacity available.

(10) Apart from GB Glass, Telux Spezialglas, and Slovenské Zadovy Technickeho Skla, leadglass manufacturers are also major manufacturers of lamps (this is the case of Philips, Osram and GE/Tungsram). In this respect, lead glass is manufactured by these manufacturers of lamps, primarily to meet their in-house needs. However, due to the fact that the lead glass furnaces are normally in production 24 hours a day, and are only stopped for major overhauls, surplus quantities are virtually inevitable in practice. These surpluses, together with the production of lead glass manufacturers that do not manufacture lamps, are sold in the free market to small and medium-sized manufacturers of normal or specialized lamps (4) that do not have internal production of lead glass.

The size of the free market has been estimated at around 4 500 tonnes a year in the EEA. Suppliers to this market are by order of importance Philips, which sells around [... to ...] tonnes a year to third customers in the EEA (5), GB Glass, [...] tonnes sold to third parties in1993, (plus a further [...] tonnes sold to GE), GE/Tungsram [...] tonnes in 1993, Telux Spezialglas [... to ...] tonnes a year since 1991 and Slovenské Zadovy Technickeho Skla [...] tonnes in 1992. Prior to 1993, Sylvania of the USA was also an independent supplier of lead glass in Europe, selling well over 1 000 tonnes a year. As for Osram's Berlin facilities prior to 1992, on average [...] tonnes a year were sold to third-party customers. However only a minor part of that amount, in fact less than [...] tonnes, were actually sold to EEA customers (6). To those producers (7) it is possible to add, as future suppliers, the companies Krosno (8) (Poland) and Tesla (Czech Republic).

(11) The use of lead is at the origin of serious environmental problems that are now solved by installing expensive filters and other pieces of equipment in factories. However, there is a growing pressure, as a result in particular of increasingly strict environmental laws, for the development of new types of lead-free substitutes for lead glass. In this respect, one of the aims of the joint venture is to conduct R&D in that area. Several other lamp or glass manufacturers are also working in that area. These are, at least, GE (USA), Corning Glass (USA), Owens Illinois (USA), Schott (USA), Asahi Glass Co. (Japan) and Nippon Electric Glass (Japan).

(12) As indicated earlier, lead glass is an intermediate product in the manufacture of lamps. The lamp market for basic incandescent and fluorescent lamps is a mature market. New compact-

(1) This figure has been obtained by adding quantities sold, given in recital 10, corresponding to GE/Tungsram and Slovenské Zadovy Technickeho Skla.

(2) Osram Sylvania's maximum production capacity is [...] tonnes of which [...] correspond to own consumption. [...] are sold to third-party customers and the rest, some [...] tonnes are kept in reserve. In 1993 imports to third party customers in the EEA amounted to some [...] tonnes.

(3) GE produces in the United States an additional [...] tonnes and has still some [...] tonnes more as reserve production capacity.

(4) The most important ones that the Commission has identified are Edil (Switzerland), Lindner (Germany), Lumalampan (Sweden), File (Italy), Imperia (Italy), Falma (Switzerland), Alba (Germany), Guy Daric (France), Portalux (Germany) and VCH (United Kingdom). Their requirements for lead glass range from slightly over 1 000 to a few dozen tonnes.

(5) And slightly more than [...] tonnes a year to customers outside the EEA.

(6) The main part was sold in Algeria and Turkey.

(7) The Commission has also found evidence of very small quantities of lead glass imported from Toshiba of Japan.

(8) According to the parties, Krosno is already supplying in the EEA. However, the Commission has not been able to confirm this.

fluorescent and halogen lamps have been introduced on the market as substitute products for those traditional ones. In addition, imports of cheap incandescent lamps from Hungary, Slovakia, China, India and some other countries are increasing (in many instances such lamps are sold by large retail chains under their own brands). As a result, it is unlikely that the parties' own in-house demand for lead glass will increase dramatically in the years to come. In addition, third-party demand for lead glass, particularly from European lamp producers, has not grown for the last few years, so that it is considered unlikely that a situation of shortage in supply will arise that could be to the detriment of third parties.

D. The notified declaration of intent

(13) The parties have notified a declaration of intent including the guiding principles of their relationship and of the operation of the joint venture company. Such principles are binding and will be implemented immediately after the approval by the Commission of the notified joint venture. However, the position that the Commission is adopting is limited to the proposed joint venture as notified.

(14) The main provisions of the declaration of intent are the following:

— the joint venture company will be created for an initial period of 30 years, which will be extended for an indefinite period of time, unless terminated by either party by giving five years' prior written notice to the other party,

— participation and control in respect of the joint venture will be shared equally between shareholders. In this respect, major decisions will require unanimous voting,

— the board of directors of the joint venture is to consist of four members, of which two shall be nominated by each parent company. The day-to-day management of the company will be entrusted to a management team of two members nominated by the parties,

— Philips and Osram shall source at least 80 % of their European requirements for lead glass from the joint venture. The production of the joint venture exceeding parent's requirements will be made available to third-party customers in Europe and elsewhere,

— in case of shortage in capacity and supply, the joint venture is to give preference in supplying lead glass to the parent companies in proportion to their respective off-take. In this respect, the parties have submitted that the structural surplus capacity of the joint venture will be 4 000 tonnes bigger than the existing surplus capacity of Philips and Osram combined,

— the products of the joint venture will be sold to the parents at equal billing prices including transport costs from the factory in Lommel to the various lamp factories of the parties in Europe,

— both parent companies undertake not to compete with the joint venture in Europe in respect of the manufacture or sale of products competing with lead glass,

— the joint venture will be using Philips' existing technology. In consideration of such use, the joint venture will pay Philips a given royalty based on its net sales of lead glass.

E. Third Party observations

(15) Following the two publications pursuant to Article 19 (3) of Regulation No 17 made to cover Article 85 of the EC Treaty and Article 53 of the EEA Agreement respectively, no comments were received from third parties.

II. LEGAL ASSESSMENT

A. Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement

1. *The joint venture*

(16) The joint venture falls within the scope of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement. Osram has the financial, technical and research capabilities to set up a new facility to produce lead glass in the EEA. In this respect, the creation of the joint venture eliminates at least potential competition from Osram as an independent producer of lead glass in the EEA. As a result, lamp manufacturers, in particular those that do not have their own in-house production of lead glass, will see their freedom to choose among alternative lead glass suppliers at competitive prices reduced. These restrictive effects are particularly important as there are only a few manufacturers of lead glass in the EEA, and in view of the high market share of the parents in the lead glass market.

(17) The Commission has assessed whether the joint venture could give the parties the possibility of foreclosing access of those independent manufacturers to supplies of lead glass. The conclusion of the Commission is that this is not the case, in particular for the following reasons: the overcapacity prevailing not only in the EEA but also in other areas, such as the USA, the characteristics of the product, that make it easily transportable, the small importance of transport

costs and the existence of several alternative actual and potential suppliers within and outside the EEA.

(18) The joint venture will also have some limited spillover effects as regards the lamp market, where the parties are by far the leading European suppliers of lamps with two-thirds of the market and are in direct competition in all segments of it. The joint venture results in a limited standardization of manufacturing costs. The parties will have identical unit costs for lead glass components which account for 2 to 3 % of the costs of a lamp (incandescent and fluorescent). In addition, the parties are already manufacturing bulbs in common for incandescent lamps (which make about 7,5 to 8 % of the costs of an incandescent lamp). This standardization of costs is somewhat reinforced by the freight pool system which shares equally between the parents the overall transport costs per kilogram, which accounts for 2 % of the cost price of lead glass [1]. However, given the very small importance of lead glass on the manufacturing costs of lamps, such standardization is not considered relevant enough as to constitute a restriction of competition. Such consideration is reinforced by the fact that there is no suggestion that the creation of the joint venture will have any significant impact on conditions of competition on the market for lamps, where the parties continue to compete directly with each other. There is no indication either that competition in the lamp market will be decreasing given the growing pressure in the EEA from lamps imported from outside the EEA, and, in particular, the direct presence in the EEA of GE — encompassing Tungsram and Thorn — which is the largest producer world-wide and which controls around 20 % of the EEA market and of Edil (the former Sylvania Europe, now an independent company having gained a significant market share — around 10 % — in the EEA) together with a large number of medium and small manufacturers.

2. *Contractual provisions*

(19) The declaration of intent includes a number of provisions that also restrict competition:

(a) the non-compete provision, that will apply during the entire term of the agreement;

(b) the obligation on the parent companies to source most of their lead glass needs in Europe from the joint venture;

(c) the preference to be given to the parent companies (in proportion to their respective off-take) in case of shortage in capacity and supply.

[1] The freight pool system actually translates into a slight cost disadvantage for Philips and a slight cost advantage for Osram in terms of % tonnes/price.

(20) All restrictions mentioned in recital 19 are ancillary to the creation and successful operation of the joint venture. In this respect, they are considered to be subsumed under the joint venture and, consequently, they will not be assessed pursuant to Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement separately from the joint venture itself.

— The non-compete provision is the expression of the lasting commitment of each parent company towards the other and the joint venture. In addition, it is limited to activities in Europe. So, for instance, Osram Sylvania is not only prevented from selling in the EEA to existing or new customers, but is in fact selling there.

— The obligation on the parent companies to source most of their needs for lead glass in Europe from the joint venture guarantees an effective and economical production load of the joint venture, particularly important in view of the fact that furnaces are producing lead glass 24 hours per day. Such use of the production capacity of the joint venture will secure certainty over the costs, quality and continuity of lead glass supplies to its parents and to third customers. In addition, given that a bigger use of the production capacity will help to reduce the per-unit production costs of the leadglass, this commitment is in the interest of the parent companies, as they will be supplied on cost price basis.

— As regards the preference to be given to parent companies, even if it could have a potentially restrictive effect, were the current overcapacity situation in the market for lead glass in the EEA to turn into a situation of scarcity, it can be accepted as ancillary because the joint venture is created to be the in-house production unit in the EEA for the two parent companies, which are investing money in it. Any in-house lead glass production unit gives priority to the demand of the lamp manufacturer to which it belongs and only sells on the free market the surplus production not consumed by the parent company. It has already been said that such surplus production is unavoidable given that furnaces normally operate 24 hours a day and results in a lower cost of production the bigger the use of the capacity. In this respect, the capacity of the new unit will be bigger than the previous combined capacity of the two parents in the EEA and Philips and Osram have declared that they will be continuosly interested in the joint venture supplying lead glass to third parties to the greatest extent possible. In addition, they have also declared that in emergency cases (e.g. breakdown of the furnace) the joint venture will honour existing purchasing agreements of parents and third

parties alike, in proportion to their off-take prior to the emergency.

(21) Ancillary provisions are usually accepted for a limited period of time. In the present case, those provisions will be accepted as ancillary for the entire duration of the exemption granted by this Decision to the joint venture.

B. Effect on trade between Member States and between Member States and EFTA countries

(22) The joint venture will appreciably affect trade in lead glass between Member States and between the Member States and EFTA countries, because it refers to the common manufacture of a product which will be sold throughout the EEA and which is very important, as intermediate input, for independent producers of lamps.

C. Conclusion in respect of Article 85 (1) of the Treaty and Article 53 (1) of the EEA Agreement

(23) In conclusion it is considered that the creation of the joint venture falls within Article 85 (1) of the Treaty and under Article 53 (1) of the EEA Agreement. The restrictive effect on competition and on trade between Member States and between Member States and EFTA countries is considered to be appreciable, given in particular the strong position of the parent companies on the relevant market.

D. Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement

(24) The notified declaration of intent, in so far as its falls within Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement, satisfies the conditions for exemption laid down in Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement.

Improving production or distribution

(25) The joint venture achieves rationalization of production by allowing Osram to eliminate its obsolete facilities in Berlin and allowing Philips to relocate certain non-lead glass production from Lommel to other glass factories in the Philips' group. The joint venture will offer greater flexibility in quantities and types of product [1] and a lower risk of breakdown, and will have a production capacity substantially higher than that resulting from the combination of the production capacity of the facilities of the parent companies in the EEA for the production of lead glass prior to the creation of the present joint venture. The joint venture will result in lower total energy usage and a better prospect of realizing energy reduction and waste emission programmes.

In addition, the parties will concentrate their R&D activities in Philips' laboratories, achieving savings and economies of scale and a concentration of effort to tackle properly the common challenge of developing lead-free materials.

(26) The parties have provided figures showing yearly lead glass savings at Fl [...] million (ECU [...] million), for Philips and DM [...] million (ECU [...] million) for Osram, with R&D savings of DM [...] (ECU [...] million) for Osram. Such savings are due, in particular, to extended production range, rationalization, decreased overhead costs, flexible furnace utilization, reduced energy and environmental costs, and shared R&D on substitutes for lead glass. The relative importance of these figures is only fully appreciated when it is considered that the market price of lead glass is around Fl 2,5 (ECU 1,16) per kilogram; savings will thus be equivalent to nearly 1 800 tonnes of lead glass per year at market prices, which is about 10 % of the parties' total annual production before the establishment of the joint venture and about 7 % of its maximum production capacity (26 000 tonnes a year). This amount, for instance, largely exceeds yearly lead glass requirements of the biggest independent lamp manufacturer in the EEA.

Consumers

(27) The use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities. This positive effect will be substantially reinforced when R&D in the field produces lead-free materials.

In addition, the cost advantages resulting from the improvements mentioned above will be passed on to consumers in the form of downward pressure on lamp prices, which have been falling steadily due, in particular, to the development of new types of more modern lamps and to competition from the central and eastern European countries.

[1] In this respect, the joint venture will be equipped with three furnaces and seven production lines, whereas Philips presently has one furnace and four production lines devoted to lead glass for lamps at Lommel and Osram had one furnace and two production lines in Berlin.

Indispensability of restrictions

(28) The joint venture is indispensable for achieving the improvements in terms of rationalization, flexibility, energy and cost savings, pooling of R&D efforts and lower emissions resulting from the declaration of intent.

An alternative to the joint venture would have been for Osram to set up a new facility. However this would have resulted in a disproportionately high and risky investment, in terms of the time required for the new facility to be operational and in terms of the money required not only to set up the factory but also to install the necessary equipment to comply with environmental protection requirements. In this respect, Philips' current facility can be adapted much more quickly and has the environmental protection equipment already installed.

Another alternative would have been for Osram to enter into a long-term supply agreement with Philips (and possibly other suppliers). Osram has, however, explicitly stated that it was not interested in such an arrangement because it would have made Osram very dependent. As to Philips, such an agreement might not have provided sufficient certainty to make on its own the investments now made. This is the more so because of the limited size and the mature character of the market. The improvements resulting from the joint venture might therefore not have been achieved. Such an alternative would, therefore, most likely have resulted in a smaller quantity of lead glass being available for third parties than will be available due to the joint venture, the capacity of which will indeed be bigger than the combined previous capacity of the parent companies in the EEA.

As to the possibility of Osram obtaining supplies from its Sylvania facilities in the USA, it is sufficient to indicate that Osram Sylvania's spare capacity in the United States is not big enough to cover all of Osram's European lead glass needs.

No elimination of competition

(29) As regards the availability of lead glass, lamp manufacturers in Europe in general, and in particular those independent lamp manufacturers that do not have their own internal source of lead glass, have no difficulty ordering lead glass components made to their precise requirements, not only from actual alternative suppliers in the Community (such as GB Glass and Telux Spezialglas) but also from actual and potential alternative suppliers outside it. As already indicated, the former are Tungsram and GE, Slovenské Zadovy Technickeho Skla, Toshiba and even Osram Sylvania, which is not prevented from selling in the Community, and the latter are Krosno and Tesla. All of them have substantial spare production capacity.

In addition, several of these independent lamp manufacturers have stated that they make their lead glass sourcing decisions predominantly according to the conversion rate of the currencies involved.

On this basis, and given the overcapacity situation currently prevailing in respect of lead glass in both the Community and in other areas of the world, and at least the United States, it is concluded that the joint venture does not significantly limit long-term continuity of supply, from a number of alternative sources of supply, to third parties, in particular, to those lamp manufacturers not having their own in-house source of supply.

(30) Finally, were the present joint venture to be successful, as regards the development of lead-free substitutes, the fact that several other lamp or glass manufacturers are active, and even hold patents, in that area ensures that there would be, in the future, several alternative sources of supply.

Conclusion

(31) It is then concluded that all the four conditions for the granting of an individual exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement to the creation of the joint venture are fulfilled.

E. Duration of the exemption

(32) Pursuant to Article 8 of Regulation No 17, a decision in application of Article 85 (3) of the EC Treaty (and pursuant to Protocol 21 of the EEA Agreement in so far as Article 53 (3) of the EEA Agreement is concerned) shall be issued for a specified period. Pursuant to Article 6 of that Regulation, the date from which such a decision takes effect cannot be earlier than the date of notification. In that respect, in the present case the decision should take effect from the date the notification was complete, that is from 3 March 1992, to 2 March 2002 as regards the joint venture created between Philips and Osram. This will allow the Commission to re-evaluate the case at a moment in time when the expected benefits resulting from the joint venture will have had a reasonably long period during which to materialize,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement, the provisions of Article 85 (1) of the EC Treaty and of Article 53 (1) of the EEA Agreement are hereby declared inapplicable for the period 3 March 1992 to 2 March 2002 to the joint venture to be created between Philips Lighting Holding BV and Osram GmbH pursuant to the declaration of intent as notified to the Commission by Philips International BV and Osram GmbH.

Article 2

The non-competition obligation on Philips Lighting Holding BV and Osram GmbH, the obligation to source most of their European requirements for lead glass from the joint venture, and the preference to be given to them are to be considered as ancillary restrictions to the creation of the joint venture for the duration of the exemption granted in Article 1.

Article 3

This Decision is addressed to:

Philips Lighting Holding BV
c/o Philips International BV
Corporate Legal Department
Building VO-1
Groenewoudseweg 1, PO Box 218
NL-5600 MD Eindhoven

Osram GmbH
Rechtsabteilung
Wittelsbacherplatz 2
D-80333 München 2

Done at Brussels, 21 December 1994.

For the Commission
Karel VAN MIERT
Member of the Commission

COMMISSION DECISION

of 21 December 1994

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

(IV/32.948 — IV/34.590: Tretorn and others)

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

(Text with EEA relevance)

(94/987/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 15 (2) thereof,

Having regard to the Commission decision of 14 May 1993 to initiate proceedings in this case,

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

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

Whereas:

A. THE FACTS

I. THE PARTIES

(1) Tretorn AB, (hereinafter referred to as 'Tretorn AB'), is a Swedish industrial company. It operates within the Community in the market in tennis balls, through its subsidiary Tretorn Sport Ltd, Ireland. For the year 1992, Tretorn AB's turnover was of about ECU 16,5 million.

(2) Tretorn Sport Ltd, (hereinafter 'Tretorn'), is a subsidiary of Tretorn AB, manufacturing tennis balls. For the year 1992, Tretorn had a turnover of about ECU [. . .] [3].

(3) Formula Sport International Ltd (hereinafter 'Formula') was Tretorn's exclusive distributor in the United Kingdom until 1989.

(4) Fabra SPA, (hereinafter 'Fabra'), was Tretorn's exclusive distributor in Italy until mid-1993.

(5) Tenimport SA (hereinafter 'Tenimport'), was Tretorn's exclusive distributor in Belgium.

(6) Zürcher AG, (hereinafter 'Zürcher'), is Tretorn's exclusive distributor in Switzerland.

(7) Van Megen Tennis BV, (hereinafter 'Van Megen'), is Tretorn's exclusive distributor in the Netherlands.

II. THE MARKET FOR TENNIS BALLS

(8) The market is oligopolistic. Four producers share most (about 80 %) of the Community market for first-grade balls:

— Dunlop Slazenger International: 39 % (Dunlop 28 %, Slazenger 11 %),

— Dunlop France: 19 %,

— Penn: 16 %,

— Tretorn: 11 %.

These figures are estimated by Dunlop Slazenger International (1986): see Commission Decision 92/261/EEC, Newitt Dunlop Slazenger International and others [4]. The Commission has no reason to suppose that any significant change

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.

[3] In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 (2) of Regulation No 17 concerning non-disclosure of business secrets.
[4] OJ No L 131, 16. 5. 1992, p. 32.

has taken place since. Tretorn sales are mainly orientated on Europe.

(9) According to the producers, there are no major technological barriers to entry. Barriers are of an economic nature and include the production volumes necessary for profitability and the presence on the market of a small number of well-established enterprises with brand-name loyalty, the latter supported by sponsorship of major events and the system of national associations granting 'official ball' status to certain brands.

(10) Although 'first-grade balls' are technically fully substitutable, brand loyalty leads to a much lower level of substitution than would be expected. Also, the cross-elasticity of demand is low.

III. TRETORN'S DISTRIBUTION SYSTEM

(11) Tretorn AB uses its own subsidiaries to distribute in Germany and Denmark, and in other Member States Tretorn AB or its subsidiary Tretorn set up a network of exclusive distributorships.

IV. THE BASIS OF THE OBJECTION

(12) On the basis of the information available, the Commission carried out investigations at the premises of various tennis ball companies, including those of Tretorn. This investigation uncovered documents and correspondence which show that Tretorn actively erected barriers against parallel imports of its products within the Community.

V. GENERAL EXPORT BAN AND BARRIERS ERECTED BY TRETORN AGAINST PARALLEL IMPORTS

(13) Since 1987 at least, Tretorn has, in concertation with its exclusive distributors within and outside the Community, introduced an export ban in its exclusive distribution system and has set up a series of mechanisms aimed at implementing and reinforcing that ban.

(14) Those mechanisms consisted of: systematic reporting and investigation of instances of parallel imports; marking of products to identify the origin of parallel imports; and suspension of supplies to specific markets to prevent actual or potential parallel imports.

(15) Generally, Tretorn's intention to implement all the above measures is evidenced by a fax, from Tretorn AB to Zürcher, its Swiss distributor, dated 6 June 1989. In that fax Tretorn AB stated:

> '... our policy is to protect each and every distributor from grey market imports. We have also ... implemented many controls, designed new packages, refused several orders, etc., in order to keep this grey market business at a minimum.
>
> ... we are always prepared to listen to new ideas and proposals re how to stop this business.'

1. Export ban

(16) It appears from various documents that there was an agreement or a concerted practice between Tretorn and its distributor in the United Kingdom to prevent supply to dealers likely to engage in parallel exports.

(17) In a telex dated 13 February 1987 to Formula, Tretorn specifically warned Formula against supplying to Newitt Ltd (hereinafter 'Newitt') of York. Tretorn also informed Formula that Dunlop Slazenger International Ltd (hereinafter 'DSI') had already stopped dealing with Newitt and had curtailed supplies to JJB (another, but smaller, possible parallel exporter).

(18) Newitt was again singled out, along with JJB, at a meeting between Tretorn and Formula at Wellebourne on 18 February 1987. Tretorn stated that the relationship between Formula and Tretorn would be in jeopardy if balls supplied to Formula turned up as parallel imports in other European countries. Formula gave an assurance that it would not ship to any customer who would export.

(19) In a fax of 17 April 1987, Tretorn informed Formula that cheap balls had appeared as parallels in certain retail outlets in Switzerland. According to the date codes they had all been shipped to Formula. By letter of 6 May 1987, Formula assured Tretorn that supply via Newitt would not be an issue again.

(20) The fact that the general export ban was the result of an agreement between Tretorn and its distributors and not the result of unilateral action by Tretorn is evidenced in part by the following correspondence:

A letter of 7 November 1986 from Formula to Newitt; a telex of 20 January 1987 from Formula to Newitt again; letters of 6 and 11 May 1987 from Formula to Tretorn.

In the letter of 7 November 1986, Formula informed Newitt that its 'immediate concern is to penetrate the United Kingdom market and not actively canvass export business, as this may well disturb Tretorn's existing network'.

In the telex of 20 January 1987, Formula informed Newitt that its distribution agreement with Tretorn AB prohibits exports to 'certain European countries' and suggests that Newitt 'clarify any potential export business'. In those cases, Formula will 'ship direct, where necessary, into those countries which do not conflict with Tretorn's established distribution network'.

In the letter of 11 May 1987, Formula informed Tretorn that an order from Newitt had been accepted on the basis that the balls were to be re-sold only on the United Kingdom market. The Formula invoice was marked 'For re-sale in United Kingdom-territory only'. In the same letter Formula promised not to supply Newitt any more.

(21) Even with those assurances from Formula, which clearly show its participation in the agreement on the export ban, Tretorn was not confident that Formula would not sell to Newitt and took steps to change to another United Kingdom distributor (Tretorn's international note of 11 May 1987).

2. **Reporting and investigating parallel imports**

(22) Tretorn itself or Tretorn's distribution network reported parallel importers wherever there was evidence of such imports.

(23) Reference is made to the faxes of 6 June 1989 and 17 April 1987 respectively, quoted at paragraphs 15 and 19.

(24) In July 1987, Van Megen informed Tretorn that Tretorn balls were 'again turning up' in Holland. Tretorn asked Van Megen to forward the code number to it to allow it to find out 'which country has shipped' (fax from Tretorn to Tretorn AB dated 16 July 1987).

(25) In an internal Tretorn note dated 20 June 1988, Van Megen was said to have parallels from two different sources. He hoped to obtain date codes.

(26) In a fax dated 15 November 1988, Fabra informed Tretorn that they had identified a parallel importer in Italy, Fabra having obtained an invoice from a customer who bought a carton of balls from the parallel importer. They asked Tretorn to comment. Tretorn answered by fax dated 21 November 1988, asking for information about the type of packaging and the original shipment. By telex dated 24 November 1988, Fabra answered those questions.

(27) In a telex dated 5 December 1988, Fabra informed Tretorn of the name of another Italian parallel importer.

(28) In a fax dated 10 January 1989, Tretorn AB's German subsidiary reported a 'German exporter' who had tried to purchase Tretorn balls. Tretorn Germany refused to sell the balls. The exporter expressed its intention to buy Tretorn balls direct from the USA. Tretorn Germany informed Tretorn AB, asking it to inform Tretorn and Tretorn USA so as to prevent any sales to this presumed parallel exporter.

(29) The minutes of 22 February 1989 of a meeting between Fabra and Tretorn expressed Fabra's concern about cancelled orders due to parallel imports. It was decided that Fabra should inform Tretorn immediately of any deterioration in the situation.

(30) In a fax dated 27 February 1989, Tenimport informed Tretorn that parallel exports were on their way to Italy via Belgium and expressed its concern about the significantly lower prices offered by Tretorn to other distributors.

(31) Following Tenimport's fax dated 27 February 1989 Tretorn asked Fabra, in a telex dated 28 February 1989, for information concerning the parallel importer. The telex stated that Tretorn was monitoring the situation in order to ensure that the parallal importer did not receive any parallel-imported balls. In a fax from Fabra to Tretorn of the same day, Fabra replied that they had not been able to trace the parallel importer, and Fabra therefore asked for more information.

(32) In a fax dated 21 March 1989, Fabra identified and gave the address in France of a so-called 'parallel' and requested an investigation.

(33) The minutes of a meeting held on 5 April 1989 state that 'both parties (are) concerned about parallel ...' and Tretorn agreed with Fabra to share the costs of an investigation as to which of its customers in France was exporting to Italy.

(34) In a fax dated 6 June 1989, Tretorn AB complained to its German subsidiary that balls

intended for the United States Army in Germany had ended up in Switzerland, thereby causing Tretorn and its Swiss distributor 'great problems'. While informing Tretorn Germany that Tretorn AB's marketing contribution for these balls was cancelled, Mr Alven asked him to investigate to find out 'how this could have happened' and to see what steps should be taken.

3. **Marking of products**

(35) The evidence in the Commission's possession indicates that Tretorn marked their tennis balls with date codes which would allow the origin of parallel imports to be traced. Numerous references to these codes and their use are found in Tretorn's correspondence. Moreover, Tretorn admits having used different packaging with a view to making parallel exports less attractive.

(36) In a letter dated 13 April 1987, Zürcher informed Tretorn of parallel imports to Switzerland, and gave specific date codes, requesting Tretorn to take action.

(37) In a fax dated 17 April 1987, Tretorn pointed out to Formula that date codes on balls which had been parallel-imported into Switzerland showed that the balls came from a shipment to Formula.

(38) In a fax dated 15 May 1987 Tretorn informed Formula that date codes clearly show that balls shipped to Formula ended up in Switzerland as parallel imports, concluding that Formula was guilty for having sold to Newitt.

(39) The minutes of a meeting between Tretorn and Fabra on 6 October 1988 show that Tretorn agreed to prepare a sticker to put on ball packs to show that Fabra was the Tretorn distributor. The minutes state that this device would allow the Fabra salesmen to identify parallel imports with the retailers.

(40) In a letter dated 17 March 1989, Fabra gave Tretorn details of codes on packs of balls sold by parallel importers, clearly intending this as a means of identifying the origin of the balls.

(41) In an internal Tretorn memorandum of 17 April 1989, it is stated that the colour of the packaging of Tretorn balls meant for the American market was changed so that it differed from the colour of the packaging of balls for the European market. Tretorn however did not believe that this would 'alleviate the problem' of the re-exports of balls from the USA to Europe which had increased at an 'unprecedented rate despite all the efforts to control/stop this by our American colleagues'.

(42) The fax of 6 June 1989 quoted at paragraph 15 also makes reference to designing new packages as a measure to prevent parallel imports.

(43) Likewise, in an undated market overview (presumably conducted in early 1988), Tretorn has stated that one of the ball types will be sold in tubes in Italy in order to combat parallels from France.

In an internal memorandum dated 23 August 1988, Tretorn also contemplated changing the names of the balls exported to the USA in order to make their reexportation to Europe more difficult. It considered however that 'judging from past experience in Switzerland this would not solve the problem'.

4. **Suspension of supplies to prevent parallel imports**

(44) As stated by Tretorn in the fax of 6 June 1989 quoted at paragraph 15, it appears that Tretorn or its distributors suspended supplies to different markets in order to prevent parallel imports.

(45) Reference is made to the letters of 6 and 11 May 1987 quoted at paragraphs 19 and 20, and to the fax of 10 January 1989 cited at paragraph 28.

(46) In an internal Tretorn memorandum dated 23 August 1988, it is recommended to stop supplies to the United States market because Tretorn USA were unable to prevent re-exportation. Balls shipped to the United States were turning up as parallel imports in the Netherlands and Switherland. The United States balls bads were sold at half the price of the balls marketed in Switzerland by the Tretorn distributor, Zürcher.

(47) In an internal memo of 2 November 1988, it is stated that Tretorn USA promised once again to do all they could to prevent parallel exports from the USA. They informed Tretorn that they had stopped a shipment in San Diego the week before.

(48) In the same memo of 2 November 1988, Tretorn stated that a decision had been taken to stop

shipments to the United States market if there were 'major problems' with parallel imports in the spring of 1989.

(49) In a fax dated 6 February 1989 from Tretorn to Fabra giving the minutes of a meeting between those two parties, it is stated that Fabra had some problems with 'grey imports' from France and that Tretorn would do everything possible to stop these imports. Tretorn's memorandum to Fabra of 22 February 1989 makes it clear that shipments to France were actually suspended for February and March 1989 while investigations into parallel imports were carried out. Tretorn stated that the suspension ensured that there would be no more parallel trade.

(50) In an internal memorandum of 17 April 1989 Tretorn suggested the immediate cessation of supplies to all mail order companies and certain large chain stores in the USA in order to try to prevent parallel imports into Europe.

B. LEGAL ASSESSMENT

I. ARTICLE 85 (1)

(51) The general export ban and the barriers erected to parallel imports, as described above, should not be regarded as the result of unilateral action by Tretorn [1] but as an integral, although unwritten, parts of its distribution or sales agreements, or at least as the result of concerted action by Tretorn and its distributors.

The general export ban and the barriers had the direct object and effect of restricting competition, affecting trade between Member States and partitioning the common market. This, in fact, constitutes an obstruction of the achievement of a fundamental objective of the Treaty, the integration of the common market. It also allows Tretorn and its distributors to apply a differentiated price policy.

A. Agreements and/or concerted practices: restrictions of competition

1. *General Ban on Exports (paragraphs 15 and 16 to 21)*

(52) The fax dated 6 June 1989 from Tretorn to Zürcher, and the correspondence between Tretorn and Formula, in particular, show that Tretorn, in combination with its exclusive distributor for the United Kingdom, set up a distribution system providing for total territorial protection and therefore aimed at excluding all parallel trade.

This shows:

— that Tretorn's exclusive distribution arrangements include an unwritten undertaking by Tretorn to provide its distributors with absolute territorial protection,

— that sales agreements between Tretorn and its retailers and distributors include an unwritten condition of sale prohibiting them from exporting or supplying to any company likely to export.

(53) The fax mentioned in paragraph 52 indicates that the agreement or concerted practice applies 'to protect each and every distributor from imports'. As was stated above, there is a Tretorn exclusive distributor in all Community countries, except Germany and Denmark, where Tretorn used its own subsidiaries as distributors.

(54) Tretorn's determination to implement this agreement or concerted practice is evidenced by the minutes of a meeting between Tretorn and Formula Sport on 18 February 1987 (see paragraph 18).

(55) Clearly the agreement or concerted practice was implemented not just by Tretorn, but also in particular by the United Kingdom distributor (see paragraph 20).

(56) Those agreements or concerted practices between Tretorn and its exclusive distributors to prevent parallel trade and to monitor the implementation thereof, are specifically prohibited by Article 85 (1).

2. *Reporting and investigating parallel imports (paragraphs 15 and 22 to 34)*

(57) Tretorn's policy of preventing parallel imports was further implemented by its distributors by reporting to Tretorn instances of parallel imports.

(58) This system of reporting and investigation in order to identify parallel importers and cut off supplies to them is clearly the result of an agreement or concerted practice between Tretorn and its distributors and reinforces the ban on parallel exports in breach of Article 85 (1).

[1] 'Tretorn' must be understood in this part of the Decision as designating either Tretorn Sport Ltd or Tretorn AB.

3. *Marking of products (paragraphs 15 and 35 to 43)*

(59) The marking of products played an integral part in the implementation of Tretorn's policy to prevent parallel imports. Balls were marked with date codes and/or exclusive distributor stickers for the specific purpose of identifying the origins of parallel imports.

(60) Clearly, Tretorn's distributors made use of this marking system when reporting on parallel importers.

(61) This system of product-marking is also in agreement or concerted practice aimed at implementing and reinforcing the ban on parallel trade, thereby protecting Tretorn's distributors, contrary to Article 85 (1).

4. *Suspension of supplies (paragraphs 15 and 44 to 50)*

(62) As shown in paragraphs 44 to 50 Tretorn clearly suspended supplies to different markets in order to prevent parallel imports.

(63) It is clear that the suspension of supplies was made in coordination with Tretorn's distributors, who asked Tretorn to take action when parallel imports turned up on their markets. These actions, which reinforced and implemented the ban on parallel trade, are clear examples of concerted practices contrary to Article 85 (1).

B. **Effect on trade between Member States**

(64) The ban on exports contained in the Tretorn distribution agreements has the direct object of hampering trade between Member States. The ban is a general one, and affects trade throughout the Community, since Tretorn has distributors or subsidiaries in almost all Community countries. This results in a partitioning of the common market.

(65) Tretorn's prevention of parallel exports from the Community and into Switzerland meant that only Tretorn could deliver its products to the Swiss market through its distributor Zürcher while others in the Community were excluded from any such exports. The impediment of parallel exports from the Community and into Switzerland affected trade between Member States since it prevented Swiss dealers from buying from one Member State and re-exporting to a second Member State.

Tretorn maintains in its replies that the situation is highly unlikely since the same opportunity for re-exportation does not arise, because the price of tennis balls in Switzerland is estimated to be 15 to 20 % higher than in the Community.

Such an allegation is rejected on the grounds that it is likely that Swiss dealers would, in the absence of the restrictive practices, buy tennis balls at the lowest Community prices and resell them, even without physically shipping them to Switzerland, in Member States where the prices are higher.

The effect of the restrictive practices is therefore to maintain price differentials between Member States.

(66) Tretorn's prevention of parallel exports from the USA and into Switzerland also had an appreciable effect on trade between Member States, since the price structure in Europe and in the USA made re-exportation into the Community highly probable.

C. **Main elements of Tretorn's and its distributors' position**

(67) Only Tretorn, Tenimport and Van Megen replied to the statement of objections. Formula became insolvent, whilst Zürcher considered that the Treaty did not apply. A hearing was held on 16 November 1993.

(68) In the written and oral replies to the statement of objections, Tretorn generally denies that it had the intention of preventing parallel import or export, or that it had taken any measures having such an effect. Tretorn argues that even if some of the documents may suggest that Tretorn prevented parallel trade, the documents were formulated to pay 'lip service' to the distributors and that no actual measure has ever been taken.

Further, Tretorn maintains that it is the distributors who have taken the initiative leading to the contested actions.

This argument cannot be accepted.

Firstly, the documents referred to in paragraphs 13 to 50 demonstrate that Tretorn and its distributors have initiated a number of measures to create barriers to avoid parallel import or export and that Tretorn even penalized one of its own distributors for having sold to a parallel exporter.

As to Tretorn's intention, the wording of the correspondence to Tretorn's distributors and of internal Tretorn documents does not support the conclusion that Tretorn took measures merely to fall into line with the demands of the distributors.

Even assuming that Tretorn had not taken measures with a view to preventing parallel import or export, the system of distribution organized with its distributors resulted in a partitioning of the common market for Tretorn's tennis balls and the barriers set up resulted in encouraging the distributors to prevent parallel trade. This is acknowledged by Tretorn itself in its reply.

Tretorn also claims that, as far as Formula is concerned, the reason for preventing it from selling to parallel exporters was its bad performance in the United Kingdom territory. Even if this were true, it cannot constitute a justification. Besides, it is not the Commissions's place to evaluate the performance of Tretorn's distributors. The correspondence between Tretorn and Formula (see paragraphs 16 to 21) shows clearly that the aim of preventing parallel exports was to avoid the disruption of Tretorn's closed distribution system in other countries.

Finally, Tretorn also claims that it has itself delivered direct to dealers which Tretorn knew to be parallel importers. Even if this were the case, it does not alter the fact that the other hindrances to parallel exports or imports exercised by Tretorn constitute an infringement.

Tenimport

(69) Tenimport points out that the fax which is referred to by the Commission (see paragraph 30) must be understood in its context. Tenimport considers that Tretorn charged it the highest prices and that the object of the quoted fax was not to prevent parallel imports but to ask Tretorn to explain how some dealers could benefit from much lower prices.

Even if this interpretation of the text of the quoted fax were correct, the fact remains that the information given by Tenimport has resulted in measures taken by Tretorn and Fabra with a view to suppressing that source of parallel imports (see paragraph 31). Since the behaviour of Tenimport had the effect, even if it was not intended, of restricting competition and partitioning the common market, it constituted an infringement of Article 85 (1).

Van Megen

(70) Van Megen explained that its object in reporting date codes to Tretorn was not to prevent parallel imports but to check whether Tretorn did not supply direct in its territory. It declares that it itself supplies companies that it knows to be parallel exporters.

Even if the interpretation given by Van Megen were correct, the fact remains that the information was given in the context of a ban on parallel exports of which Van Megen was well aware and it actively participated in identifying the source of the parallel imports with a view to suppressing it (see paragraphs 24 and 25).

II. REGULATION (EEC) No 1983/83

(71) Article 1 of Commission Regulation (EEC) No 1983/83 [1] provides that exclusive distribution agreements are in general exempt from the prohibition in Article 85 (1) if they fulfil the conditions set out in that Regulation.

The exclusive distribution system operated by Tretorn does not however qualify for block exemption as it includes an unwritten undertaking giving absolute territorial protection to Tretorn's distributors, and implementation of the system involved — as was stated above — agreement or concerted practices to prevent parallel imports. For that reason the system falls within Article 3 (d) of Regulation (EEC) No 1983/83.

III. ARTICLE 85 (3)

(72) The Tretorn distribution agreements were not notified to the Commission and do not therefore qualify for an individual exemption. The agreements would not have qualified for exemption even if they had been notified, because of the export bans involved in the agreements, which are not indispensable to the effectiveness of Tretorn's distribution system.

IV. ARTICLE 3 OF REGULATION NO 17

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

(74) Tretorn should be required, in so far as it has not already done so, to terminate the export bans contained in its sales agreements and the absolute territorial protection involved in its distribution system. Tretorn and those of its abovementioned exclusive distributors which are still active, namely Tenimport, Zürcher and Van Megen should also be required to end the agreements or concerted practices described in paragraphs 13 to 50.

[1] OJ No L 173, 30. 6. 1983, p. 1.

V. ARTICLE 15 (2) OF REGULATION No 17

(75) Pursuant to Article 15 (2) (a) of Regulation No 17 the Commission may, by decision, impose fines of from ECU 1 000 to 1 000 000 or a sum in excess thereof but not exceeding 10 % of the turnover in the previous business year on undertakings which, either intentionally or negligently, infringe Article 85. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

(76) Tretorn could not have been unaware that the export ban in its distribution system and conditions of sale infringed Article 85 (1) and that it has always been the policy of the Commission and the Court of Justice, in their decisions, to regard such bans as particularly serious infringements. Tretorn and its relevant distributors could not also have been unaware that the same applies to the various concerted practices aimed at preventing parallel imports. Consequently, a fine is to be imposed on Tretorn and its relevant distributors (with the exception of Tenimport). The documents in the Commission's possession prove that the infringement was concerted between Tretorn and its subsidiary companies, Tretorn Sport in particular, and it is therefore appropriate to fine Tretorn AB and Tretorn Sport jointly and severally.

(77) The infringement committed by Tretorn and its distributors go back at least to 1987 (see paragraphs 13 to 50). There is no reason to believe that the practices are terminated. However, for the purpose of the fine only the years 1987 to 1989 will be considered.

It should finally be mentioned that, during the course of the procedure, Tenimport collaborated with the Commission, confirming the existence of an unwritten but actual prohibition on exports. It considered that the recent cancellation of its distribution agreement with Tretorn could only be understood as meaning that Tenimport had not complied with that prohibition.

(78) In determining whether to impose fines and at what level the Commission has taken into account the fact that some of Tretorn's distributors have taken a particularly active part in preventing parallel imports; but also that such participation was in other cases of a limited nature and has to be set in the context of Tretorn's general policy of prohibiting any export of its products. Moreover, the part played by Tenimport was of a less substantial nature and it is therefore justified in refraining from imposing a fine on that untertaking,

HAS ADOPTED THIS DECISION:

Article 1

Tretorn Sport Ltd and Tretorn AB have infringed Article 85 (1) of the EC Treaty by applying a general export ban to their distributors of tennis balls, implemented through monitoring measures and sanctions, through the reporting and investigation of parallel imports of tennis balls, the marking of tennis balls, and the suspension of supplies in order to prevent parallel imports and exports of tennis balls.

Formula Sport International Ltd has infringed Article 85 (1) by participating in the implementation in the United Kingdom of the export ban and suspension of supplies in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

Fabra SPA has infringed Article 85 (1) by participating in the implementation in Italy of the export ban and suspension of supplies through the reporting and investigation of parallel imports of tennis balls, the marking of tennis balls and the suspension of supplies in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

Tenimport SA has infringed Article 85 (1) by participating in the export ban and the suspension of supplies, through the reporting of parallel imports to Tretorn with the effect that Tretorn and its Italian exclusive distributor took measures with a view to eliminating those imports.

Zürcher AG has infringed Article 85 (1) by participating in the implementation in Switzerland of the export ban and suspension of supplies, through the reporting and investigation of parallel imports of tennis balls and the marking of tennis balls in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

Van Megen Tennis BV has infringed Article 85 (1) by participating in the implementation in the Netherlands of the reporting and investigation of parallel imports in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

Article 2

A fine of ECU 600 000 is hereby imposed on Tretorn Sport Limited and Tretorn AB jointly and severally and fines of ECU 10 000 each on Formula Sport International Ltd; on Fabra SPA; on Zürcher AG; and on Van Megen Tennis BV, in respect of the infringements referred to in Article 1.

The fines shall be paid, in ecus, to the Commission of the European Communities, account No 310-0933000-43, Banque Bruxelles Lambert, Agence Européenne, Rond Point Schuman 5, B-1040 Brussels, within three months of notification of this Decision.

After the expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Institute on its ecu operations on the first working day of the month in which this Decision is adopted, plus three and a half percentage points.

Article 3

Tretorn Sport Ltd, Tretorn AB, Fabra SPA, Tenimport SA, Zürcher AG and Van Megen Tennis BV shall, in so far as they have not already done so, terminate the infringements referred to in Article 1. They shall refrain from adopting any other measures having equivalent effect.

Article 4

This Decision is adressed to:

Tretorn Sport Ltd
Industrial Estate
Portlaoise
IRL-County Laois

Tretorn AB
Rönowsweg 10 Box 931
S-25100 Helsingborg

Formula Sport International Limited
c/o Arthur Andersen
PO Box 55
1 Surrey Street
UK-London WC2R 2NT

Fabra SPA
Via Sansovino 243/60
I-10151 Torino

Tenimport SA
Rue des Cottages 73
B-1180 Bruxelles

Zürcher AG
Gewerbestrasse 18
CH-8800 Thalwil

Van Megen Tennis BV
Parmentierweg 5
NL-5657 EH-Eindhoven

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

Done at Brussels, 21 December 1994.

For the Commission
Karel VAN MIERT
Member of the Commission

COMMISSION DECISION

of 21 December 1994

amending Decision 94/24/EC drawing up a list of border inspection posts preselected for veterinary checks on products and animals from third countries

(Text with EEA relevance)

(94/988/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 90/675/EEC of 10 December 1990 laying down the principles governing the organization of veterinary checks on products entering the Community from third countries [1], as last amended by Directive 92/118/EEC [2], and in particular Article 30 thereof,

Having regard to Council Directive 91/496/EEC of 15 July 1991 laying down the principles governing the organization of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC [3], as last amended by Decision 92/438/EEC [4], and in particular Article 28 thereof,

Whereas Commission Decision 94/24/EC [5] draws up a list of border inspection posts preselected for veterinary checks on products and animals from third countries;

Whereas certain border inspection posts have been inspected by the Commission's departments; whereas, in addition, the Member States may propose that new posts be included in the list or that posts included therein be withdrawn;

Whereas, in view of the results of the inspections and the proposals by the competent authorities of Belgium, Germany, France, Netherlands and Portugal, Decision 94/24/EC must be amended accordingly;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Standing Veterinary Committee,

HAS ADOPTED THIS DECISION:

Article 1

The Annex to Decision 94/24/EC is hereby amended in accordance with the Annex to this Decision.

Article 2

This Decision is addressed to the Member States.

Done at Brussels, 21 December 1994.

For the Commission
René STEICHEN
Member of the Commission

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(1) OJ No L 373, 31. 12. 1990, p. 1.
(2) OJ No L 62, 15. 3. 1992, p. 49.
(3) OJ No L 268, 24. 9. 1991, p. 56.
(4) OJ No L 243, 25. 8. 1992, p. 27.
(5) OJ No L 18, 21. 1. 1994, p. 16.

ANNEX

AMENDMENTS TO THE LIST OF PRESELECTED BORDER INSPECTION POSTS

Border inspection post		All products for human consumption		Other products		Fish	Live animals			Remarks
Name	Type (1)	Temperature (2)	Other (3)	Temperature (2)	Other (3)	(4)	Ungulates (5)	Registered equidae (6)	Other animals	
				'BELGIQUE						
Antwerpen	Port	×	×	×	×					
Oostende	Airport	×	×	×	×		×	×	×	
	Port	×	×				×	×	×	
Zeebrugge	Port	×	×	×	×					
Bruxelles-Zaventem	Airport	×	×	×	×		×	×	×	
Gent	Port	×	×	×						
				DEUTSCHLAND						
Stuttgart	Airport	×	×	×	×				×	
Weil am Rhein	Road	×	×	×	×		×	×	×	
	Rail						×	×	×	
Bietingen	Road	×	×	×	×		×	×	×	
München	Airport	×	×	×	×				×	
Furth im Wald — Schafberg	Road	×	×	×	×		×	×	×	
Schirnding-Landstraße	Road	×	×	×	×			×	×	
Waidhaus	Road	×	×	×	×		×	×	×	
Suben-Autobahn	Road	×	×	×	×		×	×	×	
Lindau-Hörbranz-Autobahn	Road	×	×	×	×		×	×	×	
Kiefersfelden-Autobahn	Road	×	×	×	×		×	×	×	
Berlin-Tegel	Airport	×	×	×	×		×	×	×	Small animals and zoo animals only
Frankfurt/Oder	Road	×	×	×	×		×	×	×	
	Rail		×		×					Casings, Lides, hair and feathers only
Forst	Road		×		×		×	×	×	
Schönefeld	Airport	×	×	×	×		×	×	×	
Bremen	Port	×	×	×	×					

Border inspection post		All products for human consumption		Other products		Fish	Live animals			Remarks
Name	Type (1)	Temperature (2)	Other (3)	Temperature (2)	Other (3)	(4)	Ungulates (5)	Registered equidae (6)	Other animals	
Bremerhaven	Port	×	×	×	×					
Hamburg Hafen	Port	×	×	×	×			×	×	
Frankfurt/Main	Airport	×	×	×	×		×	×	×	
Pomellen	Road	×	×	×	×					
Rügen	Port	×	×	×	×			×		
Rostock	Port	×	×	×	×		×	×	×	
Brake	Port				×					Meal of animal origin
Cuxhaven	Port	×	×	×	×					
Langenhagen	Airport		×		×		×	×	×	
Köln	Airport	×	×	×	×				×	
Zinnwald	Road	×	×	×	×		×	×	×	
Schönberg	Road	×	×	×	×			×	×	
Kiel	Port		×		×			×	×	
Lübeck	Port	×	×	×	×		×	×	×	
Bad Reichenhall	Road	×	×	×	×					
Hamburg Flughafen	Airport	×	×	×	×		×	×	×	
Konstanz Straße	Road	×	×	×	×		×	×	×	
Simbach Kirchdorf	Road						×			Cattle from Austria only
Bad Schandau	Rail	×	×	×	×					
				FRANCE						
Boulogne	Port	×	×	×	×	×				
Dunkerque	Port	×	×	×	×	×				
Le Havre	Port	×	×	×	×	×				
Saint-Malo	Port	×	×	×	×	×				
Brest	Airport	×	×			×				
	Port	×	×			×				
Concarneau-Douarnenez	Port					×				
Nantes-Saint-Nazaire	Airport	×	×	×	×	×				
	Port	×	×	×	×	×				

Border inspection post		All products for human consumption		Other products		Fish	Live animals			Remarks
Name	Type (1)	Temperature (2)	Other (3)	Temperature (2)	Other (3)	(4)	Ungulates (5)	Registered equidae (6)	Other animals	
Bordeaux	Airport	×	×	×	×	×				
	Port	×	×	×	×	×				
Sète	Port	×	×	×	×	×				
Marseille (port)	Port	×	×	×	×	×	×	×	×	
La Rochelle-Rochefort	Port	×	×		×	×				Fish meal only
Marseille-Provence	Airport	×	×	×	×	×			×	
Lorient	Port	×	×	×	×	×				
Roissy-Charles-de-Gaulle	Airport	×	×	×	×	×	×	×	×	
Orly	Airport	×	×	×	×	×	×	×	×	
Lyon-Satolas	Airport	×	×	×	×	×			×	
Nice	Airport	×	×	×	×	×			×	
Toulouse-Blagnac	Airport	×	×	×	×	×			×	
Saint Louis	Airport	×	×	×	×	×			×	
Bâle	Road	×	×	×	×	×				
	Rail	×	×	×	×	×				
Saint Julien Bardonnex	Road	×	×	×	×	×	×	×	×	
Beauvais	Airport							×		
Deauville	Airport							×		
Rouen	Port	×	×			×				
Ferney-Voltaire	Airport	×	×	×	×	×			×	
Divonne	Road							×		
Pontarlier	Road	Withdrawn								
					IRELAND					
Dublin-Port	Port	×	×	×	×	×				
Cork	Port	×	×	×	×	×	×	×		
Shannon	Airport	×	×	×	×	×	×	×	×	
Waterford	Port	×	×	×	×	×	×	×		
Killybegs	Port					×				
Rosslare	Port					×	×	×		
Dublin-Airport	Airport	×	×	×	×	×	×	×	×	

Border inspection post		All products for human consumption		Other products		Fish	Live animals			Remarks
Name	Type (1)	Temperature (2)	Other (3)	Temperature (2)	Other (3)	(4)	Ungulates (5)	Registered equidae (6)	Other animals	
				ITALIA						
Torino-Caselle	Airport	×	×	×	×		×	×	×	
Chiasso	Road	×	×	×	×		×	×	×	
	Rail	×	×	×	×		×	×	×	
Milano-Linate	Airport	×	×	×	×				×	
Milano-Malpensa	Airport	×	×	×	×		×	×	×	
Campo di Trens-Fortezza	Road	×	×	×	×		×	×	×	
	Rail	×	×	×	×		×	×	×	
Campocologno	Rail						×			
Pontebba-Coccau	Road	×	×	×	×		×	×	×	
	Rail	×	×	×	×		×	×	×	
Gorizia	Airport	×	×	×	×					
	Road	×	×	×	×		×	×		
Gaeta	Port	×								Fishery products only
Prosecco-Fernetti	Road	×	×	×	×		×	×	×	
	Rail	×	×	×	×		×	×	×	
Trieste	Port	×	×	×	×		×	×	×	
	Road	×	×	×	×		×			
Venezia	Airport	×	×	×	×					
	Port	×	×	×	×					
Ancona	Port	×	×							
	Airport	×	×							
Bari	Port	×	×	×	×		×	×	×	
Genova	Airport	×	×	×	×					
	Port	×	×	×	×					
Livorno	Port	×	×	×	×					
Roma-Fiumicino	Airport	×	×	×	×			×	×	
Napoli	Airport	×	×		×					
	Port				×					
Palermo	Airport	×	×		×					
	Port	×	×		×					

Border inspection post		All products for human consumption		Other products		Fish	Live animals			Remarks
Name	Type (1)	Temperature (2)	Other (3)	Temperature (2)	Other (3)	(4)	Ungulates (5)	Registered equidae (6)	Other animals	
Catania	Airport	×	×	×	×					
Roma-Ciampino	Airport	×	×	×	×		×	×	×	
Olbia	Port	×								Fishery products only
Salerno	Port	×	×		×					
Reggio Calabria	Airport	×	×		×					
Bologna-Borgo Panigale	Airport	×	×	×	×				×	
Verona-Villafranca	Airport	×	×	×	×		×	×	×	
Domodossola-Iselle	Road	×	×	×	×					
Grand San Bernardo-Pollein	Road	×	×	×	×		×	×	×	
La Spezia	Port	×	×	×	×					
Taranto	Port	×	×	×	×					
Ravenna	Port	×	×	×	×					
Pisa	Airport	×	×	×	×					
NEDERLAND										
Amsterdam	Airport	×	×	×	×		×	×	×	
	Port	×	×	×	×					
Rotterdam	Airport	×	×	×	×					
	Port	×	×	×	×					
Eemshaven	Port	×	×							
Harlingen	Port	×	×							
Vlissingen	Port	×	×	×	×					
Maastricht	Airport	×	×	×						Semen only
Moerdijk	Port		×							
PORTUGAL										
Porto	Airport	×	×	×	×		×	×	×	
	Port	×	×	×	×					
Lisboa	Airport	×	×	×	×		×	×	×	
	Port	×	×	×	×					
Funchal (Madeira)	Airport								×	
	Port	×	×	×	×					

Border inspection post		All products for human consumption		Other products		Fish	Live animals			Remarks
Name	Type (1)	Temperature (2)	Other (3)	Temperature (2)	Other (3)	(4)	Ungulates (5)	Registered equidae (6)	Other animals	
Praia da Vitória (Açores)	Port	×	×	×	×					
Ponta Delgada (Açores)	Airport	×	×	×	×				×	
	Port	×	×	×	×					
Viana do Castelo	Port	×								Fishery products only
Aveiro	Port	×								Fishery products only
Horta (Açores)	Port	×								Fishery products only
Lages (Açores)	Airport	×	×	×	×				×	
Peniche	Port					×				
Olhão	Port					×				
Portimão	Port					×				
				UNITED KINGDOM						
Dover	Port	×	×	×	×	×				
Tilbury	Port	×	×	×	×	×	×	×	×	
Heathrow	Airport	×	×	×	×	×	×	×	×	
Gatwick	Airport	×	×	×	×	×			×	
Southampton	Port	×	×	×	×	×				
Humber — Hull	Port	×	×	×	×	×				
Humber — Grimsby	Port	×	×	×	×	×				
Humber — Immingham	Port	×	×	×	×	×		×		
Felixstowe	Port	×	×	×	×	×				
Newhaven	Port	×	×	×	×	×				
Liverpool	Port	×	×	×	×	×				
Cardiff	Port	×	×	×	×	×				
Teesport	Port	×	×	×	×	×				
Grangemouth	Port			×		×				
Stansted	Airport		×	×	×	×	×	×	×	Fish at ambient temperature only
Manchester	Airport	×	×	×	×	×	×	×	×	
Luton	Airport						×	×		Fish at ambient temperature only

Border inspection post		All products for human consumption		Other products		Fish	Live animals			Remarks
Name	Type (1)	Temperature (2)	Other (3)	Temperature (2)	Other (3)	(4)	Ungulates (5)	Registered equidae (6)	Other animals	
Weymouth	Port	×	×	×	×	×				
Mostyn	Port				×					Animal proteins
Heysham	Port	×	×	×	×	×				
Tyne-Northshields	Port	×	×	×	×	×				
Milford Haven incorporating Pembroke	Port	×	×	×	×	×				
Greenock	Port			×		×				
Scrabster	Port				×	×				Animals proteins
Aberdeen	Airport				×	×				
	Port	×	×	×	×	×				
Fraserburgh	Port				×	×				Animal proteins
Falmouth	Port				×	×				
Invergordon	Port	×	×	×	×	×				Animal proteins
Lerwick	Port				×	×				Animal proteins
Belfast	Airport	×	×	×	×	×			×	
	Port	×	×	×	×	×				
Glasgow	Airport	×	×		×	×			×	
Portsmouth	Port	×	×	×	×	×				
Runcorn-Ellesmere	Port		×		×					
Prestwick	Airport	×	×	×	×	×				
Peterhead	Port				×	×				
Leith	Port	×	×	×	×	×				
Harwich	Port	×	×	×	×	×	×	×	×	
Great Yarmouth	Port	×	×	×	×	×				
Ipswich	Port	×	×	×	×	×				
Sheerness	Port	×	×	×	×	×				
Thamesport	Port	×	×	×	×	×				

(1) Select as appropriate.
(2) Frozen/chilled products.
(3) No low temperature requirements.
(4) Checking in line with the requirements of Commission Decision 93/352/EEC taken in execution of Article 18 (4) of Council Directive 90/675/EEC.
(5) Ungulates: cattle, pigs, sheep, goats, wild and domestic solipeds, etc.
(6) As defined in Council Directive 90/426/EEC.

LIST OF PRESELECTED BORDER INSPECTION POSTS COVERING BALAI PRODUCTS

Border inspection post		All products for human consumption		Other products		Fish	Live animals			Remarks
Name	Type (1)	Temperature (2)	Other (3)	Temperature (2)	Other (3)	(4)	Ungulates (5)	Registered equidae (6)	Other animals	
				UNITED KINGDOM						
North Killingholme Wharf	Port				×					
Grove Wharf Whartons	Port				×					
New Holland	Port				×					
Keadby Wharf	Port				×					
Howdendyke Wharf	Port				×					
Selby Wharf	Port				×					Animal protein
Boston	Port				×					Animal protein and hides and skins
Fosdyke	Port				×					Animal protein
Sutton Bridge	Port				×					Animal protein
Teignmouth	Port				×					Animal proteins
Sharpness Docks	Port				×					Animal proteins
Kings Lynn	Port				×					Animal proteins
Wells-next-the-Sea	Port				×					Animal proteins
Colchester	Port				×					Animal proteins
Mistley	Port				×					Animal proteins and hides and skins and feathers
Dunball	Port				×					Animal proteins
Kirkwall Port	Port				×					Animal proteins
Dundee Port	Port	Withdrawn								
Perth Port	Port				×					Animal proteins
Glasgow/George IV Dock	Port				×					Animal proteins
Edinburgh Airport	Airport				×					Biological products
Avonmouth	Port				×					Animal proteins
Glasson	Port				×					
Gunness	Port				×					

Border inspection post		All products for human consumption		Other products		Fish	Live animals			Remarks
Name	Type (1)	Temperature (2)	Other (3)	Temperature (2)	Other (3)	(4)	Ungulates (5)	Registered equidae (6)	Other animals	
Inverness	Port	Withdrawn			×					Animal proteins
Ullapool	Port									
Seaham	Port				×					Animal proteins
Goole	Port				×					Animal proteins
Garston	Port				×					Animal proteins

(1) Select as appropriate.
(2) Frozen/chilled products.
(3) No low temperature requirements.
(4) Checking in line with the requirements of Commission Decision 93/352/EEC taken in execution of Article 18 (4) of Council Directive 90/675/EEC.
(5) Ungulates: cattle, pigs, sheep, goats, wild and domestic solipeds, etc.
(6) As defined in Directive 90/426/CEE.'

COMMISSION DECISION

of 21 December 1994

amending Decision 93/495/EEC laying down specific conditions for importing fishery products from Canada

(94/989/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 91/493/EEC of 22 July 1991 [1], laying down the health conditions for the production and the placing on the market of fishery products, and in particular Article 11 (5) thereof,

Whereas the list of establishments and factory ships approved by Canada for importing fishery products into the Community has been drawn up in Commission Decision 93/495/EEC [2], as last amended by Decision 94/674/EC [3]; whereas this list may be amended following the communication of a new list by the competent authority in Canada;

Whereas the competent authority in Canada has communicated a new list adding 39 establishments, deleting nine establishments and amending the data of six establishments;

Whereas it is necessary to amend the list of approved establishments;

Whereas the measures provided for in this Decision have been drawn up in accordance with the procedure laid down by Commission Decision 90/13/EEC [4],

HAS ADOPTED THIS DECISION:

Article 1

Annex B of Decision 93/495/EEC is amended as follows:

1. The following establishments are deleted:

'0638	Canadian Arctic Smoked Product	Edmonton	Alberta
0731	Leader Marine Ltd	Vancouver	British Columbia
0944	S.S.I. Sea Products Ltd	Saltspring Island	British Columbia
1635	Harry's Roadside	Meadow Portage	Manitoba
1740	Agpro Fish Farms	Winnipeg	Manitoba
1945	Nuxalk Fish Traders Ltd	Bella Coola	British Columbia
1977	Associated Freezers of Canada Inc.	Vancouver	British Columbia
1981	Valley Marine Ltd	Langley	British Columbia
1990	Mari Fish Ltd	Alert Bay	British Columbia'.

[1] OJ No L 268, 24. 9. 1991, p. 15.
[2] OJ No L 232, 15. 9. 1993, p. 43.
[3] OJ No L 267, 18. 10. 1994, p. 15.
[4] OJ No L 8, 11. 1. 1990, p. 70.

2. The following establishments are inserted in accordance with the numerical order:

'0012	Hollis Fowler & Brothers Enterprises Ltd	Capstan Island, Labrador	Newfoundland
0017	Shell Fresh Farms	Pool's Cove	Newfoundland
0049	Sharp's Frozen Foods Limited	Humber Village	Newfoundland
0050	Dorman Roberts Limited	Triton	Newfoundland
0135	Torngat Fish Producers Co-operative Society Ltd	Hopedale	Newfoundland
0624	Port Dover Fish Co. Ltd	Port Dover	Ontario
0646	Gimli Fish Co. Ltd	Winnipeg	Manitoba
0651	Keewatin in Fish and Meats	Port Dover	Ontario
0926	Westcoast Harvester Ltd	Vancouver	British Columbia
0927	Blue Star Cold Storage Ltd	Surrey	British Columbia
0930	454307 BC Ltd	Alert Bay	British Columbia
0931	Great Blue Heron Enterprises Ltd	Powell River	British Columbia
0932	Nuyaltwa Fish Plant	Bella Coola	British Columbia
0934	Nisga'a Tribal Council	New Aiyansh	British Columbia
0935	Hardy Buoys Smoked Fish Inc.	Port Hardy	British Columbia
0936	Triumph Seafood Ltd	Richmond	British Columbia
0945	Norden Food Ltd	North Vancouver	British Columbia
0946	Campbell River Seafoods & Lockers Ltd	Campbell River	British Columbia
0948	Inpac Sea Products (1993) Ltd	Richmond	British Columbia
0949	Douglas's Custom Smoking	Port Hardy	British Columbia
0950	Alpha Processing Ltd	Port Hardy	British Columbia
0953	Blue Pacific Seafoods Ltd	Abbotsford	British Columbia
1071	Petty Harbour Fishermens Producers Co-operative Society, Limited	Petty Harbour	Newfoundland
1073	J. W. Hiscock Sons Limited	Campbellton	Newfoundland
1095	Torngat Fish Producers Co-operative Society, Ltd	Postville	Newfoundland
1114	P & G Farms Limited	Centreville	Newfoundland
1639	Hale Fisheries	Eagle River	Ontario
1649	S. Long Fisheries	Kenora	Ontario
1746	Interlake Kingo Products Ltd	St Laurent	Manitoba
1757	Aliments Piatto-Mare Food Inc.	Hawkesbury	Ontario
1758	Pangnirtung Fisheries Ltd	Pangnirtung	Northwest Territories
1847	Whattam Fishery	Picton	Ontario
1897	Sameluk Fisheries	Thunder Bay	Ontario
1987	Sealand Foods International Inc.	Richmond	British Columbia
2456	058158 Inc. NB Limited	Pointe Du Chêne	New Brunswick
3169	Weekend Fisheries Limited	Metaghan	Nova Scotia
3308	Thorburn Wharf Fisheries Ltd	Sandy Point	Nova Scotia
3312	Captain Earl's Seafoods Limited	Lockeport	Nova Scotia
3313	N. LeBlanc Enterprises Limited	Sandy Point	Nova Scotia'.

3. The data of the following establishments:

'0715	Hywave (Fairview Plant)	Prince Rupert	British Columbia
0721	Vancouver ShellFish and Fish	Vancouver	British Columbia
0916	Bornstein Seafoods Canada Ltd	Port Albion	British Columbia
0923	Wood Bay Salmon Farms Ltd	Sechelt	British Columbia
1640	Ikaluktutiak Co-op Ltd	Cambridge Bay	Northwest Territories
2134	Conpak Seafoods Inc.	Anchor Point	Newfoundland'

are replaced by:

'0715	J. S. McMillan Ltd — Fairview Plant	Prince Rupert	Britsh Columbia
0721	Vancouver Shell Fish and Fish Co. Ltd	Vancouver	British Columbia
0916	Salish Seafood Services	Port Albion	British Columbia
0923	Wood Bay Seafood Ltd	Sechelt	British Columbia
1640	Kitikmeot Fish Plant	Cambridge Bay	Northwest Territories
2134	Anchor Shellfish Inc.	Anchor Point	Newfoundland'.

Article 2

This Decision is addressed to the Member States.

Done at Brussels, 21 December 1994.

For the Commission
René STEICHEN
Member of Commission

COMMISSION DECISION

of 21 December 1994

determining for Austria the number of Animo units which may benefit from the Community's financial contribution

(Only the German text is authentic)

(94/990/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Decision 91/539/EEC of 4 October 1991 laying down implementing rules for Decision 91/426/EEC (Animo) [1], as amended by the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded and in particular Article 1a thereof,

Whereas the Austrian authorities have notified the Commission of the number of Animo units within the meaning of Article 1 of Commission Decision 91/398/EEC of 19 July 1991 on a computerized network linking veterinary authorities (Animo) [2] which are to be set up in their territory;

Whereas the number of units which may benefit from a Community financial contribution should be fixed,

HAS ADOPTED THIS DECISION:

Article 1

The number of units within the meaning of Article 1 of Decision 91/398/EEC which may benefit from the Community's financial contribution to the setting up in Austria of the Animo comupterized network shall be 74.

Article 2

This Decision shall take effect subject to and on the date of the entry into force of the Treaty of Accession of Austria, Finland and Sweden.

Article 3

This Decision is addressed to the Republic of Austria.

Done at Brussels, 21 December 1994.

For the Commission
René STEICHEN
Member of the Commission

(1) OJ No L 294, 25. 10. 1991, p. 47.
(2) OJ No L 221, 9. 8. 1991, p. 30.

COMMISSION DECISION

of 21 December 1994

amending the information contained in the list in the Annex to Commission Regulation (EEC) No 55/87 establishing the list of vessels exceeding eight metres in length overall permitted to use beam trawls within certain coastal areas of the Community

(94/991/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources [1], as last amended by Regulation (EC) No 1796/94 [2],

Having regard to Commission Regulation (EEC) No 55/87 of 30 December 1986 establishing the list of vessels exceeding eight metres in length overall permitted to use beam trawls within certain coastal areas of the Community [3], as last amended by Regulation (EC) No 3410/93 [4], and in particular Article 3 thereof,

Whereas authorities of the Member States concerned have applied for the information in the list provided for in Article 9 (3) (b) of Regulation (EEC) No 3094/86 to be amended; whereas the said authorities have provided all the information supporting their applications pursuant to Article 3 of Regulation (EEC) No 55/87; whereas it has been found that the information complies with the requirements and whereas, therefore, the information in the list annexed to the Regulation should be amended,

HAS ADOPTED THIS DECISION:

Article 1

The information in the list annexed to Regulation (EEC) No 55/87 is amended as shown in the Annex hereto.

Article 2

This Decision is addressed to the Member States.

Done at Brussels, 21 December 1994.

For the Commission
Yannis PALEOKRASSAS
Member of the Commission

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(1) OJ No L 288, 11. 10. 1986, p. 1.
(2) OJ No L 187, 22. 7. 1994, p. 1.
(3) OJ No L 8, 10. 1. 1987, p. 1.
(4) OJ No L 310, 14. 12. 1993, p. 27.

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

Matrícula y folio	Nombre del barco	Indicativo de llamada de radio	Puerto base	Potencia del motor (kW)
Havnekendings-bogstaver og -nummer	Fartøjets navn	Radio-kaldesignal	Registreringshavn	Maskin-effekt (kW)
Äußere Identifizierungs-kennbuchstaben und -nummern	Name des Schiffes	Rufzeichen	Registrierhafen	Motorstärke (kW)
Εξωτερικά στοιχεία και αριθμοί αναγνώρισης	Όνομα σκάφους	Αριθμός κλήσης ασυρμάτου	Λιμένας νηολόγησης	Ισχύς κινητήρος (kW)
External identification letters + numbers	Name of vessel	Radio call sign	Port of registry	Engine power (kW)
Numéro d'immatriculation lettres + chiffres	Nom du bateau	Indicatif d'appel radio	Port d'attache	Puissance motrice (kW)
Identificazione esterna lettere + numeri	Nome del peschereccio	Indicativo di chiamata	Porto di immatricolazione	Potenza motrice (kW)
Op de romp aangebrachte identificatieletters en -cijfers	Naam van het vaartuig	Roepletters	Haven van registratie	Motor-vermogen (kW)
Identificação externa letras + números	Nome do navio	Indicativo de chamada	Porto de registo	Potência motriz (kW)
1	2	3	4	5

A. Datos que se retiran de la lista — Oplysninger, der skal slettes i listen — Aus der Liste herauszunehmende Angaben — Στοιχεία που διαγράφονται από τον κατάλογο — Information to be deleted from the list — Renseignements à retirer de la liste — Dati da togliere dall'elenco — Inlichtingen te schrappen uit de lijst — Informações a retirar da lista

BÉLGICA / BELGIEN / BELGIEN / ΒΕΛΓΙΟ / BELGIUM / BELGIQUE / BELGIO / BELGIË / BÉLGICA

A	2	Nancy	OPAB	Antwerpen	213
BOU	201	Adriana Maria	OPHS	Boekhoute	220
K	8	Aquarius	OPAH	Kieldrecht	220
K	13	Morgenster	OPAM	Kieldrecht	218
N	73	Kotje	OPCU	Nieuwpoort	221
O	152	John	OPFV	Oostende	221
O	225	Norman Kim	OPIQ	Oostende	184
O	481	Bi Si Pi	OPTC	Oostende	165
Z	207	Permeke	OPHY	Zeebrugge	221
Z	554	Lucky Star II	OPVX	Zeebrugge	191

1	2	3	4	5
ALEMANIA / TYKSLAND/ DEUTSCHLAND / ΓΕΡΜΑΝΙΑ / GERMANY / ALLEMAGNE / GERMANIA / DUITSLAND / ALEMANHA				
ACC 9	Ozean	DCHJ	Accumersiel	219
BRA 8	Jade	DDIJ	Brake	220
CUX 3	Fortuna	DJEN	Cuxhaven	180
CUX 8	Johanna		Neuhaus-Oste	92
DOR 5	Stör	DFAT	Dorum	164
FED 9	Bianka	DLIX	Fedderwardersiel	191
GRE 22	Frieda Luise	DCPU	Greetsiel	199
HOO 1	Kpt Haye Laurenz	DJIS	Hooge	136
HUS 7	Gila	DDEY	Husum	175
NC 304	Gretha Johanna	DMEE	Cuxhaven	221
NC 320	Aaltje Van Ente	DFMD	Cuxhaven	220
NC 321	Hendrika Maria	DMED	Cuxhaven	220
NOR 205	Anette	DCEM	Norddeich	161
SC 2	Stolper Bank II	DIVQ	Büsum	221
SC 44	Klaus Groth	DIUC	Büsum	184
SD 6	Cap Arcona	DIRF	Friedrichskoog	184
SD 30	Cormoran	DFOC	Friedrichskoog	140
ST 6	Hilke Marita	DNHA	Tönning	221
ST 11	Birgit R	DJDF	Tönning	184
ST 24	Karolin	DJIF	Ording	99
DINAMARCA / DANMARK/ DÄNEMARK / ΔΑΝΙΑ / DENMARK / DANEMARK / DANIMARCA / DENEMARKEN / DINAMARCA				
E 9	Tjalfe	XPBF	Esbjerg	125
E 106	Oostbank	OXMN	Esbjerg	220
REINO UNIDO / FORENEDE KONGERIGE/ VEREINIGTES KÖNIGREICH / HNΩMENO BAΣIΛEIO / UNITED KINGDOM / ROYAUME-UNI / REGNO UNITO / VERENIGD KONINKRIJK / REINO UNIDO				
BCK 105	Westra	MBHY	Buckie	171
FH 36	Auldgirth	2JZU	Falmouth	82
P 336	Zuiderzee	2MHY	Porstmouth	210
PH 418	NK Despoerandum	MBEK6	Plymouth	118
PAÍSES BAJOS / NEDERLANDENE / NIEDERLANDE / ΚΑΤΩ ΧΩΡΕΣ / NETHERLANDS / PAYS-BAS / PAESI BASSI / NEDERLAND / PAÍSES BAIXOS				
BR 10	Johanna	PEDQ	Oostburg-Breskens	221
BR 23	Nellie	PGEL	Oostburg-Breskens	179
BR 29	Eendracht		Oostburg-Breskens	220
DZ 1	Lauwerszee		Delfzijl	88
EH 12	Dirk Senior		Enkhuizen	140
HA 106	Reseda	PHAD	Harlingen	220
HD 5	Albertina Willemmina		Den Helder	221

1		2	3	4	5
HD	45	Marie Anne		Den Helder	77
HON	29	Najade		Hontenisse	50
KG	15	Hendrik		Kortgene	221
KW	4	Willem Jan		Katwijk	221
KW	72	Tina Adriana		Katwijk	221
LO	4	Rana		Ulrum-Lauwersoog	99
LO	15	Johannes Post		Ulrum-Lauwersoog	97
NB	2	Vrijheid		Nieuw-Beijerland	110
SCH	65	Hendrina Johanna	PEQV	Scheveningen	221
SL	9	Boy Robin		Stellendam	221
SL	16	Morgenster		Stellendam	166
TM	16	Wendeltje	PINS	Termunten	96
TS	3	Bass Rock		Terschelling	156
TX	10	De Vrouw Naantje		Texel	134
UK	26	Vrijheid		Urk	63
UK	35	Noordster		Urk	110
UK	158	Willem Jacob		Urk	221
UK	321	Hessel Van Urk		Urk	221
UK	353	Regina Maris	PGZN	Urk	206
WL	21	Annie	PCRZ	Westdongeradeel	134
WR	10	Petrina	PGSD	Wieringen	188
WR	12	Dirk		Wieringen	96
WR	98	Else Jeanette	PDXK	Wieringen	221
WR	123	Jitske		Wieringen	134
WR	158	Antonia		Wieringen	220
ZK	2	Jacob Geertruida	PEHZ	Ulrum-Zoutkamp	188
ZK	19	Solca		Ulrum-Zoutkamp	55
ZK	23	Wilhelmina	PIOV	Ulrum-Zoutkamp	173
ZK	24	De Soltcamp		Ulrum-Zoutkamp	0
ZK	40	Morgenster	PGAZ	Ulrum-Zoutkamp	221
ZK	87	Klazina		Ulrum-Zoutkamp	221

B. Datos que se añaden a la lista — Oplysninger, der skal anføres i listen — In die Liste hinzuzufügende Angaben — Στοιχεία που προστίθενται στον κατάλογο — Information to be added to the list — Renseignements à ajouter à la liste — Dati da aggiungere all'elenco — Inlichtingen toe te voegen aan de lijst — Informações a aditar à lista

BÉLGICA / BELGIEN / BELGIEN / ΒΕΛΓΙΟ / BELGIUM / BELGIQUE / BELGIO / BELGIË / BÉLGICA

N	73	Kotje	OPCU	Nieuwpoort	220
O	2	Nancy	OPAB	Oostende	213
O	152	Aran	OPFV	Oostende	221
O	225	Norman Kim	OPIQ	Oostende	184
O	481	Bi Si Ti	OPTC	Oostende	165
Z	8	Aquarius	OPAH	Zeebrugge	220
Z	13	Morgenster	OPAM	Zeebrugge	218
Z	207	Verwachting	OPHY	Zeebrugge	221
Z	554	Nadia	OPVX	Zeebrugge	191

1	2	3	4	5
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CUX 8	Johanna		Cuxhaven	92
DOR 5	Stör	DFAT	Dorum	165
FED 9	Bianca	DLIX	Fedderwardersiel	191
GRE 22	Frieda-Luise	DCPU	Greetsiel	199
HOO 1	De Liekedeelers	DJIS	Hooge	136
HUS 7	Gila	DDEJ	Husum	175
NC 304	Gretha Johanna	DFNM	Cuxhaven	221
NC 320	Aaltje Van Ente	DFMD	Cuxhaven	221
NC 321	Hendrika Maria	DMED	Cuxhaven	221
NOR 205	Annette	DCEM	Norddeich	161
SC 2	Stolperbank II	DIVQ	Büsum	221
SC 44	Klaus Groth I	DIUC	Büsum	184
SD 6	Cap Arkona	DIRF	Friedrichskoog	184
SD 30	Cormoran	DFOC	Friedrichskoog	140
ST 6	Hilke-Maritta	DNHA	Tönning	221
ST 11	Birgitt-R	DJDF	Tönning	184
ST 24	Karolin	DJIF	Tönning	99
DINAMARCA / DANMARK/ DÄNEMARK / ΔΑΝΙΑ / DENMARK / DANEMARK / DANIMARCA / DENEMARKEN / DINAMARCA				
E 385	Bianca	OXRV	Esbjerg	125
L 425	Else Nees	OXMN	Thyborøn	220
RI 78	Lasse Stensberg	XP 5820	Hvide Sande	196
REINO UNIDO / FORENEDE KONGERIGE/ VEREINIGTES KÖNIGREICH / ΗΝΩΜΕΝΟ ΒΑΣΙΛΕΙΟ / UNITED KINGDOM / ROYAUME-UNI / REGNO UNITO / VERENIGD KONINKRIJK / REINO UNIDO				
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P 336	Zuiderzee	2MHY	Portsmouth	210
PAÍSES BAJOS / NEDERLANDENE / NIEDERLANDE / ΚΑΤΩ ΧΩΡΕΣ / NETHERLANDS / PAYS-BAS / PAESI BASSI / NEDERLAND / PAÍSES BAIXOS				
BR 10	Johanna	PFDQ	Oostburg-Breskens	221
BR 29	Eendracht	PDYB	Oostburg-Breskens	220
EH 12	Dirk Senior	PDQZ	Enkhuizen	140
GO 25	Elizabeth		Goedereede	176
HA 4	Zeelandia		Harlingen	221
HA 92	De Zes Gebroeders		Harlingen	162
HA 106	Reseda	PHAD	Harlingen	221
HD 5	Albertina Willemina	PCKE	Den Helder	221
KW 4	Willem Jan	PIPF	Katwijk	221
KW 72	Tina Adriana	PEQF	Katwijk	221
LO 4	Rana		Ulrum-Lauwersoog	88

1		2	3	4	5
LO	6	Zeermeermin		Ulrum-Lauwersoog	156
LO	15	Johannes Post		Ulrum-Lauwersoog	96
SCH	65	Hendrina Johanna	PEQU	Scheveningen	221
SL	8	Batavier	PFDB	Stellendam	158
SL	9	Boy Robin		Stellendam	221
SL	16	Morgenster		Stellendam	165
TH	42	Erwin		Tholen	110
TM	16	Wendeltje		Termunten	96
TS	1	Pietertje Faber		Terschelling	96
UK	158	Willem Jacob	PIPM	Urk	221
WL	21	Annie	PCRZ	Westdongeradeel	154
WR	3	Noordster	PGII	Wieringen	214
WR	10	Petrina	PGSD	Wieringen	220
WR	98	Else Jeannette		Wieringen	221
WR	123	Jitske	PFDO	Wieringen	221
WR	158	Antonia		Wieringen	221
ZK	2	Jacob Geertruida	PEZH	Ulrum-Zoutkamp	221
ZK	19	Solea		Ulrum-Zoutkamp	79
ZK	23	Wilhelmina	PIOU	Ulrum-Zoutkamp	173
ZK	24	De Soltcamp		Ulrum-Zoutkamp	116
ZK	40	Morgenster	PGAQ	Ulrum-Zoutkamp	221
ZK	87	Klazina	PFKD	Ulrum-Zoutkamp	221

COMMISSION DECISION

of 21 December 1994

concerning applications for refund of anti-dumping duties collected on imports of certain compact disc players originating in Japan (Amroh BV, PIA Hi-fi)

(94/992/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community [1], as last amended by Regulation (EC) No 522/94 [2], and in particular Article 16 thereof,

Whereas,

I. PROCEDURE

(1) Between May 1992 and July 1993, Amroh BV and PIA Hi-fi, both independent importers respectively based in Weesp (Netherlands) and Weiterstadt (Germany) made nine applications for the refund of definitive anti-dumping duties imposed by Council Regulation (EEC) No 112/90 [3] on certain compact disc players originating in Japan and paid by them on the importation from May 1992 to June 1993 of compact disc players produced and exported by Accuphase Laboratory. They argued that they had paid export prices significantly in excess of normal value. Their applications are admissible, in particular concerning time limits since they were introduced within the three months deadline set by the provisions of Article 16 of Regulation (EEC) No 2423/88.

(2) Three of the applications of Amroh BV pertained to goods imported from May to July 1992, a period already covered by a Commission Decision [4] concerning applications for refund of anti-dumping duties collected on imports of compact disc players originating in Japan. That Decision, where a refund was granted to the amount of 16,9 % of the value used by the relevant authorities for calculating the amount of anti-dumping duty, should also apply to those three transactions since their inclusion in the calculation has no impact on the actual dumping margin for the period considered.

(3) The Commission decided to handle the other applications, for which importation took place between February 1993 and June 1993, according to the rules on recurring applications laid down in point I (4) of the Commission notice concerning the reimbursement of anti-dumping duties [5]. The information required for judging the validity of the applications was provided for the period 21 December 1992 to 20 June 1993 inclusive and sent direct to the Commission by Accuphase Laboratory at the applicants' request.

(4) The Commission sought and verified all information it deemed to be necessary for the purpose of the examination of the refund applications.

(5) The refund applicants have been informed of the results of the examination of their requests. A reasonable period of time was granted to make representations on the above information and due account has been taken of these representations where considered appropriate.

II. PRODUCT UNDER CONSIDERATION

(6) The definition of the product under considereration is identical to that contained in Regulation (EEC) No 112/90, as amended by Regulation (EEC) No 819/92 [6]. The product considered is certain compact disc players falling within CN codes ex 8519 31 00, ex 8519 39 00, ex 8519 99 10, ex 8520 31 90, ex 8520 39 10, ex 8520 39 90 and ex 8527 31 91 (Taric codes 8519 31 00*10, 8519 39 00*10, 8519 99 10*10, 8520 31 90*30, 8520 39 10*10, 8529 39 90*10 and 8527 31 91*10) [7] (hereafter referred to as CDP's).

(1) OJ No L 209, 2. 8. 1988, p. 1.
(2) OJ No L 66, 10. 3. 1994, p. 10.
(3) OJ No L 13, 17. 1. 1990, p. 21.
(4) OJ No L 150, 22. 6. 1993, p. 44.
(5) OJ No C 266, 22. 10. 1986, p. 2.
(6) OJ No L 87, 2. 4. 1992, p. 1.
(7) Stand-alone sound reproducers with a laser optical reading system and with external dimensions of at least 216 × 45 × 150 mm, equipped to accommodate up to a maximum of 10 compact discs, including sound reproducers which may be incorporated in a rack system but can nevertheless operate alone separately from the rack, with their own power supply and commands, functioning with AC mains and supply of usually 110/120/220/240 V and not capable of operating with a power supply of 12 V DC or less.

III. REFUND FINDINGS

A. Merits of the claim

(7) Article 16 (1) of Regulation (EEC) No 2423/88 makes it the responsibility of the importer which has paid an anti-dumping duty and is applying for refund of that duty to show that the duties collected exceed the dumping margin calculated for the relevant reference period. This actual dumping margin should, as far as possible, be calculated using the same method as that applied during the initial investigation.

(8) The Commission considered that the information supplied by the applicants and the exporter regarding normal value and the export prices of the different CDP models was sufficient to calculate correctly the weighted average actual dumping margin.

1. *Normal value*

(9) One of the CDP models produced by Accuphase Laboratory was sold on the domestic market in sufficient quantities to be representative and at prices which permitted recovery of all costs reasonably allocated in the normal course of trade. Accordingly, normal value was determined on the basis of the weighted average prices of this model of CDP net of any rebates or discounts. For the other models, normal value was constructed in conformity with Article 2 (3) (b) (ii) of Regulation (EEC) No 2423/88.

2. *Export price*

(10) Since Accuphase Laboratory sold CDP's directly to independent importers in the Community, export prices were determined on the basis of the net prices actually paid or payable for the products sold for export to the Community.

3. *Comparison*

(11) For the purpose of a fair comparison between normal value and export price and in accordance with Article 2 (9) and (10) of Regulation (EEC) No 2423/88, the Commission took account of differences affecting price comparability where a direct relationship of these differences to the sales under consideration could be satisfactorily demonstrated. Adjustments were in particular made in respect of freight, insurance, handling expenses and sales personnel salaries. All comparisons were made at the same level of trade, at the ex-factory level.

(12) As far as differences in guarantee costs are concerned, the Commission established that the adjustment claimed by the applicant to take account of the level of these domestic costs was partly based on transactions falling outside the investigation period. Therefore, the Commission calculated the average cost for this item on all sales of stand-alone CDP's for the relevant period and adjusted the normal value on this basis.

(13) The adjustments claimed for credit costs and commissions were only made in so far as they were sufficiently evidenced.

(14) Accuphase Laboratory also made a claim for sales promotion expenses. However, Article 2 (10) (c) of Regulation (EEC) No 2423/88 does not provide for adjustments for differences in such expenses which are not directly related to the sales under consideration since such differences do not affect price comparability and the claim was, accordingly, rejected.

4. *Dumping margin*

(15) For the reference period concerned, the Commission compared the weighted average normal value of each CDP model, ex-factory, with the ex-factory export price charged by Accuphase Laboratory for each of the consignments sold for export to the Community during the same period. The Commission found the average dumping margin during the period under consideration to be lower than the duty established in Regulation (EEC) No 112/90 as being applicable to this producer. The Commission found the weighted average dumping margin, expressed as a percentage of total cif value, for the period under consideration to be 15,7%. Consequently, the applicants have shown that the duty collected at a rate of 32% exceeds the actual dumping margin for the period concerned.

B. Amounts to be reimbursed

(16) The amounts to be reimbursed to the applicants, represented the difference between the rate of duty collected and the actual dumping margin, are equal to 16,3% (32% minus 15,7%) of the value used by the relevant authorities to calculate the level of anti-dumping duty.

(17) For the transactions mentioned in recital 2, the amounts to be reimbursed are equal to 16,9% of the value used by the relevant authorities to calculate the level of the anti-dumping duty.

(18) The applicants were informed of the results of this examination and made no comments. The

Commission informed the Member States and gave its opinion on the matter. No Member State raised any objection,

HAS ADOPTED THIS DECISION:

Article 1

The applications for the refund of anti-dumping duties submitted by Amroh BV and PIA Hi-fi Vertriebs GMBH and for which importation took place within the period 21 December 1992 to 20 June 1993 are granted to the amount of 16,3 % of the value used by the relevant authorities for calculating the amount of anti-dumping duty.

The applications for the refund of anti-dumping duties submitted by Amroh BV and for which importation took place from May to July 1992 are granted to the amount of 16,9 % of the value used by the relevant authorities for calculating the amount of anti-dumping duty.

Article 2

The amounts set out in Article 1 shall be refunded respectively by the Dutch and German authorities.

Article 3

This Decision is addressed to the Kingdom of the Netherlands, the Federal Republic of Germany and the applicants:

— Amroh BV, Hogeweyselaan 227, 1382 JL Weesp, Netherlands,

— PIA Hi-fi Vertriebs Gmbh, Rosenweg 6, 64331 Weiterstadt, Germany.

Done at Brussels, 21 December 1994.

For the Commission

Leon BRITTAN

Member of the Commission