

COMMISSION

COMMISSION DECISION

of 17 December 1981

relating to a proceeding under Article 85 of the EEC Treaty

(IV/29.995 — NAVEDA-ANSEAU)

(Only the Dutch and French texts are authentic)

(82/371/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 (¹), and in particular Articles 3 and 15 thereof,

Having regard to the decision taken by the Commission on 14 November 1980 to initiate the proceeding on its own initiative;

Having heard the undertakings concerned in accordance with the provisions of Article 19 (1) of Regulation No 17 and with those of Commission Regulation No 99/63/EEC of 25 July 1963 (²);

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions, delivered pursuant to Article 10 of the said Regulation No 17 on 10 November 1981;

Whereas:

I. THE FACTS

A. Subject matter of the proceeding

- On 13 December 1978, an agreement was concluded in Brussels, Belgium, called the 'Agreement concerning the use of the NAVEDA-ANSEAU conformity label for washing-machines and dishwashers', hereinafter

referred to as 'the Agreement'. The Agreement seeks to make compulsory, with effect from 1 January 1979, the attachment to washing machines and dishwashers intended for the Belgian market of a conformity label certifying that they conform to the general safety requirements laid down by water companies for the avoidance of contamination of publicly-supplied drinking water.

B. The relevant market

- In 1980, total imports of washing machines into Belgium and Luxembourg were valued at 54 million ECU, including imports worth 51.7 million ECU from EEC Member States; total imports of dishwashers into Belgium and Luxembourg were valued at 18.8 million ECU, including imports worth 18.3 million ECU from EEC Member States. In 1977, Belgian manufacture of 'white goods' (washing machines, dishwashers, refrigerators and freezers) accounted for less than 10 % of apparent Belgian consumption of those products.

C. Parties to the Agreement

(1) First party:

- Manufacturers and sole importers affiliated to one or more of the following organizations:
 - the Communauté de l'Électricité (CEG) in Brussels, Belgium. This non-profit-making body, founded in 1956, comprises companies which generate and supply electricity, manufacturers and importers of electrical

(¹) OJ No 13, 21. 2. 1962, p. 204/62.

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

appliances, professional associations and technical bodies concerned with the applications of electricity. Its object is to promote directly and indirectly the development of electricity in all its forms. The CEG consists of groups of members (13 at present), including the two groups, Laundry Care and Dishwashers, whose representatives took part in the discussions with ANSEAU to draw up the Agreement;

- the Fédération du Commerce de l'Appareillage Électrique (FCAE-FHEA) in Brussels, Belgium. This non-profit-making body, founded in 1946, comprises manufacturers, importers and distributors of domestic electrical appliances. Its objective is to promote ethical and material improvements in the electrical appliances wholesale, import and export sectors.
- the Union des Fournisseurs des Artisans de l'alimentation – Division Grandes Cuisines (UFARAL-ULEVO) in Brussels, Belgium. This association comprises manufacturers and importers of cookers and other equipment for use in canteens and restaurants, etc.

4. The list of firms making up the first party at the time of signature of the Agreement is given in Annex I to this Decision. Moreover, on the basis of Article 4.1 of the Agreement, other manufacturers or sole importers acceded to the Agreement following its signature. The list of these firms is given in Annex II to this Decision. The UFARAL, although not an undertaking, is itself a party to the Agreement and not only through its members.

(2) Second party:

5. The Association Nationale des Services d'Eau (ANSEAU-NAVEWA) in Brussels, Belgium.

The objective of this non-profit-making body, founded in 1948, is to safeguard the common interests of water-supply companies in Belgium. The 31 water-supply companies which are members of ANSEAU are incorporated in various legal forms (joint local authority undertakings, utilities, associations of public authorities or companies that are partly privately owned companies). They were set up by the public

authorities with the aim of providing regular supply and distribution of water under conditions which fully guarantee the protection of public health. In 1965, ANSEAU drew up its general rules on users' equipment for Belgian territory, following the entry into force of a Royal Decree making suppliers liable under criminal law for the quality of water.

D. The main provisions of the Agreement

- 6. The purpose of the Agreement is 'to prevent, in the interests of public health, any deterioration in the quality of the water supplied due to contamination or pollution, particularly when washing machines or dishwashers are connected to the drinking-water supply' (Article 1 of the Agreement).
- 7. 'The Agreement shall govern the use of the NAVEWA-ANSEAU conformity label for washing machines and dishwashers' (Article 2). A set of special rules is annexed to the Agreement, laying down the technical requirements regarding conformity which such machines must meet. The main provisions of the Agreement are as follows:
- 8. — The Agreement, which came into force on 1 January 1979, is to apply for a period of three years. It is automatically extended for a further period of three years at the end of each such period (Article 3).
- 9. — For the purposes of implementation of the Agreement, the CEG acts as the representative of the firms comprising the first party (Article 4.1).
- 10. — Conformity labels shall be distributed solely by the CEG (Article 5). The CEG obtains the labels from ANSEAU at a charge of Bfrs 3.50 for each label issued (Annex II to the Agreement).
The CEG issues the labels to the contracting parties at the following prices:
 - Bfrs 4 for CEG members in the two groups, Laundry Care and Dishwashers,
 - Bfrs 5 for CEG members who are not in the abovementioned groups,
 - Bfrs 6 for users who are not members of the CEG.

11. — 'The contracting parties undertake to submit to ANSEAU via the CEG, prior to the placing on the Belgian market of new or modified machines, a complete technical file incorporating the following information:

- All the data necessary for identification (...),
- a detailed technical plan of the complete hydraulic circuit of the machines' (Article 6).

12. — 'ANSEAU shall carry out random sampling checks of the market at regular intervals in order to determine whether the machines placed in commercial distribution bear the conformity label and, if so, whether they in fact meet the technical requirements regarding conformity laid down in the special rules. Where there are justifiable grounds for so doing, the CEG may also request that ANSEAU carry out specific checks at a particular location' (Article 8.1).

13. — 'Where ANSEAU establishes, in the course of such checks, that a machine does not bear the conformity label, it shall inform the dealer concerned, by registered letter, that the machine in question does not meet the requirements for the connection of washing machines and dishwashers to the supply system' (Article 8.2).

14. The main provisions of the special rules annexed to the Agreement, which, as stated in Article 11 of the Agreement, are an integral part of it, are as follows:

15. — Washing machines and dishwashers shall be regarded as meeting the technical requirements regarding conformity where they completely fulfil the requirements of the general rules on users' equipment, as supplemented by the Rules concerning the construction and inspection of washing machines and dishwashers (Article 1).

16. — Article 38 of the general rules includes the following provision which laid down the requirements governing conformity inspection prior to the implementation of the new Agreement: 'Washing machines and dishwashers which are not on the list of appliances recognized by ANSEAU as conforming to the requirements may not be connected to the water-supply system. This list may be consulted at the offices of the water services.'

17. — The contracting parties themselves shall be responsible for determining whether machines to be placed on the Belgian market meet the abovementioned technical requirements regarding conformity. They may obtain the technical assistance of ANSEAU for this purpose. The first party shall be entitled to obtain ANSEAU's technical assistance 100 times each year, with exemption from payment (Article 2.1). Any further assistance rendered shall be paid for at the rate laid down in Article 1 of Annex II to the Agreement. The cost shall be approximately Bfrs 4 000 for one morning, in the course of which 10 machines may be inspected.

18. — Where it is found that the conformity label has been affixed to machines which do not meet the abovementioned technical requirements, the labels concerned must be removed within 10 days, unless the machines are made to conform to the requirements within the same period. The contracting party responsible shall, in addition, make a flat-rate payment to ANSEAU of Bfrs 50 000. If the contracting party does not comply with the penalties imposed within the prescribed period, or if he repeats the offence within three years, he shall lose the right to use the conformity label definitively (Article 3).

19. — Provision is made for the following transitional measures to be applied until 31 December 1979 at the latest:

- The first party shall add to the ANSEAU list of approved machines, which shall be applicable until 31 December 1978, the most recent manufacturer's serial number issued prior to that date,
- all machines bearing a subsequent manufacturer's serial number shall fall within the scope of this Agreement,
- all machines bearing an earlier manufacturer's serial number shall fall within the scope of the former rules. As from 1 April 1979, such machines shall, however, be accompanied by a certificate of conformity, including a detachable label to be affixed to the machine before it is put into service' (Article 6).

E. Origins of the Agreement

20. On 25 July 1978, a meeting was held at ANSEAU's registered office between the representatives of the two CEG groups, Laundry Care and Dishwashers, and the FCAE and the representatives of ANSEAU. The latter stated that the existing arrangements had the following disadvantages:

- both buyers and the water-supply company must consult the list in order to check whether the machine is listed,
- machines with the same hydraulic system but different numbering must be checked individually, which in some cases adds considerably to the cost of checking.'

The FCAE stated that:

'certain unofficial importers (known as parallel importers) also benefit from the verification obtained by the official importer without having to share in the costs.'

21. At a meeting on 21 September 1978, ANSEAU's working group of legal experts made the following observations on a preliminary draft Agreement submitted on 8 September 1978:

- 'The proposed Agreement between ANSEAU and the washing machine and dishwasher distributors concerned would enable 90 % of production to be checked. In order to check the remaining 10 %, 'the possibility might be considered of authorizing the distributors to establish the necessary contacts with those not party to the Agreement, with a view to making the conformity labels available to them also, on condition that they provide the distributors who are parties to the Agreement with the necessary guarantees and undertakings.'
- 'The Agreement in question would be provisional only, pending the issue by the EEC of Directives on the subject, which are currently being drafted.'
- 'It is advisable to draft the introduction in such a way as to emphasize the objectives of the parties concerned. As far as ANSEAU is concerned, the objective is most definitely to safeguard the quality of the water supplied and protect the health and safety of the consumer.'

22. — 'If the water companies find that a user has a machine which does not bear a conformity label, it will be their responsibility to check whether the machine meets the requirements regarding conformity; it will not, therefore, be able to claim payment for this service from the user.'

On 19 September 1978, at a joint meeting of the two CEG groups, Laundry Care and Dishwashers, the chairmen of the two groups reviewed the current negotiations with ANSEAU. They stated that the CEG's objectives were as follows:

- to reduce the costs of granting authorization and link them to CEG members' actual volume of sales,
- to combat fraudulent practices of which the user is the victim,
- to obtain for CEG members preferential treatment over non-members (appliances sold by non-members may not bear the authorization label, but they may, of course, have their appliances authorized by ANSEAU).'

The following conclusion was drawn: 'The consequence would be that if a water company found a machine without a label connected to its supply system, it could go so far as to cut off the water supply to the user concerned.'

23. The text of the Agreement was finalized at meetings on 10 and 13 October 1978 between the representatives of the CEG, the FCAE, UFARAL and ANSEAU. The amendment to Article 4.1 of the Agreement must be emphasized. The text proposed by ANSEAU was as follows: 'It is provided, moreover, that other parties may accede to this Agreement, provided that the CEG shall have sole power of decision in the matter, and subject to the express condition that such other parties shall also be bound by all the terms of this Agreement and shall recognize the CEG as their representative.'

After 'accede to this Agreement', the following phrase was added: 'provided that they are also manufacturers or sole importers'.

24. On 23 October 1978, a joint meeting of the two CEG groups, Laundry Care and Dishwashers,

was held, at which the FCAE and UFARAL were represented. The following statements were made by the CEG during this meeting:

- 'ANSEAU has now decided to recognize only its own label (conformity label) as proof that a washing machine or dishwasher conforms to its rules, its main objective being to avoid pollution of the water supply.'
- 'ANSEAU will inform the general public of this label through *inter alia* a press conference, leaflets inserted with statements of account and any other appropriate means of promotion.'
- 'ANSEAU will cease to publish the lists of authorized appliances which it has published hitherto and the label alone will certify that the appliance conforms to its rules.'
- 'There is no question of replacing the system that has been devised with any prohibitions on imports of equipment which does not conform to the ANSEAU rules, which is not within its power or ours; moreover, the Treaty of Rome, in fact, prohibits technical barriers to trade.'
- 'There is no other alternative for resolving the problem of authorization: there is either the old system which is expensive and unproductive ... or the proposed Agreement. The Agreement has the advantage of providing a weapon — albeit imperfect, but by no means negligible — against parallel imports: the CEG, which alone is authorized to issue conformity labels, will do so only to official sole importers.'

25. The draft Agreement received overwhelming approval at the end of that meeting, with the exception of two participants; Indesit and Philips, who had reservations with regard to the technical problems posed by the affixing of labels at the time of manufacture and the higher cost of using the labels for firms which sold a large number of machines from a restricted range of types. The final text of the Agreement was adopted at a meeting on 26 October 1978 between the representatives of the CEG, the FCAE, UFARAL and ANSEAU. It was stressed at the meeting that the new system would have the following advantage:

'We are convinced that, thanks to the publicity campaign which both parties will undertake to recommend that customers, in their own interest, should buy henceforth only machines that

conform to the rules (i.e. those bearing the conformity label), the sales of other machines will drop, even if they fulfil the requirements of the ANSEAU rules.'

26. The final text of the Agreement was communicated prior to its being signed to all the firms referred to in Annex I to this Decision; on the date of signature of the Agreement, 13 December 1978, all those firms, with the exception of the Despagne company, took part in a meeting to clarify certain points and the practical implementation of the Agreement.

F. Implementation of the Agreement

The implementation of the Agreement was accompanied by a major publicity campaign undertaken by the firms comprising the first party to the Agreement and by ANSEAU. Advertisements warned consumers against purchasing machines which did not bear the conformity label; some advertisements stated that machines without the ANSEAU label might entail heavy inspection costs and even temporary disconnection from the water supply.

28. The CEG, which alone is authorized to issue the conformity labels, strictly applied the provisions of the Agreement stating that only manufacturers or sole importers may accede to the Agreement (Article 4.1). The standard letter sent by the CEG to dealers who ask what procedure must be followed in order to obtain the NAVEWA-ANSEAU conformity labels includes the following provisions:

- 'You are requested ...
- (c) to confirm your status as *sole* importer for the Belgian market, specifying the brand(s) and type(s) of washing machines and/or dishwashers concerned;
- (d) to forward the certificate from your supplier(s) officially recognizing you as the sole importer, as referred to in (c) above'.

29. The standard letter was sent on 30 April 1979 in answer to request from S. A. Frabelmar in Ransart (a 'CORA' store), who stated that the company imported Indesit washing machines direct from Italy. The CEG sent copies of Frabelmar's request and its reply to the head

office of Indesit-Belgique to enable it, in the words of the covering letter, to 'defend itself, armed with proof, against at least one of its parallel importers'.

30. The same letter was sent on 8 August 1979 to Snack en Grootkeukenmateriaal, Koffiebranderij, CRES in Ghent. In its reply of 18 September 1979, the company stated that, in order to obtain information on the procedure to be followed, it had had to apply first to its local water-supply company, then to ANSEAU which had referred it to the CEG, which in turn informed the company that it must first contact UFARAL, since the equipment in question was for industrial catering. The CEG subsequently stated in its letter of 20 September 1979 that the stock of labels had in any event been used up by the firms which had been using them regularly since December 1978 and that it was waiting for further applications before reprinting them to meet requirements up to the end of 1980.

31. ANSEAU also played an active part in monitoring the implementation of the new system. It was stated at a meeting on 30 October 1979 between the manufacturers and distributors of washing machines and dishwashers and ANSEAU: 'The market is being intensively monitored by ANSEAU in both shops and exhibitions and trade fairs'. Where one or more of the machines displayed does not bear the conformity label, ANSEAU sends the dealer concerned a registered letter listing the machines which do not bear conformity labels and stating: 'We should like to draw your attention in particular to the fact that these machines therefore do not meet the requirements for connection to the water-supply system, which are designed to prevent any contamination or pollution of drinking water. Machines which bear the conformity label are certified as conforming to those requirements. In order to avoid any inconvenience to your customers, we would therefore advise you to request your supplier to remedy this situation without delay'.

32. A letter on these lines was sent on 25 July 1979 to the CAMPO company in Antwerp. It should be noted that approximately half of the machines which are referred to as not conforming to the requirements (that is, which do not bear the conformity label) appear in the list of machines

that conform to the requirements, published by ANSEAU on 15 January 1979.

33. ANSEAU also answers applications from foreign manufacturers or dealers who wish to export products to Belgium. In its letter of 5 November 1979 to Mr Mario Allieri, an Italian dealer who wanted to know what technical requirements had to be met before washing machines and dishwashers could be exported to Belgium, ANSEAU made the following statements:

'It should be noted that you are an exporter and not an importer; it is essential, therefore, that one of the people with whom you propose to conclude an agreement be appointed by you as the sole importer for Belgium of your make of machines. That person will then fulfil the necessary requirements for membership of the Communauté de l'Électricité (CEG), which acts on behalf of all the manufacturers and importers concerned.'

34. Finally, the local water services also carry out checks on users' premises to verify whether the machines installed are on the list of machines that conform to the rules or bear the conformity label. If neither of these requirements is met, the user is advised by letter that, within a period of three months, he must submit a detailed technical plan of the machine's complete hydraulic circuit and permit the water service to make the necessary checks on the machine, for which purpose partial dismantling of the machine must be carried out by the user himself. The user is advised that he may call upon the dealer, manufacturer or importer of the machine for that purpose.

35. Some manufacturers of washing machines and dishwashers established outside Belgium to whom such a letter had been transmitted told the Commission that they had been induced thereby to appoint a sole importer in Belgium.

36. Where the conformity check cannot be carried out within the prescribed period, the water service sends a registered letter instructing the user to disconnect the machine in question until it has been possible for the check to be made.

II. LEGAL ASSESSMENT

A. Article 85 (1) of the EEC Treaty

37. The manufacturers and sole importers affiliated to the CEG, the FCAE and the UFARAL, who

constitute the first party to the Agreement, are undertakings within the meaning of Article 85 (1). The water supply companies and services affiliated to ANSEAU which constitute the second party to the Agreement are undertakings within the meaning of that Article. The Agreement thus constitutes an agreement between undertakings and an association of undertakings.

38. Although Article 85 (1) refers only to agreements between undertakings, it also concerns agreements between associations of undertakings. The Court of Justice held in Case 67/63, SOREMA v. High Authority, [1964] ECR 151, that Article 65 of the ECSC Treaty, the terms of which are the same, as regards this point, as those of Article 85 of the EEC Treaty, applied to an agreement concluded by an association of undertakings. The Court reaffirmed this interpretation with regard to Article 85 of the EEC Treaty in Case 71/74, FRUBO v. Commission [1975] ECR 583, in which it held that Article 85 (1) applies to associations in so far as their own activity or that of their members tends to produce the effects which the Article covers.

39. The Agreement is an agreement which, through ANSEAU, also binds its members. Although ANSEAU does not have the formal power to impose rules on its members, but only to recommend that they implement the rules, the Agreement is in fact binding on the members of ANSEAU. Since the Agreement abolished, in respect of machines manufactured after 31 January 1979, the old system for checking conformity based on a list of authorized appliances, water-supply companies are obliged to recognize the NAVEWA-ANSEAU label as proof of conformity, in order to comply with their statutory obligations as regards water quality control. They would otherwise have to carry out conformity checks on an individual basis, on all washing machines and dishwashers sold in Belgium, which is impossible in practice.

40. According to its provisions, the purpose of the Agreement is 'to prevent, in the interests of public health, any deterioration in the quality of the water supplied due to contamination or pollution, particularly when washing machines or dishwashers are connected to the drinking-water supply.'

41. Both the text of the Agreement and the way in which it is implemented make it clear for the

following reasons that, in addition to its formal purpose, it is also the object of the Agreement to prevent competition within the common market within the meaning of Article 85 (1).

(a) *The NAVEWA-ANSEAU conformity label replaced the earlier system for checking conformity, based on the lists of authorized appliances*

42. ANSEAU does not dispute that, while lists of appliances that conform to the rules still exist, they concern only appliances which were manufactured prior to 31 January 1979, as is, moreover, provided in Article 6 of the special rules annexed to the Agreement, which state that the Agreement applies to all machines bearing a manufacturer's serial number issued subsequently.

43. The only means of checking the conformity of equipment manufactured after 31 January 1979, apart from the affixing of the conformity label, is the examination by ANSEAU or its members of each machine connected to the water supply. The machines must be approved on an individual basis, and approval cannot be given on the basis of the type of machine, since there is no provision for informing all the water-supply companies that a type of equipment has been recognized as conforming to the rules. The cost of this type of examination is disproportionate by comparison with the cost of the checks carried out pursuant to the Agreement (approximately Bfrs 10 000 for each examination).

44. The terms of the Agreement indicate, moreover, that even this possibility does not exist. It is clear from Article 8.2 of the Agreement that the purpose of the Agreement is to eliminate any possibility of providing proof of conformity other than by the affixing of the label. The general nature of the terms used invalidates unequivocally the argument put forward by the parties to the Agreement that the affixing of the label is only a specific means of carrying out the inspection of washing machines and dishwashers and concerns only machines marketed by manufacturers or sole importers. The abovementioned provision covers checks carried out on premises of all dealers, regardless of the origin of the machines.

45. In practice, ANSEAU sends a letter indicating that certain machines which do not bear the

conformity label therefore do not meet the conformity requirements even in the case of machines that are on the list of machines which conform to the requirements (cf. the letter sent to CAMPO, points 31 and 32 above). ANSEAU also delegates to its members the task of carrying out checks on dealers' premises.

46. As regards machines already installed on consumers' premises, the local water companies are responsible for checking machines which do not bear the conformity label. For the purpose of such checks, consumers are required to provide a technical plan of the hydraulic circuit and to undertake the partial dismantling of the machine.

47. The dissuasive effect of these measures was reinforced by the publicity campaign by ANSEAU and the other parties to the Agreement to encourage consumers to buy only machines bearing the conformity label and stressing the disadvantages which might result from purchasing machines which do not bear the label (cf. point 27). Such measures make it difficult if not impossible to sell machines which do not bear the label in Belgium, even where they meet the technical requirements regarding conformity laid down by ANSEAU.

(b) *Only manufacturers or sole importers may obtain the conformity labels*

48. Article 2 of the Agreement states that it governs the use of the NAVIEWA-ANSEAU conformity label for washing machines and dishwashers. This general provision precludes anyone other than the signatories of the Agreement from obtaining the said labels. Under Article 1 only manufacturers and sole importers may be signatories. Article 4.1 of the Agreement provides that other parties may accede to the Agreement 'provided that they are also manufacturers or sole importers and that the CEG shall have the sole power of decision in the matter ...'.

49. The CEG strictly controls the implementation of that provision by requiring firms wishing to obtain conformity labels to confirm their status as sole importers and to forward a certificate from their supplier officially recognizing them as sole importer (cf. point 28).

50. ANSEAU indicates to firms which request information from it that the labels may be issued only to sole importers and even that the latter must be members of the CEG (cf. the letter to Mr Allieri, point 33 above). Apart from the direct measures taken by ANSEAU, the discriminatory nature of the checks made on machines which can not qualify under the provisions of the Agreement has induced some foreign manufacturers to appoint sole importers in Belgium (cf. point 35 above).

51. The argument advanced by certain parties to the Agreement that some of them were not manufacturers or sole importers merely indicates that the Agreement has not been properly implemented and does not eliminate the Agreement's object of restricting competition. Moreover, it invalidates the argument that the Agreement can be extended only to other manufacturers or sole importers since they alone provide adequate guarantees.

52. The fact was not disputed that, except for the specific instance of industrial catering equipment, dealers who were not manufacturers or sole importers could obtain the conformity label only through the manufacturer or sole importer.

(c) *The conformity labels are distributed solely by the CEG, which is authorized for that purpose by all the contracting parties*

53. This condition, laid down in Article 5, and the more general requirement that new parties to the Agreement must recognize the CEG as their representative (last sentence of Article 4.1) reinforce the restrictive object of the Agreement, since it is possible to obtain the conformity labels only on the basis of the provisions of the Agreement. Even if the clause excluding importers other than sole importers were deleted, they would still be able to obtain the conformity labels only through the CEG. This requirement enables an organization comprising only manufacturers and sole importers to check on the sales of importers who are not sole importers.

54. As regards industrial catering equipment, even though UFARAL states that it is authorized by the CEG to distribute the relevant labels, the fact remains that no distinction is made in the Agreement, and the CEG's exclusive right to distribute the labels applies equally to that type of equipment. In any event, the CEG is still able, in delegating this power, to check on who has the labels and determine whether the applicants are in fact manufacturers or sole importers, by virtue of Article 4.1 of the Agreement. The fact that UFARAL may also distribute labels does not eliminate the restriction, since importers who are not members of UFARAL will normally apply to the CEG.

55. The fact that the technical data on new or modified machines must be forwarded to ANSEAU 'via the CEG' (Article 6 of the Agreement) also reinforces the restrictive object of the Agreement.

56. The combined effect of the provisions of the Agreement mentioned at points 42 to 55 above is that for washing machines and dishwashers imported into Belgium by importers other than sole importers the checking of conformity to ANSEAU requirements is carried out under conditions which discriminate against them by comparison with those which apply to sole importers and manufacturers established in Belgium. The only possibility for importers other than sole importers to obtain the conformity labels is to apply to the sole importer concerned. In the event of a refusal, they or the dealer must then have each machine individually examined, which is prohibitively expensive by comparison with the selling price of the machines. These provisions thus enable sole importers to check parallel imports and to take any other restrictive measures to prevent them (cf. point 29 above).

57. As regards industrial equipment, the restriction is not eliminated by virtue of the fact that the pattern of demand makes parallel imports difficult. The establishment of discriminatory conditions for authorization in respect of machines imported by importers other than sole importers is directed at all equipment imported by dealers who are able to provide customers with high-quality service but to whom the manufacturer does not wish to grant an exclusive dealing agreement, perhaps because of his selling policy. By tending to make the appointment of sole importers obligatory, while, according to UFARAL, the manufacturers do not pursue an exclusive distribution policy in this sector, the Agreement also restricts competition in this sector by its effect on the pattern of supply.

58. Therefore, the provisions of the Agreement excluding the possibility for importers other than sole importers to obtain a conformity check for the machines which they import into Belgium under conditions which are not discriminatory in comparison with those applying to sole importers and manufacturers constitute restrictions of competition within the meaning of Article 85 (1) of the Treaty.

59. These restrictions may affect trade between Member States, since the establishment of discriminatory conditions for the authorization of machines imported by importers other than sole importers may affect trade between the Member States in a manner prejudicial to the attainment of the objectives of a single market. They strengthen the exclusivity granted to sole importers in that they tend to exclude the possibility of other patterns of trade in the relevant products by way of parallel imports.

60. The Agreement restricts competition and may affect trade between Member States appreciably, not only because of the nature of the restrictions which it contains but also because it concerns all washing machines and dishwashers sold in Belgium and most of these machines are imported from other common market countries.

B. Article 85 (3) of the EEC Treaty

61. Before a decision can be taken granting exemption under Article 85 (3), the Agreement must have been notified to the Commission in accordance with Articles 4 (1) or 5 (1) of Regulation No 17, except where this requirement does not apply, pursuant to Articles 4 (2) or 5 (2) of that Regulation.

62. The Agreement was not notified to the Commission and it is not covered by the exceptions provided for in Article 4 (2) of Regulation No 17. The argument advanced by certain parties to the Agreement that the Agreement is exempt from the requirement

of notification on the basis of point (1) of Article 4 (2) of the Regulation is not acceptable. Point (1) provides that 'paragraph 1 shall not apply to agreements ... where the only parties thereto are undertakings from one Member State and the agreements, decisions or practices do not relate either to imports or to exports between Member States'. As the Court of Justice stated in the case *Fonderies Roubaix-Wattrelos* of 3 February 1976 (Case 63/75, [1976] ECR 111): 'This second condition must be interpreted with reference to the structure of Article 4 and its aim of simplifying administrative procedure, which it pursues by not requiring undertakings to notify agreements which, whilst they may be covered by Article 85 (1), appear in general, by reason of their peculiar characteristics, to be less harmful from the point of view of the objectives of this provision and which are therefore very likely to be entitled to the benefit of Article 85 (3).' In the present case, the Agreement restricts the right to obtain the conformity labels to manufacturers and sole importers (the latter forming the great majority of the parties to the Agreement) and may not benefit from any presumed application of Article 85 (3). Therefore the Agreement relates to imports and exports between Member States within the meaning of Article 4 (2) of Regulation No 17.

63. In any event, even if the Agreement had been notified, the exemption provided for in Article 85 (3) could not be granted, since the barriers to parallel imports tend to isolate the Belgian market in a manner incompatible with the basic principles of the common market. Moreover, while the Agreement may enable the quality of the water supply to be guaranteed, the provisions restricting competition referred to above are certainly not indispensable to that guarantee. There is also no reason to suppose that these provisions may benefit consumers.

C. Article 90 (2) of the EEC Treaty

64. Certain parties to the Agreement claimed that the prohibition under Article 85 does not apply to the Agreement by virtue of Article 90 (2) of the Treaty, since the members of ANSEAU are undertakings entrusted with the operation of services of general economic interest, within the meaning of that Article, and the application of the prohibition would obstruct the performance, in law or in fact, of the particular task assigned to them.

65. The water-supply companies which are members of ANSEAU and which were set up by the public authorities in order to secure regular supply and distribution of water under conditions which fully guarantee the protection of public health are undertakings entrusted with the operation of services of general economic interest, within the meaning of that Article.

66. Such undertakings are exempt from the requirement of compliance with the rules on competition only in so far as the application of such rules would obstruct the performance, in law or in fact, of the particular task assigned to them. It is not sufficient in this regard that compliance with the provisions of the Treaty makes the performance of the particular task more complicated. A possible limitation of the application of the rules on competition can be envisaged only in the event that the undertaking concerned has no other technically and economically feasible means of performing its particular task.

67. In the case in point, the establishment of discriminatory conditions for the authorization of machines imported by importers other than sole importers was not necessary, let alone indispensable, to enable the companies which are members of ANSEAU to perform the task assigned to them. The fact of making it possible for importers other than sole importers to obtain labels on non-discriminatory terms, direct from ANSEAU, could not in any case have obstructed the performance of that task. Article 90 (2) does not, therefore, preclude the application of the prohibition under Article 85 to the said provisions of the Agreement, and there is no need to examine whether the development of trade was likely to be affected to such an extent as would be contrary to the interests of the Community.

68. It is clear from the foregoing considerations that the parties to the Agreement have infringed Article 85 of the EEC Treaty. After receiving the statement of objections, they signified their intention to amend the Agreement, but so far as the Commission is aware they have not in fact done so. Therefore these infringements are still current.

69. It is, therefore, necessary, pursuant to Article 3 of Regulation No 17, to require the parties to the

D. Article 3 (1) of Regulation No 17

Agreement to bring these infringements to an end forthwith by amending the Agreement in such a way that it does not prevent importers other than sole importers from obtaining the NAVIEWA-ANSEAU conformity labels directly. It is also necessary to require ANSEAU to take all the measures necessary to ensure that such importers may obtain the labels direct from ANSEAU itself, without having to recognize the CEG as their representative, and on non-discriminatory terms by comparison with those granted to manufacturers and sole importers. Those measures must be adequately publicized. The amendments to the Agreement and the measures taken by ANSEAU must be communicated to the Commission within two months of the notification of this Decision.

E. Article 15 (2) of Regulation No 17

70. The parties to the Agreement have acted in breach of Article 85 since 1 January 1979 in the case of the original signatories and since the date of their accession to the Agreement in the case of the others. The infringements are still current, as is shown at point 68 above.

71. It is well known that the Community authorities regularly institute proceedings and impose penalties in respect of measures adopted by undertakings to prevent parallel imports and establish artificial barriers within the European Community, thereby prejudicing the unity of the common market. In the present case, restrictions on parallel imports based on a contractual system of checking conformity with technical requirements are serious infringements of Article 85, since the system is binding upon third parties.

72. It is, moreover, apparent from the statement of the facts that the undertakings which participated in the drawing-up of the Agreement, namely those referred to in Annex I to this Decision, committed these infringements deliberately, because they were aware of the anti-competitive object of the Agreement. Indeed, the chairmen of the two CEG groups, Laundry Care and Dishwashers, stated on 19 September 1978 that one of the aims of the CEG was to obtain for its members preferential treatment over non-members, who had to have their machines individually checked by ANSEAU, while only the

members of the CEG could use the conformity label. The CEG, moreover, stated unequivocally at the meeting on 23 October 1978 that the Agreement had the advantage of constituting a weapon against parallel imports. The responsibility of these undertakings results, on the one hand, from their participation in the drawing-up of the Agreement and, on the other hand, from their status as CEG members, because of the active part taken by the latter in the drawing-up and enforcement of the Agreement.

73. Therefore it is appropriate that fines should be imposed under Article 15 (2) of Regulation No 17 on the undertakings which took part in the drawing-up of the Agreement. It must be noted that, because of their participation in the drawing-up of the Agreement and their status as CEG members, all these undertakings bear the same responsibility. Moreover, the amounts of the fines imposed upon them must take into account the particular context in which the infringement was committed and the individual positions of those undertakings on the relevant market.

74. On the other hand, the undertakings which became parties to the Agreement after its signature, namely those referred to in Annex II to this Decision, took no initiative in the drawing-up of the Agreement and were practically obliged to participate. Therefore no fine should be imposed upon them.

75. It must also be noted that the most important part of the responsibility for the infringement lies with ANSEAU. The fact that the members of ANSEAU are entrusted by the public authorities with the operation of services of general economic interest made it possible to present the Agreement as being an obligatory agreement and thus to give it binding force *vis-à-vis* third parties who were not party to the Agreement. ANSEAU should, therefore, have paid particular attention to ensuring that the system instituted for checking the conformity of washing-machines and dishwashers could not be anti-competitive and discriminatory. ANSEAU did allow the Agreement to have such an objective, even though its group of legal experts had drawn its attention to the fact that the Agreement made it possible to check 90 % of production and that a solution must be found to enable the conformity labels to be made available to the remaining 10 %, which was never done. Moreover,

ANSEAU and the representatives of the CEG, the FCAE and UFARAL were present at the meeting on 26 October 1978, at which the participants stated that, thanks to the publicity campaign which would be undertaken to encourage consumers to purchase only machines bearing the conformity label, the sales of other machines would drop, even those which conformed to the ANSEAU rules. Therefore ANSEAU committed the infringements through gross negligence.

76. It is therefore also appropriate to impose a fine on ANSEAU pursuant to Article 15 (2) of Regulation No 17. Although ANSEAU bears the most important part of the responsibility, as it is a non-profit-making body, the fine must be equal in amount to the largest fines imposed on the undertakings which took part in the drawing-up of the Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of the Agreement concerning the use of the NAVIEWA-ANSEAU conformity label concluded on 13 December 1978 in Brussels, Belgium, excluding the possibility for importers other than sole importers to obtain a conformity check for the washing-machines and dishwashers which they import into Belgium under conditions which are not discriminatory by comparison with those which apply to manufacturers and sole importers, constitute infringements of Article 85 (1) of the Treaty establishing the European Economic Community. This applies in particular to Articles 2, 4.1, 5 and 6 of the said Agreement and to Article 6 of the special rules annexed to that Agreement.

Article 2

The parties to the Agreement shall forthwith bring to an end the infringements established in Article 1. They shall inform the Commission within two months of the notification of this Decision of the measures taken in this regard.

Article 3

1. A fine of 9 500 (nine thousand five hundred) ECU or Bfrs 390 723 (three hundred and ninety thousand

seven hundred and twenty-three Belgian francs) is hereby imposed on each of the following undertakings:

Despagne, Rue des Carmes 14/16, 4000 Liège, Asogem, Boomsesteenweg 65, 2630 Aartselaar, Hobart, Chaussée de Wavre 1120, 1160 Bruxelles, Indesit, Zoning Industriel, 1301 Bierges-Lez-Wavre, Bell-Telephone, Bell Telephonelaan 2, 2440 Geel, BBC Hausgeräte GmbH (succ. belge), Rue de Stalle 96, 1180 Bruxelles.

2. A fine of 38 500 (thirty-eight thousand five hundred) ECU or Bfrs 1 583 455 (one million five hundred and eighty-three thousand four hundred and fifty-five Belgian francs) is hereby imposed on each of the following undertakings:

Van Assche, Schaarbeeklei 636/638, 1800 Vilvoorde, Hoover, Chaussée de Haecht 1650, 1130 Bruxelles, Zanker, Rue de Molenbeek 94, 1020 Bruxelles, Disem-Andries, Eikestraat 8, 2800 Mechelen, Artsel, Boomsesteenweg 65, 2630 Aartselaar, IAZ, Steenweg op Bergen 216, 1520 Lembeek, Electrolux-Martin, Rue Nestor Martin 315, 1080 Bruxelles, Siemens, Chaussée de Charleroi 116, 1060 Bruxelles, Van Maercke, Westdorp 61, 8573 Tiegem.

3. A fine of 76 500 (seventy-six thousand five hundred) ECU or Bfrs 3 146 346 (three million one hundred and forty-six thousand three hundred and forty-six Belgian francs) is hereby imposed on the Association Nationale des Services d'Eau (ANSEAU) and on each of the following undertakings:

Bauknecht, Nijverheidslaan 1, 1820 Grimbergen, ACEC, Rue Cambier Dupret, 6001 Marcinelle, AEG, Rue Souveraine 40, 1050 Bruxelles, Philips, Place de Brouckère 2, 1000 Bruxelles, Miele, Industriepark, 1702 Asse-Mollem, Associated Consumer Brands, Bd. Émile Bockstael 122, 1020 Bruxelles, Bosch, Chaussée de Mons 128, 130, 1070 Bruxelles.

4. These fines shall be paid to Banque Bruxelles-Lambert — Agence Européenne account No 310-0231000-32 in the name of the Commission of the European Communities, within three months of the notification of this Decision.

Article 4

This Decision is enforceable in the manner provided for in Article 192 of the Treaty establishing the European Economic Community.

Article 5

This Decision is addressed to:

- Association Nationale des Services d'Eau (ANSEAU-NAVEWA), Chaussée de Waterloo, 255, b. 6, 1060 Brussels,
- Union des Fournisseurs des Artisans de l'Alimentation (UFARAL-ULEVO), Avenue de Cortenberg, 172, 1040 Brussels,

— the undertakings which are signatories of the Agreement and are listed in Annexes I and II to this Decision.

Done at Brussels, 17 December 1981.

For the Commission

Frans ANDRIESSEN

Member of the Commission

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ANNEX I

Undertakings which took part in the drawing up of the Agreement

Bauknecht, Nijverheidslaan 1, 1820 Grimbergen
 ACFG, Rue Cambier Dupret, 6001 Marcinelle
 AEG, Rue Souveraine 40, 1050 Bruxelles
 Philips, Place de Brouckère 2, 1000 Bruxelles
 Miele, Industriepark, 1702 Asse-Mollem
 Van Assche, Schaarbeeklei 636/638, 1800 Vilvoorde
 Associated Consumer Brands, Boulevard Émile Bockstael 122, 1020 Bruxelles
 Bosch, Chaussée de Mons 128, 130, 1070 Bruxelles
 Hoover, Chaussée de Haecht, 1650, 1130 Bruxelles
 Zanker, Rue de Molenbeek 94, 1020 Bruxelles
 Despagne, Rue des Carmes 14/16, 4000 Liège
 Disem-Andries, Eikestraat 8, 2800 Mechelen
 Asogem, Boomsesteenweg 65, 2630 Aartselaar
 Hobart, Chaussée de Wavre 1120, 1160 Bruxelles
 Artsel, Boomsesteenweg 65, 2630 Aartselaar
 IAZ, Steenweg op Bergen 216, 1520 Lembeek
 Indesit, Zoning Industriel, 1301 Bierges-Lez-Wavre
 Electrolux-Martin, Rue Nestor Martin 315, 1080 Bruxelles
 Siemens, Chaussée de Charleroi 116, 1060 Bruxelles
 Van Maercke, Westdorp 61, 8573 Tiegem
 Bell-Telephone, Bell Telephonelaan 2, 2440 Geel
 BBC Hausgeräte GmbH (succ. belge), Rue de Stalle 96, 1180 Bruxelles

ANNEX II

Undertakings which became parties to the Agreement after its signature

SBR, Industrielaan 1, 1720 Groot Bijgarden
GB-INNO-BM, Avenue des Olympiades 20, 1140 Bruxelles
Olympia, Rijksweg 55/57, 9860 Machelen-Zulte
Expert, Kerklaan 78/82, 1830 Machelen
Primus, Heulestraat 51, 8630 Gullegem
Automatic Industries, Verzoeningstraat 16, 2200 Borgerhout
Thorflam, Zone Industrielle, 5730 Malonne
Horemat, J. P. Ballingslaan 11 — Bus 2, 1090 Brussels
Neribel, Admiraalreef 10, 9110 St. Amandsberg
Elma, Oude Gentweg 100, 2720 Burcht
Gloria, Gistelsteenweg 27, 8400 Oostende
Atag, Kapucijnenlaan 102, 9300 Aalst
Rofco, Bondgenotenlaan 8, 8500 Kortrijk
Mench, Rue Aug. Snieders 23, 1030 Bruxelles
Novolec, Rue Neuve 127, 1640 Rhode-St-Genese
Saltini, Stationsstraat 39, 2570 Duffel
Vox, Rue des Mégissiers 18/24, 1070 Bruxelles
Éts. Abel Falisse, Av. Emile Digneffe 26, 4000 Liège
Werkhuizen Fobelets, Stationsstraat 1, 3150 Booischot
Le Chauffage, Av. du Port 82, 1020 Bruxelles
Santos Palace, Rue Manchester 32, 1070 Bruxelles
Éts. Meurice, Chaussée de Bruxelles 151, 6040 Jumet