

## II

*(Acts whose publication is not obligatory)*

## COMMISSION

## COMMISSION DECISION

of 26 November 1986

relating to a proceeding under Article 85 of the EEC Treaty

(IV/31.204 — MELDOC)

(Only the Dutch text is authentic)

(86/596/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas :

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup>, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 4 thereof,

Having regard to Council Regulation No 26 of 4 April 1962 applying certain rules on competition to production of and trade in agricultural products <sup>(2)</sup>, as amended by Regulation No 49 <sup>(3)</sup>, and in particular Articles 1 and 2 thereof,

Having regard to the Commission Decision of 25 September 1985 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, pursuant to Article 19 (1) of Regulation No 17 and to 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 <sup>(4)</sup>,

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

## I. THE FACTS

## A. The parties

- (1) The parties in this case are :
- Melkunie Holland BV ('MU'),
  - Coöperatieve Melkproduktenbedrijven 'DOMO-Bedum' GA ('DOMO'),
  - Verenigde Coöperatieve Melkindustrie 'Coberco' BA ('Coberco'),
  - DMV Campina BV ('Campina'),
  - Menken Landbouw BV ('ML').
- (2) The parties belong all to the Netherlands dairy industry. They have each an individual product range which has been formed under the influence of geographical position, organizational structure and corporate strategy. The first four companies are cooperatives whereas the fifth, ML, is a private company. In degrees, all the parties are involved in the export of their products.

## B. The products and the market

- (3) The products in question are liquid milk and liquid dairy products, both fresh and long-life, as defined in the 1958 Dairy Board (Produktschap voor Zuivel) Terminology Regulations. This definition excludes condensed milk, but includes cream and yoghurt. In this Decision, all market shares refer to the definition given in this paragraph.

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No 30, 20. 4. 1962, p. 993/62.

<sup>(3)</sup> OJ No 53, 1. 7. 1962, p. 1571/62.

<sup>(4)</sup> OJ No 127, 20. 8. 1963, p. 2268/63.

- (4) The market structure for dairy products in the Netherlands has, as is the case in other Member States, undergone dramatic changes in the last two decades. These changes relate both to the supply and demand sides of the market. As in other countries, the dairy industry in the Netherlands is highly organized and represented in numerous public institutions.
- (5) Traditionally, supplies comprised a large number of regional companies. The common market organization established by Council Regulation (EEC) No 804/68<sup>(1)</sup>, innovation, concentration in the retail business led to take-overs and mergers on a regional level between both cooperatives and privately owned companies.
- (6) In 1960 there were 247 liquid-milk processing plants in the Netherlands. Over the years this number steadily decreased to 39 plants in 1984. The number of dairies — some dairies own more than one processing plant — in 1984 processing less than 60 000 tonnes of milk was 14, representing a market-share of 10,95 %. Their total production amounted to 184 000 tonnes in 1984. The remaining 89,05 % is produced by five dairies, having a total production of 1 496 000 tonnes in 1984. There are four main cooperatives left. In addition, there are a few small cooperatives and

private companies. The four main cooperatives are MU, Campina, Coberco and Noord Nederland (of which DOMO forms a part).

- (7) Door-step deliveries of milk and milk products used to have the largest share of distribution but have now shrunk to approximately 20 %. Since 1970 one notes the growth of large supermarket chains which account for roughly 75 % of the distribution. An important factor which has contributed to this development is the acceptance by law of sales of milk in supermarkets. These big retailers normally have national and international ramifications which is particularly important with respect to long-life milk, which by its nature can be transported over large distances. The concentration of market power on this side of the market is underlined by the fact that two supermarket chains hold more than 50 % of the Netherlands market.
- (8) Although the Netherlands population has grown markedly in the last 20 years, total consumption of milk has hardly increased. The composition of the product range has undergone important changes: consumers have turned more to milk products and long-life milk whereas in the Netherlands the consumer has traditionally been mainly interested in fresh milk.
- (9) The development of the production-pattern since 1960 is as follows:

(x 1 000 tonnes)

Products	1961	1970	1975	1980	1981	1982	1983	1984
Fresh products	1 363	1 357	1 346	1 340	1 351	1 370	1 373	1 381
Long-life milk and milk products	247	283	360	420	439	459	467	458
Farm milk	334	260	225	150	140	140	140	140
	1 944	1 890	1 931	1 910	1 930	1 969	1 980	1 979

The development since 1950 of the consumption of milk per head of the Netherlands population per day and in grams is as follows:

(grams)

Year	Consumption milk	Milk products	Total
1950	517	56	573
1955	477	76	553
1960	397	84	481
1965	330	93	423
1970	280	112	392
1975	254	124	378
1980	236	126	362
1983	229	138	367
1984	230	134	364

- (10) The developments as set out above have led to a shift of market power in favour of the demand side, i.e. the large distribution companies, which operate both nationally and internationally. High costs involved in reorganization, concentration and investments in new technologies led to overcapacity in a market of strong competition between the milk producers to gain the favours of the large supermarkets.

#### Imports

- (11) Already in 1970 Belgian imports to the Netherlands occurred. Imports from Germany began a few

<sup>(1)</sup> OJ No L 148, 28. 6. 1968, p. 13.

years later. The tables below show the development with respect to imports from Belgium and Germany as from 1971 to 1983.

TABLE 1

## Belgium

(x 1 000 kg)

Year	NIMEXE 1983			Total
	04.01-11 <sup>(1)</sup>	04.01-21 <sup>(2)</sup>	04.01-25 <sup>(3)</sup>	
1971				4 861
1972				26 247
1973	6 612	23 234	26 230	57 076
1974	2 982	14 994	26 649	44 625
1975	5 759	17 710	42 810	66 279
1976	7 217	27 887	57 174	92 278
1977	7 019	33 355	60 582	100 956
1978	4 632	31 924	56 932	93 488
1979	6 487	23 675	77 310	107 472
1980	7 468	20 856	91 833	120 157
1981	7 484	24 022	106 065	137 571
1982	11 816	16 737	105 951	134 504
1983	9 816	15 636	106 075	131 527

TABLE 2

## Germany

(x 1 000 kg)

Year	NIMEXE 1983			Total
	04.01-11 <sup>(1)</sup>	04.01-21 <sup>(2)</sup>	04.01-25 <sup>(3)</sup>	
1976	339	53	1 048	1 440
1977	246	26	697	969
1978	331	27	973	1 364
1979	12 698	68	451	13 217
1980	10 158	38	514	10 647
1981	13 114	1 530	9 174	23 818
1982	16 519	6 452	23 322	46 293
1983	24 560	2 774	20 949	48 283

<sup>(1)</sup> 04.01-11 : yoghourt, buttermilk, curdled milk, acidified milk.

<sup>(2)</sup> 04.01-21 : skimmed milk.

<sup>(3)</sup> 04.01-25 : full milk and semi-skimmed milk.

*Minimum-price rules*

- (12) Liquid milk is one of the products which are subject to minimum prices in the Netherlands. The responsibility for setting the minimum prices is delegated by a Royal Decree of 2 March 1973 <sup>(1)</sup> to the Dairy Board, a semi-public body.

<sup>(1)</sup> Staatsblad 52.

The minimum price applies to the end-consumer level; whole and semi-skimmed milk, pasteurized and packaged in a Netherlands dairy may not be sold to the end-consumer at a price below the minimum price. This price was set at such a high level that imports became attractive. A different price system applies to milk other than the pasteurized milk just described. Whole and semi-skimmed sterilized milk and imported milk may not be sold to the final consumer at a price which is lower than the purchase price per litre plus a margin of FL 0,08 plus VAT on the total of the two.

- (13) The minimum prices are adjusted two or three times a year in line with changes in raw material prices and other costs. The minimum price for packaged standardized whole fresh milk with a fat content of 3,2 % applicable from 13 March 1973 was set at Fl 0,69 per litre. The subsequent price adjustments were the results of various factors such as increases in price for raw materials and intervention prices by the EEC authorities and increase in VAT. The development of the minimum price shows that this price has increased slower than the general cost of living. The two occasions on which the minimum price was reduced, on 13 September and 18 October 1983, were a result of decisions by the dairy industry itself.

*Lesser Meldoc organization*

- (14) Against that background three companies took the initiative in 1974 to cooperate. They formed the so-called lesser Meldoc cartel. The agreement was entered into on 24 September 1974 by MU, DOMO and Coberco. Their cooperation was limited to the national level. Under the agreement, which was notified to and approved by the Netherlands authorities, sales of liquid milk and dairy products were regulated by means of a quota system. The quotas were to be periodically adjusted and rules were laid down for dealing with cases where actual sales diverged from the allotted quotas. The second major element of the agreement was a system for pooling revenue from deliveries to small retailers. Two three-member boards were set up, an administrative board to administer the agreement and a commercial board to lay down rules for coordinating sales.
- (15) The three partners represented in 1974 approximately 45 % of the Netherlands consumption milk industry which was equal to 39 % of the sales on the Netherlands market.

- (16) Imports to the Netherlands of Belgian plastic-bottled long-life milk already started around 1970. None of the members of Meldoc had facilities for manufacturing such milk. They nevertheless closely watched the developments with respect to plastic-bottled long-life milk, including Belgian imports which undercut the price of fresh milk of

Netherlands origin. In order to gain control of the Netherlands plastic-bottled long-life milk market the three partners in Meldoc on 15 January 1975 concluded an agreement in Deventer with De Volharding WA, Nijkerk (Volnij), granting it the exclusive right to produce their milk in plastic bottles for the Netherlands market. In return, the members of Meldoc were given a say in all Volnij's management decisions and their implementation and the business was to be run for the joint account of the members. Meldoc undertook to supply Volnij with whole milk at reasonable prices. The agreement was amended in December 1977 whereby Volnij's exclusive manufacturing rights were limited. Above this limit the members of Meldoc were free to produce plastic-bottled milk themselves or to buy in supplies from third parties. In 1981 Volnij merged with Coberco.

#### *Greater Meldoc organization*

- (17) The enlargement of the lesser Meldoc organization to the greater Meldoc organization by the inclusion of Campina and ML was thoroughly prepared in a memorandum dated 27 January 1978 entitled 'Discussion paper on cooperation between Meldoc, Campina and Menken Landbouw on the sale of liquid milk in the Netherlands'. The memorandum listed a number of the features of the Netherlands liquid milk market, such as the continuing price competition and the increase in the size of discounts, the increasing concentration in the retail trade and the changing distribution patterns, the stagnation of liquid milk sales and the increasingly strong position of Belgian suppliers.
- (18) The discussion paper pinpointed a number of advantages of cooperation, such as the ability to take joint action including mounting 'massed attacks on the remaining competition, joint infiltration over the borders'. It also saw the advantage of weakening the buying power of their customers, who would no longer be able to play the suppliers off against one another by shopping around for better prices. Another virtue of cooperation mentioned in the paper was the fact that domestic and foreign competitors would be less able to acquire, maintain or extend market positions.

Page 13 contains a passage in which the power aspect in relation to customers was identified as the most critical aspect of the cooperation. To retailers

and final consumers the cooperation should remain as inconspicuous as possible. However, penetration from abroad into the domestic fresh milk market could give rise to the need to change that strategy.

The document went on: 'It is already clear that the increasing concentration of retailers and the further penetration of our domestic market from abroad will increase the need for further tie-ups within the dairy industry.'

- (19) The features of the market situation as described in the abovementioned discussion paper were presented as reasons for entering into a 'cartel agreement'. The fact that the future partners were aware that their cooperation could give rise to objections from an EEC point of view is shown by the separate chapter in the discussion paper on advantages and disadvantages of cooperation with a view to the Government and the EEC. At a meeting held on 27 February 1978 the subject of foreign imports was discussed and it was agreed that attempts should be made to arrange talks on the subject with Belgian producers. A memo written sometime in May-June 1979 notes: 'On 19 December 1978 the policy group decided, after discussion lasting a year, to accept the fourth draft of the cooperation agreement as binding'. (The actual name of this agreement is the 'Dairy Industry Basic Cooperation Agreement'; the quota arrangement had retroactive effect to 25 December 1977.)
- (20) The arrangements for cooperation between the lesser Meldoc organization and Campina and ML to form the greater Meldoc organization were set out in the 'Dairy Industry Basic Cooperation Agreement' (hereinafter referred to as 'Basic Agreement').
- (21) The Basic Agreement provided for the parties to pursue a joint commercial policy, under which they would collectively determine their policy on prices and conditions of sale for liquid milk and dairy products. In order to remain competitive, the parties must also aim, the Basic Agreement said, to keep their cost prices as low as possible. For this purpose they were to pursue a joint production and distribution policy, under which production-sharing would be encouraged, coordination and concentration of buying would take place and standardization and exchange of products would be promoted. The members shared the costs of the Meldoc bureau which operates as the hub of the cartel's operations.

The parties would endeavour to concentrate their sales on a territory allotted to each one. The sales territories, which roughly followed provincial boundaries, were marked on a map appended to the Agreement. It was explicitly stated that each party was obliged as against the other parties to protect its sales volume against outsiders.

The Basic Agreement also provided for quotas, which were based on the parties' 1977 sales levels. The quotas could be adjusted from time to time in line with actual sales. Quotas or part of them could be transferred to another party but must be offered to all the parties collectively first. A party exceeding or failing to reach its quota paid or received compensation. These quota arrangements were laid down in an ancillary agreement appended to the Basic Agreement. The quota agreement was signed for six years from 25 December 1977 until the end of 1983 or thereabouts, with the possibility of one-year extensions. Parties could withdraw upon one year's notice.

The proportion of the Netherlands market supplied by the Meldoc organization rose from approximately 68 % in 1978 to over 90 % in 1983. The increase in market share is primarily due to further take-overs and mergers.

A Board was set up on which each party was represented by the member of its staff with ultimate responsibility for liquid milk policy. The Board was responsible under the Basic Agreement for implementing and enforcing the Basic Agreement, and could make new additional agreements. The internal regulations of the Board were contained in an ancillary agreement appended to the Basic Agreement. The Basic Agreement was never signed by the five Meldoc partners and for that reason it did not need to be notified to the Netherlands authorities under the Competition Act (*Wet Economische Mededinging*, artikel 2). When the Agreement was concluded the five Parties accounted for 68 % of the market; by 1983 that share had grown to 90 %.

- (22) Both Campina and ML have stated that there was no alternative but to join Meldoc. Referring to the developments in the market, ML has argued that its existence would have been endangered if it had not used the opportunity to accept the cooperation within Meldoc. Campina has argued that one of the main reasons for joining Meldoc was its inability to resist the competition from the lesser Meldoc acting together with Volnij which was, together with Campina, finally the only remaining Netherlands supplier of plastic-bottled long-life milk. This

type of milk was far more important in the south where it had a share of 35 % of the total market of consumption milk, whereas this share was 8 % in the remaining parts of the Netherlands. It was particularly difficult to resist competition from Volnij since this company was supported by Meldoc. Campina also faced a large market share (about 20 %) of Belgian milk-suppliers which share was roughly 3 % in the rest of the Netherlands. These circumstances, taken together with internal company problems of a more structural nature, compelled Campina to join Meldoc rather than staying alone. Campina has stated it was not aware when it joined Meldoc that this form of cooperation could give rise to problems under the EEC competition rules. However, the Commission's copy of the discussion paper referred to above, and obtained during the inspection at Campina's premises, suggests otherwise. On page 7, where mention is made of legal advice on competition law questions, there is a handwritten note reading: 'quota is dangerous subject. destroy everything. keep one copy. make a thorough search. keep one secret file per firm'.

#### *The operation of the Basic Agreement*

- (23) The agreement must be analyzed in the context of the market developments described above and in the light of the parties' overall objectives. As has been shown above, the Netherlands milk producers in Meldoc agreed to a coordinated response to the threat posed to their market position by imports from other Member States. Accordingly, the agreement must be read in conjunction with the discussion paper (see paragraph 17 to 19) and other documentary evidence such as the memorandum quoted in paragraph 27 which states that the protection of the Netherlands market against inroads of milk from abroad was one of the original policy objectives of the cartel.
- (24) Many committees and working parties operated within the greater Meldoc. From 1978 to the end of July 1984 some 175 meetings took place, the majority being accounted for by the commercial working party on fresh milk and the Liquid Milk Steering Committee. The agendas covered a wide range of issues relating to the agreed areas of cooperation.
- (25) Imports of long-life milk from Belgium were extensively discussed in Meldoc. In a memorandum written on 18 February 1980, a series of possible countermeasures was put forward to hold down Belgian imports, such as using threats of incursions into the Belgian market to secure price agreements,

which would mainly benefit Volnij and Campina (at the time the only Netherlands producers of long-life milk in plastic bottles). Other ideas were to undermine the margins on plastic-bottled milk in Belgium by quoting lower prices from the Netherlands, to capture a share of the Belgian long-life milk market with Netherlands long-life milk in cartons (although losses might have to be sustained), to approach Netherlands purchasers of Belgian milk, to try to build up sales of pasteurized milk and dairy products (the market share of fresh milk and dairy products in Belgium was at the time under 10 %), or to take a stake in a Belgian dairy and 'use it to disrupt the market (both negatively and positively)'.

The minutes of the meeting of the Liquid Milk Steering Committee of 22 February 1980 reported under point 6, 'Belgian plastic-bottled imports', that the best approach was to 'further undermine the margins on plastic-bottled milk in Belgium by lower offers from the Netherlands' and went on, 'A common fund should be established and an independent marketing man put in charge to get the Belgians into such a mess that they come and talk'.

- (26) The feeling of the members of Meldoc that it was in their common interest to do something to force back the Belgians' share of the Netherlands market was also expressed in a memorandum of 2 May 1980 entitled 'Some "headlines" about sales of plastic-bottled'. The memo of 2 June 1980 referred to above stated that any costs arising from the expansion of Netherlands production of long-life milk in plastic bottles should be pooled.

The discussion was concluded at the meeting of the Liquid Milk Steering Committee on 6 June 1980, where it was decided to attempt to freeze Belgian sales in the Netherlands. Meldoc would try to capture the growth in that segment themselves. It was agreed to act together to attract the anticipated growth of 10 to 15 million litres a year by either sales commitments or loss pooling.

- (27) In 1981 the first imports of UHT long-life milk from Germany appeared. It was thought that, in the long run, UHT milk would oust plastic-bottled long-life milk and that foreign suppliers would capture an increasing share of the long-life market. The Meldoc group feared that this trend would in the long run harm their own market position for

fresh milk and dairy products. It was therefore agreed to make special deliveries of UHT milk themselves. The discussions on the arrangements to be made were based on the starting point that the policy objectives originally agreed by the partners would be maintained. These objectives were formulated in a document of 29 December 1982 as follows:

- a. defence of the margins on pasteurized milk
- b. protection against further inroads by long-life milk from abroad
- c. in the long run (when a substantial sales volume has been built up) to arrive at a balanced distribution of production so that financial compensation can be dispensed with.

- (28) The agreement provided for the suppliers of the UHT milk to be compensated for their losses by the other members. The difference between the selling price ex warehouse and an agreed 'Meldoc cost price' was pooled and the total shared between the members in the following proportions: MU 26 %, DOMO 16 %, Coberco 22 %, Campina 29 % and ML 7 %.

It was agreed that MU should advance the money to compensate the other suppliers until accounts had been settled. The scheme covered UHT whole milk and skimmed cocoa milk (memo of 1 February 1982).

- (29) The 'share-out of the losses sustained on Campina's UHT deliveries to Aldi (a large German supermarket chain which also operates in the Netherlands) in 1982 totalled Fl 947 858. For 1983 the figures for the UHT deliveries from Campina and Coberco to Aldi and ML to Edah (a supermarket chain) were:

*(guilders)*

	Campina to Aldi	Coberco to Aldi	ML to Edah
MU	16 490	261 426	172 509
DOMO	4 639	160 828	106 160
Coberco	6 451	221 207	145 970
Campina	7 080	291 590	192 414
ML	4 028	70 384	46 445
Total	38 688	1 005 435	663 498

- (30) The results of Meldoc's policy of protecting its sales volume against foreign suppliers is described with respect to the years 1980 to 1982 in a note dated 24 October 1983 in the following terms:

'In these years we pursued a policy of replacing imports of plastic-bottled with UHT milk in cartons. A policy not without results, though achieved only by fierce price-cutting. One of the most important motives for the policy was to give Belgium, and Germany, as little scope as possible to make inroads into the fresh milk market where we were vulnerable because of high prices.'

At a meeting of Meldoc's long-life working party on 5 May 1983 the results of the joint policy on long-life milk were summarized as follows:

'We can say that the Belgians especially have lost a lot of ground. If the increase in sales to Aldi are included, then the Germans too have not been left unscathed. The conclusion — after discussion — is in the coming years capacity is needed for about 100 to 25 million litres of UHT milk in cartons.'

- (31) Intensive consultations between the members of Meldoc also took place in the commercial working parties. The information exchanged did not only relate to long-life but also to fresh milk and milk products. A document dated 24 May 1982 states in respect of Meldoc's general policy that, in deciding on price levels, the partners should have respect for each other's position. Proposed price quotations were in fact discussed in detail by the working parties. The report on the 11th meeting of the Liquid Milk Steering Committee states under point 3 concerning list No 55 of the conclusions of the commercial working party 'There have traditionally been proper consultations about quoting to one another's customers.' A final example of the detailed exchanges of views that took place about price quotations is list No 15 of the conclusions of the meeting of the long-life and fresh milk working parties on 17 January 1984. Several large customers are taken in turn and the trend regarding prices quoted to them discussed.
- (32) In 1983 the development the Meldoc group had been dreading for many years came to pass: imports of fresh milk. On 29 July a special meeting of the Policy Committee was called to discuss the problem of fresh milk imports. The

report on the meeting summarized the Chairman's presentation of the situation as follows:

'the high margin on liquid milk in the Netherlands makes it attractive for foreign competition (especially from Belgium and Germany) to enter that market.'

A couple of examples of Belgian and German imports are mentioned. The imported milk is of acceptable quality for the consumer and is sold below the minimum Netherlands consumer price.

- (33) Before and after the meeting on 29 July 1983 a number of specific measures were taken to stem the tide of fresh milk imports. These measures are discussed below, where reference will be made to a memorandum of the Meldoc Bureau dated 24 October 1983 entitled 'Some facts and background concerning the price reductions of 12 September and 17 October 1983', which described the situation and the measures taken to deal with it. As far as the Commission has been able to establish, these measures consisted in persuading Ziko<sup>(1)</sup> not to import fresh milk from West Germany, approaches to Belgian suppliers to induce them to stop supplying Netherlands customers, and the 'dumping' of milk on the Belgian market.
- (34) Dissatisfied as it was with the discounts it received from MU, Ziko started to prepare for trials of whole and semi-skimmed milk from Germany. A note on the 151st meeting of MU's sales staff on 28 March 1983 recognized the danger of other customers looking for imports from Germany as well. The prospective German supplier was approached several times and it was made clear to him by MU that deliveries of whole and semi-skimmed milk to the Netherlands market would put pressure on the margins of large Netherlands dairies.
- (35) The Ziko case was discussed at several Meldoc meetings, such as those of the Liquid Milk Steering Committee on 6 May and 3 June 1983. The minutes of the various meetings make it clear that, within Meldoc, agreement existed to try to prevent Ziko starting importing from Germany.

(<sup>1</sup>) Ziko is a trading company, based in Eindhoven, which acts as a central purchasing organization for milk and products of its members.

- (36) MU concluded a multi-annual contract with Ziko for fresh milk and dairy products. Clause 1 of this contract reads:

'All the Ziko members listed agree to purchase the basic range of fresh milk and dairy products from Melkunie Holland for all their outlets.'

That the express purpose of the contract with Ziko was to prevent imports is underlined by the following passage from the Meldoc Bureau memorandum of 24 October 1983: 'Meanwhile the Ziko group was threatening to import from Germany. By giving an extra discount we were able to get it to sign a multi-annual purchase contract.'

- (37) Ziko's prospective German supplier, Naarmann, had received packaging material for the deliveries to Ziko. MU explained in a letter to the Commission that, after Ziko had decided not to take fresh semi-skimmed or whole milk from Naarmann, MU reimbursed Ziko for the sums it had paid to Naarmann for the packaging. These costs were shared between the members of Meldoc. The accounts for 1983 contain an item of Fl 26 289 for 'paper reimbursement Germany', which was split between them.

#### *'Dumping' (1) in Belgium*

- (38) Towards the end of May 1983, Edah started to sell imported fresh whole and semi-skimmed milk in a large number of its branches in the south of the Netherlands. The whole milk from Belgium was sold at Fl 0,10 per litre less than Netherlands whole milk. Meldoc thereupon three times attempted unsuccessfully to get the Belgian suppliers to stop their deliveries. The memorandum of 24 October 1983 stated that the Belgian suppliers initially showed some interest, but later because of differences of opinion it was decided that there was no point in continuing the attempts.
- (39) During the summer imports of Belgian milk continued to rise. An interim report written at MU on 27 September 1983 observed that imports of fresh milk and any loss of market share was unacceptable. Two days later, on 29 September, an interim meeting of the Steering Committee was

held about the increase in imports. Various measures to curb the imports were discussed. It was decided, among other things, that Campina could buy 10 million kg of milk in Belgium with the intention of getting the Belgian suppliers round the table.

- (40) A written internal MU note dated 29 September 1983 said that a number of agreements were made concerning Belgian imports, one of which was to begin a campaign of 'dumping' long-life milk in Belgium. The partners set aside 10 million litres of plastic-bottled and 5 million litres of cartons for this purpose.

The aim of all this was to put severe pressure on Belgian margins on long-life milk.

- (41) An internal memo from Campina dated 18 October 1983 stated that the cost price of the products to be 'dumped' on the Belgian market would be reimbursed in consultation with Meldoc.

A second memo, dated 24 October 1983, says that it was decided to try to sell as small a quantity of long-life milk as possible in Belgium at as many addresses as possible, 'i.e. spread out so as to cause the maximum fall in prices.' It also said that the impression should not be given that the Netherlands dairy industry was acting together.

- (42) The milk was invoiced to the Belgian customers (Delhaize, Dial and CFC) by Mona-Belgium, a subsidiary of Melkunie Holland. Mona purchased the milk from Melkunie, which in turn obtained most of it from Coberco and Campina, Coberco and Campina delivered the milk direct to the Belgian customers but invoiced it to Melkunie. The Commission has documentary evidence of all these transactions between Melkunie and Mona and then Delhaize, Dial or CFC.

- (43) The Commission has obtained a fairly complete list of prices charged for the milk delivered to the Belgian retailers in 1983 at each stage. The deliveries of plastic-bottled whole milk to Melkunie by Volnij can serve as an example. Melkunie paid Fl 103/100 litre for this milk. Melkunie charged Mona Fl 80,93/100 litre, i.e. Fl 22,07 less than it had paid Volnij. Mona sold the milk to Dial and Delhaize for Fl 82,45 and Fl 83,22/100 litre, i.e. Fl 20,55 or Fl 19,78 less than the price invoiced by Volnij at the beginning of the transaction.

- (44) These deliveries were still going on at the time of the Commission's inspection visits to the firms. A

(1) 'Dumping' is used here in a different sense from its meaning in Council Regulation (EEC) No 2176/84. It is used because it was used by the members of the cartel themselves. To avoid misunderstanding, it will be placed in quotation marks.

Melkunie memorandum dated 13 June 1984 shows that the loss-making sales of Netherlands milk on the Belgian market were continuing. After Coberco/Volnij had stopped producing plastic-bottled milk from 1 June 1984, deliveries were kept up by Campina and Melkunie on their own.

- (45) A document made up to the 135th Committee meeting 2 March 1984 states with respect to the long-life milk deliveries to Delhaize that :

- Volnij and Campina delivered approximately 100 000 and 50 000 litres of plastic-bottled whole milk per week, respectively,
- the invoice was drawn up by Mona-Belgium under the responsibility of MU's liquid milk division, and
- that the supply contract ran from 1 December 1983 until around 1 June 1984.

The minutes of the meeting reported that it had been decided to present a proposal on the allocation of these costs at the next meeting. The costs involved were approximately Fl 687 500.-.

- (46) A document of 4 April 1984 entitled 'Additional decisions on settlement of accounts 1983' contains the following passage :

*Deliveries to Belgian customers*

The following agreements have been made concerning deliveries by Coberco (Volnij), Campina and Melkunie to Belgian customers :

- (a) Plastic-bottled long-life milk and UHT milk is covered.
- (b) The delivery period is from November 1983 until the beginning of June 1984.
- (c) The maximum quantities are limited to 10 million litres plastic-bottled and 5 million litres UHT.
- (d) The suppliers will be compensated for the difference between cost and selling prices (average about 15 cents/litre).

For 1983 accounts must be settled for November/December deliveries.'

- (47) The accounts for Meldoc's activities were held and processed on MU's computer. During the investigation at MU, an entry for Fl 117 577,79, under reference 'memo 4.01.02' and labelled 'Meldoc sterile milk Belgium', was found on page 6 of the ledger for processing carried out on 12 March 1984 concerning accounts ending 31 December 1983. This sum represented the loss made on 'dumping' Netherlands long-life milk on the Belgian market. MU's financial controller, who was responsible to the Director Liquid Milk Operations and represented MU on many Meldoc working parties, had already charged a percentage of this sum to Melkunie's accounts.

- (48) In their replies to the Commission's letter of 6 June 1984, the Meldoc partners denied that they had intended to share out the cost of the loss-making operations on the Belgian market, though they admitted that such an allocation had been discussed at meetings. The minutes of the 139th Steering Committee meeting on 2 June 1984, which also discussed the Commission's inspections, reported that in view of the foreseeable commercial developments and the inspections by the European Commission, all parties felt that caution was generally called for in sharing costs and that : 'the proposal made at the time by the Chairman for collective contributions to possible losses on sales by Melkunie to Belgian customers was finally dropped.'

- (49) In their written defence, as well as during the hearing, the Meldoc partners stated that their action on the Belgian market as described in the preceding paragraph was a reaction to alleged anti-competitive practices which occurred on the Belgian market. Although they admitted that their reaction to Belgian imports might possibly be covered by Article 85 (1) of the Treaty, the Meldoc partners agreed that in these circumstances the imposition of fines would be inappropriate.

- (50) Working paper No 3 of 21 March 1983 for a meeting of the Policy Group on 30 March 1983 dealt with the policy for cooperation for the period 1984 to 1985. The members of the Liquid Milk Steering Committee attended the meeting. The working paper said it was 'necessary to strengthen and expand the members' reasonable competitive

position in relation to abroad'. To do so, the Members should make efforts to reduce their cost prices, renew their range and improve relations with large customers. About Belgian imports, which the memo said were then running at 5 million litres of dairy products on an annual basis, it observed: 'Our countermeasures in Belgium consist in putting pressure on prices there, which are already generally at low levels, by fiercely price-cutting quotes and supplying about 200 000 litres of long-life milk a week until 1 June next. Continuation of this and the means of doing so (cost about 15 cents/litre) are under discussion.' Referring to imports from Germany by Pollfood, which supplied only large customers, the paper said that 'irresponsibly' intense price pressure had built up in that market segment and that the 'tactics we have used so far of giving them as little scope as possible' should be refined. It went on: 'Reactions to competition must, as has been the case so far, continue to be jointly discussed, decided and if necessary financially pooled. They must be implemented as far as possible under the direct responsibility of one or more members.'

- (51) The working paper recommended that the drive to win back sales of long-life milk and dairy products lost mainly to Belgian suppliers (about 130 million litres of plastic-bottled) must be continued. Foreign imports were estimated in the paper at about 100 million litres a year, with price competition with German suppliers of UHT milk extremely fierce. The members should endeavour to see that each other's capacity was utilized as fully as possible and to decide to expand only after joint consultation.

## II. LEGAL ASSESSMENT

### A. Article 2 of Regulation No 26

- (52) The activities of the greater Meldoc relate to the production and trade of agricultural products cited in Annex II to the Treaty<sup>(1)</sup>. These products fall under Articles 1 and 2 of Regulation No 26, Article 1 of which provides that Articles 85 to 90 of the Treaty apply to agreements relating to such products, whilst Article 2 provides for exceptions to the application of Article 85 to agreements relating to such products. The first sentence of Article 2 (1) states that Article 85 (1) of the Treaty does not apply to agreements, decisions and practices relating to trade in the products which form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty. The second

sentence of Article 2 (1) provides that, in particular, Article 85 (1) shall not apply to agreements, decisions and practices of farmers, farmers' associations or associations of such associations from a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardized.

- (53) The national market organizations in the dairy industry have been replaced by the common organization of the market, the rules for which are laid down in Council Regulation (EEC) No 804/68<sup>(2)</sup>. Accordingly, the agreement by which the greater Meldoc was set up cannot be covered by the first exception contained in the first sentence of Article 2 (1) of Regulation No 26.

- (54) Nor is the agreement by which the greater Meldoc was set up necessary for the attainment of objectives set out in Article 39 of the EEC Treaty. The third paragraph of the preamble to Regulation No 26 shows that this exception is applicable only in so far as application of Article 85 (1) of the Treaty would jeopardize attainment of the objectives of the common agricultural policy in the sector concerned. Secondly, the means which may be employed in the dairy sector in order to attain the objectives of the common agricultural policy set out in Article 39 of the Treaty are stated in Regulation (EEC) No 804/68. This applies especially in the field of price-support measures. Even if some scope remains for private initiatives within the framework of Regulation (EEC) No 804/68's statement of the means to attain the objectives of Article 39 of the Treaty, the Meldoc partners' activities in this case (involving a quota system, a compensation scheme, consultations on sales and prices and specific acts designed to inhibit imports from other Member States) amount to an attempt to set up a private intervention mechanism, very different from the intervention for which Regulation (EEC) No 804/68 provides and which must be standardized 'so as not to impede the free movement of the goods in question within the Community' (fourth recital). The greater Meldoc agreement sought to protect the parties' market positions from competition, particularly from other Member States. It cannot therefore be said to be necessary for the attainment of the objectives set out in Article 39 of the Treaty, the means for which are laid down in this sector by Regulation (EEC) No 804/68.

<sup>(1)</sup> List referred to in Article 38 of the Treaty, Chapter 4.

<sup>(2)</sup> OJ No 148, 28. 6. 1968, p. 13.

- (55) Since the two conditions for the exception provided for in the first sentence of Article 2 (1) of Regulation No 26 are not satisfied, the exception provided for in the second sentence is not applicable, since it refers to one particular form of the arrangements covered by the first sentence and requires that the case satisfy one of the two conditions for the exception in the first sentence as well as having the features described in the second sentence<sup>(1)</sup>.

However, even if the special circumstances described in the second sentence were intended to constitute a separate exception, this additional independent test would still not be met. Since ML is a private company and not an association of farmers, it cannot be maintained that the Meldoc agreement is covered by the exception provided for in the second sentence of Article 2 (1).

- (56) Hence the exceptions provided for in Article 2 of Regulation No 26 are not applicable in the present case and do not, therefore, preclude the application of Article 85 of the Treaty.

#### B. Article 85 (1)

- (57) Article 85 (1) prohibits as incompatible with the common market 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object and effect the prevention, restriction or distortion of competition within the common market, and in particular those which :

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions ;
- (b) limit or control production, markets, technical development or investment ;
- (c) share markets or sources of supply ;

...

#### *Basic Agreement*

- (58) The agreement covering the cooperation of the five-member 'greater Meldoc group' in the field of liquid milk and dairy products, the Dairy Industry Basic Cooperation Agreement, was adopted by

Meldoc's Policy Group on 19 December 1978 in its fourth draft and constitutes an agreement within the meaning of Article 85 (1). The Policy Group was composed of senior officers and executives of the five companies.

- (59) The Basic Agreement contains a large number of provisions which restrict competition, especially in the fields of sales, prices, production, distribution and markets. The closeness of the cooperation is further demonstrated by the great number of meetings that took place within the Meldoc organization.

The documentary evidence gathered by the Commission, some of which has been discussed above (including the minutes of meetings of the Milk Steering Committee, the Policy Group and the various working parties) prove that regular consultations took place on all the abovementioned forms of cooperation.

- (60) Full consultations were traditionally held about quoting to each other's customers. The meetings of the various working parties (long-life and fresh) were essentially devoted to coordination of sales and prices, thereby implementing the objective of a joint commercial policy.

Apart from the general impact of the quota arrangements on the members' freedom to decide reductions or increases in output, actual output restrictions concerned especially the long-life milk sector. The growing imports of long-life (plastic-bottled) milk from Belgium and later of UHT milk from Belgium and Germany led to agreements to increase production.

The quota arrangements shared out the market between the members in quantitative terms. The Basic Agreement also involved geographical market-sharing. The bulk of each member's sales was subject to quotas. The rise in the proportion of the Netherlands market supplied by the Meldoc organization (from 70,2 % in 1978 to 91,4 % in 1983) and the proportion of the market accounted for by Meldoc sales subject to quotas (from 65,2 % in 1978 to 78 % in 1983) show that the Meldoc cooperation excluded or restricted competition on a nation-wide scale. Competition was restricted not only because of the allocation of quotas but also because of the financial transfers between the parties if they fell short of or exceeded the agreed quotas and because of the consultation on quoting to each other's customers and agreements concerning production levels.

<sup>(1)</sup> Second Report on Competition Policy, point 75, and Case 71/74 Frubo, (1975) ECR 563, where only the conditions referred to in the first sentence are mentioned as the tests for the exception provided for in Regulation No 26.

*Actions against imports*

- (61) In assessing the Meldoc partners' market behaviour it becomes clear that the Basic Agreement cannot be isolated from earlier and later documentary evidence. Even though the text of the Basic Agreement contains no references to imports or exports it does provide for the specific obligation of the parties to protect their sales volumes against third parties. The discussion paper, which served as a contribution to the discussion on the Basic Agreement, had already recognized the 'increasing concentration of retailers' and the 'further penetration of our domestic market from abroad' as developments which would urge closer cooperation. The advantages of cooperation were, amongst other things, the ability to take joint action including mounting 'massed attacks' on the remaining competition, joint infiltration over the borders'. As is shown by the facts the Meldoc partners protected their sales volumes against third parties by taking joint action to curb imports. One of the documents of a later date than the Basic Agreement also confirms that this agreement cannot be viewed separately from the later evidence such as the memorandum of 29 December 1982 which stated that the protection of the home market against 'further inroads by long-life milk from abroad' was among the original policy objectives of the cartel. This document was drawn up in relation to a discussion on joint actions by the Meldoc partners against imports of UHT milk.

*Imports of long-life milk*

- (62) The Meldoc partners wanted to stop the competition from Belgian milk on the Netherlands market because of the pressure on their prices caused by lower-priced Belgian milk and because they feared an erosion of their shares of the fresh milk market. In order to achieve this aim, different joint actions were carried out. As is shown in paragraph 31 the Meldoc partners regularly exchanged information on quotations in connection with imported milk and in other contexts. This not only distorted competition between the members of the cartel, because information on prices and customers was shared and because they respected each other's positions, but also distorted competition between Netherlands and foreign milk.
- (63) The decision referred to in paragraph 26 to freeze Belgian sales of long-life milk in the Netherlands and to capture the anticipated growth in this segment is another example of a decision which distorted competition. The scheme of special UHT

deliveries was also a Meldoc operation to distort competition within the Netherlands and eliminate competition from Germany and Belgium. The scheme involved selective low offers to the Netherlands customers concerned to make it worth their while not to import the cheaper UHT milk. The losses were shared between the members. The quotations given in paragraph 30 show that the Meldoc group thought their action a success.

*Imports of fresh milk*

- (64) The multi-annual contracts which MU concluded with Ziko was clearly intended to prevent loss of business to German suppliers. This emerges most clearly from the second quotation in paragraph 36 stating that MU reacted to Ziko's intention of buying milk from Germany by offering an extra discount. In return for this extra discount Ziko was prepared to sign a multi-annual contract, which, as the first quotation in paragraph 36 shows, prevented Ziko outlets from purchasing from any other supplier than MU 'basic' range of fresh milk and dairy products for the duration of the contract, thus shutting out other, particularly German, suppliers. MU's contract with Ziko fitted into the general policy of the Meldoc group to keep imports of long-life and fresh milk out of the Netherlands market. The evidence presented in paragraphs 35 and 36 also proves that the Meldoc group regarded it as a matter of common interest that MU should secure the Ziko contract. Not only was the Ziko case discussed at several Meldoc meetings but the cost of reimbursing Ziko for packaging it had ordered from the German supplier, which was part of the price MU paid to gain the contract, was shared between the partners.

It is concluded that MU's contract with Ziko followed from the Basic Agreement which, amongst other things, aimed at protecting the Meldoc partners' share of the Netherlands market against inroads by foreign milk suppliers.

*Action on the Belgian market*

- (65) Imports of Belgian milk and possible measures to prevent them from increasing or to recapture business the members had lost to Belgian suppliers were regular topics of discussion in Meldoc. Apart from the Meldoc members' action against Belgian imports of long-life milk and dairy products in the Netherlands, in 1983 they also undertook joint action on the Belgian market to induce Belgian suppliers to stop their deliveries of fresh milk to Netherlands customers. In 1983, Edah began importing Belgian fresh milk and several other

customers followed Edah's example. To force the Belgian suppliers to stop these exports and avoid losing sales on the important fresh-milk market, the members of Meldoc decided to mount a 'dumping' operation on the Belgian market. Initial attempts to stop the imports by talking to the Belgian suppliers had failed. That the 'dumping' operation was, explicitly directed against the Belgian imports is proved by several documents, including those mentioned in paragraphs 39 and 40. These documents also show that it was a joint action by the members of Meldoc. The margin of loss on the 'dumped' milk was considerable, as is shown by the figures given in paragraph 43, and this was openly admitted in the memorandum, quoted in paragraph 44, which spoke of loss-making sales. The considerable scale of these sales is shown by the figures given in paragraph 45. The aggressiveness and covert nature of the operation emerge from the quotations given in paragraph 41. The aim was the 'maximum fall in prices' and, to avoid giving the impression that 'the Netherlands dairy industry is acting together', Volnij channelled its deliveries to Dial under one of Mekunie's brand names.

- (66) The denial by the members of Meldoc in reply to the Commission's questions that any decision was ever taken to share out the cost of the cooperation on the Belgian market is contradicted by the evidence. First, an intention to split the cost of joint operations is expressed in a number of documents where such operations are discussed. The evidence reveals that this intention was also realized in some particular cases (such as the special UHT deliveries and the Ziko case). The intention to share the cost of the action against Belgian fresh milk imports is proved by:
- (a) the estimates of the deficit to be borne by Meldoc in respect of the deliveries to Belgian customers given in the document referred to in paragraph 45;
  - (b) the reference to a decision to compensate suppliers in the document entitled 'additional decisions' referred to in paragraph 46;
  - (c) the fact that Melkunie had already charged to itself a percentage of the Fl 117 577,79 entry, for Meldoc sterile milk in Belgium, found in its computer records.
- (67) It can be concluded that the 'dumping' operation was mounted by Meldoc to curb imports of fresh milk from Belgium with the aim of sharing the costs of the operation in agreed proportions. The fact that, in the event, the costs of the operation were not shared, or at least the Commission's lack of evidence that they were actually shared, does not lessen the seriousness of this operation. If the costs were indeed not shared out, this might be due to the fact that the Commission had commenced investigations into the companies. Although the operation was jointly decided by all the members of Meldoc, it must be pointed out that the ring-leaders were MU, Coberco and Campina; MU because it played the key role in organizing the operation and Coberco and Campina because they, as well as MU, supplied the milk that was 'dumped' on the Belgian market.
- (68) The actions by Meldoc against imports as described above cannot be seen as merely incidental behaviour. The policy of taking a common stand against any competition, including from abroad, is manifestly confirmed by the evidence discussed in paragraph 50 where not only is it said that reactions to competition were to be discussed and decided jointly, and if necessary pooled, but also that such a policy should be continued during the years 1984 and 1985
- (69) Finally, the argument raised by the defence concerning alleged anti-competitive practices on the Belgian market cannot be accepted by the Commission. Even if it is true that the Belgian imports to the Netherlands had been brought unfairly, because based on those alleged anti-competitive practices, this circumstance could still not constitute a mitigating factor in the decision-making process on the imposition of fines. If this were otherwise, undertakings could be encouraged to determine for themselves how to react to behaviour which infringes the EEC competition rules and disregards the rules which have specifically been adopted to remedy such behaviour. The Meldoc partners should have filed a complaint to the Commission under Article 3 of Regulation No 17. They have never done so. It was only at the instance of the defence against the Statement of Objections that this point concerning alleged anti-competitive practices on the Belgian market was raised.

*Effect on trade between Member States*

(70) It has been established by the Court of Justice that an agreement which covers the whole territory of a Member State 'has by its nature the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production' (VCH judgment of 17 October 1972 in Case 8/72 (1)).

(71) In the defence to the Statement of Objections, the point is raised that the VCH judgment concerned a cartel between traders which is different from the present case which concerns a cartel between manufacturers. According to the defence, the principle laid down in the Court's judgment is based on the understanding that foreign suppliers depend normally on local distributors when they try to penetrate a foreign market. A situation in which most distributors are deprived of their freedom to take commercial decisions independently would almost inevitably have an impact on other parties (especially manufacturers) from abroad, since they would suffer from the lack of independence among distributors. The defence states that this reasoning cannot be applied to an agreement between manufacturers which has a strictly national character, particularly when the manufacturers in question have no exclusive relationships with their buyers.

(72) The rationale of the VCH judgment, which concerned a cartel between traders, is equally applicable in this case. The present agreement which covers — practically — the whole of the territory of the Netherlands is indeed able to render the penetration of the Netherlands market more difficult than would have been the case otherwise. The size of the cartel, together with the obligation to defend sales against third parties and the intensive cooperation in terms of sales and prices, have an inherently adverse effect on the possibilities for foreign suppliers to penetrate the Netherlands market. These suppliers are confronted with a market which is divided between members of a cartel which ultimately covered more than 90 % of the relevant product market and who acted together to defend their sales volume. Furthermore, the cooperation in quoting prices has a distorting effect on the competition from any third supplier, including foreign suppliers.

(73) A principal element of Meldoc's defence was the distinction between the agreement establishing the

greater Meldoc as an agreement of a strictly national nature and what were called 'the incidents' thereby referring primarily to the action on the Belgian market between December 1983 and June 1984. The argument that the Meldoc cartel was of a strictly national nature cannot be supported in view of what has been stated in the foregoing paragraph. Furthermore, the evidence clearly shows that the distinction between the Meldoc agreement and the so-called incidents is artificial. The discussion paper shows that part of the purpose of the greater Meldoc agreement was explicitly to influence inter-State trade. The paper shows the cooperation was in part deliberately intended to obstruct the entry of foreign milk. By referring also to what has been said in paragraph 61 above, it can be concluded that the contractual objective and the subsequent course of conduct show a constant commitment to the distortion and restriction of competition from foreign imports into the Netherlands.

*Article 4 (2) of Regulation 17*

(74) In their defence to the Statement of Objections the Meldoc partners argued that Article 4 (2) of Regulation 17 applied to the agreement by which the greater Meldoc was established. This provision exempts agreements, etc., from the obligation to notify in order to obtain an exemption under Article 85 (3) where the only parties thereto are undertakings from one Member State and where the agreements, etc., do not relate to imports or to exports between Member States. It is however clear from what is said in paragraph 61 that the protection of the Netherlands market against imports was one of the original purposes of Meldoc. In implementing the agreement, the Meldoc partners have taken several steps directly aimed at curbing imports. The agreement therefore relates to imports. The second subparagraph of paragraph 2 obviously does not apply because the Meldoc cartel concerns an agreement between more than two undertakings. Accordingly, the application of Article 4 (2) of Regulation 17 to this case has to be rejected.

*Article 85 (3)*

(75) It follows from the preceding paragraph that the agreement establishing the greater Meldoc was not exempted from the obligation to notify. Since no notification has been made the agreement is not eligible for exemption.

(1) ECR 977 (1972).

*Article 15 (2) of Regulation No 17*

- (76) Under Article 15 (2) of Regulation No 17, the Commission may impose fines on undertakings where they intentionally or negligently infringe Article 85 (1) of the Treaty. In deciding the size of the fines, regard shall be had both to the gravity and to the duration of the infringement. In its judgment in the Pioneer case on 7 June 1983 (Joined Cases 100 to 103/80<sup>(1)</sup>), the Court of Justice held that, in assessing the gravity of an infringement, a large number of factors have to be taken into account, the nature and importance of which may vary according to the type of infringement in question and the particular circumstances of the case. Those factors may include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertakings and the influence the undertakings were able to exert on the market. It is important to have regard to the context in which the infringements occurred. In that respect the structure of the market should also be considered.
- (77) The special position of agriculture with respect to the application of the EEC competition rules is reflected by the adoption of Council Regulation No 26. Furthermore, the structure of the agricultural market, including the role competition plays in that market, is influenced by numerous Community and national regulations. This applies in particular to the dairy sector.
- (78) The fact that four of the five companies forming Meldoc are cooperatives deserves special consideration. A characteristic feature of cooperatives is that they are owned by farmers who in terms of their income depend directly on the business results of their cooperative.
- (79) A further element which has to be recognized is the difficult market situation that the Meldoc partners had to deal with. The concentration of market power on the side of the big retailers, consolidation by way of take-overs and mergers, the important changes in the composition of the product range and the vulnerability to imports urged the Meldoc partners to cooperate. However, in their choice to cooperate and not to notify their cooperation to the Commission, the Meldoc partners assumed the right to regulate the Netherlands market for milk and milk products themselves. In as far as such regulation infringes Article 85 (1), such behaviour can of course never be accepted by the Commission. In this particular case the Commission is, moreover, confronted with serious violations of the EEC competition rules. Market-sharing through a

quota system in combination with cooperation on sales and prices on a nation-wide scale and the protection of markets against imports are well-established infringements. Further factors to be taken into consideration are the long duration of the cartel (since 25 December 1977), the adverse effect it had on inter-State trade at least from 1980 onwards, as well as the knowledge of the members of the cartel that their cooperation could be in violation of EEC competition rules (see paragraphs 19 and 22).

- (80) As to the relative contribution of each of the members of the cartel to the infringements committed, it is clear that Melkunie has primary responsibility. Not only was this undertaking one of the three which originated the cartel, it was also the largest partner in the Meldoc organization. Having regard to its market share in fresh milk compared to the other members of Meldoc, Melkunie had the largest interest in sealing off the Netherlands market for fresh milk. Furthermore, Melkunie played the leading role in carrying out the 'dumping' operation on the Belgian market. Melkunie was also primarily responsible for the agreement with Ziko.
- (81) The fact that DOMO and Coberco were, with Melkunie, the founding members of the Meldoc cartel also deserves special consideration in determining the level of the fines. Coberco, together with Campina, bears additional responsibility for carrying out the 'dumping' operation on the Belgian market in cooperation with Melkunie. The evidence shows that ML took an active part in the cartel but in a less central role than the other members.
- (82) Finally, an important consideration in the determination of the fines must be the wilful obstruction of the achievement of one of the most fundamental objectives of the Treaty, the integration of the economies of the Member States. By blocking imports of cheaper milk from Belgium and Germany, the cartel has a clear adverse effect on consumer interests,

HAS ADOPTED THIS DECISION:

*Article 1*

The agreement establishing the greater Meldoc organization in so far as it gave rise to the combination of consultation on sales and prices, a quota system with a compensation scheme and actions against imports constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

<sup>(1)</sup> ECR 1825 (1983).

*Article 2*

The companies forming part of the greater Meldoc organization shall refrain from the behaviour as described in Article 1.

*Article 3*

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

- |  |                |
|--|----------------|
| (1) Verenigde Cooperatieve Melk-industrie 'Coberco':   | 1 360 000 ECU, |
| (2) DMV 'Campina' BV:                                  | 1 020 000 ECU, |
| (3) Menken-Landbouw BV:                                | 425 000 ECU,   |
| (4) Melkunie Holland BV                                | 3 150 000 ECU, |
| (5) Cooperatieve Melkproductie Bedrijven 'DOMO-Bedum': | 600 000 ECU.   |

These fines shall be paid into the Commission's accounts Nos:

- (a) Account No 54.16.99.369 — Commissie van de Europese Gemeenschappen Brussel — ECU (for payment in ECU),

Algemene Bank Nederland NV,  
 attentie de Heer F. Maane,  
 Vijzelstraat, 32,  
 Amsterdam,

- (b) Account No 41.60.95.518 (for payment in Fl),

Amrobank,  
 Rembrandtplein 47,  
 Postbus 1220,  
 Amsterdam 1000,

within three months from the date of notification of this Decision. After three months interest shall automatically be payable at the rate charged by the European Monetary

Coöperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 10,5 %.

Should payment be made in the national currency of the addressees, the exchange rate applicable shall be that prevailing on the day preceding payment.

*Article 4*

This Decision is addressed to:

- (1) Melkunie Holland BV  
 De Bleek 1,  
 NL — 3440 AE Woerden,
- (2) Coöperatieve Melkproductie Bedrijven 'DOMO-Bedum',  
 De Perk 30,  
 NL — 9411 PZ Beilen,
- (3) Verenigde Coöperatieve Melkindustrie 'Coberco',  
 Stationsplein 37,  
 NL — 7200 AB Zutphen,
- (4) DMV 'Campina' BV,  
 Dirk Boutslaan 2,  
 NL — 5600 AN Eindhoven,
- (5) Menken-Landbouw BV,  
 Rijksstraatweg 500,  
 NL — 2240 Wassenaar.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty,

Done at Brussels, 26 November 1986.

*For the Commission*

Peter SUTHERLAND

*Member of the Commission*