II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 May 1994

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

(IV/33.640 — Exxon/Shell)

(Only the English text is authentic)

(94/322/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to the applications for negative clearance and the notification for exemption submitted pursuant to Articles 2 and 4 of Regulation No 17 on 21 November 1991 and 29 May 1992 by Exxon Chemical International Inc. (Belgium) on behalf of all Exxon Chemical affiliates in Europe and on 2 December 1991 and 10 June 1992 by the Shell International Petroleum Company Limited (London, United Kingdom) on behalf of Shell Chimie SA (Rueil-Malmaison, France) and Shell Nederland Chemie BV (Rotterdam, Netherlands), concerning a set of agreements between certain chemical companies of the Exxon Group (USA) and certain chemical companies of the Shell Group (Netherlands — United Kingdom),

Having regard to the summary of the applications and notifications published [2] pursuant to Article 19 (3) of Regulation No 17,

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

Whereas :

I. THE FACTS

A. Subject of the Decision

(1) This Decision concerns a set of agreements between chemical companies of the Exxon and Shell Groups related to establishing, financing, constructing, managing and operating a production joint venture between a French affiliate of the Exxon Group and a French affiliate of the Shell Group.

The joint venture is named 'Compagnie Industrielle des Polyéthylènes de Normandie' (Cipen) and is situated at Notre-Dame-de-Gravenchon (NDG) in France, where an Exxon integrated petroleum/chemical complex is also situated.

(2) The principal aim of the joint plant is production of linear low-density polyethylene (LLDPE), but it may also produce high-density polyethylene (HDPE). Both LLDPE and HDPE are covered by the term 'linear polyethylene' — to be distinguished from high-pressure low-density polyethylene (LDPE).

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 92, 2. 4. 1993, p. 2.

B. The undertakings

(3) The partners in Cipen are Exxon Chemical Polymers SNC (NDG, France) and Shell Chimie SA (Rueil-Malmaison, France), two companies incorporated under the laws of France, affiliates, respectively, of the Exxon Group and of the Shell Group. The parties to the other notified agreements all also belong to either the Exxon or the Shell Group.

(4) The Exxon Group is a multinational group, the principal business of which is energy. This involves exploration for, and production of, crude oil and natural gas, manufacturing of petroleum products and transportation and sale of crude oil, natural gas and petroleum products. Exxon is a major manufacturer and marketer of petrochemicals (ethylene, propylene, benzene and their derivatives).

(5) The Shell Group is a multinational group engaged in the oil, natural gas, chemicals, coal and metals businesses. This includes major activities in the field of petrochemical manufacturing and marketing.

C. The products and their markets

(6) LLDPE, with which the Exxon/Shell joint venture agreements are principally concerned, and HDPE, are thermoplastics produced from ethylene, a monomer derived from naphtha cracking or from ethane and gas-oil cracking and co-monomers such as butene-1. The linear polyethylene produced by the Exxon/Shell joint venture is manufactured through the polymerization and processing of ethylene and butene-1 feedstocks.

(7) The consumption LDPE/LLDPE, if analysed according to processing technique and application, can be split up principally into the following sectors :

— film and sheet such as heavy-duty sacks ; shrink and stretch film ; other packaging applications in the industrial, retail and domestic fields ; carrier bags ; agricultural, building and construction applications, and refuse sacks,

— injection moulding,

— blow moulding used for a wide range of domestic products where its good surface finish has an advantage,

— pipe and profiles ; mainly for irrigation systems in the agricultural and horticultural industries,

— wire and cable,

— extrusion coating which is used to make liquid packaging containers.

(8) HDPE, if analysed according to processing technique and application, can be split up principally into the following sectors :

— injection moulding which includes crates and boxes ; household wares and other applications such as toys and electrical components,

— blow moulding ; especially for distinctive packaging, and for large drums and other containers,

— extrusion applications in packaging film ; pipes and profiles ; wire and cables, geotextiles, ribbon, monofilaments and raffia,

— miscellaneous applications mainly in rotational casting and melt casting operations.

(9) In 1991 more than 70 % of LDPE/LLDPE consumption was in the film and sheet sector, while only about 2 % was in the blow moulding sector.

On the other hand more than 40 % of HDPE consumption was in the blow moulding sector. Moreover about 25 % of HDPE consumption was in the injection moulding sector, while less than 8 % of LDPE/LLDPE consumption was in the same injection moulding sector.

Therefore, as HDPE is much less interchangeable with LLDPE than LDPE, the market mainly affected by the joint venture is the combined market for LDPE and LLDPE.

(10) However, it is true that LDPE and LLDPE are not fully interchangeable. But the only use for which LDPE is almost completely unsubstitutable with LLDPE is extrusion coating, a sector consuming less than 8 % of the LDPE total sales. On the other hand, new technological developments are increasing the substitutability between certain polymers. However, as far as polyethylene polymers are concerned, the most significant change is that polypropylene has begun to compete partially with HDPE. Therefore this change has only a limited indirect impact on the LDPE/LLDPE market.

(11) As the LLDPE process utilized by Cipen is also capable of producing HDPE, the HDPE market could also be affected by the joint venture.

(12) As was stated previously, polypropylene has begun to compete partially with HDPE. In 1991 the HDPE applications more appreciably under attack from polypropylene were some areas of injection moulding (in particular housewares) and the extrusion sub-sectors, including netting, geo-textiles, ribbon, monofilaments and raffia.

(13) The relevant geographical market is the whole Community, as the products in question are safety and easily transportable and as the EC producers and suppliers are in fact active in inter-State trade to a considerable extent.

(14) The LDPE/LLDPE relevant market in economic terms is the territory of the Community, and not the whole territory of western Europe (EC plus EFTA). In fact, on the one hand, the four major exporting countries in western Europe in 1991 were EC Member States (the Netherlands, Belgium, France and Germany), together representing over 70 % of total tonnage moved inside Europe, and, on the other hand, the four major importing countries accounting for 60 % of internal trade in western Europe were also EC Member States (Germany, Italy, United Kingdom and France). Out of approximately 3 200 Kt (kilotonnes) of LDPE/LLDPE exported in 1991 by EC countries, only about 300 Kt were exported to the EFTA countries while more than 2 380 Kt went to other EC countries. Out of approximately 3 370 Kt of LDPE/LLDPE imported in 1991 by the EC countries, less than 390 Kt were imported from the EFTA countries while more than 2 380 Kt were imported from other EC countries. However, even if the relevant market in economic terms were the whole territory of western Europe, the respective capacity share of almost every producer would be very similar to those they hold in the Community and the Commission's assessment of the case would not change.

(15) Similar considerations apply to HDPE. The two major exporting countries in western Europe in 1991 were EC Member States (Belgium and Germany), while EC Member States (Germany, United Kingdom, France and Italy) were the four main importing countries. Out of approximately 1 600 Kt of HDPE exported in 1991 by EC countries, only about 140 Kt were exported to EFTA countries while about 1 270 Kt went to other EC countries. Out of approximately 1 900 Kt of HDPE imported in 1991 by EC countries only about 200 Kt were imported from EFTA countries while about 1 270 Kt were imported from other EC countries.

(16) The situation for polypropylene is also similar. The three major exporting countries in western Europe in 1991 were EC Member States (Belgium, France and the Netherlands), while EC Member States (Germany, Italy, United Kingdom and Belgium) were the four main importing countries. Out of 2 840 Kt of polypropylene exported in 1991 by EC countries, less than 200 Kt were exported to EFTA countries while about 2 270 Kt went to other EC countries. Out of about 2 700 Kt of polypropylene imported in 1991 by EC countries, only about 300 Kt were imported from EFTA countries while about 2 270 Kt were imported from other EC countries.

(17) Total EC LDPE/LLDPE capacity in 1991 was about 5,5 million tonnes. The largest LDPE/LLDPE producer in the EC is currently Enichem with a capacity production share of about 24 % in 1991, followed by Dow ±12,5 %; BP/Bayer ±12 %; Exxon ±11,5 %; Shell ±8,5 %; DSM ±8,5 %; Atochem ±7,5 %; BASF ±5 %; Repsol ±5 %; Leuna Werke ±3 %; Neste ±2,5 %. Exxon's plants (apart from Cipen) are located in Meerhout (375 Kt/y of LDPE) and Antwerp (260 Kt/y of LDPE) in Belgium. Exxon also has an LLDPE/HDPE plant at Al-Jubail in Saudi Arabia (50 % of the Kemya joint venture producing 430 Kt/y) supplying EC countries with significant volumes. Shell's plants (apart from Cipen) are located in Berre (105 Kt/y of LDPE) and Fos (100 Kt/y of LDPE) in France, in Carrington (105 Kt/y of LDPE) in the United Kingdom and in Wesseling (50/50 ROW joint venture with BASF : 400 Kt/y of LDPE and 15 Kt/y of LLDPE/HDPE, Shell having 12 % drawing rights) in Germany.

(18) Total EC capacity for manufacturing HDPE in 1991 was about 3,1 million tonnes. The largest HDPE producer in the EC is currently Hoechst/Wacker with a capacity production share of about 17,4 % in 1991, followed by Fina/Petrochim ±14,4 %; BP/Bayer ±11 %; Enichem ±10,5 %; Solvay ±8 %; Repsol ±7 %; Dow ±6,2 %; BASF ±6 %; DSM ±5 %; Huels ±5 %; Atochem ±3 %; Neste ±3 %; POB/Danubia ±3 % and Shell ±0,5 %. As was previously mentioned, Exxon has (apart from Cipen) an LLDPE/HDPE plant in Saudi Arabia (50 % of the Kemya joint venture producing 430 Kt/y). Shell has (apart from Cipen) an HDPE plant in Wesseling in Germany (50 % of the ROW joint venture with BASF, capable of producing 215 Kt/y).

(19) Total EC polypropylene capacity in 1991 was about 4,6 million tonnes. The largest polypropylene producer in the EC is currently Himont, with a capacity production share of about 17 % in 1991, followed by Shell ±11,6 %; Hoechst ±11,6 %; Atochem/BP ±7,2 %; Neste ±6,5 %; ICI ±6,5 %; BASF ±5,9 %; DSM ±5,8 %; Solvay ±5 %; Amoco ±4 %; Norpolefin/Statoil ±4 %; Fina ±3,5 %; Repsol ±3 %; Polychim ±3 %; Danubia/OMV ±2,9 % and Huels ±2,5 %.

(20) Total apparent LDPE/LLDPE consumption (production + import-export) in the EC was about 4,9 million tonnes in 1991.

The market shares were similar to the respective capacity shares, even allowing for the fact that in 1991 there were about 974 Kt of LDPE/LLDPE imported into the EC and about 818 Kt exported from the EC.

Like the other EC polyethylene producers Exxon and Shell (before the start-up of Cipen's plant Shell sold LLDPE bought from Exxon) sell most of the LDPE/LLDPE the produce to customers for further processing the market is very fragmented with many hundreds of processing companies of various sizes. Vertical integration and captive consumption are therefore very limited.

(21) Total apparent HDPE consumption (production + import-export) in the EC was about 2,9 million tonnes in 1991.

The market shares were similar to the respective capacity shares, even allowing for the fact that in 1991 there were about 637 Kt of HDPE imported into the EC and about 343 Kt exported from the EC.

(22) Total apparent polypropylene consumption (production + export-import) in the EC was about 3,8 million tonnes in 1991.

The market shares were similar to the respective capacity shares, even allowing for the fact that in 1991 there were about 440 Kt of polypropylene imported into the EC and 575 Kt exported from the EC.

(23) The LDPE/LLDPE and the HDPE markets have oligopolistic characteristics, as a small number of undertakings (Enichem, Dow, BP/Bayer, Exxon, Shell and DSM for LDPE/LLDPE; Hoechst/Wacker, Fina/Petrochim, BP/Bayer, Enichem and Solvay for HDPE) have the major share of capacity and, given the noticeable similarity between capacity and market shares, the major share of the market. Moreover, these markets are characterized by considerable price transparency and by a certain stability of production capacity shares in spite of the imbalance between production capacity and demand. The polypropylene market also has oligopolistic characteristics: only the first three companies have more than a 10 % capacity share each (Himont, Hoechst and Shell), while only they and the next three (Atochem/BP, Neste and ICI) go beyond a 6 % share; and prices are extremely transparent in a situation of some stability in production capacity shares with a noticeable similarity to capacity and market shares.

(24) As stated previously, the linear polyethylene produced by the Exxon/Shell joint venture is manufactured through polymerization and processing of ethylene and butene-1 feedstocks. Both Exxon and Shell are ethylene producers and Exxon has a steamcracker at NDG. Extending the capacity of this steamcracker allows Exxon to produce all the ethylene feedstock (200 Kt) required by the Exxon/Shell joint venture at NDG. The 100 Kt of ethylene required to supply Exxon's Antwerp and Meerhout (Belgium) polyethylene plants are supplied by Shell which has a steamcracker at Moerdijk (Netherlands).

(25) The current polyethylene situation is characterized by a certain imbalance between production capacity and demand. However some companies remain continuously optimistic about the LDPE/LLDPE market because of their low-cost LLDPE units and of the shifting of their LDPE efforts away from many 'general purpose' film applications and towards more specific applications for LDPE.

D. The agreements as signed in 1989/90

(26) The agreements which are the subject of the present procedure relate to the establishment of a 50/50 joint venture, (Cipen), a company located at NDG and carrying out the production of LLDPE as its main business. The plant has been built and is to be operated (for an initial term of 15 years from the date of start-up) by Exxon Chemical Polymers SNC (ECP). The products manufactured by the joint venture are to be sold independently by the two partners, together with the same or similar products of their own production.

The joint venture's production capacity is 220 000 tonnes per year of linear polyethylene (mainly LLDPE). A large part of the feedstock is supplied by the parent companies. Total Exxon and Shell production capacity of LDPE/LLDPE was therefore, by the end of 1992, about 1,3 million tonnes per year (about 20 % more than their 1991 total production capacity) without considering Exxon's production capacity in Saudi Arabia [1]. After completion (15 May 1992) Exxon and Shell together have more than 20 % of the EC's total LDPE/LLDPE production capacity.

[1] Exxon's production capacity in Saudi Arabia is 215 000 tonnes per year (3,9 % of the total EC LDPE/LLDPE capacity in 1991) and Exxon's EC LLDPE sales originating from Saudi Arabia were 43 500 tonnes in 1991.

(27) The main elements of the arrangements signed in 1989/90 were as follows:

(a) 'Joint Venture Agreement' between Shell Chimie SA and ECP;

(b) 'Economic Interest Group (GIE) Constitution' Agreement between Shell Chimie SA and ECP;

(c) 'Internal and Operating Rules' approved by the General Meeting of Cipen;

(d) 'Plant Utilization Agreement' between Shell Chimie SA and ECP and Cipen;

(e) 'Ethylene Supply Contracts' (Swap) between Exxon Chemical Belgium and Shell Nederland Chemie BV on the one hand and Société Française Exxon Chemical and Shell Chimie SA on the other;

(f) 'Butene-1 Supply Contract' between ECP and Shell Nederland Chemie BV;

(g) 'Construction, Operating and Services Agreement' between ECP and Cipen;

(h) 'Linear Polyethylene Technology Agreement' between Exxon Corporation and Cipen.

The principal features of the above listed agreements were the following:

(28) (a) *'Joint Venture Agreement'*

This is the main agreement and sets out the basic principles of the joint venture. Its main provisions are as follows:

— Shell Chimie SA and ECP agree to establish Cipen as an Economic Interest Grouping ('Groupement d'Intérêt Économique') between them under French law. They agree to vest the joint venture in Cipen,

— the parent companies are to have equal interests in Cipen in proportion to their equal financing of the joint venture. (The total plant cost is approximately FF 1 000 million),

— this agreement is to remain effective and enforceable for a primary term of 15 years after the 'start-up' of the joint venture plant.

(29) (b) *'GIE Constitution'*

The purpose of Cipen is:

— to construct and operate, directly or indirectly (in particular authorizing ECP to design, build and operate the plant) on behalf of its members, a linear polyethylene manufacturing plant located at NDG,

— to make available to its shareholders, or their affiliates, at total cost, all polyethylene produced from ethylene and/or other raw materials supplied by them.

(30) The instruments of the GIE are the General Meeting, the sole director and the controller.

— The General Meeting is to include one representative of each shareholder, and its decisions are to be by unanimous vote. It is to have power to change the articles of Cipen's Constitution and of the Internal and Operating Rules; to increase or reduce capital; to approve the accounts and the investments and operating budgets; to appoint the director and the controller; to determine policies for amortization, depreciation and reserves; to authorize all endorsements, sureties and guarantees given by Cipen; to designate an operator for the linear polyethylene manufacturing plant at NDG; to authorize proposals for new investments, loans and applications for banking facilities; and in general, to take all decisions in Cipen's interests, in particular those that may not be taken by the director.

— The sole director is chosen from among the personnel of ECP and is appointed by the General Meeting. The director is to carry out the decisions resulting from the investment budget approved by the General Meeting. Generally, the director is not entitled to perform any act falling outside the terms of ordinary business.

— The controller is to be appointed by the General Meeting and chosen from among the personnel of Shell Chimie SA. The controller is to have the power to carry out any audit he may choose on Cipen's operations excluding, however, any right to inferfere with such operations.

The GIE shall permit duly authorized representatives of either member ('audit team') to have full access to the operations of the GIE. The auditing and controls exercised by the controller (and audit team) shall be confined to the operations of the GIE, to the exclusion of any other industrial activity on the same site at NDG. However, the controller shall have personal access to other pertinent industrial activities at the site and to certain essential technology and confidential information.

(31) (c) *'Internal and Operating Rules'*

Among the matters regulated by these rules are the following: new investments; sharing of costs; off-takes and supplies, as well as the organization of day-to-day management.

— New investments: four different types of new investment can be distinguished, three within the GIE and one outside the GIE.

1. Joint investments which do not exceed the authority given to the director in the annual budget: these investments, as they are contemplated in the budget approved by the General Meeting, can be carried out by the director.

2. Joint investments which exceed the authority given to the director in the annual budget: any proposal concerning a potential joint investment opportunity for Cipen and exceeding the authority given to the director in the annual budget must be submitted for consideration by a General Meeting. If one party does not approve such a proposal, the other is to be entitled to make such investment at the plant under the following conditions:

3. separate investments within the GIE: a member is entitled to make such investment only if the other member has refused to make it jointly and only if such investment is within the manufacturing capability of the plant as determined by the General Meeting.

Such separate investment is subject to the following conditions:

— it must be at the sole cost and risk, and for the sole benefit of the investing member,

— the investing member must make arrangements to obtain all required utilities and services from the GIE and to hold the non-investing member harmless against any increase in costs resulting directly or indirectly from such investment,

— any such separate investment by a member necessitating a revised sharing of the members' respective Production Rights is to be limited by the general principle that each member's Production Rights are to be no less than 33 %.

4. Separate investments outside the GIE: each member may make an independent investment at any time outside the GIE in any facility, whether or not relating to linear polyethylene.

— Sharing of costs: Cipen's fixed costs are to be borne by each member in proportion to its shareholding; variable costs are to be allocated to the shareholders in proportion to their production through Cipen.

— Off-takes and supplies: once the production plan has been established each member is to supply the amount of ethylene and butene-1 required for the manufacture of polyethylene during the following month and to take delivery of the corresponding production, in accordance with the provisions of the Plant Utilization Agreement.

— Organization of day-to-day management: the agreement envisages the establishment of an Operating Committee consisting of two members of each party and the Director of the GIE to oversee the construction of the plant and the GIE's operations. This includes ensuring the monthly offtake schedule, the annual preparation of the production plan and budget, the development of new and experimental products, the preparation of investment proposals and quality control.

(32) (d) *'Plant Utilization Agreement'*

Among the matters regulated by this agreement is the calculation of Shell's and Exxon's production rights: the plant's available hours are to be shared pro rata to the parties' interests in Cipen.

The agreement provides that if either party does not fully utilize all of its production rights in a specified period, the possible reapportionment of production rights for such period is to be discussed by the two parties.

(33) (e) *'Construction, Operating and Services Agreement'*

Cipen authorizes ECP to design, build and operate, for a term of 15 years, a linear polyethylene manufacturing plant at NDG with an annual capacity of approximately 220 000 metric tonnes at a cost of approximately FF 1 000 million and to obtain all necessary construction and operating permits.

(34) (f) *'Ethylene Supply Contracts' (Swap)*

The Société Française Exxon Chemical (ECSF) is to supply Shell Chimie SA (SC) with ethylene volumes corresponding to SC's requirements for manufacturing linear polyethylene at NDG under the Plant Utilization Agreement (1) and ECSF is to have one of its affiliated companies — Exxon Chemical Belgium (ECB) — buy equivalent volumes at similar terms and conditions from a Shell affiliate : SC is to arrange for the supply of such volumes for delivery at Antwerp (2) on similar terms and conditions by Shell Nederland Chemie BV (SNC). There are two purchase and supply contracts (Exxon-SC and SNC-Exxon) on identical terms.

(35) (g) *'Butene-1 Supply Contract'*

Shell is to sell to Exxon a percentage (minimum 85 %, maximum 115 %) of the adapted base quantity of butene-1 (the estimated annual base quantity required to produce 110 kt of linear polyethylene at the NDG unit, adapted in proportion to the annual linear polyethylene production for Exxon at the unit).

(36) (h) *'Linear Polyethylene Technology Agreement'*

The Exxon Corporation grants the GIE, as an Exxon affiliate, the rights and obligations of the Low Pressure Polyethylene Licence Agreement between Union Carbide Corporation (UCC) and Exxon Corporation, under which Exxon is licensed to manufacture, use and sell polyethylene resins with UCC technology under UCC polyethylene Patents Rights.

The GIE therefore obtains an extension of rights under the Exxon-UCC PE Licence, and continuing technology and technical support from Exxon, for the commercial manufacture of linear polyethylenes in France. For use in the construction of its plant of the information included in UCC PE technology, Exxon PE technology and Exxon PE improvements, the GIE shall pay Exxon a lump sum and a running royalty on all PE resins produced in its plant and plant extensions which are sold or used during the Royalty Term.

(1) Exxon ethylene from Notre-Dame-de-Gravenchon is delivered to Shell Chimie at the LLDPE/HDPE joint facilities.
(2) Shell ethylene from Moerdijk (The Netherlands) is delivered to ECB in the Antwerp area of the pipeline grid owned by Ethyleen Pijpleiding Maatschappij.

E. Notification and amendment of the agreements

(37) Following a Statement of Objections sent by the Commission to both parties concerned they notified the abovementioned agreements. The Commission therefore considered it appropriate to send a supplementary Statement of Objections on 3 April 1992, confirming its legal assessment of the case and explaining that the conditions specified in Article 85 (3) for granting an exemption were not fulfilled because the agreements imposed on the parties restrictions on competition which were not indispensable to the attainment of the objectives listed in Article 85 (3).

(38) Specifically :

(a) new separate investment by either party in the joint facility depended on the consent of the other ;

(b) an Operating Committee, including representatives of both parties, was responsible for most decisions concerning the operation and management of the joint venture, allowing a continuous flow of sensitive competitive information between the parties ;

(c) if either party under-utilized its share of the plant's production capacity, the other party could not take over part, or all, of the non-utilized capacity without the first party's agreement.

(39) In view of the Commission's remarks in the supplementary Statement of Objections of 3 April 1992, the parties modified the original agreements and notified the following changes :

(a) each member of the joint venture is entitled to make any investment within the GIE. If the proposed investment involves a modification of existing production facilities, the member wishing to make such investment shall give the other member the opportunity to make such investment jointly.

If the other member wishes to participate, the joint investment proposal shall be submitted for consideration by a General Meeting if it exceeds the authority given to the director in the annual budget.

If the other member does not wish to participate, the member wishing to invest shall be entitled to make such investment provided that such investment would not impair the technical capabilities of the GIE's linear polyethylene manufacturing plant. Such investment shall however be subject to the same conditions as those listed in the original text of this clause.

(b) the Operating Committee has been replaced by an Advisory Committee to be convened at the sole director's discretion, to be consulted by the sole director on any subject of an administrative or technical nature;

(c) in the case of under-utilization of its production rights by either party, the other party is entitled to take over all or part of the non-utilized production rights without any need to consult the under-utilizing party.

F. Comments by interested parties

(40) Following publication of the notice required by Article 19 (3) of Regulation No 17 the Commission did not receive any observations from interested third parties.

II. LEGAL ASSESSMENT

A. Cooperative nature of the Exxon/Shell joint venture [1]

(41) The agreements between chemical companies of the Exxon Group and the Shell Group which are the subject of this Decision provide for the creation of a joint venture and for feedstock supplies. The joint venture is cooperative in nature, as it does not perform all the functions of an autonomous economic entity, and gives rise to coordination of competitive behaviour by the parents both between themselves and in relation to the JV (point 10 of the Commission Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty, read in conjunction with Article 3 (2) of Regulation (EEC) No 4064/89) [2].

B. Article 85 (1)

(42) The agreements between Exxon and Shell fall within Article 85 (1) since they restrict competition and may affect trade between Member States. They cannot therefore be given negative clearance as the parties have requested in their applications. They may, however, be exempted under Article 85 (3).

(43) Taking into account the criteria set out in the Commission Notice on cooperative joint ventures and applying them in the light of the particular circumstances of the present case the Commission concludes that the agreements (a) lead to joint control of the venture, (b) have as their object and effect the coordination of the competitive behaviour of the parties and therefore a restriction of competition and (c) may affect trade between Member States.

(a) *Joint control*

(44) Cipen is not an independent and autonomous undertaking *vis-à-vis* its parent companies, since its activity is limited to the production and supply of linear polyethylene to the parent companies, which remain active as producers and sellers of the same or similar products. Cipen's activites are determined at the General Meeting by unanimous vote. Daily management is in the hands of a director chosen from among the personnel of Exxon and is subject to audit by a controller chosen from among the personnel of Shell. Even if the controller has no right to interfere with Cipen's operations, its structure allows each member to obtain full information about its business. The parties claim that their control is limited to organizational and technical arrangements for the use of the production facility. However, the characteristics of Cipen are, *inter alia*, participation of both ventures in budget decisions, joint decisions on joint future investments which do not exceed the authority given to the director in the annual budget and on joint future investments which exceed this authority, and joint decisions on plant optimization and on product development. Shell's role is not therefore limited to that of a passive investor and the rela-

[1] See Commission Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty, OJ No C 43, 16. 2. 1993, p. 2.

[2] OJ No L 257, 21. 9. 1990, p. 14, corrected version replacing the version printed in OJ No L 395, 30. 12. 1989, p. 1.

tionship between the parties is not that of customer and supplier; nor is this a long-term processing arrangement.

Joint control between competitors implies, in the present case, intimate and continuous cooperation between the parents: such cooperation necessarily leads to a coordinated management structure and allows a two-way exchange of information.

(45) In the Exxon/Shell case cooperation is not confined to organizational and technical arrangements for the use of the facilities, but amounts to real joint control by the parents of the joint venture. It should be noted that Exxon's preferred option was, as stated in the Exxon internal note of 1 February 1989 (meeting with Shell, Paris, 26 January 1989), a pre-payment agreement (PPA) which in shell's view would not easily have allowed for equal control over the plant. However, Shell did not accept unilateral control by Exxon and finally succeeded in having genuine joint ownership.

(46) This is shown by the Shell internal note of 1 February 1989 ('Cape Project Form of Cooperation'). Point 2 of this note – 'Why not a processing agreement like in Mosmorran ?' (Great Britain) — clearly explains the essential difference between:

1. an agreement limited to technical arrangements for joint production (a 'feedstock-driven project') as at Mosmorran which is described as a 'plant dedicated to the conversion of ethane and propane stream produced by the Shell/Exxon E&P venture; by definition, 50 % of that stream is Exxon's entitlement and 50 % is Shell's' (1),

and

2. a 'product-driven project' as at Notre-Dame-de-Gravenchon.

(47) The peculiarities of such a 'product-driven project' are, *inter alia:*

(i) participation of both venturers in budget decisions;

(ii) joint decisions on investments;

(iii) joint decisions on plant optimization and on product development.

(48) The Note continues 'An Agreement of this kind would reflect the business consensus as exists between Shell and Exxon. This consensus extends far beyond the limits of a processing agreement ... However, the envisaged cooperation fits naturally in a flexible and simple joint venture type of agreement because it provides the principal tools for tailor-made decisions to direct the operations in a manner which suits parties' changing requirements.'

(49) The Commission therefore concludes that the coordinated management structure of CIPEN gives Exxon and Shell joint control.

(b) *Restrictions resulting from joint formation and joint control*

(50) Exxon and Shell are competitors on the principal relevant market: the oligopolistic EC market for LDPE/LLDPE (as distinct from HDPE and other thermoplastics), where they were the fourth and fifth larges producers in 1991, with market shares of some 11,5 % and 8,5 % respectively. The HDPE market might also be relevant: Exxon and Shell must be considered competitors on that market.

In particular:

— Exxon produces LDPE in Belgium and LLDPE/HDPE in Saudi Arabia; Shell produces LDPE in the United Kingdom, France and Germany. Shell produces polypropylene in Germany and in the United Kingdom; Exxon produces polypropylene in France,

— Exxon is capable of setting up LLDPE/HDPE production facilities in the common market independently and Shell is capable of beginning individual production of LLDPE/HDPE. Shell and Exxon are capable of setting up polypropylene facilities in the common market independently.

(1) The main elements of the plant project for the production of ethylene at Mosmorran are as follows: under the processing agreement between Exxon and Shell (July 1980), Exxon Chemical Ltd is to process feedstock owned and supplied by Shell into ethylene for Shell in the plant, for whose management and operation Exxon is to be solely responsible; and Shell is to offtake such ethylene from Exxon. Exxon is to make all decisions relating to the design, construction, operation, addition(s) and modification(s) to or replacement(s) of the plant.

(51) As regards Exxon, this ability is proven firstly by the know-how that it has and uses in its LLDPE/HDPE plants outside Europe (Exxon is licensed to manufacture, use and sell LLDPE/HDPE with UCC technology) and by its polypropylene plant at NDG. As regards Shell, it should be noted that all other polyethylene manufacturers have been able either to develop their own technology or to acquire it under licence and that Shell owns jointly with BASF (ROW) and LLDPE/HDPE plant in Germany with a capacity of 15 kg/y. Furthermore Shell, according to the Memorandum to the Board of Shell Petroleum NV of October 1989, has sold (before May 1992) a 'pre-marketing volume' of LLDPE bought from Exxon ; thus Shell has already its own commercial experience in this particular sector. Shell has already its own experience in producing and marketing polypropylene.

(52) Secondly, an Exxon and/or a Shell LLDPE/HDPE facility having half the capacity of the joint venture would be of a technically and economically feasible size (110 Kt), as is shown by the existence of LLDPE/HDPE facilities of the same size and even smaller, belonging to other undertakings.

(53) Therefore the formation by Exxon and Shell of a joint production venture to be operated within the same markets as the parent companies which are and still remain competitors has to be examined and evaluated in the light of Article 85 (1).

(54) In evaluating whether the set of agreements between Exxon and Shell has as its object or effect to restrict competition, account must be taken of the legal and er economic context, in particular in the light of the situation on the relevant market and the position of the parties thereon. Although the Court of Justice has not yet taken a specific position on joint ventures, the Commission has to bear in mind the central role of the independence of business operators with respect to their business decisions which must not be subject to reciprocal influence.

(55) Cipen is a joint venture to which the parent companies have delegated only the production functions of an undertaking (partial function JV). As the joint venture processes feedstock provided by the parent companies into polyethylene (which continues also to be individually produced and marketed by Exxon and Shell) to be supplied back to them, competition between undertakings — taking into account the market proximity of their cooperation and the inherent tendency to align prices — will exist in a weaker form only (point 40 of the Commission Notice on cooperative joint ventures).

(56) The parent companies have made a significant investment in the new production facility, which represents a considerable part (approximately 17 %) of their overall activity in the LPDE/LLDPE market (where there is the risk that the existing imbalance between production capacity and demand will persist for the next few years), and sell its output without further processing. Their setting-up and running of Cipen as a joint venture implies a direct and permanent cooperation influencing their current and future competitive behaviour and affecting their independence.

(57) However, as far as the HDPE market is concerned the Commission considers that the restriction of competition is not significant because the current weight of Exxon and Shell in the HDPE market is not great. Shell has only 50 % in the ROW joint venture with BASF, capable of producing 215 Kt/y of HDPE and Exxon has no HDPE plant in the Community. It is true that Exxon can export HDPE from the Middle East and the United States of America but the outlook for the next decade is a decline in total imports from the United States of America as world prices are expected to equalize and there will be increased domestic availability. On the other hand, it has to be borne in mind that Shell is the second producer (with Hoechst and after Himont) of polypropylene, which partially competes with HDPE. Moreover, Exxon is one of the major polypropylene producers in the United States of America and since the end of 1992 has had its first plant in the EC (140 Kt/y) at NDG. For these reasons, the Commission considers Exxon and Shell to be competitors but, at the same time, since the inter-polymer competition between HPDE and polypropylene is not significant, the Commission believes that Cipen, given its present size and in the light of the present characteristics of the oligopolistic HDPE market and of the only partial substitutability of HDPE by polypropylene, leads only to an insignificant restriction of competition.

(58) This restriction of competition (significant in the LDPE/LLDPE market but not so in the HDPE market), which does not presuppose any explicit intention of the parties, is well illustrated by the aspects of investment and of production :

I. Investment

(59) In declining to create a new production facility jointly, the parents coordinated their investment plans and gave up the possibility of enlarging their polyethylene buinesses by individual action, of which they would have perfectly capable, given their overall size and experience inthe sector. As far as investments within the GIE are concerned neither the General Meeting nor the director can act contrary to the interests opf one of the shareholders: the first because its decisions must be unanimous; the second *inter alia* because of the controller's power of audit. The decision-making powers of the General Meeting and of the director are limited by Cipen's need to accommodate the interests of its shareholders. As far as the investments outside the GIE are concerned, even if each member may make anindependent investment, it will be influenced in its own investment decisions concerning LDPE/LLDPE by the decisions made jointly with its partner in a plant which represents a considerable and technologically sophisticated part of both parents' activities in the LDPE/LLDPE market. In particular, the decision to set up a joint facility will appreciable reduce the possibility that either of the parties, after having put substantial financial investment into the joint venture, will undertake costly investments in capacities competing with those of the joint venture [1]. The very object of their cooperation will thus be a restriction of competition between Exxon and Shell in the LDPE/LLDPE market. This restriction of competition will also indirectly affect the competitive position of the partners themselves.

II. Production

(60) Exxon and Shell will inevitable be led to coordinate their production within Cipern. Even if both are entitled to use the production facilities for the same length of time and for the required grades, each must necessarily take account of the other's plans, about which they will be able to acquire significant information, and respect the limits of the production facilities when producing for the other. Each parent is committed to taking delivery of the quantity of LLDPE/HDPE corresponding to the feedstock supplied by it and to supplying the ethylene and butene-1 required for the manufacture of the linear polyethylene corresponding to the operating time (50 %) allotted to it.

(61) The coordination between Exxon and Shell of their producton programme of linear polyethylene within the joint venture is strengthened by the ethylene supply contracts. In view of the economic reality represented by the ethylene supply contracts which amount to *de facto* exclusivity and their legal structure, it is clear that:

(i) only ethylene produced by the parents is supplied to Cipen;

(ii) the swap arrangements for ethylene between Exxon and Shell indirectly and coordination of their polyethylene production to plants not forming part of the joint venture (Exxon's LDPE plants in Belgium).

(62) This anticompetitive effect is not eliminated by the fact that the parties continue to market LDPE/LLDPE products — including the output of the joint venture — independently [2]. As sales prices are largely similar, the major competition parameter is the overall strategy on investment and production which is precisely the concern of their coordination within the joint venture.

(63) Nor is the anticompetitive effect eliminated by the amendments to the agreements subsequent to the Commission's supplementary Statement of Objections. It is true that those amendments guarantee a larger autonomy in day-to-day management and greater scope for separate investments, and for adapting the output of the joint venture to the respective needs of the parents. Nevertheless, the structure chosen for their cooperation is still different from the forms of passive investment or long-term processing arrangements. In fact, the provisions provided for go beyond what is strictly necessary for the creation and proper technical and administrative operation of the joint venture and lead to coordination of the competitive behaviour of the parties [3]:

— As far as new investments within the joint venture are concerned, it remains true that joint future investments which do not exceed the authority given to the director in the annual budget are the result of a joint decision because they are contemplated in the budget approved by the General Meeting and that joint future investments which exceed the authority given to the director in the annual budget are equally

[1] Commission Delegation 88/88/EEC — Olivetti/Canon, OJ No L 52, 26. 2. 1988, p. 51.

[2] Commission Decision 88/88/EEC — Olivetti/Canon. The impact of the cooperation on the parents' resale prices was in the case an additional item.

[3] Commission Decision 87/100/EEC of 17 December 1986 — Mitchell Cotts/Sofiltra, OJ No L 41, 11. 2. 1987, p. 31.

the result of a joint decision because they must be submitted for consideration by a General Meeting. Moreover, the party wishing to make a separate investment within the CIE is not permitted to do so if the other party wishies such investment to be made jointly. Furthermore, the party investing separately is permitted to make such investment only if the other party's production rights do not fall below 33 %. There is still, therefore, coordination of competition behaviour in the investments field.

— As far as the day-to-day management is concerned, it remains the case that, even though the director has greater autonomy, he has still to carry out the joint decisions arising from the budget approved by the General Meeting.

— As far as production rights are concerned, it remains the case that each party must necessarily take account of the other's plans, about which they will be able to acquire significant information and respect the limits of the joint production facilities when producing for the other.

It has in particular to be pointed out that the flow of information between Exxon and Shell allowed by the joint venture structure is the basis on which each partner can plan its polyethylene production and adapt it to the choices of the other partner. This interdependence has a direct effect on the Exxon and Shell joint venture production plans (allowing, as was established by a Commission verification of the practical functioning of the joint venture, a perfect equalization of the quantities produced by the two ventures or a contemporaneous halting of the joint venture's production), but also an indirect effect (spill-over or group effect) on the polyethylene production plans of the Exxon and Shell groups as a whole. In fact any increase, reduction or halt in production decided by one partner in order to adjusts its behaviour to the other partner's choices in the joint venture entails a general reconsideration of the production plans of all polyethylene sites belonging to that partner's group.

(c) *Effect upon trade between Member States*

(64) The Exxon/Shell joint venture and related agreements may have an appreciable effect upon trade between Member States. The agreements concern products supplying the products throughout the Community. In particular, linear polyethylene manufactured by the plant venture is to be marketed *inter alia* throughout the EC.

C. Article 85 (3)

(65) The agreements between Exxon and Shell meet the conditions for exemption laid down in Article 85 (3). They contribute to improving the production of goods and to promoting technical and economic progress, while allowing consumers a fair share of the resulting benefit.

(66) As amended following the Commission's supplementary Statement of Objections, they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives. Finally, the agreements do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(a) *Improvement in production*

Promotion of technical and economic progress

(67) The agreements between the parties allow for the building of the first LLDPE/HDPE plant in the European Community utilizing the Unipol technology.

This technology provides a high degree of flexibility (enabling the plant at NDG to produce several different grades of linear polyethylene) and efficiency (enabling the plant at NDG to produce polyethylene at competitive costs). In the realm of technical progress, the presence of additional LLDPE in the Community at low cost should encourage customers to convert ageing extrusion equipment (older extruders must process an LDPE-LLDPE offers over LDPE in terms of 'down-gauging' (thinner films with equivalent strength). This would result in a reduction of customers' use of raw materials, their costs and the volume of plastic wastes.

(68) Account also has to be taken of the fact that an LLDPE/HDPE production joint venture between two ethylene producers which, because of the exchange swap agreements, do not need to transport ethylene, avoids health and environmental risks connected with such transport.

(69) Moreover, the fact that Cipen benefits from Exxon's existing Unipol technology licence, saving the expenses of a new Unipol licence or of developing and implementing alternative technologies, allows significant cost savings to be achieved.

(b) *Advantages for consumers*

(70) Besides this favourable effect to customers, the introduction in the Community of LLDPE produced by the Unipol technology and of the availability of significant volumes of lows cost LLDPE in the market described above will benefit consumers. Indeed the Exxon/Shell joint venture and related agreements do not contain any element preventing consumers from sharing in the resulting benefit of the LLDPE's low cost at Cipen. In particular it has to be pointed out that neither parent depends on the other for the feedstock (ethylene). Because of the ethylene swap arrangements Shell's raw material costs for LLDPE/HDPE ex-NDG will be based on Shell's costs of producing ethylene at its Moerdijk plant, while Exxon's cost of raw materials will be based on the economies of its NDG cracker. As it is highly unlikely that Moerdijk and NDG ethylene costs will be identical and as the two parties have separate marketing organizations and operations, competition between Exxon and Shell even if restricted by cooperation in the joint venture, will also prevail for the LLDPE produced at Cipen, thereby allowing consumers a fair share of benefits resulting from improvements in production and in technical and economic progress.

(71) Moreover, the often superior performance of LLDPE over LDPE will result in improved products for consumer's use. It should also be noted that the reduction in the use of raw materials and of plastic waste and the avoidance of environmental risks involved in the transport of ethylene will be perceived as beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are of increasing public concern.

(c) *Indispensability of the restrictions*

(72) The restrictions on competition arising from the agreements between Exxon and Shell as modified following the Commission's supplementary Statement of Objections are now reduced to the minimum indispensable to the attainment of the above objectives carried out by means of a reliably functioning joint production venture.

(73) The modified agreements still provide for a certain coordination of the competitive behaviour of Exxon and Shell with respect to investment and production of LDPE/LLDPE. However, this cooperation is carried out in the manner least restrictive of competition, thus maintaining as far as possible the economic autonomy of independent operators on the market.

(74) The reduced from of coordination is indispensable for attaining the abovementioned production, technical and economic improvements.

It is unlikely that either party alone would have built such an efficient and reliable LLDPE/HDPE plant for the following reasons :

(a) although both Shell and Exxon are financially strong, they did not have, given the current market situation, sufficient incentive to invest 100 % of the capital in a highly efficient and reliable LLDPE/HDPE plant like Cipen, which cost approximately FF 1 000 million ;

(b) although Exxon and Shell are capable of setting up individual LLDPE/HDPE facilities in the common market, having half the capacity of the joint venture, a single reactor plant using the advanced gas phase process is, technically and economically, the most appropriate.

(75) The objectives of the present cooperation could not, in the specific circumstances of the case, have been achieved by a long-term processing arrangement or by means of a mere financial participation in the venture, because of the complex issues relating to grade slate development and investment planning, which require that both parties exercise certain powers to oversee the structure of the venture.

(76) Given the capabilities of the Unipol process, a very large number of different reactor grades can be produced covering a multitude of combinations within the wide ranges of key product characteristics such as melt index, density, comonomer content, etc. Each product-finishing phase can be tailored, by addition of a variety of packages, to produce specific properties meeting the customers' applications requirements. As a result, Cipen's plant will be able to produce several different grades of linear polyethylene. Because some grades are not efficiently produced in sequence, the parties probably will want a very limited number of grades during any particular period of production. Thus the parties need a forum to discuss and determine which specific grades will be produced, both currently (grade slate selection) and in the future (new/experimental produce development).

Hence, proper grade slate development, capacity enhancement and grade cycle planning are key ingredients of an effective guidance of Cipen's processing facility characterized by the above described flexible producing system. In these particular circumstances it is indispensable that both parents be involved in the bilateral determination of such matters through a bilateral interactive decision-making process.

Were it not for the General Meeting's taking decisions unanimously and the sharing of authority between the Exxon Director (daily management) and the Shell Controller (internal auditing), the parties could not efficiently manage a joint venture in which they have made a significant investment and which requires, because of the above described complexity of the flexibility of the grade slate production, an interactive and continuous decision-making process.

(77) This does not mean that every decision concerning the new production facility has to be taken jointly. In fact the actual structure of the joint venture guarantees :

— a greater possibility of separate investment decisions not only outside, but also within, the GIE because such separate investment is not subject, as it was in the original agreements, to the condition of being 'within the manufacturing capability of the plant as determined by the General Meeting' but to the much more objective condition that 'such investment would not impair the technical capacilities of the GIE's linear polyethylene manufacturing plant.' In fact the original provisions concerning new investments in the Cipen facilities, where such investment effectively depended on the content of the other party, constituted a restriction of competition which was not indispensable. While it is necessary and acceptable that a proposed separate investment in the plant itself is not permitted if the other party wishes such investment to be made jointly, it must be possible for the party proposing such investment to make it independently as long as the operation of the plant is not jeopardized and the other party refuses to participate in the proposed investment. Since the new arrangements in the Internal and Operating Rules concerning new instruments in the facility take this requirement into account they do not exceed what is indispensable for the attainment of Cipen's objectives,

— the possibility, in the case of under-utilization of its production rights by one party, for the other party to take over all or party to take over all or part of the non-utilized rights without any need to consult the under-utilizing party, because such extra off-taking is not made subject, as it was in the original agreements, to the holding of a meeting between Exxon and Shell to 'discuss promptly the possible reapportionment of their respective production rights', but to the much more objective condition that the interested party shall 'notify the director of its intention to take over all or part of the non-utilized production rights, which shall be invoiced by the GIE to said party at the price of the actual fixed costs relating to the part of production rights taken over. GIE will promptly reimburse the under-utilizing party the amount so paid by the other party.'

As a general rule it is appropriate that each party has at its disposal a share of Cipen's production capacity corresponding to its interest in Cipen. Nevertheless, in a situation where one party under-utilizes its share of the plant's production capacity, it must be possible for the other party to take over part or all of the unutilized capacity without the first party's express or implied consent. While the original provisions concerning off-takes required such consent of

the other party and thus restricted the parents' autonomy in their production decisions beyond what is indispensable for the functioning of the joint venture, the alternations to the Plant Utilization Agreement now provide for each party to take the decision to utilize part or all of the plant operating time that the other party does not utilize, without needing that party's consent. In the area of plant utilization the agreements therefore no longer constitute a restriction which is not indispensable on competition,

— greater independence for the director in the day-to-day management of the joint venture because his powers are no longer limited, as they were in the original agreements, by the Operating Committee: the Committee has been replaced by an Advisory Committee to be convened at the director's discretion and to consulted by the director on any subject of an administrative or technical nature. While participation of both parents in budgetary decisions and decisions on joint future investments, plant optimization and product development are to be considered as related to the joint control of the venture, the day-to-day managemwent of the plant has to be organized in a manner which excludes the parents from continuously influencing Cipen operations not strictly related to the flexibility of its grade slate production.

This has been achieved by granting the Director of Cipen a large degree of autonomy with regard to the day-to-day management of the plant. A situation in which an Operating Committee, including representatives of both parties, was responsible for most decisions concerning the operation and management of the joint venture, as originally envisaged by the parties, would have allowed a continual flow of sensitive competitive information between the parties.

The new arrangement whereby the director, supported by the Advisory Committee, is responsible for the day-to-day management of the plant reduces this danger of undue cooperation between the parties and — unlike the arrangement originally envisaged — meets the condition of being indispensable for the smooth running of the plant.

(78) In this altered context the supply arrangements, and in particular the ethylene swap, can be considered as containing restrictions that are ancillary to the restriction of competition arising from the joint venture itself. The Commission Notice concerning the assessment of cooperative joint ventures pursuant to Articlew 85 of the EEC Treaty establishes that 'ancillary restrictions require no special justification under joint venture' because 'the exemption from prohibition is based for both on the same principles' (point 67 of the Notice).

(d) *Elimination of competition*

(79) The agreements between Exxon and Shell do not afford the parties the possibility of eliminating competition for a substantial part of the products in question.

(80) In fact the agreements do not exclude competition between the parties, although competition is restricted by cooperation in the joint venture. 'Cipen is a non-exclusive vehicle for each of the parties to produce certain volumes of LLDPE/HDPE in a jointly-owned Exxon operated plant and the parties have modified the original agreements to ensure that they remain separate and, to the greatest possible extent, independent competitors in the LDPE/LLDPE market.'

(81) After the implementation of the agrements, Exxon and Shell's total production capacity share for LDPE/LLDPE is about 22 % and their aggregate market share is of a similar magnitude. Considering that the joint venture restricts, but does not eliminate, competition between the parties, and even if one takes into account the aggregate market shares of the two groups, the size of the other competitors in the same market guarantees that workable competition is not eliminated.

This is in line with the Commission Notice concerning the assessment of cooperative joint venture pursuant to Article 85 of the EC Treaty, which establishes (point 63 of the Notice) that 'The market share limit of 20 % in the group exemption regulation can serve as a starting point for the assessment of production JVs in individual cases.' As the total production capacity share of Exxon and Shell for LDPE/LLDPE is marginally in excess of the threshold mentioned and as the market structure will continue to guarantee a degree of competition which, although reduced by the parties' cooperation in the joint venture, will nevertheless be sufficient, an individual exemption is justified.

Article 2

The declaration of exemption contained in Article 1 shall be subject to the following obligations:

1. Exxon and Shell shall, individually, inform the Commission in advance of any renewals of, or extensions in the scope of nature of, or amendments or additions to the agreements (including the identity of the parties) referred to in Article 1, and of any halt in production in the joint venture by Exxon or Shell (specifying the duration and the reasons for the halt).

2. Exxon shall submit, during the period of the exemption, a report every year to the Commission, arriving not later than two months after the end of the period which it covers. The first report shall refer to the period from 1 Janaury to 31 December 1993 and should be sent to the Commission within one month of the notification of this Decision.

   The report shall concern the activities relating to the production and the sale of LDPE, LLDPE and HDPE and shall, for each product, indicate the amount produced and the amount sold by Exxon, its subsidiaries and companies it controls, in the common market as a whole, in each Member State and in other countries, in each case identifying Cipen's production separately.

3. Shell shall submit, during the period of the exemption, a report every year to the Commission, arriving not later than two months after the end of the period which it covers. The first report shall refer to the period from 1 January to 31 December 1993 and should be sent to the Commission within one month of the notification of this Decision.

   The report shall concern the activites relating to the production and the sale of LDPE, LLDPE and HDPE and shall, for each product indicate the amount produced and the amount sold by Shell, its subsidiaries and companies it controls, in the common market as a whole, in each Member State and in other countries, in each case identifying Cipen's production separately.

4. Exxon and Shell shall individually inform the Commission in advance of any envisaged modification of capacity outside or within the Groupement d'intérêt économique with reference to the products under references in this Decision.

5. Exxon and Shell shall answer any request for any other information the Commission deems necessary to verify that competition is not restricted more that this Decision allows.

Article 3

This Decision is addressed to the following undertakings:

— Exxon Chemical International Inc.,
Boulevard du Souverain 280,
B-1160 Brussels,
(on behalf of the Exxon Group);

— Shell International Chemical Company Limited
Shell Centre,
GB-London SEI 7PG,
(on behalf of the Seil Group).

Done at Brussels, 18 May 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

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   The report shall concern the activites relating to the production and the sale of LDPE, LLDPE and HDPE and shall, for each product indicate the amount produced and the amount sold by Shell, its subsidiaries and companies it controls, in the common market as a whole, in each Member State and in other countries, in each case identifying Cipen's production separately.

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