

II

(*Acts whose publication is not obligatory*)

COMMISSION

COMMISSION DECISION

of 5 July 2000

relating to a proceeding pursuant to Article 81 of the EC Treaty

(Case COMP.F.1/36.516 — Nathan-Bricolux)

(notified under document number C(2000) 1853)

(Only the French text is authentic)

(2001/135/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES

I. THE FACTS

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 Regulation (EC) No 1216/1999⁽²⁾, and in particular Articles 3 and 15⁽²⁾ thereof,

Having regard to the Commission decision of 26 June 1998 to initiate proceedings in this case,

Having given the parties concerned the opportunity to make known their views on the objections raised by the Commission, in accordance with Article 19(1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17⁽³⁾,

After consulting the Advisory Committee on restrictive practices and dominant positions,

Whereas:

A. INTRODUCTION

(1) By letter of 21 April 1997, the French authorities informed the Commission that in the course of investigations carried out in France into the distribution of educational material, they had come across anti-competitive agreements concerning several Member States. By letter of 7 July 1997 those authorities sent the Commission the documents collected during their investigations.

(2) The Commission asked two competing French producers of educational material and their distributors in several Member States to provide information on their commercial relations, pursuant to Article 11 of Regulation No 17.

(3) These proceedings concern the agreements concluded between Éditions Nathan and its exclusive distributors, Bricolux SA in the Walloon region of Belgium, Smartkids in Sweden and Borgione Centro Didattico in Italy.

⁽¹⁾ OJ 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ 148, 15.6.1999, p. 5.

⁽³⁾ OJ 127, 20.8.1963, p. 2268/63.

B. THE PARTIES

- (4) Éditions Nathan ('Nathan') is a subsidiary, incorporated under French law, of Librairie Fernand Nathan — Fernand Nathan et Compagnie, which at the material time was itself a subsidiary of the CEP Communication group. CEP Communication was taken over by Havas in 1998, and Havas in turn was taken over by Vivendi, so that Nathan was eventually controlled by Vivendi. Vivendi has diversified into a number of areas such as the environment, construction, and, in its communications branch, publishing and multimedia; it had a turnover of EUR 41,5 billion in 1999. Nathan publishes, purchases, sells and distributes books, other publications and articles for educational and cultural purposes. Turnover in 1996 was FRF [...] * (ECU [...] *). Its educational material business is carried out in a separate commercial division that is different from the school textbooks business.
- (5) Bricolux SA is a company incorporated under Belgian law which specialises in the distribution of traditional school supplies and educational material to schools in the Walloon region of Belgium and, through a subsidiary, in Luxembourg. In 1996, its turnover was BEF [...] * (ECU [...] *).
- (6) Borgione Centro Didattico srl is a company incorporated under Italian law which has distributed educational material since 1977. Its turnover in 1996 was ITL [...] * (ECU [...] *).
- (7) Set up in 1995, Smartkids AB is a company incorporated under Swedish law which has distributed Nathan educational material in Sweden since 1996. In 1997 its turnover was SEK [...] * (ECU [...] *).

C. THE RELEVANT MARKET

- (8) The agreements between Nathan and its exclusive distributors concern the market for educational material intended for young children and define the conditions under which the contract products are distributed in several Member States.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets.

1. The product

- (9) The educational material includes products that are designed for and primarily intended to contribute to the education and development of the cognitive, sensory, motor and social abilities of children under the age of nine ⁽⁴⁾, through teaching activities led by qualified staff in establishments designed for that purpose.
- (10) The products as a whole are intended to meet all the teaching material needs of the establishments concerned. They are marketed essentially through a single medium, an annual catalogue which offers hundreds of items within a very broad price range ⁽⁵⁾.
- (11) The educational material can be divided into four main segments corresponding to different stages of development and meeting specific and separate educational needs ⁽⁶⁾:
- material to stimulate awareness and manipulation abilities, including puzzles, card games, shape games and sensory stimulation material,
 - basic learning material for language, drawing, technology, mathematics, creative activities, etc.,
 - equipment for activity areas, e.g. painting, activity corners, storage equipment, etc.,
 - equipment for living areas including outdoor games, playground equipment, cycles and carriers and beds and bunks adapted to the establishments.

⁽⁴⁾ Clearly, the needs of two-year old children and the material to meet those needs will not be the same as for eight-year olds, except in the case of special education. Nine is regarded as the threshold age over which the content of teaching material is aimed more at the acquisition of knowledge than at developing children's abilities. For instance, Nathan considers that its products are aimed at day nurseries and children aged two to six (statement made by the head of Nathan's educational material department to the French authorities, sent to the Commission by Nathan).

⁽⁵⁾ For example, wooden puzzles were sold for FRF 95 in the 1997 Nathan catalogue, i.e. 33 times less than plastic assembly kits intended to improve motor ability.

⁽⁶⁾ As the establishments work towards achieving a balanced development of the children, the products intended as teaching material for a particular area, for example, motor ability, cannot generally be replaced by those used in a different area, e.g. basic mathematics.

- (12) On the supply side, the annual catalogues include both Nathan's own products and products bought in by Nathan for resale. The market is also divided into two levels: production and sale to distributors (first level) and purchase for resale to the final consumer (second level). For example, firms that are well-established on the French market such as CAMIF or Celda, which are only distributors, are in competition with other firms which are both manufacturers and distributors, such as Asco, Nathan and Wesco.
- (13) Firms which only distribute (such as CAMIF) purchase products from several suppliers and incorporate them into a single range in the annual catalogue. In the case of manufacturing distributors (such as Wesco) the range in the annual catalogue includes the manufacturer's own products and products bought in for resale. In both cases, the aim is to cover an establishment's complete requirements. Nonetheless, a supplier may specialise in one of the segments. Nathan is known and highly regarded as a specialist in furniture for children and educational toys on the French market. It also benefits from the reputation earned through its strong presence as a publisher of textbooks for primary and secondary schools (some [between 10 % and 50 %] of total sales in France). Sales of educational material thus benefit from the reputation of the textbooks.
- (14) Demand stems primarily from nursery and primary schools, creches, hospitals, playgroups and specialised education centres for small children. Sales to such establishments are based on on-the-spot visits and demonstration. Products, prices and distribution channels and methods do not differ substantially from one category of establishment to another; these establishments constitute a category of demand separate from retail sales to the general public.
- (15) The relative size of each segment of the product market is dependent on the content of the curricula, in particular as regards schools which account for the largest share of demand. The curricula determine the relative amount of sport, music, language acquisition or mathematics (7). In turn, the extent of each learning area determines what each school purchases and in what quantities (8).
- (16) The choices made by the authorities responsible for equipping public-sector establishments and those made by teachers, instructors and heads of private-sector establishments also directly influence the volume and precise composition of their purchases of educational material; this is not true of retail sales to the general public.
- (17) Unlike retail goods, educational material sold to establishments must be suitable for use in groups, which calls for tough materials and forms suited to that purpose. Furthermore, as the goods are not intended for sale to the final consumer, packaging plays a less important commercial role than for similar goods sold retail (toys, games, drawing materials).
- (18) Differences in packaging, in distribution channels and methods (catalogue, sales promotion or targeted demonstration) and the specific needs of establishments also distinguish educational materials from the neighbouring markets for traditional school supplies (pencils, paper, books, etc.), school textbooks and audiovisual or informatics equipment, although the latter are also purchased by establishments looking after young children and form part of their budgetary decisions.
- (19) In short, these factors indicate that the manufacture and distribution of educational materials in establishments looking after young children is a separate market from identifiable neighbouring markets.
- (20) The market is in turn divided into segments of products which meet specific educational needs or vary considerably in price. Nathan has amended the view it had put to the Commission that educational material covered several separate product markets. Contrary to the initial view communicated by Nathan to the Commission (9), the segments are not separate educational material markets. The relevant market in this case is therefore the market in educational material.
-
- (7) For example, six-year olds in Spain will have 70 hours a year of artistic activities compared with 143 hours a year for Belgian pupils. (Eurydice report 'Pre-school and primary education in the European Union', 1994).
- (8) For example, the inclusion of musical activities in the curriculum will encourage manufacturers, with the help of educational research teams, to develop suitable products. In the words of a competitor in the field, 'Educational material is designed with a view to the requirements of teachers and educators, sticking as closely as possible to school curricula'. In its reply of 1 October 1997 to the Commission's request for information, Nathan also based its design of the material and segments on the official Ministry programme.
- (9) Nathan's reply of 1 October 1997 to the Commission request for information (see recital 116).

2. The geographic market

- (21) Apart from products with a predominant language component, material is designed by manufacturers and importers with a plurality of cultures and customs in mind. The production and sale of educational material at the first level of distribution does not have a solely national dimension. Purchases from other Member States (including products resold as they are and components) by the main firms on the French market account for some 25 % of the total.
- (22) Like other manufacturers, Nathan produces and distributes products that can be used without a knowledge of a particular language. They thus can be distributed outside France. Sales by French manufacturers via distributors in other Member States account for 12 % of their sales in the Community. Similarly, the Belgian market is very international from the standpoint of distributors' sources of supply, most products being imported from other Member States.
- (23) On the other hand, competition at the second distribution level (sales to establishments) are not homogeneous in the common market. All the Member States have establishments looking after small children. Nevertheless, policies adopted at national or local level play a crucial part in defining the curricula of the establishments⁽¹⁰⁾. The type of educational material purchased and the frequency with which it is replaced can differ between Member States.
- (24) The rules governing purchases made by establishments looking after young children also differ from one Member State to another. Their budgets and tendering procedures have a decisive impact on their choices, depending on whether they are in the public sector, in the private sector but working under contract, or in the free private sector⁽¹¹⁾. The ratio of children in public-

sector and private-sector establishments (whether or not subsidised) also varies considerably from one Member State to another⁽¹²⁾.

- (25) The fact that local authorities have regulatory and budgetary powers in the area of education in most Member States can thus create markets narrower than the national markets. For example, the allocation of powers for education, differences in curricula and cultural habits split the Belgian market between the French and Flemish-speaking communities (see recital 34).
- (26) Furthermore, although the quality of the products and their educational value is a prerequisite for the development of sales, they must be based on a local commercial presence, in particular for the purposes of on-the-spot demonstration. In addition, in view of the size of the transaction costs compared with the value of orders which would result from competitive tendering by suppliers from several Member States or several regions in certain Member States, the establishments, for budgetary reasons, essentially obtain their supplies locally, regionally or nationally.
- (27) For example, direct or indirect sales to the final consumer in other Member States by distributors operating only on the second level on the French market are insignificant (under 1 % of the total in the common market). By comparison, the share of sales in the common market excluding France held by French producers/distributors operating at the two distribution levels (Nathan, Edrasco/Asco, Wesco) is 12 times larger.
- (28) In view of the foregoing, the relevant geographic dimension of the market in the production and wholesale distribution of educational material takes in several Member States on the supply side, as evidenced by the agreements concluded by Nathan which are the subject of these proceedings. Retail selling and final demand tend, however, to be confined more to a national or regional dimension.

⁽¹⁰⁾ The age at which children first attend school varies from two to four, depending on the educational system, whilst the total number of hours of teaching varies according to age bracket and also within the age bracket. A six-year old in Italy would be expected to attend school for 1 080 hours a year, compared with 773 hours a year in the United Kingdom (Eurydice report cited above).

⁽¹¹⁾ In the first two instances, purchases are usually grouped together by administrative region and then delivered to each establishment. The last two groups have more autonomy. The extent to which orders are grouped together can also modify purchasers' buying power in their dealings with producers and distributors.

⁽¹²⁾ From 13,6 % of French children to 39,5 % of Belgian children in the private sector (subsidised or not), and from 86,4 % of French children to 60,5 % of Belgian children in the public sector (Eurydice report cited above).

3. Position of the parties

- (29) The value of the relevant market in the Member States concerned has to be approached by estimating the order of magnitude (13). As supply and demand are scattered over a broad, heterogeneous area, public statistics do not distinguish between purchases of educational material and other operating expenditure by schools, nor do they identify purchases by private educational establishments and, especially, by other centres looking after young children such as holiday camps and hospitals.
- (30) In 1997, Nathan's turnover in the Community market for educational material was FRF [between 75 million and 100 million] *, of which FRF [between 65 million and 90 million] * was in France. Sales to Borgione, Smartkids and Bricolux, totalling FRF [...] *, amounted to [less than 10 %] * of Nathan's total sales in the Community and [less than 10 %] * of its sales in France.

(a) The Community

- (31) As a rough guide, a value of FRF 3 774 million for 1997 can be estimated for the entire Community market (14). Nathan and Edrasco/Asco, the largest and second-largest French manufacturers/distributors, appear to have held some 5 % of the total in 1997, with Nathan holding [less than 5 %] *.

(b) France

- (32) According to the estimates provided by the firms questioned, the nine leading market participants hold 57,6 % of the French market, the value of which is estimated at FRF 654 862 000 in 1997 (15). The resulting

(13) 'Survey of the market for educational material' sent to Nathan and Bricolux by the Commission on 30 September 1999.

(14) Estimate based on a ratio of expenditure per child equivalent to that for France, including all categories of schools, i.e. FRF 89 and a population of 42,4 million children under the age of nine in the fifteen Member States in 1997. As the ratio differs depending on the Member State, extrapolating the French ratio to cover the entire Community amounts to using it as an average between the Member States where expenditure per child is less and those where it is more. The estimate for the Community is provided as an order of magnitude; the market shares to be taken into account are those for the various exclusive territories.

(15) This estimate is based on the total turnovers of the nine leading participants, as communicated to the Commission, plus the remaining 42,4 % which, taking an average of their estimates, is held by the other smaller participants. ('Survey of the market for educational material', cited above).

ratio of expenditure on educational material per child is FRF 89, taking all types of establishment together. This gives Nathan a market share of [between 5 % and 15 %] *.

- (33) There are very few reliable aggregate data concerning the different segments of the product market. Within the different categories of establishment, Nathan held [between 5 % and 15 %] * of the market for educational material for French State nursery schools in 1995. With regard to the different product segments, Nathan held a strong position in France in the learning and games segments [between 10 % and 25 %] * and in the furniture segment [between 25 % and 35 %] * (16).

(c) French-speaking Belgium

- (34) The distribution of powers for education, differences in curricula and cultural habits split the Belgian market between the French and the Flemish-speaking communities. The distributors questioned sell either in Flanders and Brussels or in Wallonia and Brussels, but not in Wallonia and Flanders. Nathan products are distributed by different distributors in Flanders and Wallonia, as are Asco products.

- (35) In French-speaking Belgium, for which Bricolux holds the territorial exclusivity, the total value of the market is in the region of FRF 42 542 000 (17). This means that

(16) Nielsen, 'Ressources et dépenses des écoles maternelles publiques', July 1996, pp. 83 et seq. However, the market analysed in that study is much larger than the relevant market in the present case. The study includes books, audiovisual material etc., where a language component is decisive. The figure of [between 5 % and 15 %] * for State schools alone is therefore an underestimate as regards educational material only. The small gap of [less than 5 %] * compared with the market share of all establishments and all educational material segments in 1997 is also due to the fact that Nathan has a stronger presence than its competitors in other segments such as nurseries, day-care centres, hospitals and holiday camps, which account for 24,2 % of total demand.

(17) On the basis of 478 000 children reported by the French-speaking Community authorities and an expenditure of FRF 89 per child (ratio for France). The French ratio is well above the Bricolux estimates of the ratio per pupil in French-speaking Belgium (ratio per pupil BEF 75, letter of 26 September 1997) and those given by Viroux, a Bricolux competitor (ratio per pupil BEF 300, letter of 17 June 1999).

Bricolux's sales of Nathan products accounted for [5 % to 15 %]* of the market in 1997 (18).

(d) *Italy*

- (36) The value of the Italian market in 1997 may be estimated at FRF 491 003 000, taking all establishments together (19), even if Borgione operates as a distributor of school equipment only for the provincial centres of the Italian Education Ministry (*Direzioni Didattiche*, 59 %), municipalities (*comuni*, 31 %) and other resellers (10 %). Nathan equipment accounts for [between 20 % and 30 %]* of Borgione's turnover.
- (37) Taking account of the sales of Nathan products, plus the margin added by Borgione, Nathan's share appears to be [below 5 %]*. Like Borgione (20), the Italian distributors contacted confirm that they do not sell educational material outside Italy.

(e) *Sweden*

- (38) On the basis of the population under the age of nine, the size of the market may be estimated at FRF 102 430 000 for 1997. Sales of Nathan products are estimated at [less than 5 million]* for the same year, so that Nathan's market share was [less than 5 %]*.

D. NATHAN'S DISTRIBUTION NETWORK IN EUROPE
AND THE AGREEMENTS CONCLUDED
WITH ITS EXCLUSIVE DISTRIBUTORS

1. **Nathan's distribution network**

- (39) Nathan is directly responsible for distribution [between 50 % and 70 %]* of its products in France; this figure comprises [less than 30 %]* through sales representatives (both independent and paid employees) and [between 30 % and 40 %]* by mail order. Nathan

(18) Letter from Nathan of 28 October 1999 in response to the 'Survey of the market for educational material' sent to Nathan and Bricolux on 30 September 1999 putting its sales to Bricolux in 1997 at FRF [less than 5 million]* adjusted by the coefficient of [...] applied by Bricolux as its gross margin.

(19) In the absence of any compatible estimates provided by the Italian firms questioned, the estimate is based on the ratio of expenditure per child of FRF 89 calculated for France, which includes all categories of establishment.

(20) Letter from Borgione of 2 October 1997, attached to the statement of objections.

products are also sold to establishments or members of the public by wholesalers [less than 5 %]* and retail booksellers [less than 50 %] (21)*. Nathan is therefore active on the upstream market in production and sales to distributors and also, to a significant extent, on the downstream market in direct distribution to establishments in France. A potential competing source of supplies of Nathan products for resale in France are reimported products marketed through the network outside France.

- (40) In the Community; Nathan products are distributed in 11 Member States through a network of some 20 distributors. Sales to the latter account for [less than 20 %]* of Nathan's turnover in educational material. In Spain/Portugal, Italy, French-speaking and Flemish-speaking Belgium, Sweden, Finland and, for certain products, the United Kingdom/Ireland, a local distributor holds the exclusive territorial reselling rights (22).

2. **Distribution agreements with certain sole distributors**

(a) *Italy*

- (41) The distribution contract concluded between Nathan and Borgione on 1 April 1993 gives the latter the exclusive rights in respect of the Nathan educational material listed in its annual catalogue *Matériel Éducatif* for Italy. Under the contract, Nathan charges Borgione a supply price of [less than 55 %]* of the French catalogue price inclusive of tax. The prices are guaranteed for one year. The contract, initially concluded for two years, has since been extended.

(21) In a statement forwarded by Nathan to the Commission, the manager of Nathan's educational material department explained that, 'We also work with booksellers (about 200). These act as our letterboxes ... Our customers can use either the order form in the catalogue, or go to their local bookseller. The latter enjoys a discount of [15 % to 25 %]* on our catalogue price, depending on the turnover achieved.'

(22) Abacus has been the de facto exclusive distributor since 1989 of Nathan products in Spain and Portugal. The Nottingham Group has held the exclusive distribution rights for certain products in the Nathan catalogue for the United Kingdom and Ireland since 1993. Their commercial relations with Nathan are not, however, formalised in a written contract. In its answer to the request for information from the Commission, the Nottingham Group states that it does not regard itself as an exclusive distributor for Nathan.

- (42) Under Article 2 of the contract, the exclusivity covers 'direct sales to all pre-primary and primary Italian-speaking establishments, in particular schools, day-care centres, nurseries and leisure centres in Italy'. Borgione undertakes 'not to market the products outside the territory covered by the exclusivity' and 'not to market products competing with products sold by Nathan' (Article 3).
- (43) Under Article 3 of the contract, Borgione also undertakes 'to provide Nathan with a list of the prices at which Borgione is selling Nathan products on its territory. The prices, converted into French francs, shall not exceed the price at which Nathan sells the same products in France by more than 5 %'.
- (44) The provision concerning the maximum price is supplemented by Article 10 of the contract which stipulates that, as regards the commercial conditions attached to the sale of Nathan material 'Borgione ... will refrain from all commercial conduct (special offers, discounts, rebates, clearance sales, etc.) liable to damage the Nathan brand. Borgione may reduce the prices for end-of-line articles in the Nathan catalogue'.
- (45) According to the estimates given by Nathan, the differences between the sales prices charged by Borgione and those in the 1997 French Nathan catalogue range from [- 15 % to - 25 %] * to [+ 15 % to + 25 %] *⁽²³⁾.
- (b) *Sweden*

- (46) Smartkids has operated as a distributor in Sweden since 1995. About half its turnover in 1997 was accounted for by Nathan products. Smartkids operates on a relatively fragmented market and is the third largest distributor in Sweden of educational material, excluding textbooks and software.
- (47) The distribution agreement concluded between Nathan and Smartkids on 1 July 1996, gives the latter the exclusive rights in respect of the Nathan educational material listed in its annual catalogue *Matériel Éducatif* for 'sale to all Swedish pre-primary and primary establishments, in particular schools, day-care centres, nurseries and leisure centres located in Sweden' (Article 2).
- (48) Under the contract, Nathan charges Smartkids a supply price of [less than 55 %] * of the price before tax (excluding VAT) listed in the Nathan catalogue for France. The prices are guaranteed for one year. Smartkids undertakes 'not to market the products outside the

territory covered by the exclusivity, not to market products competing with products sold by Nathan and not to market any Asco products', and 'to agree with Nathan on how competition from other products sold by Smartkids is to be avoided' (Article 3).

- (49) Article 3 also requires Smartkids to undertake 'to provide Nathan with a list of prices for Nathan products sold by Smartkids in Sweden. The prices, exclusive of tax and converted into French francs, must be less than or equal to Nathan prices exclusive of tax multiplied by a factor of 1,6'.
- (50) As in the case of Borgione, Nathan's contract with Smartkids stipulates, as regards the commercial conditions applied to customers Smartkids 'will refrain from all commercial conduct (special offers, discounts, rebates, clearance sales, etc.) liable to damage the Nathan brand. Smartkids may reduce the prices for end-of-line articles in the Nathan catalogue'.
- (51) According to Nathan's estimates, the differences between the sales prices charged by Smartkids and those in the 1997 French Nathan catalogue range from [+ 40 % to 50 %] * to [+ 75 % to + 85 %] *⁽²⁴⁾.

3. French-speaking Belgium

- (52) Bricolux has distributed Nathan products in Belgium since 1986. Commercial relations between Nathan and Bricolux are based on commercial usage and have not been formalised by a written contract. The parties have been negotiating such a contract since August 1992 but have been unable to date to condense their commercial relations into a single document. According to the correspondence exchanged between the parties, Bricolux has de facto exclusive territorial rights to distribute the education material in Nathan's annual catalogue *Matériel Éducatif* in French-speaking Belgium.
- (53) Article 3 of a draft contract drawn up by Nathan on 12 November 1992 (2 September 1993 according to Bricolux) required Bricolux to give the undertaking 'not to market such [Nathan] products outside the territory covered by the exclusivity'. The exclusivity also related to pre-primary and primary establishments and required Bricolux to meet all orders from dealers.

⁽²³⁾ Comments by Nathan of 27 October 1998, p. 13, Annex 6.

⁽²⁴⁾ Comments by Nathan of 27 October 1998, p. 13, Annex 6.

- (54) Under the draft contract of 2 September 1993, Bricolux was also required to 'provide Nathan with a list of prices for Nathan products sold by Bricolux in its sector. The prices, converted into French francs, are to be equivalent to the prices set by Nathan for the same products in France, with a possible variation of plus or minus 10 %'.
- (55) Bricolux answered by letter of 5 November 1993 as follows: 'Whilst it is clear that the eventual aim is to sell a Nathan product at the same price throughout Europe, it is just as obvious that this will not be easy to achieve' (25).
- (56) By letter dated 13 January 1994, Nathan (26), noting that the abovementioned contract had not been signed, in order to define the conditions governing its commercial relations with Bricolux for 1994, accepted the proposal to fix prices put forward by Bricolux, in the following terms: 'We accept for 1994 that the maximum selling price for Nathan products in Belgium should be the French selling price converted into Belgian francs + 15 %. But wherever possible we should like you to apply the same prices as in France'. The letter stipulates a supply price for Bricolux of [less than 55 %]* of the 1994 French Nathan catalogue price, exclusive of taxes ([less than 55 %]* inclusive of taxes).
- (57) The effort to establish similar commercial conditions for Nathan products throughout Europe is evident in a letter to Bricolux where Nathan refers to their conversations: 'We also raised the problem of discounts to dealers. I feel that the discount of [...] * granted by Bricolux to its distributors is too high. Nathan grants a discount of [between 15 % and 25 %]* to booksellers, which gives some control over the prices charged to schools'. When Larousse, a subsidiary like Nathan of CEP Communication, occasionally sold Nathan material in Belgium in 1991, it gave the following undertaking to Bricolux: 'If the educational material is contained in the Nathan and MDI catalogues, our role will be limited either to forwarding the order to you, or to meeting it ourselves as a stop-gap measure. We will align our prices on those charged by Bricolux' (27).
- (58) In a letter dated 24 January 1994 in which Bricolux rejected several provisions of the draft contract and any clause permanently fixing resale prices, Bricolux stated that it followed Nathan's instructions for fixing the resale

prices for certain products, in the following terms: 'We should in any event inform you that we have agreed to apply the yellow points in 1994, i.e. resale prices that are lower than or the same as in 1993' (28). Bricolux automatically changed the prices of those products to reflect price reductions or price freezes on the same articles in France, leaving its margin unchanged.

- (59) After receiving this information, in reply to a question from the Commission on the existence and frequency of promotional operations, Bricolux explained that, 'We can also grant discounts at trade fairs (maximum twice a year). But, in general, we do not mount one-off promotions, educational material is not the sort of thing that is sold at fairs' (29).
- (60) According to Nathan's estimate, the differences between the sales prices charged by Bricolux and those in Nathan's 1997 catalogue for France range from [- 60 % to - 50 %]* to [+ 25 % to + 35 %]* (30).
- (61) Amongst its retailers of Nathan material, Bricolux concluded an exclusive contract with the bookshop La Découverte in Brussels in 1990. When Bricolux terminated the contract in January 1993, La Découverte obtained supplies of Nathan material from another distributor in France, the booksellers Vauban in Maubeuge (31). Deliveries were made in France, at the initiative of La Découverte, for resale in Walloon Belgium and Brussels. With a view to putting an end to this parallel trade into its exclusive territory, Bricolux wrote to Vauban as follows: 'Further to our telephone conversation and the letter sent to you by Mr Grimbert of Nathan, we should like to clarify matters as follows ... We therefore require a letter from you assuring us that you will no longer deliver any supplies to La Découverte ... quite simply because for nearly two years now, we have been tracking La Découverte in order to find out its sources and it was only at the beginning of March

(25) Draft contract of 2 September 1993. Bricolux letter to Nathan of 5 November 1993.

(26) Letter from Nathan to Bricolux.

(27) Letter from Ms Marrot, of Nathan, to Mr Collard, of Bricolux, 25 February 1993. Letter from Mr Hublau, Director-General of Larousse Belgium, to Mr Collard, of Bricolux, 9 December 1991.

(28) Letter from Bricolux to Nathan of 24 January 1994. On a fax of 12 January 1994 from Nathan (Ms Marrot) to Bricolux (Mr Collard), in which Nathan refers to 'the agreement of Bricolux that in the Belgian and Luxembourg catalogues we should keep the yellow marks relating to price reductions or unchanged prices, as you pass it on to your prices in BF, there is a hand-written note signed by Alain Collard reading, 'Okay, no objection to leaving the yellow marks'.

(29) Letter from Bricolux to the Commission of 2 December 1997 replying to a request for information dated 24 November 1997.

(30) Comments by Nathan of 27 October 1998, p. 14, Annex 6.

(31) Letter from Bricolux dated 26 September 1997.

- that we obtained proof that the bookseller concerned is indeed Vauban' (32).
- (62) The Nathan letter to which Bricolux refers is dated 21 March 1995 and it informs Vauban: 'Following our telephone conversation of 20 March, I can confirm that we have an exclusive distributor in Belgium with whom we have been working for several years to develop our presence on this market. We do not want our distributor to be destabilised as a result of outside commercial operations. The distributor can, for completely valid reasons which are always fully explained to us before any decision is taken, refuse to serve certain customers' (33).
- (63) In reply to Vauban's wish to continue to supply La Découverte, Bricolux threatened as follows: 'As your letter (of 14 April 1995) appears to indicate that you will continue to supply Belgium, we must inform you that we shall flood the town halls and schools of northern France with Nathan and Bricolux catalogues at prices which will without question ensure that your customers consider your prices to be extortionate. It is for you to decide whether the game is really worth the candle and whether you want a trade war to the finish. Check with Nathan, they will confirm that ... we have powerful methods of getting our own way' (34).
- (64) The fact that Bricolux considered competing actively outside its exclusive territory solely in response to competition encountered on its own territory is attested to by its letter of 20 November 1995 to the French competition authorities, who then turned the case over to the Commission: 'Clearly if a bookshop that is well established in Brussels distributes French Nathan catalogues that it receives from the booksellers Vauban, increases the prices to current levels in Belgian francs and sells to our customers, it naturally causes us serious financial and moral damage as it destroys our credibility'. Bricolux does not point out that, in general, such sales to its customers must, if they are to compete with its own, be backed by prices or services that are more attractive than those it offers itself. The letter continues: 'Whilst I can understand that they cannot refuse to sell in their own shop, which would be contrary to the Treaty of Rome, they are of course prohibited from quoting prices and invoicing in Belgium for Nathan or Asco goods which they know are protected by an exclusive dealing contract ... whilst in Belgium we have exclusive dealing contracts, in France the market is completely free. What is there to prevent us from flooding northern France with our Bricolux, Nathan and Asco catalogues at prices that would make Vauban look like thoroughgoing scoundrels?' (35).
- (65) If engaging in active competition was not to be considered, alternative solutions to the problem posed by Vauban were also raised in parallel with Nathan. Methods were studied as early as 1995 of preventing Bricolux from being upset by Vauban, as explained to Bricolux by Nathan: 'Vauban: I and the commercial manager for France are studying means of putting on pressure to prevent Vauban from supplying La Découverte and Belgian Schools. Here too I shall inform you of what we decide to do. Unfortunately, the European directives prevent us from not supplying them' (36). It is clear that Vauban also supplied Belgian schools direct, and that this too was to be prevented.
- (66) Two years later, Bricolux informed Nathan that parallel imports into Belgium from France were continuing: 'Confirming our talks 95 and 96 concerning parallel imports of Nathan products into Belgium, we confirm that La Découverte is still distributing Nathan's French catalogue for 97 with Belgian prices like ourselves, and is still being supplied by Vauban or another French bookseller. I thought that abolishing discounts would put an end to this sort of playing around' (37).
- (67) Nathan's involvement in the coercive measures taken with regard to Vauban is confirmed by Bricolux in another letter more than two years after pressure was first exerted on Vauban: 'Mr Grimbert claimed that if the discounts given to Vauban were abolished the problem

(32) Letter from Mr Collard, of Bricolux, to Ms Cagnon, Librairie Vauban, 23 March 1995. Mr Grimbert was export manager of Nathan's educational material department.

(33) Letter sent by Nathan on 14 January 1999 with its comments to clarify points raised at the hearing on 3 December 1998.

(34) Letter from Bricolux to Vauban of 4 May 1995, sent by Bricolux with its comments on 11 December 1998 to clarify points raised at the hearing on 3 December 1998.

(35) Letter from Bricolux to Mr Alvain, Department for Competition, Lille, sent by Bricolux, with its comments, on 11 December 1998 to clarify points raised at the hearing on 3 December 1998.

(36) Fax from Ms Marrot, head of the export department at Nathan, to Mr Collard at Bricolux, dated 25 October 1995; forwarded by Bricolux, with its comments, on 11 December 1998, to clarify points raised at the hearing on 3 December 1998, and sent for comment to Nathan, which replied on 14 January 1999, to clarify points raised at the hearing on 3 December 1998.

(37) Fax from Mr Collard of Bricolux to Nathan's export department dated 23 May 1997.

would sort itself out. You will see from the attached document that this has not happened and that La Découverte continues to sell Nathan products, short-circuiting our own agreements and causing us moral and commercial damage' (38)

II. LEGAL ASSESSMENT

A. ARTICLE 81(1) OF THE EC TREATY

(68) Article 81(1) of the EC Treaty prohibits as incompatible with the common market 'all agreements between undertakings ... which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which ... directly or indirectly fix purchase or selling prices or any other trading conditions ... [or] share markets or sources of supply'.

1. Agreements between undertakings

(69) Nathan, its exclusive distributors Bricolux, Borgjone, Smartkids and its other distributors in other Member States are engaged in the economic activity of producing or purchasing goods for resale and are therefore 'undertakings' within the meaning of Article 81(1) of the EC Treaty.

(70) Nathan concluded an exclusive distribution agreement for Italy with Borgjone which has governed their commercial relations since 1993 and the terms of which are described in recitals 41 to 45 of this Decision. Nathan also concluded an exclusive distribution agreement for Sweden with Smartkids which has governed their commercial relations since 1995 and the terms of which are described in recitals 46 to 51. Bricolux, in agreement with Nathan, has since 1986 distributed Nathan educational material in Walloon Belgium and French-speaking Belgium on the terms described in recitals 52 to 67. Similarly, Nathan sells its products for resale to independent producers without territorial exclusivity in France and in other Member States of the Community (recitals 39 and 40).

(71) The provisions of the exclusive contracts concluded between Nathan and its distributors Borgjone and Smartkids, and the terms on which Nathan and Bricolux jointly interpret or implement the commercial exclusivity held by Bricolux for the distribution of Nathan material within the Nathan distribution network are agreements between undertakings within the meaning of Article 81(1) of the EC Treaty.

(38) Fax from Mr Collard of Bricolux to Mr Langlois-Meurinne, Director-General of Nathan, dated 30 May 1997.

2. The object or effect of restricting or distorting competition

- (72) The agreements concluded between Nathan, Borgjone, Smartkids and Bricolux have the object of restricting or distorting competition within the common market inasmuch as they are aimed at isolating territories by preventing or restricting parallel sales within or outside those territories and at fixing resale prices, as demonstrated below.
 - (a) *Restrictions on parallel sales inside and outside the contract territories*
- (73) Under the agreements concluded with Borgjone and Smartkids, Nathan grants them, for Italy and Sweden respectively, the exclusive right to sell to all pre-primary and primary establishments, excluding those under the aegis of the French Education Ministry. The exclusivity is also part of the agreements between Nathan and Bricolux covering Wallonia and French-speaking Belgium. Nathan agrees to forward any orders from those sources to its exclusive distributors, and hence not to supply those territories direct.
- (74) The agreements between Nathan, Borgjone and Smartkids include the obligation not to market the products outside the territory covered by the exclusivity.
- (75) As far as agreements intended to apply within the Community are concerned, the Court has already held that 'an agreement intended to deprive a reseller of his commercial freedom to choose his customers by requiring him to sell only to customers established in the contractual territory is restrictive of competition within the meaning of Article 85(1) of the EC Treaty' (39).
- (76) This obligation to respect the exclusive territory absolutely, also present in the agreements with Bricolux, is confirmed by the way it is implemented by Nathan and Bricolux. The latter refrains from selling outside its exclusive territory and considers doing so only as a means of commercial reprisal against another distributor, Vauban, which has stepped into its exclusive territory by selling Nathan products directly or indirectly to Wallonia and French-speaking Belgium, as the Bricolux letters indicate (see recitals 63 and 64). In this case, the products in question were being sold and delivered in France to La Découverte, a distributor which competes with Bricolux and resells in Belgium.

(39) See most recently C-306/96 Javico v Yves Saint Laurent Parfums [1998] ECR I-1983, paragraph 13, citing in particular Case 86/82 Hasselblad v Commission [1984] ECR 883, paragraph 46 and Case C-70/93 BMW v ALD [1995] ECR I-3439, paragraphs 19 and 21.

- (77) Bricolux's exclusivity is the reason given to Vauban by Nathan when sales are made into the Bricolux territory by a competing Belgian distributor in order to avoid Bricolux being destabilised as a result of outside commercial operations on the part of other distributors (see recital 62). The exclusivity, as interpreted by Nathan, thus legitimately prohibits such sales. When it considered ways of preventing Vauban from supplying, the customers that Nathan was trying to retain were stated to be the Belgian schools in the territory of Bricolux (see recital 65). Bricolux invoked the same exclusivity agreements between them and the assurances given by Nathan when it complained to Nathan that they had been infringed by sales to its Belgian competitor (see recital 67).
- (78) The Court has held that 'an agreement which requires a reseller not to resell contractual products outside the contractual territory has as its object the exclusion of parallel imports within the Community and consequently restriction of competition in the common market. Such provisions, in contracts for the distribution of products within the Community, therefore constitute by their very nature a restriction of competition' ⁽⁴⁰⁾.
- (79) The agreements between Nathan and its exclusive distributors which prevent sales outside the territory, as illustrated by their implementation, are therefore aimed at preventing or restricting sales to competing distributors who might sell within an exclusive territory or to customers within that territory. They thus prevent parallel trade and confer absolute territorial protection within the exclusive territories.
- (80) Similarly, by preventing those exclusive distributors from marketing Nathan products outside their territory, the agreements are aimed at protecting Nathan's distribution network and the various territories of the Member States outside French-speaking Belgium, Italy and Sweden from sales by Bricolux, Borgjone and Smartkids. Such territories include France in particular; what is protected here is the 200 independent distributors for Nathan (booksellers and wholesalers), and indeed sales by Nathan itself.
- (81) It is a fact, in view of the difference between the price paid by the French distributors, i.e. [between 15 % and 25 %]* discount on the catalogue price (see recitals 39 and 57) and that paid by the exclusive distributors outside France, [less than 55 %]* exclusive of tax or [less than 65 %]* inclusive (see recitals 41, 48 and 56), the latter are potentially able to compete against the French distributors.
- (82) It would appear that the prices set for certain products by Borgjone and Bricolux, both located in areas close to the French border, are lower by [...] * (see recitals 45 and 60) than the Nathan catalogue for France. Competing French distributors would have had difficulty in offering lower prices for the same products. Indeed, the ability to cut prices in France is also referred to by Bricolux simply as a warning in the event that its exclusive territory is not respected (see recitals 63 and 64).
- (83) The desire to restrict competition outside the exclusive territory also explains Nathan's request to Bricolux that it charge the same prices as in France (recital 56) as does it reprimand when Nathan considers that the [...] * discounts Bricolux grants to its distributors are too high compared with the [between 15 % and 25 %]* discounts that Nathan grants its distributors in France. The same desire to harmonise the price of Nathan products is displayed by Larousse Belgique, a subsidiary like Nathan of the CEP Communication group at the relevant time (see recital 57).
- (84) In principle, the profits earned by Nathan on its total sales should not be directly dependent on discounts or prices subsequently applied by Bricolux within its own exclusive territory. However, direct or indirect sales by a distributor re-exporting from its exclusive territory may compete against Nathan's direct sales in France ([between 50 % and 70 %]* of the total) or those of its distributors (the remaining [between 30 % and 50 %]*), sales which can leave a larger trading margin for Nathan than the margin allowed to Bricolux and Borgjone.
- (85) In this context, the obligation not to market contract products outside the exclusive territory prevents potential customers, in particular French customers, from benefiting from such lower prices, and restricts competition with local booksellers and with Nathan itself in its capacity as direct distributor to schools. The Belgian schools also ultimately suffer from the restricted competition resulting from the limitation of sales by French distributors either to customers in Bricolux's territory or to Belgian distributors competing with Bricolux that obtain supplies in France for resale in Belgium.

⁽⁴⁰⁾ Case C-306/96 Javico v Yves Saint Laurent Parfums [1998] ECR I-1983, paragraph 14, which refers also to Case C-279/87 Tipp-Ex v Commission [1990] ECR I-261, paragraph 22, and Case 19/77, Miller International Schallplatten v Commission [1978] ECR 131, paragraph 7.

- b) *Fixing of retail price levels*
- (86) The restriction of the freedom to sell outside an exclusive territory or into such a territory is supplemented and reinforced, in the case of Borgione and Smartkids, by the ban on all special offers, discounts, rebates or clearance sales liable to damage the Nathan brand (see recitals 44 and 50). Even though there is no explicit and objective definition of the level at which special offers, rebates or discounts harm the brand image, the freedom of Borgione and Smartkids to grant discounts is limited, a fact of which they must be aware, compared with what it would be if they were totally free to fix their final price, i.e. the catalogue price minus discounts, rebates or special offers. Price competition is distorted or restricted as a result, as the Commission has already noted in the past in respect of this type of clause in its Decision 87/17/EEC (IV/30937 — Pronuptia) (41). The clause in particular can be invoked if larger discounts are given than those granted by Nathan to its distributors in France, something which Nathan ordered Bricolux not to do.
- (87) On the other hand, the Commission no longer believes that an obligation not to exceed a maximum resale price, in this case a multiplier of the price charged in France by Nathan for the same products (see recitals 43 and 49), in itself necessarily restricts competition (see communication from the Commission on the application of the Community competition rules to vertical restraints) (42). However, the maximum price imposed here serves as a ceiling for a range of resale prices, at the bottom end of which is the ban on promotional discounts. As a result, the agreements fix effectively a resale price level (after discounts and rebates), although the range is fairly broad.
- (88) Fixing a resale price level distorts price trends on the market and has the object of restricting competition. On the one hand, a distributor must comply with the contractual commitments which restrict its freedom to define its pricing policing. On the other hand, Nathan is endeavouring artificially to harmonise prices and discounts in relation to those applied in France. The fixing of prices designed to distort the normal evolution of prices on the markets is specifically referred to in Article 81(1)(a) of the EC Treaty, as the Court of First Instance of the European Communities has recalled (43).
- (89) The evidence shows nevertheless that neither Borgione nor Smartkids adhered to the maximum resale price stipulated in their agreement with Nathan, though this cannot be used to argue that the price provision did not form part of the agreement or that the obligation could not be invoked by Nathan with a view to the harmonisation of discounts sought by Nathan in the Bricolux case. However, as regards Bricolux, there is no evidence that the fixing of prices was either agreed or implemented by Bricolux under its agreement with Nathan, despite the latter's repeated attempts.
- (90) In short, the agreements between Nathan and its distributors include restrictions of competition which, by prohibiting sales outside the territory or in the case of Borgione and Smartkids limiting the freedom to fix prices and conditions of resale, reinforce each other. Nathan thus aims to expand the sale of its products in the Community provided that it does not compete against sales on its principal market, i.e. France. In isolation or in combination, the provisions of the agreements have the object of restricting competition within the meaning of Article 81(1) of the EC Treaty.
3. **Appreciable effect on trade between Member States**
- (91) The agreements concerned here lay down the conditions on which products which Nathan manufactures and distributes in France are sold by Nathan to distributors for resale in other Member States. The agreements concluded between Nathan and its distributors in French-speaking Belgium, Italy and Sweden lay down the conditions on which Bricolux, Borgione and Smartkids resell products acquired from Nathan, and restrict their sales to other Member States. In the other Member States, the products sold by Nathan are distributed by some 20 independent distributors, whereas in France they are distributed by some 200 independent distributors. The restriction aimed at preventing or putting an end to sales by these distributors into the exclusive territories are liable to affect trade between France, Belgium, Italy and Sweden.
- (92) However, agreements such as those concluded by Nathan which concern cross-border sales are caught by Article 81(1) of the EC Treaty only if they are likely to affect trade between Member States to a significant extent (44). The Court of Justice has held that this means that 'it must be possible to foresee with a sufficient

(41) OJ L 13, 15.1.1987, p. 39, paragraph 12(c).

(42) OJ C 365, 26.11.1998, p. 3.

(43) Case T-13/89, ICI v Commission [1992] ECR II-1021, paragraphs 310 and 311.

(44) See judgment in Javico cited above, paragraphs 15 to 17, which refers to Case 5/69 Völk v Vervaecke [1969] ECR 295, paragraph 5.

degree of probability, on the basis of a set of objective factors of law or of fact, that [such agreements] may have an influence, direct or indirect, actual or potential on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States' (45).

be compromised by the re-imports that its agreements are aimed at restricting or preventing, chiefly from Belgium and Italy, as they share its borders. It is not, however, possible to estimate what the figure would have been if Bricolux and Borgione had been able to sell outside their territory without restrictions. In any event, the incorporation of restrictions in the agreements indicates that Nathan could have estimated that the potential volume was far higher.

(93) The effect which the agreement between Nathan and its distributors may have on trade between Member States should be assessed in particular on the basis of the position and importance of the parties on the market for educational material (46). In a case involving agreements aimed at partitioning the markets of Member States through export bans, the Court of Justice held that it was relevant that the Commission should examine both the position of the producer on its national market (between 5 % and 6,1 % in the present case) and the extent of its production as well as the existence of exports and the pricing policy adopted in order to determine whether trade between the Member States concerned might be significantly affected [see Commission Decision 76/913/EEC (IV/29018 — Miller International Schallplatten GmbH) (47) and the judgment of the Court of Justice in that case (48)].

(94) Nathan's share of the French market, which is the chief market which its agreements with Bricolux, Borgione and Smartkids are designed to protect from direct and indirect sales by all three, totals [between 5 % and 15 %] * (see recital 33). On certain market segments, it ranges [between 10 % and 35 %] *. Bricolux's sales of Nathan products amount to some [between 5 % and 15 %] * of the market on its own territory (see recital 35). Furthermore, Nathan is potentially in competition with its distributors in France (see recital 39).

(95) Although they do not exceed the value of its sales in France, where it is one of the three leading producers, Nathan's sales outside France within the common market ([less than 15 %] * of the total) and those on the territories held by Bricolux, Borgione and Smartkids, ([less than 10 %] * of its sales in France) are sufficiently large to allow its position in France, where it distributes the educational material it produces to institutions, to

(96) Furthermore, whether or not justified by the volume of purchases, the existence of an export price that is considerably lower, by some [less than 55 %] * of the price excluding tax in France, as compared with the [between 15 % and 25 %] * applied by Nathan to its distributors in France (see recitals 39, 41 and 57) and of prices charged by Bricolux in Belgium and Borgione in Italy that are significantly lower than French prices (from [...] * to [...] * less) (see recitals 45 and 60) are facts that would have made it economically feasible to reimport into France if there had been no restrictions on selling outside one's exclusive territory.

(97) Furthermore, Nathan itself purchases products as components or for resale in France from firms in the different Member States, and is in competition with firms which do the same. Such purchases amount to some 20 % to 25 % of the costs or sales of the leading competitors on the French market (see recital 21). As a result, the restriction of competition aimed at protecting Nathan on the French market is likely to affect the volume of purchases of its competitors and hence the flow of trade between the relevant Member States.

(98) It can be concluded, on the basis of these considerations of fact and of law, that the agreements between Nathan and its distributors may have an influence, direct or indirect, actual or potential, on the pattern of trade at least between France, Belgium, Italy and Sweden, such as might prejudice the achievement of a single market between Member States.

(99) Accordingly, although the position of Nathan products on the Italian and Swedish markets might be less strong than in France and in French-speaking Belgium, the agreements are likely to have an appreciable effect on trade between Member States and competition, within the meaning of Article 81(1) of the EC Treaty, on at least the French and French-speaking Belgian markets.

(45) Judgment in Javico cited above, paragraph 16.

(46) Case 99/79, Lancôme and Cosparfrance Nederland [1980] ECR 2511, paragraph 24.

(47) OJ L 357, 29.12.1976, p. 40, paragraphs 4, 15 and 16.

(48) Case 19/77, Miller International Schallplatten v Commission, [1978] ECR 131, paragraphs 8, 9, 10 and 15.

B. ARTICLE 81(3) OF THE EC TREATY

2. Individual exemption under Article 81(3)

(100) Article 81(1) of the EC Treaty may be declared inapplicable to any agreement or category of agreements between undertakings which contributes to improving the production or distribution of goods or to promoting technical progress, while allowing consumers fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives.

1. Block exemption: Commission Regulation (EEC) No 1983/83 (Exclusive distribution agreements) and (EC) No 2790/1999 (Vertical agreements)

(101) The eighth recital of Commission Regulation (EEC) No 1983/83⁽⁴⁹⁾ states that 'further restrictive obligations and in particular those which limit the exclusive distributor's freedom to determine his prices and conditions of sale cannot be exempted under this Regulation'. The Nathan, Borgione and Smartkids agreements do limit the exclusive distributor's freedom to determine prices and commercial conditions of sale, and consequently are not covered by Regulation (EEC) No 1983/83.

(102) Furthermore, Article 3(d)(2) of the same Regulation states that the block exemption does not apply where one or both of the parties makes it difficult for intermediaries to obtain the contract goods inside the common market, in particular where one or both of them exercises rights or takes measures to prevent dealers from obtaining contract goods outside the contract territory or from selling those products in the contract territory.

(103) The ban on marketing Nathan products outside the exclusive territory prevents passive sales by exclusive distributors outside Walloon and French-speaking Belgium, Italy and Sweden. Nathan and Bricolux threatened Vauban in order to prevent it from selling Nathan products into the exclusive territory held by Bricolux, including products delivered in France, for resale in Belgium.

(104) These provisions likewise prevent the application to their agreements of Commission Regulation (EEC) No 1983/83, in force at the material time and Regulation (EC) No 2790/1999⁽⁵⁰⁾, in accordance with Article 4 thereof.

(105) The Commission may grant undertakings individual exemption under Article 81(3) from the prohibition set out in Article 81(1). Exemption may be granted only if the undertakings have notified their agreement to the Commission or if the agreement is exempt from notification under Article 4(2) of Regulation No 17.

(106) The exclusive distribution agreements between Nathan and its distributors were not notified to the Commission and do not satisfy the cumulative conditions of Article 81(3).

(107) Even if the territorial exclusivity agreements were to improve the distribution of the contract products on the markets in French-speaking Belgium, Italy and Sweden, the absolute ban on marketing outside the territory is not likely to improve the production or distribution of educational material, or in any event is not indispensable to the attainment of that objective. The legitimate objective of concentrating marketing within the licensed territory is achieved sufficiently by a restriction on active marketing.

(108) The restrictions on the freedom of exclusive distributors to sell passively outside their territories cannot provide establishments looking after young children, and more especially those in France, with a fair share of any resulting benefit. On the contrary it is clear that the ban on marketing outside the territory deprives those establishments of the favourable prices and terms which Bricolux and Borgione could have offered, in competition with the French distributors, from over the borders which the agreements with Nathan are designed to keep watertight.

(109) There is very little mobility between geographic areas in the final demand from establishments looking after young children. In that market context, any dealing between different areas is carried out essentially by retail intermediaries. As a result, competition in the relevant markets is based principally on the ability of retailers to sell without geographic limitations. Consequently, any restriction of that ability deprives the establishments of a fair share of the potential benefits that might result from a territorial exclusivity agreement if final consumers were actually dealing between territories. Nathan, however, in conjunction with Bricolux, sought to prevent Belgian resellers in competition with Bricolux from obtaining supplies, and at the same time to retain its Belgian schools' clientele solely for Bricolux. It can therefore be ruled out that the users (dealers or establishments) derived any benefits.

⁽⁴⁹⁾ OJ L 173, 30.6.1983, p. 1.

⁽⁵⁰⁾ OJ L 336, 29.12.1999, p. 21.

(110) The restriction on the freedom of Borgione and Smartkids to determine their prices and discounts is not essential to improving the distribution of products. It leads to an artificial level or range of prices by reference to France, with the equivalent of a fixed minimum price for sales to wholesalers, which does not reflect any local market reality or give the establishments a share in any of the benefits of the agreement. These establishments are deprived of the possibility of paying lower prices both in the dealer's exclusive territory and in France, where Nathan distributes a major proportion of its products.

(111) Furthermore, as regards discounts and special offers, while it may be legitimate to wish to maintain a brand image, it must nevertheless be said that Nathan is free to set the prices it charges its distributors at a level it regards as adequate in relation to objective costs and the positioning it seeks for its products on the market. The objective can thus be attained by means that are less restrictive of the freedom of the parties concerned than such a clause.

(112) It follows that all the conditions of Article 81(3) are not satisfied.

C. PRINCIPAL COMMENTS MADE BY NATHAN AND BRICOLUX IN RESPONSE TO THE STATEMENT OF OBJECTIONS

(113) Some of the objections or assessments detailed in the Commission's statement of objections of 26 June 1998 have been dropped in this Decision, or have had their scope reduced; only those comments which are relevant to the grounds for the finding of infringement are set out here.

1. The geographic dimension of the relevant market, the position of the parties and the effect of the agreements on trade between Member States

a) Nathan points out that demand tends to be directed towards suppliers on the domestic market. This, together with transport costs and language barriers, confirms the national dimension of the market, from which Nathan concludes that the practices objected to cannot affect trade between Member States or competition to any significant extent

(114) The Commission is aware that factors may explain that there is, in fact, mobility of final demand within the Community. Nonetheless, the agreements in question concern sales to distributors in Member States other than France, where Nathan manufactures and sells its

products to establishments and to bookshops. That these are in fact cross-frontier sales by Nathan, and its competitors in France to distributors, in other Member States, whether exclusive or not, and that these are significant, is very evident from the facts, unless it be argued that Nathan is selling to a market that does not exist.

(115) As regards the significant effect on trade between Member States within the meaning of Article 81(1), and on competition, the Commission refers to its analysis in recitals 89 to 97.

b) As regards its position in the different territories concerned, Nathan has pointed out that its products account for only a fraction of sales by Bricolux, Borgione and Smartkids in their territories. Nathan has recalculated the data in the statement of objections, and estimates the share of its products in their exclusive territories to be [less than 10 %]*. As regards France, it points to the existence of other demand segments in addition to the nursery schools which form the basis of the calculation of its total share of the French market. Bricolux, for its part, considers that its share of the education material market is 1,2 %.

(116) Nathan has amended the view it had put to the Commission that educational material covered several separate product markets, a view which, together with a description of Nathan's shares of each of those markets had been repeated in the statement of objections of 26 June 1998. The Commission has taken account of Nathan's comments by altering the assessment in the statement of objections as to the existence of separate product markets in some of which Nathan's share reached [between 25 % and 35 %]*, and here refers only to the existence of different product segments.

(117) After receiving the comments from Nathan and Bricolux, the Commission made inquiries of several leading French, Belgian and Italian producers and distributors. The results were forwarded for comment to Nathan and Bricolux. The comments having been received, the contents of that inquiry are essentially set out in recitals 31 to 38, in order to quantify the market share of Nathan products on the markets concerned (51).

(51) With the exception of French-speaking Belgium, for which the Commission based its calculation on the figure of FRF 2 336 234 provided by Nathan as constituting its sales to Bricolux in 1997.

(118) The differences between the estimates in the statement of objections and those made by Nathan on the basis of those estimations are explained by the different bases used for the calculation, both where the resulting market share is below that estimated by Nathan (in Italy and Sweden) and where it is larger (in France and French-speaking Belgium).

- Nathan has not contested the low estimate of [less than 10 %]* as its share of purchases by nursery schools in France. It has, however, pointed to the existence of demand segments other than nursery schools, although it has not provided an objective quantification of the total volume.
- For French-speaking Belgium, the difference between the Commission estimate for 1997 and Nathans's for 1996 which is [less than 10 %]*⁽⁵²⁾ or Bricolux's, which is 1,2 %, can be explained by the difference in turnover between 1997 and 1996, by the different bases for calculation, and by the fact that Bricolux excludes a number of articles from its definition of the market.
- For Italy, the Commission estimate for 1997 [less than 5 %]* is well below the estimate of [less than 5 %] for 1996 provided by Nathan⁽⁵³⁾. The disparity is due in particular to the inclusion in the market of establishments other than State schools, where Borgione sells none or only a few of its products.
- For Sweden, the Commission estimate for 1997 [less than 5 %]* is well below that provided by Nathan for 1996, [less than 5 %]* of the market, based on the estimates provided by Smartkids⁽⁵⁴⁾.

2. As regards the barriers to parallel trade, in particular the barrier to sales by Vauban, Nathan points to the resumption of sales by Vauban between 1995 and 1997 and the fact that it did not retaliate against Vauban during that period

(119) It is true that the Commission has no proof that Nathan actually exerted the pressure planned or discussed with Bricolux (blocking of supplies or cancelling of discounts), or that it followed up the requests made by Bricolux to

that effect. Nathan nevertheless did draw Vauban's attention to the exclusivity held by Bricolux for French-speaking Belgium in respect of Vauban's sales in France to Belgian customers. The references made in the letter sent by Nathan to Vauban on 21 March 1995 and the telephone calls made by its export manager (paragraph 62) indicate that the sales by Vauban were regarded as contrary to that exclusivity, a view shared by Bricolux (recital 67).

(120) The Commission concludes from the foregoing that the ban on passive sales into the exclusive territory is part of the agreements between Nathan and Bricolux, agreements which the Commission regards as restrictive. Reprisals against other firms would simply have constituted an aggravating circumstance in the application of the restrictions, as stated in the Commission guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty ('the guideline on fines')⁽⁵⁵⁾.

3. Regarding the existence of potential competition between Nathan and its distributors, Nathan argues that the Commission is complaining that it has no distributor in France, which is tantamount to deciding how Nathan must organise the distribution of its products

(121) The Commission has found that there are competitors with Nathan in France who distribute their products in other Member States themselves. The Commission has likewise found that in France Nathan itself accounts for a preponderant share of sales to final customers of products which it manufactures or purchases for resale in its catalogues. It would also appear that the fact that direct competitors with Nathan on the French market for distribution to schools do not manufacture their own products is not an obstacle to their active presence. Similarly, sales to the final customer call for expertise, business organisation and logistics which differ from those required for manufacturing and sales to resellers alone. Under such conditions, it is certainly true that a distributor may be in competition with its supplier, provided that its services are more efficient. In its assessment, the Commission must take account of the real economic context of the agreements. This cannot be regarded as interference in the degree of vertical integration of Nathan.

⁽⁵²⁾ Nathan's comments of 27 October 1998 on the statement of objections, Annex 5, and Bricolux's comments of 30 October 1998, p. 9.

⁽⁵³⁾ Nathan's comments of 27 October 1998, Annex 1.

⁽⁵⁴⁾ Nathan's comments of 27 October 1998, Annex 5.

⁽⁵⁵⁾ OJ C 9, 14.1.1998, p. 3.

D. ARTICLE 3(1) OF REGULATION No 17

- (122) Pursuant to Article 3(1) of Regulation No 17, where the Commission finds that there is an infringement of Article 81 of the EC Treaty, it may require the undertakings concerned to bring such infringement to an end.
- (123) According to the information contained in its reply to the statement of objections, Nathan rejects the existence of an infringement, but has amended the disputed clauses in its agreements with Borgjone, Smartkids and Bricolux. However, Nathan has not informed its non-exclusive distributors that they may carry out direct passive sales, or sales to dealers, of goods for resale in the exclusive territories within its distribution network in the Community.
- (124) The restriction on such passive sales is also part of the infringement which forms the subject matter of this Decision and which must be brought to an end.

E. ARTICLE 15 OF REGULATION No 17

- (125) Under Article 15(2) of Regulation No 17, the Commission may by decision impose fines, within the limits laid down in that Article on undertakings where, either intentionally or negligently, they infringe Article 81 of the EC Treaty. In determining the amount of the fine, the Commission must have regard to all the relevant circumstances and particularly to the gravity and duration of the infringement. The Commission also takes account of the existence of any aggravating and/or mitigating circumstances.
- (126) The infringement was committed intentionally. The clauses restricting competition were specifically included in the contracts between Nathan and Borgjone and Smartkids. Nathan and its exclusive distributors could not have been unaware of the inclusion of provisions prohibiting sales outside the exclusive territory in their agreements, or of the anti-competitive object of those provisions.

- (127) With regard to Bricolux, the exchanges of correspondence between Bricolux and Nathan show in particular that the parties intentionally endeavoured to prevent a competing distributor, Vauban, from continuing to sell material to the bookshop La Découverte, which in turn resold in Belgium in competition with Bricolux. Although the action taken by Bricolux on the one hand and Nathan on the other with regard to Vauban was not accompanied by commercial reprisals, it was aimed at dissuading Vauban from selling directly or indirectly to Belgium in order to restrict competition for the benefit of Bricolux, in turn, deliberately refrained from selling outside its territory, and only threatened Vauban that it might do so, in order to dissuade it from continuing its sales.

(128) In clearly and repeatedly taking action either contractually or through correspondence to harmonise price levels and the commercial conditions applied by its distributors, Nathan also deliberately sought to restrict competition.

(129) A fine should be imposed only in respect of the conduct of Nathan and Bricolux. Even if Borgjone and Smartkids were also parties to the agreements which the Commission considers to constitute an infringement, and even if it is objectively in their interests to implement the agreements, the fact is that those agreements were concluded with several distributors and the restrictions were imposed on third parties by a single operator, i.e. Nathan. Bricolux, however, took the initiative of asking Nathan to enforce the agreements and instigating retaliatory measures against other resellers of Nathan products.

(130) Accordingly, the Commission proposes to impose a fine on Nathan and on Bricolux.

- As Bricolux is a small undertaking, and cooperated with the Commission during the investigation by providing on request or spontaneously a number of relevant documents without which it would not have been possible to prove the infringement, and as the request that the agreements be enforced, according to the evidence in the Commission's possession, concerned only one competing distributor and in view of the discretionary nature of decisions as regards symbolic fines as laid down in the guidelines on fines, a symbolic fine of EUR 1 000 should be imposed on Bricolux.
- As regards Nathan, the calculation of the fine takes account of the factors considered in recitals 131 to 134.

1. Gravity of the infringement

(131) Fixing price levels and commercial resale conditions and the partitioning of national markets are, in principle, serious infringements and are, according to an extensive body of precedent and case-law, contrary to the objectives of the common market. However, in the present case, in the part of the common market where the restrictions were implemented, i.e. French-speaking Belgium and France, the implementation was not systematic, according to the information in the possession of the Commission. As a result, the infringement in the present case may be considered minor. A fine of EUR 84 000 would be in keeping with the gravity of the infringement.

2. Duration of the infringement

- (132) The overall period in which the agreements were in force until they were amended runs from 1993 to 1998. However, evidence that they were implemented and enforced goes back only to 1995. As a result, the infringement was of medium duration, and it is appropriate to impose an increase of 20 % (i.e. EUR 16 000).

3. Basic amount of the fine

- (133) The basic amount of the fine must therefore be EUR 100 000.

4. Aggravating and mitigating circumstances

- (134) Nathan expressed its willingness to put an end to the infringement after receipt of the statement of objections. Nathan also cooperated with the Commission during its investigation by providing it on request with a number of relevant documents without which the infringement could not have been proven. In view of the foregoing, the basic amount of the fine should be reduced by 40 % (EUR 40 000).

5. Amount of the fine imposed on Nathan

- (135) A fine of EUR 60 000 should therefore be imposed on Nathan in respect of the infringements which form the subject matter of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

Éditions Nathan has infringed Article 81 of the EC Treaty by including in its agreements with its distributors restrictions concerning, on the one hand, passive sales by them outside their exclusive territories and passive sales by other distributors into those territories and, on the other hand, the freedom to fix prices and commercial resale conditions.

Bricolux SA has infringed Article 81 of the EC Treaty, in agreement with Éditions Nathan, by restricting its sales outside its exclusive territory and instigating Éditions Nathan to restrict sales by other distributors within its exclusive territory.

Article 2

A fine of EUR 60 000 is hereby imposed on Éditions Nathan and a fine of EUR 1 000 is imposed on Bricolux SA for the infringements referred to in Article 1.

The fines shall be paid in euro, within three months of the date of notification of this Decision, to the following account: Account No 642-0029000-95 of the European Commission at Banco Bilbao Vizcaya Argentaria BBVA, Avenue des Arts/Kunstlaan 43, B-1040 Brussels.

After three months, interest shall automatically be payable at the rate charged by the European Central Bank to its main refinancing operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 7,79 %.

Article 3

Éditions Nathan and Bricolux SA shall forthwith bring the infringements referred to in Article 1 to an end, if they have not already done so, in particular by informing the distributors of Éditions Nathan that they may engage in passive selling to the exclusive territories within the distribution network of Éditions Nathan in the Community.

Article 4

This Decision is addressed to:

Éditions Nathan
9, rue Méchain
F-75676 Paris CEDEX 14

Bricolux SA
2, Rue Saint Isidore, Zone industriel
B-6900 Marloie.

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

Done at Brussels, 5 July 2000.

For the Commission
Mario MONTI
Member of the Commission