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Legislation

Contents

I *Acts whose publication is obligatory*

. . . . . .

II *Acts whose publication is not obligatory*

Council

84/378/EEC:

★ **Council Directive of 28 June 1984 amending the Annexes to Directive 77/93/EEC on protective measures against the introduction into the Member States of organisms harmful to plants or plant products** 1

Commission

84/379/EEC:

★ **Commission Decision of 2 July 1984 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.615 – BL)** 11

84/380/EEC:

★ **Commission Decision of 4 July 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.810 – Synthetic fibres)** 17

84/381/EEC:

★ **Commission Decision of 12 July 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.129 – Carlsberg)** 26

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other Acts are printed in bold type and preceded by an asterisk.

II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DIRECTIVE

of 28 June 1984

amending the Annexes to Directive 77/93/EEC on protective measures against the introduction into the Member States of organisms harmful to plants or plant products

(84/378/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Directive 77/93/EEC (1), as last amended by Directive 81/7/EEC (2), and in particular Article 13 thereof,

Having regard to the proposal from the Commission,

Whereas the Community plant protection system should include provisions on protective measures against harmful organisms such as Amauromyza, Liriomyza and Radopholus;

Whereas the provisions on protective measures against harmful organisms such as Erwinia amylovora, Leptinotarsa decemlineata and Quadraspidiotus perniciosus should be improved, and in particular adapted to the present distribution of such organisms;

Whereas it is appropriate, furthermore, to clarify certain provisions of the Annexes and to take into account some growing, harvesting and processing practices and other data in respect of potatoes, lucerne seed, tomato seed, conifer wood and growing media, including soil,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Annex I to Directive 77/93/EEC is hereby amended as follows:

1. In part A (a), the following is inserted before (1):

   '01. Amauromyza maculosa (Malloch)';

2. In part A (a), the following are inserted:

   '7a. Liriomyza huidobrensis (Blanchard),

   7b. Liriomyza sativae (Blanchard),';

(1) OJ No L 26, 31. 1. 1977, p. 20.
(2) OJ No L 14, 16. 1. 1981, p. 23.

3. In part A (a), points 17, 18 and 19 become points 02, 8a and 8b respectively;

4. Part A (e) (2) (a) is deleted;

5. Part A (e) (4) is replaced by the following:

   '4. Potato spindle tuber viroid';

6. In part B (a), the following is inserted:

'10a. Liriomyza trifolii (Burgess)	Denmark, Greece, Ireland, United Kingdom Other Member States recognized as being free from Liriomyza trifolii in accordance with the procedure laid down in Article 16'.

Article 2

Annex II to Directive 77/93/EEC is hereby amended as follows:

In part A (a), the following are inserted:

'6a. Liriomyza trifolii (Burgess)	Plants of Apium graveolens L., Capsicum annuum L., Chrysanthemum L., Dendranthema (DC) Des. Moul, Dianthus caryophyllus L., Gerbera Cass., Gypsophila L., Solanum lycopersicum L., intended for planting, other than seeds'
'7a. Radopholus citrophilus (Huettel, Dickson and Kaplan)	Plants of Araceae, Citrus L., Fortunella Swingle, Maranthaceae, Musaceae, Persea Americana P. Mill., Poncirus Raf., Strelitziaceae, rooted or with growing medium attached or accompanying
7b. Radopholus similis (Cobb) Thorne (sensu stricto)	Plants of Araceae, Maranthaceae, Musaceae, Strelitziaceae, rooted or with growing medium attached or associated'.

Article 3

Annex III to Directive 77/93/EEC is hereby amended as follows:

1. Part A (8) is deleted;

2. In part A, the following is inserted:

'9a. Potato tubers (Solanum tuberosum L.), other than those officially certified as seed potatoes, pursuant to Directive 66/403/EEC	Without prejudice to the special requirements applicable to potato tubers under Annex IV (A): Turkey, USSR Third countries not belonging to the continent of Europe, other than the following: — Algeria — Cyprus — Egypt — Israel — Libya — Malta — Morocco — Syria — Tunisia';

3. In part A, the following is added:

'11. Plants of Citrus L., Fortunella Swingle, Poncirus Raf., other than fruit, seeds and parts of plants used for decoration	USA (Florida, Louisiana, Hawaii)
12. Growing medium as specified in Annex V (5) (a)	Turkey, USSR Third countries not belonging to the continent of Europe, other than the following: — Algeria — Cyprus — Israel — Malta — Morocco — Tunisia';

4. In part B (1), '(Citrus L.)' is replaced by '(Citrus L., Fortunella Swingle, Poncirus Raf.)';

5. In part B, the following is added:

'8. From 16 April to 30 September, in the case of origin in the Northern Hemisphere, and from 16 October to 31 March, in the case of origin in the Southern Hemisphere, plants of Chaenomeles Lindl./Cornus L., Cotoneaster (B. Ehrh.) Med., Crataegus L., Cydonia Mill., Malus Mill., Mespilus L., Prunus L., Pyrus L., Ribes L., Sorbus L., Symphoricarpos Duham, other than fruit, seeds and parts of plants used for decoration, originating in or coming from countries or, in the case of certain Member States, regions other than those recognized as being free from Quadraspidiotus perniciosus, in accordance with the procedure laid down in Article 16	Belgium, Denmark, Ireland, Luxembourg, Netherlands, United Kingdom
9. Plants of Cotoneaster (B. Ehrh.) Med., Crataegus L., Sorbus aria L., Stranvaesia davidiana Deche, and other genera, species or varieties of species deemed to be very sensitive to Erwinia amylovora, in accordance with the procedure laid down in Article 16	Greece, Ireland, Italy, United Kingdom (Northern Ireland), other Member States having taken official steps to restrict the planting of such plants at national level
10. Without prejudice to the prohibition applicable to plants under point 9, from 16 April to 31 October, in the case of origin in the Northern Hemisphere, and from 1 November to 15 April, in the case of origin in the Southern Hemisphere, plants of Chaeno-	Greece, France, Ireland, Italy, Luxembourg, United Kingdom (Northern Ireland), to the extent that, and for as long as, bearing in mind the possible spread of Erwinia amylovora, mention of these countries has not been deleted from this column in accordance with the procedure laid down in Article 16'

meles Lindl., Cotoneaster (B. Ehrh.) Med., Crataegus L., Cydonia Mill., Malus Mill., Pyracantha M. J. Roem, Pyrus L., Sorbus L. other than Sorbus Intermedia L., Stranvaesia Lindl., other than fruit and seeds, originating in countries or regions other than those recognized as being free from Erwinia amylovora in accordance with the procedure laid down in Article 16	

Article 4

Annex IV to Directive 77/93/EEC is hereby amended as follows:

1. The right-hand column of part A (1) is replaced by the following:

   'The wood shall be stripped of its bark or there shall be evidence by a mark "Kiln-dried", "K.D." or another internationally recognized mark, put on the wood or on its packaging in accordance with current commercial usage, that it has undergone kiln-drying to below 20 % moisture content, expressed as a percentage of dry matter, at time of manufacture, achieved through an appropriate time/temperature schedule';

2. In part A, the following is inserted:

'14a. Plants of Chaenomeles, Cornus, Cotoneaster, Crataegus, Cydonia, Malus, Mespilus, Prunus, Pyrus, Ribes, Sorbus, Symphoricarpus, other than fruit, seeds and parts of plants used for decoration, originating in or coming from countries where Quadraspidiotus perniciosus is known to occur	Without prejudice to the prohibitions applicable to the plants under Annex III (B) (8): (a) official statement: — that the provisions of Council Directive 69/466/EEC or – in the case of third countries – measures recognized to be equivalent, in accordance with the procedure laid down in Article 16, are applied, and — either that the plants originate in regions recognized as being free from Quadraspidiotus perniciosus, in accordance with the procedure laid down in Article 16, and no contamination by Quadraspidiotus perniciosus has been observed either at the place of production, or in its immediate vicinity, since the beginning of the last two complete cycles of vegetation, or — that no contamination by Quadraspidiotus perniciosus has been observed either at the place of production or in its immediate vicinity since the beginning of the last two complete cycles of vegetation, and the plants have been subjected at a suitable stage to fumigation or other appropriate

	treatment against that harmful organism, in accordance with a method approved in accordance with the procedure laid down in Article 16 or – in the absence of such approval – as required by the introducing Member State; (b) where fumigation or other treatment were not carried out as specified in the third indent of (a) the plants have undergone such fumigation or such treatment at a place approved by the official plant-protection organizations of the countries concerned
14b. Plants of Amelanchier, Cercidiphyllum, Euonymus, Fagus, Juglans, Ligustrum, Lonicera, Populus, Ptelea, Pyracantha, Rosa, Salix, Spiraea, Syringa, Tilia, Ulmus, other than fruit, seeds and parts of plants used for decoration, originating in or coming from countries where Quadraspidiotus perniciosus is known to occur	Official statement that the provisions of Directive 69/466/EEC or – in the case of third countries – measures recognized to be equivalent, in accordance with the procedure laid down in Article 16, are applied and official statement: — that no contamination by Quadraspidiotus perniciosus has been observed either at the place of production, or in its immediate vicinity, since the beginning of the last two complete cycles of vegetation, or — in the case of Rosa, that the plants have undergone fumigation or other appropriate treatment against that harmful organism, where agreed by the official plant-protection organizations of the countries concerned, in accordance with a method and at a place approved in such agreement';

3. Part A (15) is replaced by the following:

'15. Plants of Chaenomeles, Cotoneaster, Crataegus, Cydonia, Malus, Pyracantha, Pyrus, Sorbus other than Sorbus intermedia, Stranvaesia, intended for planting, other than seeds	Official statement that: — either the plants originate in countries or regions recognized as being free from Erwinia amylovora, in accordance with the procedure laid down in Article 16, or — no symptoms of Erwinia amylovora have been observed either at the place of production or in its immediate vicinity since the beginning of the last complete cycle of vegetation';

4. In part A, the following is inserted:

'15a. Plants of Araceae, Citrus, Fortunella, Maranthaceae, Musaceae, Persea, Poncirus, Strelitziaceae, rooted or with	Without prejudice to the prohibitions applicable to the plants listed in Annex III (A) (11) and (B) (1), official statement that:

growing medium attached or associated, originating in or coming from third countries	— the plants originate in and come from countries known to be free from Radopholus citrophilus and Radopholus similis, or — representative samples of soil and roots from the place of production have been subjected, since the beginning of the last complete cycle of vegetation, to official nematological testing for at least Radopholus citrophilus and Radopholus similis, and have been found free, in these tests, from those harmful organisms
15b. Plants of Araceae, Marantaceae, Musaceae, Sterlitziaceae, rooted or with growing medium attached or associated, originating in and coming from a Member State	Official statement, that: — no contamination by Radopholus similis has been observed at the place of production, since the beginning of the last complete cycle of vegetation, or — soil and roots from suspected plants have been subjected since the beginning of the last complete cycle of vegetation to official nematological testing for at least Radopholus similis, and have been found free, in these tests, from that harmful organism';

5. In part A, the following is inserted:

'33a. Plants of Apium graveolens, Capsicum annuum, Chrysanthemum, Dendranthema, Dianthus caryophyllus, Gerbera, Gypsophila, Solanum lycopersicum, intended for planting, other than seeds, originating in a Member State or in those third countries where it has been ascertained, in accordance with the procedure laid down in Article 16, that: — Amauromyza maculosa, — Liriomyza huidobrensis, — Liriomyza sativae, — Liriomyza trifolii are not known to occur, or, if Liriomyza trifolii occurs, measures equivalent to those taken by the Community are applied	Official statement, that: — either no contamination by Liriomyza trifolii has been observed at the place of production, on official inspections carried out at least monthly during the three months prior to harvesting, or — the plants or, in the case of cuttings, the mother plants have been subjected to an officially approved and supervised control regime including appropriate treatment aimed at eradicating Liriomyza trifolii from plants
33b. Plants of Apium graveolens, Capsicum annuum, Chrysanthemum, Dendranthema, Dianthus caryophyllus, Gerbera, Gypsophila, Solanum	Official statement that no contamination by Amauromyza maculosa, Liriomyza huidobrensis, Liriomyza sativae or Liriomyza trifolii has been observed at the place of production, on official inspections

lycopersicum, intended for planting, other than seeds, originating in American countries or in any other third country not covered by 33a.	carried out at least monthly during the three months prior to harvesting';

6. Part A (35) is replaced by the following:

'35. Growing medium as specified in Annex V (5) (b)	Official statement that: (a) the growing medium, at the time of planting was: — either free from soil and organic matter, or — found free from insects and harmful nematodes and subjected to appropriate examination or treatment to ensure that it was free from other harmful organisms, or — subjected to appropriate treatment to ensure freedom from harmful organisms, and (b) since planting: — either appropriate measures have been taken to ensure that the growing medium has been maintained free from harmful organisms, or — within two weeks prior to dispatch, the plants were shaken free from the medium leaving the minimum amount necessary to sustain vitality during transport, and, if replanted, the growing medium used for that purpose meets the requirements laid down in (a)';

7. Part A (36) is deleted;

8. In part A (39), the second indent of the right-hand column is replaced by the following:

'— either:

— the crop belongs to a variety recognized as being highly resistant to Corynebacterium insidiosum, or

— it had not yet started its fourth complete cycle of vegetation from sowing when the seed was harvested, and there was not more than one preceding seed harvest from the crop, or

— the content of inert matter which has been determined in accordance with the rules applicable for certification of seed marketed in the Community, does not exceed 0,1 % by weight';

9. In part A (41), the right-hand column shall be replaced by the following:

'Official statement that:

1. the seeds have been obtained by means of an appropriate acid extraction method or an equivalent method approved in accordance with the procedure laid down in Article 16, and

2. (a) either the seeds originate in regions where Corynebacterium michiganense, Xanthomonas vesicatoria or Potato spindle tuber viroid are not known to occur, or

   (b) no symptoms of diseases caused by those harmful organisms have been observed at the place of production since the beginning of the last complete cycle of vegetation, or

   (c) the seeds have been subjected to official testing for at least those harmful organisms, on a representative sample and using appropriate methods, and have been found to be free, in these tests, from those harmful organisms';

10. In part B, the following shall be inserted:

'7a.	Plants of Chaenomeles, Cotoneaster, Crataegus, Cydonia, Malus, Pyracantha, Pyrus, Sorbus other than Sorbus intermedia, Stranvaesia, other than fruit and seeds	Without prejudice to: — the prohibitions applicable to the plants under Annex III (B) (9) or (10), or — the exemptions from certain requirements listed below, which may be granted to Member States, in accordance with the procedure laid down in Article 16, when equivalent guarantees can be given: A. Official statement that: 1. the plants originate in Greece, Ireland, Italy or the United Kingdom (Northern Ireland), or in other countries or regions recognized as being free from Erwinia amylovora, in accordance with the procedure laid down in Article 16, if these countries or regions are effectively protected against the introduction of Erwinia amylovora, and that the plants were produced in nurseries using, exclusively, material bred in such countries or regions, or 2. the plants: (a) have been produced on a field: (i) which is located in an officially designated protected zone covering at least 50 km^2 i.e. an area where host plants are subjected at least to an officially approved and supervised control regime with the object of minimizing the risk of Erwinia amylovora being spread from the plants grown there; (ii) which has been officially approved, before the start of the last complete cycle of vegetation, for the cultivation of plants under the requirements laid down in A (2) (a) and (b) of this column, this approval being notified before July to the Commission, indicating the location of the field as well as the type and approximate number of plants grown there, and the date of the approval;	Greece, France, Ireland, Italy, Luxembourg, United Kingdom (Northern Ireland), to the extent that, and for as long as, bearing in mind the possible spread of Erwinia amylovora, mention of these countries has not been deleted from this column in accordance with the procedure laid down in Article 16.'

(iii) which, as well as the other parts of the "protected zone", has been found free from Erwinia amylovora since the beginning of the last complete cycle of vegetation:

— at official inspections carried out at least twice in the field, as well as in the surrounding zone of a radius of at least 250 m, i.e. once during July/August and once during September/October respectively for the Northern Hemisphere and once during January/February and March/April respectively for the Southern Hemisphere, and

— at official spot checks carried out in the surrounding zone of a radius of at least 1 km, at least once during July to October for the Northern Hemisphere and at least once during January to April for the Southern Hemisphere, in selected appropriate places, in particular where appropriate indicator plants are present, and

— at official tests carried out in accordance with an appropriate laboratory method on samples officially drawn, since the start of the last complete cycle of vegetation, from plants having shown symptoms of Erwinia amylovora on the field or in other parts of the "protected zone" and

(iv) from which, as well as from the other parts of the "protected zone", no host plants showing symptoms of Erwinia amylovora have been removed without prior official investigation or approval;

and

(b) have been subjected to appropriate administrative arrangements to ensure their identity, such as field labelling in the case of fruit trees, or other operations having comparable effects.

B. The plants are packaged and the packages are officially marked with distinctive marks to ensure the identity of the plants in the consignment, the same marks being reproduced on the certificate provided for in Article 7;

11. In part B (14), in the left-hand column, 'Apium' is inserted before 'Beta', and 'and Lactuca' is replaced by 'Lactuca, Petroselinum and Spinacea';

12. In part B (14), the following is added to the first indent of the central column:

'in particular in crops of potatoes or egg-plants in the immediate vicinity or, where there has been previous production of potatoes or egg-plants, at the place of production, unless no contamination by Leptinotarsa decemlineata has been observed in those crops in official inspections carried out at least twice since the beginning of their last complete cycle of vegetation'.

Article 5

Annex V to Directive 77/93/EEC is hereby amended as follows:

1. In point 2 (a), 'Dendranthema' is inserted after 'Chrysanthemum' and 'Gypsophila' is inserted after 'Gladiolus'.
2. Point 5 is replaced by the following:

'5. (a) Growing medium as such, which consists in whole or in part of soil or solid organic substances such as parts of plants, humus including peat or bark, other than that composed entirely of peat, or

(b) growing medium, attached to or associated with plants, consisting in whole or in part of material specified in (a) or consisting in whole or in part of peat or of any solid inorganic substance intended to sustain the vitality of the plants, originating in countries to which Annex III (A) (1) or (12) applies.'

Article 6

Annex VI is hereby deleted.

Article 7

Member States shall bring into force the laws, regulations or administrative provisions necessary to comply with this Directive by 1 July 1985 at the latest.

Member States shall immediately inform the Commission of all laws, regulations and administrative provisions adopted in implementation of this Directive. The Commission shall inform the other Member States thereof.

Article 8

This Directive is addressed to the Member States.

Done at Luxembourg, 28 June 1984.

For the Council

The President

H. BOUCHARDEAU

COMMISSION

COMMISSION DECISION

of 2 July 1984

relating to a proceeding under Article 86 of the EEC Treaty

(IV/30.615 - BL)

(Only the English text is authentic)

(84/379/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Greece, and in particular Article 3 thereof,

Having regard to the application lodged under Article 3 of Regulation No 17 on 6 November 1981 by Derek Merson, a sole trader,

Having regard to the Commission decision of 28 June 1982 to initiate proceedings in this case,

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

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

Whereas:

I. THE FACTS

A. BL

(1) BL was given its present structure on 11 August 1975 and has been a public limited company since 31 July 1981.

(2) BL is the second largest British car manufacturer and ranks seventh in Europe as a whole in terms of its turnover. On 31 December 1982 the United Kingdom Government owned 99,7 % of the issued capital of the company with 69 000 private shareholders accounting for the remaining 0,3 %.

B. THE BRITISH TYPE-APPROVAL REGULATIONS

(3) In most circumstances passenger cars can be licensed for use on roads in Great Britain (England, Wales and Scotland) only if there is a type-approval certificate in force in respect of the vehicle in question whether manufactured in Great Britain or imported. The existence of such a type-approval certificate shows that the vehicle complies with certain standards of design, construction and environmental protection. The current regulations which govern the national type-approval arrangements are contained in Statutory Instrument No 1092 of 1979, as amended by Statutory Instruments Nos 1980/879 and 1165, 1981/696 and 1619 and 1982/8. These regulations are made by the Secretary of State for Transport pursuant to powers conferred on him by the Road Traffic Acts 1972 and 1974.

(4) The national type-approval (hereinafter NTA) regulations do not apply to all classes of vehicle. In particular, a type-approval certificate will not be necessary for temporary or personal imports as defined by the regulations. In all other cases, however, NTA applies and compliance with the regulations is mandatory. Thus by virtue of section (51) (1) of the Road Traffic Act 1972 and NTA

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

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

Regulation 14 it is an offence for any person to use, or cause or permit to be used on roads in Great Britain a vehicle subject to NTA if it has not been certified. Similarly, by virtue of section 62 of the Road Traffic Act 1972, as amended, it is an offence to sell, supply or offer to sell or supply a vehicle subject to NTA if approval has not been granted.

(5) Compliance with the NTA regulations, which is essentially a two-stage process, can be achieved in a variety of ways. Thus in the case of vehicles manufactured in the EEC and first sold in Great Britain, a manufacturer first obtains an NTA certificate from the Department of Transport and then supplies a certificate that a given vehicle conforms with the approved type on delivery of the vehicle in question.

(6) Alternatively, a manufacturer – and in this case any other person including an importer – can apply for a certificate for a single variant of any model range. This application, which forms part of the standard procedure for obtaining NTA for vehicles manufactured outside the EEC, leads to the grant of a Primary Minister's Approval Certificate (PMAC). Thereafter subsequent Minister's Approval Certificates (sub-MACs) can either be provided by the manufacturer on request in the case where he (the manufacturer) has obtained the PMAC, or can be created by the importer himself in the case where he has obtained the PMAC.

(7) While the NTA does permit an importer to apply for a PMAC, most importers – whether individuals or traders – are unlikely to take advantage of this opportunity since obtaining a PMAC independently may require physical testing of the vehicle, which costs approximately £ 20 000. However, even if the manufacturer provides systems information which would make physical testing unneccessary, the cost of obtaining a PMAC – approximately £ 800 – is likely to deter most importers. Except in cases where advantage is taken of the personal import exemption referred to in paragraph 4 above, individuals or traders need the cooperation of the motor manufacturer in order to comply with the NTA regulations.

C. THE DEMAND FOR IMPORTED BL VEHICLES

(8) In 1981, BL was selling left-hand-drive (LHD) variants of its models in certain other Member States at prices considerably lower than those charged by BL's authorized UK dealers for right-hand-drive (RHD) equivalents. In normal circumstances demand for attractively priced BL vehicles in the United Kingdom might have been satisfied by personal imports of RHD vehicles sold outside the United Kingdom.

(9) At this time, however, BL only generally supplied its distributors in other Member States (except Ireland) with RHD variants under special schemes designed to facilitate purchases by diplomatic or military personnel. It followed that the only way in which demand for cheaper BL vehicles could be satisfied was by the importation of LHD variants.

(10) When BL closed its assembly plant at Seneffe in Belgium in 1981, prospective UK purchasers seeking to take advantage of the price differentials between the United Kingdom and some other Member States were obliged to purchase vehicles produced in the United Kingdom to specifications appropriate for other Member States and then reimport them.

(11) Having obtained an LHD vehicle the importer would be faced with several problems before he could use it lawfully on the roads. First, in order to obtain a certificate of conformity from the manufacturer, he would have to establish that certain minor specification changes had been carried out.

(12) Once type approval was granted, the owner would then normally want to convert his vehicle to RHD even though driving an LHD vehicle is not prohibited. Conversion, however, does not present great technical difficulties and neither invalidates type approval nor contravenes UK safety regulations if carried out properly.

(13) The path was therefore clear for substantial trade in BL vehicles to develop between Member States. Demand was particularly strong for the LHD version of the Metro which was covered by NTA certificates first granted on 17 July 1980.

D. BL'S REACTION

(14) In the event, the importation of the Metro was not welcomed by BL's authorized UK dealers. This discontent found expression in BL Dealer Council

meetings, which provide an opportunity for authorized dealers and BL management to discuss their mutual concerns. Commission investigations subsequently revealed that BL responded to the dealers' complaints on 4 November 1981 by informing the Dealer Council that there was 'no longer any commercial justification for maintaining UK type approval for LHD cars and that existing approvals should be allowed to lapse from October 1981'.

(15) However, any impression that BL gave to the Dealer Council that type approval would no longer be available after October 1981 as a result of its actions was erroneous. In fact all vehicles manufactured before the date on which type approval is intended to lapse can be registered at any time. Indeed, even those vehicles manufactured after that date can be registered so long as an application is made within six months. In the case of the LHD variant of the Metro it follows that vehicles manufactured before October 1981 can still be registered, whereas vehicles manufactured after that date could be registered up until 1 April 1982.

(16) In spite of the fact that BL ought to have been aware of the continued availability of type approval for the LHD Metro, examination of BL's business records for the period October 1981 to April 1982 showed that the company had on occasion rejected requests for assistance addressed to it, on the grounds that type approval did not exist.

(17) BL's decision not to renew type approval, and its assertions that such approval did not exist when it was still in force, were not the only measures the company took which impeded the reimportation of LHD Metros. Other documents examined by the Commission show that in the period June 1981 to January 1982 BL consistently refused to provide the information necessary to obtain certificates of conformity. Whether BL denied existence of a type approval or simply refused to assist purchasers in obtaining certificates of conformity by withholding vital information, the result was the same. In either case, the LHD Metros could not be lawfully used on the roads in England, Scotland and Wales.

(18) In particular, the Commission's inspectors examined a so-called 'pirate' file at BL's premises. This file contained correspondence with several car dealers and individuals which disclosed the following facts: on 18 June 1981, BL informed, Auto Europa of Birmingham that no certificates of conformity were available for LHD Metros and declined to provide the relevant NTA numbers; on 23 June 1981, BL wrote to International Cars RHT Ltd of Edgware in similar terms; on 11 August 1981, BL wrote to Mrs Fox of Pevensey denying, in effect, that NTA for LHD Metros applied to vehicles sold in Member States other than the United Kingdom; on 16 November 1981, BL informed Royal Cars AMS Autos Ltd of London that it would not provide NTA numbers for LHD Metros; on 17 November 1981, BL wrote to Mr Merson, the complainant in this case, to inform him that BL was not able to provide NTA numbers for any LHD Metro; on 12 January 1982, BL informed Mr Doyle of Preston that LHD Metros were not type-approved. At all material times, however, type approval for the LHD Metro was still in force and certificates of conformity could have been granted.

(19) It was against this background that a question was asked in the House of Commons on 2 February 1982 which was designed to elicit information about Government intentions in this area. In reply, the Secretary of State for Transport stated that his officials were approaching the manufacturers and their accredited dealers to discuss how individual purchasers and individual dealers could be given prompt and ready access to the type-approval information they needed and to which they had a right under international trading law.

(20) Three weeks later, BL indicated that it had reviewed its policy and was now able to issue the necessary certificates. However, BL decided to impose a charge of £ 150 for creating a certificate and requested payment before providing the information. The fact that the work involved in granting a certificate was purely administrative in nature prompted the Commission to investigate BL's pricing policies with a view to discovering whether the figure of £ 150 was excessive or discriminatory.

(21) The investigation showed that BL had charged varying amounts for the different sorts of type-approval information. Thus BL had charged

either nothing or £ 25 in respect of each vehicle (LHD or RHD), whether the applicant was a private individual or a trader. However, in July 1981, when concern was first being voiced at Dealer Councils about the influx of LHD vehicles, BL raised its charge for granting a certificate of conformity to a trader for LHD variants to £ 150 whilst retaining the £ 25 charge for private individuals and RHD vehicles. At the same time BL also raised the charge for granting a sub-MAC to LHD models that had been manufactured at Seneffe and for which it had obtained a PMAC. In this case the price was raised from £ 100 to £ 150.

(22) With supplies of RHD and LHD BL variants manufactured outside the United Kingdom rapidly running out as a result of the closure of BL's plant at Seneffe in January 1981 and the number of RHD vehicles manufactured in the United Kingdom but sold abroad being so limited, the most significant charge levied by BL was the £ 150 on LHD variants reimported by traders. This sum of £ 150 proved to be six times higher than the price charged to private importers or traders for the small number of RHD variants of the same vehicle that found their way into the United Kingdom, and yet, as the Commission investigation showed, the amount of administrative time involved was the same in the case of both variants – namely two hours of clerical work.

(23) It was with a view to avoiding these obstacles that some traders tried to obtain BL's assistance in seeking a PMAC for their own reimports. With BL's help a PMAC could have been obtained for approximately £ 800 irrespective of whether an NTA certificate was in force or not. However, BL refused to furnish traders with the systems-approval information necessary to obtain this alternative form of type approval. Furthermore when BL decided to re-apply for an NTA certificate for LHD models towards the end of 1982 BL continued to be uncooperative. In fact the only concession that BL was prepared to make to traders was to reduce the charge for granting a certificate of conformity from £ 150 to £ 100. However this charge, which became effective on 16 March 1983, when the new LHD type approval came into force, appears to have been achieved at the expense of individual purchasers of LHD variants who now have to pay £ 100 instead of £ 25.

II. LEGAL ASSESSMENT

A. ARTICLE 86

(24) Article 86 of the EEC Treaty prohibits as incompatible with the common market any abuse by an undertaking of a dominant position within the common market or a substantial part thereof in so far as it may affect trade between Member States.

(a) **Dominance**

(25) (i) *The relevant market*

The relevant market is the market for the supply of information relating to national type-approval certification needed by an importer seeking to license a BL vehicle for use on the roads in Great Britain, which is a substantial part of the common market.

(ii) *BL's dominant position*

BL's dominant position in the above market arises by virtue of the provisions of the United Kingdom Road Traffic Acts and the Motor Vehicles (Type Approval) (Great Britain) Regulations made thereunder which authorize BL alone to apply for national type approval for vehicles of its own manufacture and subsequently to grant the certificates of conformity which are necessary if a vehicle is to be licensed and used on the road. The technical availability of the alternative PMAC procedure for obtaining type approval for individual vehicles does not in any way undermine this analysis. In the first place the cost of obtaining such approval independently – namely £ 20,000 – is prohibitive, and in the second place BL did not and will not furnish importers with information necessary to obtain the PMAC for £ 800. In these circumstances the PMAC procedure cannot be considered as a substitute.

(b) **Abuse**

(26) BL has abused its dominant position in Great Britain, which is a substantial part of the common market, in several ways. First, BL refused to supply a number of traders and private individuals

wishing to reimport LHD Metros into Great Britain with certificates of conformity in spite of the fact that an NTA certificate for these vehicles was in force at the time of application. Secondly, BL deliberately decided not to update the NTA certificates for the LHD variant of the Metro. Thirdly, when BL finally decided to update its NTA certificate for the LHD Metro, it demanded a fee for the grant of a certificate of conformity which was both excessive and discriminatory, having regard to the fee charged by BL for the RHD variant of the same vehicle. The Commission's investigations referred to in paragraph 18 above show that BL's refusal to assist importers was consistent. As a result, BL Metros that had been imported from other Member States could not be legally used and vehicles for which a demand clearly existed and continues to exist are subjected to a penalty. By its actions BL has therefore abused its dominant position in the market for the provision of information relating to national type-approval certification necessary for the licensing of its vehicles for use on the roads in Great Britain.

(27) Such behaviour cannot be justified on any objective grounds. The first abuse – namely the refusal to grant certificates of conformity – cannot simply be explained away as an administrative error. Such decisions in the BL organization are not taken at a local level but are the responsibility of one centralized department. In these circumstances the Type Approval Department is unlikely to have been unaware of the company's desire to impede reimports and BL's explanation is therefore not convincing. BL's attempt to justify its second abuse – namely its decision not to update the NTA certificate for the LHD Metro – must be viewed in the same light. The company's desire to reduce administrative costs might have been a credible explanation for its behaviour had its decision not been taken at a time when the Dealer Council was urging BL to restrict the flow of reimported Metros into the United Kingdom.

(28) Very much the same considerations apply to BL's attempt to show that the charge of £ 150 for the granting of a certificate of conformity was justified by an increase in overheads. Once again the timing of BL's action and the degree of the increase in price are inconsistent with its explanations. The weakness of BL's justification for the charge of £ 150 becomes more apparent still in the light of its decision actually to reduce the charge to traders by £ 50 to £ 100 whilst at the same time increasing the charge to individuals to £ 100. It is thus apparent that cost factors were not the decisive element in the determination of the amount of these charges. What is more, the charge of £ 100 is well in excess of the sum that the Court of Justice indicated as being reasonable in its judgment in Case 26/75 General Motors v. Commission [1], once allowance is made for inflation. In the circumstances, both the charge of £ 150 and £ 100 to traders, and the revised charge of £ 100 to private individuals constitute penalties on reimports and therefore amount to abuses of BL's dominant position.

(c) **Effect on trade between Member States**

(29) BL impeded trade between Member States by preventing owners of imported vehicles from licensing those vehicles for use on the roads in Great Britain. BL's action also had the effect of deterring would-be importers from taking advantage of lower prices for BL vehicles elsewhere in the common market. In particular, car dealers who would otherwise have been able to satisfy a considerable demand for Metros were prevented from doing so. Furthermore, when NTA was made available, BL's charge of £ 100 for the provision of type-approval information to importers amounts to a penalty on parallel trade. BL therefore impeded, and continues to impede, the free movement of goods and economic interpenetration which the EEC Treaty aims to encourage.

B. ARTICLE 15 OF REGULATION No 17

(30) Article 15 (2) (a) of Regulation No 17 empowers the Commission, by decision, to impose fines of between 1 000 and 1 000 000 units of account or a sum in excess thereof (but not exceeding 10 % of the turnover of the preceding business year) on an undertaking participating in the infringement where, either intentionally or negligently, such undertaking infringes Article 86 of the Treaty.

(31) In fixing the amount of the fine in this case regard should be had to the gravity and the duration of the infringement. BL ought to have known that its

(1) [1975] ECR 1367.

actions were a variety of those held to be abusive by the Commission in Decision 75/75/EEC (General Motors Continental) [1]. The infringements lasted for a considerable period of time – namely from October 1981 until March 1983 as regards suspension of NTA for LHD variants, from June 1981 to the present day in respect of charges for the supply of certificates of conformity and from October 1981 to April 1982 in respect of the failure to grant certificates of conformity when type approval was still in force. Although the evidence collected by the Commission indicates that BL's infringements were committed intentionally, BL's cooperative attitude in relation to certain of the infringements found to have been committed in this decision should be taken into account in assessing the level of the fine,

HAS ADOPTED THIS DECISION:

Article 1

It is hereby established that BL has infringed and continues to infringe Article 86 of the Treaty establishing the European Economic Community in the following respects:

(i) by refusing to issue certificates of conformity between June 1981 and April 1982 when an NTA certificate was in force for the LHD variant of the Metro;

(ii) by deciding in November 1981 no longer to seek NTA for the LHD variant of the Metro as a means of impeding reimportation of this vehicle into the United Kingdom from other Member States;

(iii) by charging £ 150 to traders for the provision of certificates of conformity in respect of LHD Metros between August 1981 and April 1982 and by charging £ 100 for the same service to both independent dealers and individuals since 16 March 1983, when NTA for the LHD variant of the Metro was renewed.

Article 2

In respect of the infringements set out in Article 1, a fine of 350 000 (three hundred and fifty thousand) ECU, that is £ 207 876,55, is imposed on BL. This fine shall be paid within three months of the date of notification of this Decision into the account of the Commission of the European Communities with Lloyds Bank, Overseas Department, PO box 19, 6 Eastcheap, UK-London (account No 1086341).

Article 3

BL shall bring the infringement described in Article 1 (iii) to an end and shall inform the Commission promptly of measures taken to this effect.

Article 4

This Decision is addressed to:
BL plc,
33 – 35 Portman Square,
UK-London W1H 0HQ.

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

Done at Brussels, 2 July 1984.

For the Commission
Frans ANDRIESSEN
Member of the Commission

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[1] OJ No L 29, 3. 2. 1975, p. 14.

COMMISSION DECISION

of 4 July 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.810 – Synthetic fibres)

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

(84/380/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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

Having regard to the notification pursuant to Article 4 of Regulation No 17, on 10 November 1982, of an agreement signed by the major European synthetic-fibre producers on 21 October 1982,

Having regard to the Commission decision of 9 November 1983 to initiate proceedings in this case,

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

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

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

Whereas:

I. THE FACTS

1. THE SIGNATORIES OF THE NOTIFIED AGREEMENT

(1) The present signatories of the agreement of 21 October 1982 are:

(1) Anicfibre SpA (Italy);

(2) Bayer AG (Germany), acting also on behalf of Bayer Antwerpen NV (Belgium);

(3) Courtaulds plc (United Kingdom), acting also on behalf of Courtaulds SA (France) and Lirelle plc (Ireland);

(4) Enka AG (Germany) and Enka BV (Netherlands), acting also on behalf of British Enkalon UK Ltd (United Kingdom);

(5) Hoechst AG (Germany), acting also on behalf of Hoechst Fibre Industries UK Ltd (United Kingdom);

(6) Imperial Chemical Industries plc (United Kingdom), acting also on behalf of ICI Europa Fibres GmbH (Germany);

(7) Montefibre SpA (Italy), acting also on behalf of Montefibre France SA (France), Fibra del Sud SpA, SIPA, SINA, S. It. Poliestere (Italy);

(8) Rhône Poulenc SA (France), acting also on behalf of Rhône Poulenc Textile SA (France) and Deutsche Rhodiaceta AG (Germany); and

(9) SNIA Fibre SpA (Italy), acting also on behalf of SNIA Ltd (Ireland) and Nysam SA (France).

2. THE PRODUCTS COVERED BY THE AGREEMENT

(2) The products covered by the agreement are the following synthetic textile fibres:

— polyamide textile yarn,
— polyamide carpet yarn,
— polyester textile yarn,
— polyamide staple,
— polyester staple and
— acrylic staple.

(3) Currently installed machinery allows producers considerable flexibility as to the capacity at which

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 314, 19. 11. 1983, p. 3.
[3] OJ No 127, 20. 8. 1963, p. 2268/63.

it is operated, the characteristics of the products and the scope for switching from one product to another (e.g. from polyamide to polyester).

(4) Cellulosic fibres (e.g. rayon and rayon staple fibre) and natural fibres (e.g. cotton and wool) are to some extent in competition with synthetic fibres, but in most cases these different types of fibre are used together.

(5) The proportion of each fibre in the final product can vary depending on their relative prices. For example, if natural fibres are unavailable the proportion of cellulosic or synthetic fibres in the final product can be increased. This interchangeability has an influence on the price of the final product.

Synthetic fibres account for about 50% of the consumption of textile fibres in the Community.

(6) There are a number of other producers besides the signatories operating on the European synthetic-fibres market. These include companies based in the Community (Du Pont de Nemours, Fabelta, Saint Gobain Industries, Owens Corning Fiberglass), in Austria (Chemiefaser Lenzing AG, Chemie Linz AG, Erste Österreichische Glanzstoff-Fabrik AG), in Switzerland (Viscosuisse, Verband der Schweizerischen Chemiefaser-Industrie) and in Spain (Empresa Nacional de Celulosas SA, Cyanenka) and Portugal (Companhia Industrial de Fibras Artificiais, Fisipe).

Imports of the products covered by the agreement coming from third countries (USA, Austria, Spain, Switzerland, etc.) have recently been running at about 9 to 10% of total deliveries in the Community and about 14 to 15% of deliveries by the signatories.

The shares of the Community market held by the signatories for each of the fibres have been as follows (as % of total deliveries):

	1981	1982	1983
Acrylic staple	74,3	74,2	77,6
Polyester staple	60,4	55,8	56,7
Polyamide staple	75,1	73	73
Polyamide carpet yarn	62,4	54,7	54,6
Polyamide textile yarn	75	72,9	74,1
Polyester yarn	72	73,8	75,8

(7) Some members of the agreement are also producers of polyamide for industrial uses and other synthetic fibres and of cellulosic fibres. These two groups accounted in 1982 for 7,35% and 20% respectively of their sales.

At the time the agreement was signed, the signatories held about 70% of total synthetic-fibre capacity in Western Europe and about 85% of installed capacity in the EEC.

3. ORIGIN OF THE AGREEMENT AND STATE OF THE INDUSTRY

(8) The parties to the agreement see the difficulties being experienced by the European synthetic-fibres industry as due to an imbalance between supply and demand. This imbalance stems partly from adverse market trends characterized by weak demand and increased import penetration and partly from the existence of increasing surplus capacity in the industry.

(9) The polyester-staple sector had already run into these difficulties in 1972. Increased import penetration and the need to design much larger plants to reap economies of scale had contributed to a situation of overcapacity and low prices. The main producers of polyester staple notified to the Commission an agreement to coordinate investment and rationalize production in order to eliminate present and prevent future overcapacity. However, in the face of the Commission's opposition to the agreement, which would have affected the production and sales policies of those involved, the producers eventually withdrew the notification [1].

(10) From 1975 onwards the overcapacity in synthetic fibres became more and more unmanageable and began to jeopardize profitability. By 1977 plant was operating at an average of only 70% of capacity.

In 1978, with prices continuing to depress profitability and the installation of new capacity imminent, the producers concluded a new agreement covering all the products listed in paragraph 6 above.

(11) The aims of the 1978 agreement were twofold: to bring supply and demand gradually back into balance by 1981 by means of an orderly reduction in capacity of approximately 13% and to restore a reasonable level of capacity utilization. The Commission again refused to exempt this agreement under Article 85 (3) because it too

(1) Eighth Report on Competition Policy, point 42.

contained unacceptable clauses providing for production and delivery quotas. Between 1979 and 1981 the parties made various changes to the original agreement, but without securing the Commission's formal approval [1].

(12) Meanwhile, in July 1977, the Commission had called upon Member State Governments to avoid aggravating the overcapacity problem by granting any form of State aid to the sector. The aid discipline introduced in 1977 is still in operation.

(13) The 1978 agreement was provisionally implemented pending a Commission decision and the capacity-reduction target was in fact greatly exceeded: by the end of 1981, installed capacity had been cut by an average of 20% from 1977 levels.

(14) Nevertheless, after a thorough reappraisal of the situation on both the European and the international markets, the same producers concluded that there was still no prospect of a significant upturn in demand between 1982 and 1985 and that any increase in capacity during this period would continue to be damaging to the industry.

(15) For these reasons, and in order to create favourable conditions for long-term research and development to enable the industry to offer consumers improved products and face third-country competition, the producers agreed to carry out a further round of capacity reductions and, to that end, signed the agreement of 21 October 1982 which is the subject of this Decision.

That agreement was notified on 10 November 1982 and was subsequently amended on 9 March and 19 July 1983 in response to observations made by the Commission.

4. THE PRESENT CONTENT OF THE AGREEMENT

(16) The size of the projected capacity reductions has been based on the following assumptions:

— capacity must be operated at at least 85 % to be economic,

— sales will stabilize at 1981 levels by 1986.

[1] *Twelfth Report on Competition Policy*, points 38 to 41.

The signatories' sales of all the products covered by the agreement in 1981 totalled 1 373 000 tonnes. On the basis of a minimum capacity-utilization ratio of 85 %, capacity still needs to be brought down to 1 640 000 tonnes. The agreement therefore calls for cuts totalling 354 000 tonnes in the signatories' combined production capacity for synthetic fibres by the end of 1985, namely 57 000 tonnes of polyamide textile yarn, 42 000 tonnes of polyamide carpet yarn, 61 500 tonnes of polyester yarn, 33 000 tonnes of polyamide staple, 71 500 tonnes of polyester staple and 89 000 tonnes of acrylic staple.

(17) On the basis of this overall capacity reduction requirement, each signatory has drawn up its own detailed plan, taking as its starting point the capacity it was supposed to have by the end of the 1978 agreement, and allowing for any intervening transfers of capacity between signatories or between signatories and non-signatories.

The addditional reductions which some firms made independently over and above their quotas under the 1978 agreement are thus allowed for in calculating the further reduction now required of them.

(18) The other main provisions of the agreement are as follows:

(a) The participating companies commit themselves to achieving their individually determined capacity targets by the dates they have announced.

They must lodge details of the capacities they intend to cut and of the implementation of the cuts with an independent trustee body. They will be subject to checks by independent experts. The obligation not to exceed the capacity to which they have committed themselves is not satisfied by selling or otherwise transferring capacity to third parties for use within Western Europe.

(b) The participating companies undertake not to increase their capacities during the currency of the agreement, i.e. until the end of 1985.

(c) The parties will endeavour, as far as possible, to secure the retraining and redeployment of any labour displaced in the process of restructuring their operations and undertake to observe their statutory and/or contractual obligations existing in this regard in their respective countries.

(d) The Commission will be kept informed of any decisions or recommendations arising from the agreement and of its results in both the economic and social fields.

(e) Any non-signatory company established in the EEC or elsewhere in Western Europe can accede to the agreement on terms to be determined in each case.

(f) A trustee body with powers to carry out on-the-spot inspections will periodically check on the accuracy of the information the parties have supplied concerning their capacity.

(g) In the event of major changes in the situation (involving, for example, the behaviour of European non-signatories on the European market, imports from non-European sources or the collapse of export markets), the parties will consult together to find solutions to the problem.

(h) In the event of transfers of activities or rights, the rights and obligations under the agreement will continue to vest in the parties benefiting from such transfers.

If a party purchases production capacity either from another party or from a non-signatory, its capacity will be adjusted appropriately.

A party wishing to sell or assign the use of some or all of its capacity to a non-signatory must endeavour to secure an undertaking from the purchaser to observe the principles of the agreement, except where the capacity is transferred outside Western Europe.

(i) In the event of a party's non-compliance with its obligation to scrap or not to increase capacity, the party will be liable to pay damages of 2 000 ECU per tonne of excess annual capacity and a further sum of the same amount for each year of delay.

Violations of the agreement will be dealt with under an arbitration procedure.

5. CLAUSES DELETED FROM THE AGREEMENT

(19) The notified draft of the agreement contained some clauses which have been deleted at the insistence of the Commission.

They include the following:

— A ban on investment leading to increases in capacity without the consent of all other parties.

This clause has been deleted; increases in signatories' capacity now come under the clause providing for consultations in the event of major changes.

— A clause providing that the Commission would use its good offices in the event of difficulties arising from implementation of the agreement. This clause has been deleted.

— A clause providing for the transmission of information on deliveries to the trustee body appointed by the IRSFC and a clause whereby the operation of plant at over 95 % of the party's declared capacity would be taken as casting doubt on the correctness of the capacity declaration. These clauses would have made it possible to monitor output and deliveries and have been deleted.

The expiry of the agreement was also brought forward from 30 June 1986 to 31 December 1985.

6. IMPLEMENTATION OF THE AGREEMENT

(20) The table below shows the amounts of capacity already closed or remaining to be closed under the agreement. It is seen that the bulk of the agreed reductions were already made in 1982 and 1983 for almost all the fibres except acrylic. For the latter, cuts in installed capacity of 15 000 tonnes in 1984 and 66 000 tonnes in 1985 are scheduled. A reduction of 17 000 tonnes also still has to be made in 1984 for polyester yarn. Anicfibre has announced that it has reached agreement with the trade unions to close its Ottana plant in Sardinia, which has a capacity of 15 000 tonnes of polyester yarn, in the middle of summer 1984 and that its Pisticci plant in southern Italy where it produces polyester yarn and acrylic staple will also be closed in the coming months.

Capacity reductions implemented or planned

(1 000 tonnes)

	1982	1983	1984	1985	Total
Acrylic	8	—	15	66	89
Polyamide textile yarn	37	32	—	2	57
Polyamide staple	14	19	—	—	33
Polyamide carpet yarn	21	21	—	—	42
Polyester textile yarn	50	11	17	—	61,5
Polyester staple	34,5	37	—	—	71,5

(21) The table below shows the signatories' rates of utilization of installed capacity for each of the products between 1978 and 1983.

The implementation of the agreement has significantly raised capacity utilization in the past three years.

Capacity utilization (signatories)

	1978	1979	1980	1981	1982	1983
Acrylic staple	61,6	61,4	59	67,8	65,7	73,4
Polyester staple	70	63	56,9	65,9	67,6	77,4
Polyamide staple	73,3	71,8	59,4	67,5	68,5	81,9
Polyamide carpet yarn	55	57,4	61	60	68,6	75
Polyamide textile yarn	86,8	86,2	77,9	75	65,7	84,1
Polyester textile yarn	73,6	70,9	60,7	68,4	79,3	78,1
Total	68,7	66,8	61,4	68	70	76,6

(22) The parties have observed the agreement's clauses regarding adjustments to commitments following disposals or acquisitions of plant. On 31 May 1983, for example, Montefibre took over Monsanto's acrylic plants at Coleraine (Northern Ireland) and Lingen (Federal Republic of Germany). Later it sold the Lingen plant to Bayer after obtaining the approval of the Federal Cartel Office. On each occasion appropriate adjustments were made to the parties' reduction commitments, without changing the overall reduction target which remains 18 % of the capacity scheduled to exist at the end of the 1978 agreement.

II. OBSERVATIONS OF THIRD PARTIES

(23) On 19 November 1983, a summary of the agreement was published in the *Official Journal of the European Communities* to give interested third parties an opportunity to comment, as required by Article 19 (3) of Regulation No 17. In reply to the notice, several associations of synthetic-fibre user industries made representations to the Commission in which they argued that:

— the capacity reduction planned was excessive since the market had improved,

— coming at a time when activity was picking up, the capacity reductions would lead to supply difficulties,

— in these circumstances it would be easy for producers to impose price increases.

(24) Although it is true that the market improved in 1983, capacity utilization still only averaged 76,6 %, quite a long way short of the 85 % aimed at in the agreement, so that it cannot be said that supply has been cut more than intended.

The presence of other producers who are not members of the agreement and of importers (holding a combined 30 % of the market) and the level of capacity utilization among the signatories would suggest that supply difficulties are unlikely in the foreseeable future.

As far as prices are concerned, price movements in recent years have shown increases only for some products but reductions in price for some others. The latest trends do not point to an abnormally sharp rise in prices.

Prices (1974 = 100)

(DM)

Year	Polyester staple	Acrylic	Polyester textile yarn	Polyamide yarn
1974	100	100	100	100
1980	91	92	70	106
1981	93	98	73	105
1982	98	110	80	99
1983	93	104	74	100

III. LEGAL ASSESSMENT

A. ARTICLE 85 (1)

(25) The notified agreement is an agreement between undertakings which has the object and effect of restricting competition within the common market.

(26) By committing themselves to reduce capacity, the parties accept restrictions on the scale of their production facilities and hence on their investment. This commitment involves an obligation on each party to draw up and implement a capacity reduction plan showing, by product and plant, the size and timetable of the cuts to be made by the party.

The parties are, moreover, held to their obligations until the expiry of agreement, even if, according to their capacity-reduction plans, they will have completed their reductions before that date.

(27) The notified agreement is liable to affect trade between Member States. It involves undertakings based in different Member States which operate, mainly through subsidiaries or associated companies, throughout the common market. The products in question are traded between Member States and between Member States and third countries.

B. ARTICLE 85 (3)

(28) 1. The question whether the agreement meets the conditions set out in Article 85 (3) must be considered against the background of the overcapacity that existed in the synthetic-fibres industry in 1982 and that is still running at a high level (around 30 %) despite some reduction in capacity in the past few years.

The overcapacity is mainly a result of rapid technological advances (introduction of the rapid spinning process, building of larger production units to take advantage of scale economies) and a demand trend which, though not actually falling, has failed to rise as much as expected.

(29) 2. (a) The purpose of the agreement is to reduce capacity so that the capacity that remains can be operated at a more economic level.

(30) In a free market economy it ought to be principally a matter for the individual undertaking to judge the point at which overcapacity becomes economically unsustainable and to take the necessary steps to reduce it.

(31) In the present case, however, market forces by themselves had failed to achieve the capacity reductions necessary to re-establish and maintain in the longer term an effective competitive structure within the common market.

The producers concerned therefore agreed to organize for a limited period and collectively, the needed structural adjustment.

(32) As major producers, many of them would have been unwilling to go ahead with capacity cuts on their own without the certain knowledge that their competitors would follow suit and that no new capacity would be installed for the period of the agreement.

(33) The fact that some of the parties, particularly the more diversified ones, may, for their own peculiar economic, technical or social reasons, have cut back their capacity further than others does not diminish the effectiveness of these collective arrangements in securing the capacity reductions required.

(34) By reducing its capacity, the industry will shed the financial burden of keeping underutilized excess capacity open without incurring any loss of output, since the remaining capacity can be operated more intensively. The capacity reductions also provide the undertakings with an opportunity to develop their particular strengths, since each has selected for closure those of its plants which are less profitable or competitive because of their obsolescence or small size.

(35) By concentrating on the production of particular products and giving up the production of others, the signatories will tend to become more specialized. Specialization on products for which they have the best plant and more advanced technology will help the parties to achieve optimum plant size and improve their technical efficiency. It will also help them to develop better-quality products more in tune with the user's requirements. The elimination of the capital and labour costs of unprofitable activities will make resources available for the capacity that remains in production.

(36) The eventual result should be to raise the profitability and restore the competitiveness of each party. It is worth

noting that the total losses of the European synthetic-fibres industry are reported to have been down to DM 500 000 000 in 1983 from an estimated DM 1 200 000 000 in 1981.

(37) The coordination of plant closures will also make it easier to cushion the social effects of the restructuring by making suitable arrangements for the retraining and redeployment of workers made redundant.

(38) It can be concluded then that the agreement contributes to improving production and promoting technical and economic progress.

(39) (b) Article 85 (3) also requires that an agreement afford consumers a fair share of the resulting benefit. In the present case, consumers stand to gain from the improvement in production, in that the industry which eventually emerges will be healthier and more competitive and able to offer them better products thanks to greater specialization, whilst in the short term they will continue to enjoy the benefits of competition between the parties. The agreement also ensures that the shake-out of capacity will eliminate the non-viable and obsolete plant that could only have survived at the expense of the profitable plant through external subsidies or loss financing within a group, and will leave the competitive plants and businesses in operation.

(40) The number of producers remaining for each product (signatories and non-signatories) is big enough to leave users a choice of supplier and security of supply and to preclude the danger of monopolies developing on national markets.

Number of producers of each product

	Signatories		In Europe
	Before agreement	After agreement	
Acrylic staple	7	6	10
Polyester staple	8	6	12
Polyamide staple	6	5	11
Polyamide carpet yarn	6	4	11
Polyamide textile yarn	7	5	21
Polyester textile yarn	8	6	19

(41) Textile manufacturer users of the products covered by the agreement have expressed fears about future price levels.

It is true that a capacity reduction agreement may lead to a short-term increase in prices to the user. However, in the present case this tendency may be expected to be limited by the special features of the synthetic-fibres market where each signatory faces considerable pressure in his pricing from synthetic-fibre users, who because they are now operating on a very competitive market and have difficulties of their own resist price increases which they regard as unjustified. Users could also switch to other sources of supply in Europe or elsewhere if the signatories tried to charge exorbitant prices.

(42) (c) Another important consideration for the application of Article 85 (3) is whether or not all the planned arrangements for effecting the capacity cutbacks are indispensable to that end.

(43) The agreement is concerned solely with reducing excess capacity and is of limited duration. It does not interfere with the parties' freedom to determine their output or deliveries. Clauses which might have done so have been deleted.

(44) The agreement will expire on 31 December 1985. All parties continue to be bound by the agreement up to the expiry date, even if they complete their capacity cuts in advance of that date. The agreement also continues in force until the expiry date for all the products it covers, even if the capacity reductions for some products are completed beforehand.

The uniform duration for all signatories and all products covered by the agreement is justified by the fact that the agreement concerns the fibres (staple and yarn) as a whole and furthermore a uniform duration ensures that all the signatories fulfil all their obligations to one another, particularly that not to increase capacity before the end of 1985.

(45) The agreement's success depends on each party strictly observing the closure timetable it has announced. Hence, it is

essential that pecuniary sanctions may be imposed if a party fails to discharge this basic obligation.

(46) The adjustment of parties' obligations in the event of transfers of capacity between them and the extension of the obligations to non-signatories to which capacity is sold are necessary to ensure that all capacity set down for scrapping is actually scrapped.

(47) Finally, the restrictions on the scale of the parties' production facilities are also indispensable for the attainment of the objectives in view.

(48) (d) For Article 85 (3) to be applicable, the agreement must further not afford the undertakings the possibility of eliminating competition for a substantial part of the products in question.

(49) In determining whether this condition is met, account must be taken of the features of the market, the duration of the agreement and the provisions contained in it.

(50) The signatories are not the only suppliers of the products covered by the agreement on the Community market. A number of other producers, including subsidiaries of North American companies and American producers importing direct from the United States, also operate on the market and are in strong competition with the signatories.

(51) The products covered by the agreement are in competition with natural fibres (cotton and wool) and cellulosics. Although normally used together, these fibres are all to some extent interchangeable and therefore competing materials, the degree of competition between them depending on their relative prices.

(52) The limited duration of the agreement, which is due to expire on 31 December 1985, obliges the signatories to take account in the dispositions they make while it is in force of the imminent disappearance of the restrictions at the scheduled date. Moreover, there is no provision in the agreement for any coordination of the signatories' commercial behaviour, and the coordinated capacity reductions involve but one element of the undertakings' competitive strategies.

C. ARTICLES 6 AND 8 OF REGULATION No 17

(53) The parties signed the agreement on 21 October 1982 and notified it on 10 November 1982. Under Article 6 of Regulation No 17, the Decision applying Article 85 (3) of the Treaty can therefore take effect on 10 November 1982.

(54) As the agreement expires on 31 December 1985, it is appropriate to determine that date as the date until which the Decision shall remain in effect, in accordance with Article 8 (1) of Regulation No 17.

(55) The agreement must not be allowed to provide an opportunity for exchanging information which could give rise to concerted practices incompatible with Article 85. Therefore, it is necessary to require the signatories to refrain from communicating details of their individual output and deliveries of synthetic fibres to one another either directly or through the trustee body or a third party,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the Treaty establishing the European Economic Community, the provisions of Article 85 (1) of the Treaty are hereby declared inapplicable, with effect from 10 November 1982 for the period to 31 December 1985, to the agreement signed by the synthetic-fibre producers listed in Article 3 which was notified to the Commission on 10 November 1982.

Article 2

This Decision is subject to the condition that the signatories shall refrain from communicating data on their individual output and deliveries of synthetic fibres to one another either directly or through a trustee body or a third party.

Article 3

This Decision is addressed to the following undertakings:

1. Imperial Chemical Industries plc,
   Hookstone Road,
   UK-Harrogate HG2 8QN;

2. Courtaulds plc,
   18 Hanover Square,
   UK-London W1A 2BB;

3. Rhône-Poulenc SA,
   25, quai Paul-Doumer,
   F-92408 Courbevoie;

4. Enka BV,
   Velperweg 76,
   NL-Arnhem;

5. Montefibre SpA,
   Via Pola, 14,
   I-20124 Milano;

6. Anicfibre SpA,
   I-San Donato Milanese;

7. SNIA Fibre,
   Via Borgonuovo, 14,
   I-20121 Milano;

8. Enka AG,
   Postfach 10 01 49,
   D-5600 Wuppertal 7;

9. Bayer AG,
   D-5090 Leverkusen-Bayerwerk;

10. Hoechst AG,
    Postfach 80 03 20,
    D-6230 Frankfurt/Main 80.

Done at Brussels, 4 July 1984.

For the Commission

Frans ANDRIESSEN

Member of the Commission

COMMISSION DECISION

of 12 July 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.129 – Carlsberg)

(Only the Danish and English texts are authentic)

(84/381/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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

Having regard to the application for negative clearance and the notification filed, pursuant to Article 4 of Regulation No 17, on 12 June 1980 by De forenede Bryggerier A/S, also known as The United Breweries Limited, Copenhagen, and Grand Metropolitan Limited, London, concerning the Cooperation Agreement between them, 'the Lager Agreement', signed on 2 June 1980;

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

After consultation within the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. THE UNDERTAKINGS

(1) De forenede Bryggerier A/S, also known as The United Breweries (UB) is a company incorporated in Denmark which was formed on 10 June 1970 by the merger of the companies Carlsberg Bryggerierne, indehaver Carlsbergfondet and Aktieselskabet De forenede Bryggerier, the owners of the Carlsberg and Tuborg brands respectively. The company (hereinafter referred to as 'Carlsberg') produces and sells under these brand names, through a large number of subsidiaries in the Federal Republic of Germany, France, Luxembourg, the United Kingdom and elsewhere, a range of bottom-fermented beers commonly known as 'lager'. In 1982/83 Carlsberg and its subsidiaries had an aggregate turnover of Dkr 7 177 000 000. It estimates its share of the lager market at 80% in Denmark, 14% in the United Kingdom [3] and less than 0,5% in the rest of the EEC. On 1 May 1970, Carlsberg, which already owned three agencies for distributing its beer in the United Kingdom (in London, Goole and Edinburgh), set up a new company, Carlsberg Brewery Limited (hereinafter referred to as 'Carlsberg Ltd'), to brew its beer there in a large new brewery at Northampton. In 1981/82, Carlsberg Ltd and its three agencies had total sales of £ 123 575 000. Since 1981 the Northampton brewery has also brewed Tuborg beers, but another Carlsberg subsidiary, Tuborg Lager Limited, distributes them. The Tuborg brand has about 2% of the British lager market.

(2) Grand Metropolitan Ltd (now plc) (GM) is the parent company of a British group with interests in the hotel and catering, food, brewing, wines and spirits and leisure sectors. In 1981/82 GM had a total turnover of £ 3 848 500 000. In 1972/73, Grand Metropolitan took over the breweries Truman and Watney Mann and merged them into the single subsidiary Watney Mann & Truman Brewers Limited (WMTB). WMTB's turnover in 1981/82 was £ 491 815 000, of which £ 214 859 000 (44%) was from sales of lager. GM, with 11,5% of the total UK beer market, is also in joint second position (with Allied

[1] OJ No 13, 21. 2. 1962, p. 204/62.

[2] OJ No C 27, 2. 2. 1984, p. 4.

[3] Including sales of Carlsberg products brewed under licence by Watney Mann & Truman Brewers Ltd, a subsidiary of Grand Metropolitan.

Breweries) among the country's lager producers. GM supplies close on 24 000 on-licence outlets (i.e. licensed to sell alcoholic liquor for consumption on the premises), of which about half are tied houses committed to purchasing GM beer brands. It also sells to about 12 000 off-licence outlets (i.e. licensed to sell alcoholic drinks for consumption off the premises), about 1 000 of which are also tied to GM by long-term purchase agreements.

B. BACKGROUND OF THE LAGER AGREEMENT

Carlsberg breweries have been exporting their products, *inter alia* to the United Kingdom, for over a century. In the late 1960s they were sending a million hectolitres of lager beer a year to the United Kingdom, where it was distributed by the three agencies of Carlsberg. Because of the considerable increase in the volume exported and the forecast growth in demand, Carlsberg entered into negotiations with Watney Mann Ltd with a view to setting up a joint subsidiary to produce a number of lager beers under the Carlsberg brands. A 'Shareholders Agreement' was signed by Carlsberg and Watney on 1 December 1970 under which Watney subscribed 49 % of the share capital of the new company, Carlsberg Brewery Ltd, which Carlsberg had set up on 1 May 1970. A brewery with an initial capacity of 1 000 000 hl a year was built at Northampton and went into production in August 1973. Under a sales agreement, also signed on 1 December 1970, Watney was licensed to sell Carlsberg beers from its outlets. In October 1975, Carlsberg bought back Watney's holding in the previous joint subsidiary Carlsberg Ltd, but the distribution agreements whereby Carlsberg beers were sold through Watney's network of tied houses continued in force. When it became apparent that a doubling of production capacity at the Northampton brewery would not be enough to meet the growing demand for lager on the British market, Carlsberg entered in 1975 into a licensing agreement with GM as the parent company of the merged Watney Mann & Truman whereby GM was permitted to produce Carlsberg 1 030° [1] in the breweries belonging to the group and to sell it in the UK market. This agreement has now been superseded by a production and sales agreement, known as the Lager Agreement, signed by Carlsberg and GM on 2 June 1980, which is the subject of this Decision.

[1] The 'original gravity' of the beer (i.e. the specific gravity of the unfermented wort).

C. THE LAGER AGREEMENT

The purpose of the Agreement is to ensure optimum utilization by Carlsberg Ltd and WMTB of their production facilities for Carlsberg beers and to develop the sale of these products in the United Kingdom. The essential terms of the Agreement are now as follows:

(1) In recognition of Carlsberg's investment in UK brewing facilities to supply GM's requirements, GM undertakes to purchase a specified, large volume of lager beers from Carlsberg Ltd each year for the currency of the Agreement, that is until 30 September 1991. This minimum purchase commitment is increased or reduced in line with GM's total sales in the United Kingdom of lager of less than 1 040° original gravity (clauses 1, 1.1, 1.2 and 1.3).

(1.1) Should GM in any year fail to take up the agreed volume, except for reasons beyond its control, Carlsberg Ltd is entitled to compensation from GM (clause 1.9).

(2) Carlsberg may permit any company or companies other than GM to brew Carlsberg beers in the United Kingdom. However, if the brewings by such other companies for sale in the United Kingdom exceed in any year a certain number of barrels [2] the volume of lager which GM is committed to purchase from Carlsberg Ltd in that year is reduced by an amount equivalent to the excess (clause 1.8.1).

(2.1) GM is released from its purchase commitment should Carlsberg, without GM's consent, knowingly permit the volume of brewing of Carlsberg beer in the United Kingdom in any year by another company to exceed the sales of the products to that company's tied outlets (clause 1.8.2).

[2] 1 barrel = 163 litres.

(2.2) To enable it to check on compliance with the latter clause, GM is provided each year with an audited statement of the combined total brewings and sales to tied outlets by all such companies (clause 1.8.3).

(3) Carlsberg Ltd undertakes to supply GM with all its requirements of Carlsberg beers up to the level forecast each year by GM plus 10 % (clause 4.1).

(3.1) If Carlsberg is unable to supply GM's requirements, the parties will confer to consider and agree upon the action to be taken to make good a shortfall in supply (clause 4.6).

(3.2) Carlsberg Ltd is not allowed to supply to GM without GM's consent Carlsberg beers which have been brewed by third parties (clause 4.8).

(4) The provisions on calculation of the prices which Carlsberg Ltd charges GM for supplies of each Carlsberg product stipulate that the invoiced price will be a weighted average of two prices (a standard price and a marginal price), based on the WMTB sales forecasts as previously agreed with Carlsberg Ltd for the year ending 30 September to which the price applies, such forecasts to be made during the month of June preceding the year in question (clause 3.1.9).

(5) Carlsberg grants to GM for as long as the Agreement is in force the right to produce and package at any of its breweries in the United Kingdom Carlsberg 1 030°, Carlsberg Carlsen Lite and any other Carlsberg beer of less than 1 040° original gravity which may be introduced during the currency of the Agreement, according to information, specifications and directions given by Carlsberg, in particular as set out in the Schedule to the Agreement (clause 5.1). The beers are produced by GM with Carlsberg's know-how and using a special yeast (Hanseniospora Valbyensis) which Carlsberg supplies to it. When the Agreement expires, Carlsberg will no longer be obliged to supply this yeast.

(5.1) Should Carlsberg change the previously agreed specification of any beer being produced by GM or for which GM has invested in production facilities, Carlsberg will cooperate fully with GM to resolve any problems arising from such change including the provision of the necessary technical assistance. Each party will bear the expense of the change within its respective organization, but Carlsberg undertakes to pay reasonable compensation to GM if the costs GM incurs to modify its plant in order to maintain its committed level of production significantly exceed those Carlsberg Ltd incurs to modify its plant (clause 5.2).

(5.2) Subject to observance of its purchase commitment to Carlsberg Ltd, GM is entitled to brew and sell all its additional requirements of Carlsberg beers (clause 2).

(5.3) GM is free to brew and market lager products other than Carlsberg (clause 12).

(6) A Consultative Committee for Carlsberg beers is set up under the Agreement, consisting of two representatives of Carlsberg Ltd and two representatives of WMTB and having as its main objectives:

— to promote, develop and extend the sales of Carlsberg beers throughout the United Kingdom, taking care to protect the mutual interests of Carlsberg Ltd and WMTB,

— to consult over marketing and advertising plans,

— to monitor the operation of the Agreement and the commercial relationship between the parties,

— to review and agree the sales and supply forecasts of WMTB and Carlsberg Ltd,

— to cooperate in planning economical packaging, transport and delivery of Carlsberg beers (clause 11).

(7) In order that each party may individually plan his production, packaging and distribution arrangements in the most effective manner practicable, WMTB furnishes Carlsberg Ltd, four times a year, with a rolling forecast of its anticipated sales and supply requirements in the following 15 months, broken down by product and by month, and Carlsberg Ltd similarly furnishes WMTB with a forecast of its anticipated sales and requirements for its direct and agency trade. Each forecast is to be supported by a

statement of the rationale of the figures and the Consultative Committee will consider the basis for supply and commitment (clause 4.2).

(7.1) After submission of WMTB's forecasts of requirements, Carlsberg Ltd immediately makes known to GM, through the Consultative Comittee, any areas of exceptional expenditure to Carlsberg Ltd that would arise if the actual requirements varied from the forecast by more than plus or minus 10%. The Consultative Committee, if necessary, reviews the forecast in the light of this information. If such exceptional expenditure is incurred, Carlsberg Ltd is entitled to compensation from GM (clause 4.7).

(8) The parties agree that it is of the utmost importance to maintain the high quality of Carlsberg products and to ensure that there is no difference in quality between the Carlsberg beers brewed by GM and those brewed by Carlsberg Ltd in the United Kingdom and Carlsberg in Denmark (clause 5.5).

(8.1) Carlsberg has the exclusive right to decide on the character, type, design, form and closure of all packaging in order to protect the international image of the products. GM is to be consulted whenever changes are made to the packaging specifications for products GM is entitled to package. Should the cost to GM of implementing such changes significantly exceed those falling to Carlsberg Ltd, Carlsberg will pay GM reasonable compensation (clause 7.2).

(8.2) Carlsberg is to consult with GM before introducing a new Carlsberg product under 1 040° original gravity to the UK market or changing an existing product (clause 9.6).

(8.3) If either party should discover any improvement for the production of any Carlsberg beer to the approved standards of quality for the product concerned, it must promptly disclose the improvement to the other and the improvement may be used within a reasonable period. When specifying the production materials and process requirements of any new product, Carlsberg must take into account the need to make efficient use of the facilities already existing at the GM brewery at which the brewing is proposed (clause 5.6).

(8.4) Should Carlsberg permit other companies to brew in the United Kingdom Carlsberg beers for sale there, it must apply to them the same standards, specifications and technical requirements in respect of brewing, packaging and dispensing as it imposes on GM (clause 13).

(9) Carlsberg Ltd provides advertising support including promotion and point-of-sale material for Carlsberg beers. This support is split between brands and regions broadly in proportion to sales volumes. The allocation of support between brands is decided in consultation with GM (clause 9.1).

(9.1) GM has to pay Carlsberg Ltd, as a contribution to marketing expenses, each year a certain sum per barrel of Carlsberg beers in excess of a specified number of barrels brewed by GM in that year, subject to WMTB's prior agreement (which may not unreasonably be withheld) to the overall UK marketing plan for Carlsberg beers having an original gravity of less than 1 040° (clause 9.3).

(9.2) Carlsberg Ltd consults with WMTB each year about the setting of its advertising and marketing objectives for the next 18 months. After full discussion and agreement of the objectives, Carlsberg Ltd produces a detailed plan, keeping WMTB involved in the process. It presents its comprehensive plans to WMTB before seeking formal approval of the plans from Carlsberg (Denmark) (clause 9.5).

(10) GM is not authorized to use the name Carlsberg except in connection with the sale of Carlsberg beers during the currency of the Agreement (clause 15).

(11) Any information which any of the parties acquires about the other's business and which is not in the public domain is to be treated as strictly confidential (clause 16).

(11.1) GM will maintain all disclosures of know-how by Carlsberg, including all specifications and methods, in confidence. It may continue to use such know-how after the expiry of the Agreement, provided it does not mention the Carlsberg name or trade mark (clause 16.2).

(11.2) The know-how and improvements relating specifically to the production of Carlsberg beers may be used by GM for the production of those beers only in accordance with the provisions of the Agreement. In other contexts and after expiry of the Agreement, this know-how may be used freely by Carlsberg and GM (clause 16.3).

(12) The parties will try to arrive at an amicable settlement of any dispute, question or matter of difference concerning the construction or effect of the Agreement or as to their rights, duties and liabilities (clause 26.1).

(12.1) If no amicable settlement is reached, the dispute is to be referred to a single arbitrator to be agreed upon by the parties or, in the absence of agreement, appointed by the President of the Law Society of England and Wales (clause 26.2).

(13) The Agreement is deemed to have come into effect on 1 October 1979 and will continue in force until 30 September 1991. After that date it will be renewed automatically, subject to not less than two years' prior notice of termination by either party, such notice not to be given before 30 September 1989 (clause 14).

The notified version of the Lager Agreement contained some provisions which the parties have now amended or deleted. These include an obligation to agree each year WMTB's lager production plans, which the Commission regarded as restricting competition and ineligible for exemption and which the parties deleted on 21 December 1983.

D. ECONOMIC BACKGROUND

I. General features of the UK beer market

(a) *Importance of the market*

The beer market in the United Kingdom is of great economic importance. In 1983 it was worth over £ 7 800 000 000 at retail prices ([1]). Seven large brewing groups, of which Grand Metropolitan is one, hold over 80 % of this market ([2]).

With a total output in 1982 of 58 149 000 hl ([3]), which was considerably down on previous years, British breweries supply about 95 % of domestic consumption. In the same year, total UK imports of beers of all types and from all sources came to only 2 732 000 hl ([3]), i.e. less than 5 % of total consumption. Apart from Ireland, whose beers have always had a special position in the United Kingdom ([4]), the only EEC countries which have managed to significantly expand their exports of beer to Britain are the Federal Republic of Germany and the Netherlands; Germany's share of total exports to the United Kingdom rose from 3,5 % in 1972 to 27,8 % in 1982 and the Netherlands' from 1,5 to 6,5 % ([5]). The UK exports of two other major European beer-producing countries, Denmark and Belgium, fell sharply over the same period, largely because of the decision of the two main exporting breweries in the two countries to have their products brewed under licence in the United Kingdom.

(b) *Structure of the UK beer market*

Three factors set the British beer market apart from other markets:

1. a strong tendency towards concentration,
2. the 'tied-house' system, and
3. the paucity of independent wholesalers.

1. The tendency towards concentration

In 1900 there were 1 466 breweries in the United Kingdom ([6]). By 1950 the number had fallen to 362 and by 1982 there were only 78 ([7]). This figure masks considerable differences in the size of breweries. As already mentioned, over 80 % of the beer market is held by the seven large national brewing groups, Bass Charrington, Allied Breweries, Scottish & Newcastle, Whitbread, Grand Metropolitan (Watney Mann & Truman), Courage and Guinness. To this list can be added the 1972-built Carlsberg brewery at Northampton, with a lager output in 1982 of 2 258 000 hl, or about 4 % of total beer production.

2. The 'tied-house' system

The second feature of the market is the system of selling beer through networks of outlets, including pubs, clubs and off-licence shops, belonging to or

([1]) United Kingdom Central Statistical Office, *Monthly Digest of Statistics*, No 461, May 1984, p. 9.
([2]) *Retail Business*, No 263, January 1980, 'Special Report No 1 – Beer', p. 25.
([3]) The Brewers' Society, *UK Statistical Handbook 1982*, p. 22.
([4]) In 1982 58,6 % of UK beer imports came from Ireland. *Retail Business*, No 312, February 1984, 'Special Report No 2 – Beer', p. 28.
([5]) *Retail Business*, No 312, February 1984, 'Special Report No 2 – Beer', p. 28.
([6]) Including what is now the Republic of Ireland.
([7]) The Brewers' Society, *UK Statistical Handbook 1982*, p. 90.

controlled by the breweries. About two-thirds of sales are made through such outlets. In 1980, out of a total 76 412 full on-licence outlets, 48 958 (64 %) belonged to breweries (1). In addition, the breweries have succeeded in attaching to themselves very many clubs and other premises having only a restricted on-licence, the number of which has grown steadily in recent years. The tied-house system allows the breweries to control closely the distribution and sale of their products right up to the final consumer, to guarantee themselves a market, and to match output better to customers' requirements. Since about 80 % of draught beer, which accounts for over 79 % of total beer sales, is sold in pubs and each of the big brewing groups mentioned above owns or controls several thousand of such pubs as tied houses, it is necessary for a foreign brewer wishing to enter the British market to gain the assistance of a large national brewery.

3. The wholesale trade

There is no significant beer wholesale trade independent of the breweries in the United Kingdom, since the breweries generally distribute and sell their products themselves. Almost all beer is sold, imported or exported by the breweries. The biggest have set up sales subsidiaries. The breweries also nowadays carry out their own bottling and casking, with the result that many bottling wholesalers have gone out of business or have been taken over by the breweries. The share of the bottled beer market still held by independent wholesalers has become minimal. This situation has a bearing on the low percentage of imports of beer into the United Kingdom, since it is independent wholesalers which are traditionally most active in inter-State trade.

(c) *Retailing*

At the retail level, beer is sold on draught and packaged (in bottles and cans). Draught makes up the biggest proportion of sales and its share has been steadily rising from 73,5 % in 1971 to 79,3 % in 1981 (1).

Over the same period the proportion of beer sold in returnable bottles has steadily declined in favour of beer in cans or non-returnable bottles, whose share of sales has risen from 4 % in 1971 to 11,2 % in 1981 (2).

The last few years have seen an expansion in the take-home beer market. In 1982 this market accounted for about 12 % of all beer sales (3). According to some estimates, 44 % of take-home sales are from supermarkets (48 % for lager), compared with 28 % (30 % for lager) from off-licence shops and 15 % (11 % for lager) from pubs.

II. **The lager market**

(a) *Characteristics of the product*

This case concerns bottom-fermented beers, which are known in the United Kingdom as 'lager' (from German 'Lager' meaning 'store').

This type of beer is more expensive to produce than others, because at an important stage in the brewing process it must be left to stand for periods ranging from eight days to several weeks, depending on the type of beer and the process used, at a temperature of from 6 to 12 °C. On the other hand it can be stored for longer periods than most beers, which has the advantage that production can be spread over the year, whereas its consumption is subject to marked seasonal variations, with summer peaks sometimes almost 100 % above winter sales levels. With other beers the difference is only about 50 % (4).

(b) *Size of the lager market*

The lager market began a rapid expansion in the 1960s after lager was introduced in pubs. At that time it accounted for under 1 % of total consumption of beer of all types. By 1971 it had reached 9,9 % and in 1981 it held 31 % of the market. This expansion was made at the expense of the traditional British beer types, ale and stout,

(1) The Brewers' Society, *UK Statistical Handbook 1982*, pp. 21 and 66 to 67.

(2) The Brewers' Society, *UK Statistical Handbook 1982*, p. 21.

(3) *Retail Business*, No 312, February 1984, 'Special Report No 2 – Beer', p. 41.

(4) *Retail Business*, No 263, January 1980, 'Special Report No 1 – Beer', p. 30.

Shares of the UK lager market (packaged and draught) held by the major breweries in 1982 [1]

Brewery	Main brands of draught lager	%
Bass	Carling Black Label Hemeling Tennent's Tribune	25
Allied	Wrexham Jaguar Skol Löwenbrau Oranjeboom Gold Cross	13,5
Grand Metropolitan (Watney)	Fosters Carlsberg Pilsner Holsten Export	13,5
Scottish & Newcastle	McEwans Kestrel Harp	12
Whitbread	Gold Label Stella Artois Heineken Heldenbrau	12
Courage	Hofmeister Harp Kronenbourg	9
Other		15
TOTAL		100

[1] *Retail Business*, No 313, March 1984, 'Special Report No 2 – Beer', part 2, pp. 15 and 17.

whose market share has declined from 90,1 % in 1971 to 68,9 % in 1981 [1].

Lager is sold on draught and packaged (in cans and bottles). Consumption is steadily expanding in all three forms, but the fastest growth has been in draught, which rose from 7,1 % of the total beer market in 1971 to 23,2 % in 1981 [1].

(c) *Producers and brands of lager*

A large number of brands of lager are sold in the United Kingdom but the market is dominated by eight brands which together account for 95 % of all lager sales. These brands are owned by the big national breweries or brewed and sold by them under licence. The table above shows the market shares of each of the breweries in 1982 and the main brands they produce and/or sell.

[1] The Brewers' Society, *UK Statistical Handbook 1982*, pp. 20 to 21.

II. LEGAL ASSESSMENT

A. ARTICLE 85 (1)

(1) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings and concerted practices 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.

(2) The Lager Agreement signed on 2 June 1980 between United Breweries (Carlsberg), its British subsidiary Carlsberg Brewery Limited (Carlsberg

Ltd) and the Grand Metropolitan group (GM), the latter acting chiefly on behalf of its subsidiary Watney Mann & Truman Brewers Ltd (WMTB), is an agreement between undertakings within the meaning of Article 85 (1) of the Treaty. The object of the Agreement, as stated in its preamble, is to continue and reinforce the cooperation between the two brewing groups in developing and promoting the sale of Carlsberg products in the United Kingdom, which dates from the formation of Carlsberg Ltd on 1 May 1970 as a joint subsidiary of Carlsberg and Watney Mann and was continued under agreements made after the joint venture was ended. This cooperation between the biggest Danish brewery, Carlsberg, and two of the biggest British breweries Watney Mann and Truman and their subsidiaries, which all belong to the GM group, involves close consultation between them regarding both the production and the distribution and marketing of Carlsberg products in the United Kingdom. The community of interest which the cooperation engenders between the parties and the reciprocal influence it causes them to exert on one another significantly affect their market behaviour.

(3) The following provisions of the Agreement have the object and effect of restricting competition within the common market, and this effect is particularly significant since the industry concerned is already highly concentrated.

(3.1) The obligation upon GM to purchase each year from Carlsberg Ltd throughout the currency of the Agreement, that is until 1991, a very large volume of lager beers, which at present makes up over half of GM's annual lager purchases, is restrictive of competition because it prevents GM from producing this volume itself or purchasing it from other producers, possibly on more favourable terms. The restriction of competition is backed up by the right of Carlsberg Ltd to claim compensation from GM if GM fails, except for reasons beyond its control, to take up the agreed volume. These provisions significantly affect the competitive position of each of the undertakings both in relation to the other party and in relation to their competitors on the UK lager market.

(3.2) The obligation upon Carlsberg Ltd to supply GM throughout the currency of the Agreement with all its requirements of Carlsberg beers up to the level forecast each year by GM plus 10 % is also restrictive of competition because it deprives Carlsberg Ltd of control over more than half of its present output which it would otherwise be able to sell to other breweries or on the free market through its agencies. Since Carlsberg has not yet entered into a similar agreement with any other brewery in the United Kingdom and has granted a manufacturing and sales licence for its beers only to GM, GM has *de facto* exclusivity for the sale of Carlsberg beers in the United Kingdom. The clause whereby GM would be released from its purchase commitment should Carlsberg permit another company to brew Carlsberg beers in the United Kingdom in excess of the company's sales to its tied outlets, so that some of the beer brewed by the company would be available for sale on the free market, also operates in favour of exclusivity for GM, since it tends to discourage Carlsberg from licensing other companies for fear of losing the guaranteed market for over half of Carlsberg Ltd's output.

(3.3) The obligations upon each party to furnish the other four times a year with a rolling forecast of its sales and supply requirements and to consult with one another about such sales forecasts are restrictions of competition which are linked to the purchase and supply commitments. The restrictive effect of the obligations is reinforced by Carlsberg Ltd's right to compensation from GM should it incur exceptional expenditure because of GM's failure to keep to the announced forecasts, which obliges GM to keep its sales strictly to the forecast levels.

(4) The other clauses of the Lager Agreement do not fall within Article 85 (1) because they do not have as their object or effect a significant restriction of competition within the common market. This applies, for example, to Carlsberg's obligation to apply to any other licensees the same standards, specifications and technical requirements in respect of brewing, packaging and outlets as it imposes on GM, which is necessary in order to guarantee that Carlsberg products are of uniform quality whoever produces them, uniform quality being inextricably linked to the international reputation of the trade mark, which is also licensed to GM. It is justifiable for the licensee to attach the same importance to this as the licensor, since sales of Carlsberg products make up a substantial proportion of its subsidiary WMTB's turnover.

(5) Although the Lager Agreement only concerns the production, distribution and sale of Carlsberg products in the United Kingdom, it is liable to have a significant effect on trade between Member States.

(5.1) First, the commitment of GM to purchase a very large quantity of Carlsberg beers from Carlsberg Ltd each year prevents other EEC brewers selling GM that quantity of lager beer. Secondly, with over half of Carlsberg Ltd's output reserved for one buyer in the United Kingdom, GM, this amount is not available for export, for example to other European markets like Belgium, Luxembourg and France where the products are popular; Carlsberg Ltd already occasionally exports lager to certain other Member States. That the Agreement can have a tangible effect on inter-State trade is shown by the fact that some other large Continental brewers export large quantities of lager to the United Kingdom each year and that Carlsberg used to export large amounts of beer to the United Kingdom before the Northampton brewery was built and still exports small amounts of special beers which it would be uneconomic for it to produce locally. The obligations on the parties to inform one another of their anticipated sales and supply requirements and to consult with one another on their sales forecasts reinforce and complement the effect of the purchase and supply commitments on inter-State trade. The trade in lager to and from the United Kingdom is thereby significantly altered from what it would otherwise be.

(6) The Agreement therefore falls within the scope of Article 85 (1).

B. ARTICLE 85 (3)

(7) Article 85 (3) of the EEC Treaty provides that Article 85 (1) may be declared inapplicable in the case of any agreement between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(8) The Lager Agreement and the restrictions of competition contained in it must be seen in the light of the peculiar structure of the British beer market and the economic and commercial position of Carlsberg on that market. The Cooperation Agreement has enabled Carlsberg to establish itself more quickly and over a wider area thanks to GM's large network of tied outlets. Without this cooperation Carlsberg would as yet be unable to keep its Northampton brewery fully occupied. In view of the economic advantages of the arrangements, which will be shown below, the restrictions of competition resulting from the Agreement can be tolerated until 30 September 1991, since this period should be sufficient for Carlsberg to build up its own sales network and progressively become independent of any other large brewery for distributing its output.

(9) The purchase, supply and forecasting obligations contribute to improving production and distribution. The purchase and supply commitments allow the parties to make the best use of production capacity and to rationalize the distribution of a product which has to be consumed within a relatively short period and the consumption of which is subject to marked seasonal variations. The obligation to collate their sales forecasts enables the parties to plan future output and sales of their products more precisely and further ahead and to cut production, storage and marketing costs. By allowing a better adjustment of production to sales, the obligation to collate forecasts also helps to maintain optimum utilization of the parties' respective production capacity and to pay off the considerable investment each of them has committed to Carlsberg beer in the United Kingdom more quickly.

(10) Consumers are allowed a fair share of the benefits resulting from the abovementioned improvements in production and distribution since, by making

possible the brewing of Carlsberg beers in the United Kingdom, the Agreement ensures that supplies of the beers there are more plentiful, fresher and also cheaper because of the saving of the considerable cost of transporting a heavy commodity like beer over large distances.

(11) The Agreement does not entail any restrictions which are not indispensable. If the restrictions had not been agreed, the economic advantages listed above would not have been obtained to the same extent in view of the peculiar structure of the British beer market and the economic and commercial position of Carlsberg Ltd. These obligations do not go beyond what is strictly necessary, since the parties have agreed to delete the restrictions which were not indispensable. They are also free to set their own prices and conditions of sale.

(12) The Agreement does not afford the undertakings the opportunity of eliminating competition for a substantial part of the products in question. The volume of Carlsberg lager which GM is committed to purchase from Carlsberg each year represents at present about one-third of GM's total lager sales, which include competing lager brands such as Fosters, Holsten and Top Brass as well as the lager supplied by Carlsberg Ltd and that which it brews itself under licence from Carlsberg. There are a large number of competing brands of lager on the British market. Other large breweries or brewing groups operating on the market hold market shares in the lager sector equal to or larger than Carlsberg's, as the above table shows. Carlsberg's share of the UK beer market overall is only about 4 %. The Agreement does not, therefore, have the effect of eliminating competition for a substantial part of the products in question.

(13) All the conditions laid down in Article 85 (3) are consequently fulfilled.

C. ARTICLES 6 AND 8 OF REGULATION No 17

(14) Article 6 of Regulation No 17 provides that whenever the Commission takes a decision pursuant to Article 85 (3) of the Treaty it must specify the date from which the decision shall take effect. Such date may not be earlier than the date of notification.

(15) Article 8 of Regulation No 17 provides that decisions in application of Article 85 (3) of the Treaty must be issued for a specified period and that conditions and obligations may be attached.

(16) The Agreement in question was notified to the Commission on 12 June 1980, came into effect on 1 October 1979 and is due to expire on 30 September 1991, unless renewed automatically.

(17) The period until 30 September 1991 should be long enough for Carlsberg Ltd to build up its own distribution network so that it is no longer dependent on GM for the marketing of its output in the United Kingdom. It is therefore appropriate to grant the exemption for the period from 21 December 1983, when the parties decided to end the obligation to agree Watney Mann & Truman's lager brewing plans, which the Commission considered to be a restriction which was not indispensable within the meaning of Article 85 (3), until 30 September 1991.

(18) In order that the Commission may satisfy itself that the conditions of Article 85 (3) continue to be fulfilled during the period of the exemption, the parties should be required to send the Commission, without delay, copies of the minutes of meetings of the Consultative Committee set up under clause 11 of the Agreement,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable, for the period from 21 December 1983 until 30 September 1991, to the Cooperation Agreement called the 'Lager Agreement' signed on 2 June 1980 between De forenede Bryggerier A/S (The United Breweries Limited) and Grand Metropolitan Ltd.

Article 2

The undertakings to which this Decision is addressed shall send the Commission, without delay, copies of the minutes of meetings of the Consultative Committee set up under clause 11 of the Agreement.

Article 3

This Decision is addressed to:

— De forenede Bryggerier A/S (The United Breweries Limited),
Vesterfælledvej 100,
DK-1799 Copenhagen V;

— Carlsberg Brewery Limited,
29 Bedford Row,
UK-London WC1;

— Grand Metropolitan plc,
11/12 Hanover Square,
UK-London W1.

Done at Brussels, 12 July 1984.

For the Commission

Frans ANDRIESSEN

Member of the Commission