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I

(Acts whose publication is obligatory)

COMMISSION REGULATION (EC) No 997/96

of 4 June 1996

on the transport for the free supply to Turkmenistan of common wheat flour

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1975/95 of 4 August 1995 on actions for the free supply of agricultural products to the people of Georgia, Armenia, Azerbaijan, Kyrgyzstan, Tajikistan and Turkmenistan⁽¹⁾, as amended by Regulation (EC) No 686/96⁽²⁾, and in particular Article 4 thereof,

Whereas Commission Regulation (EC) No 2009/95⁽³⁾, as amended by Regulation (EC) No 723/96⁽⁴⁾, established the detailed rules applicable to the free supply of agricultural products provided for by Regulation (EC) No 1975/95; whereas it is appropriate to open a tendering procedure for the supply of 9 000 tonnes of common wheat flour intended for Turkmenistan;

Whereas, in view of the present difficulties in this Republic and the specific problems of forwarding aid to this region, it is appropriate to organize the supply of the abovementioned product in one lot;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

1. A tendering procedure is hereby initiated for the supply costs of 9 000 tonnes (net) of common wheat flour as indicated in Annex I, in accordance with the provisions of Regulation (EC) No 2009/95, and in particular Article 2 (1) (b) thereof. The invitation to tender relates to one lot.

⁽¹⁾ OJ No L 191, 12. 8. 1995, p. 2.

⁽²⁾ OJ No L 97, 18. 4. 1996, p. 1.

⁽³⁾ OJ No L 196, 19. 8. 1995, p. 4.

⁽⁴⁾ OJ No L 100, 23. 4. 1996, p. 9.

2. The supply costs shall relate to the take-over at the stage laid down in paragraph 3 and transport by the appropriate means to the places of destination and within the time limits indicated in Annex I.

3. The flour will be made available for loading, free on board, stowed on the ship or wagon, during a maximum period of 10 days from the dates indicated, in the following manner:

Lot

— 3 000 tonnes (net), made available with effect from 1 July 1996.

— 3 000 tonnes (net), made available with effect from 4 July 1996.

— 3 000 tonnes (net), made available with effect from 10 July 1996.

After the expiry of 10 days following the dates mentioned above, the successful tenderer shall be required to reimburse to the Commission the costs which it will have borne to cover the costs (waiting, insurance, security, guarantees, etc.) referred to at Article 6 (1) (e) (4) of Regulation (EC) No 2009/95.

The total quantity may vary by a maximum of plus or minus 20 % compared to the tonnages mentioned above. The precise quantity will be communicated to the successful tenderer at the same time as the notice of award of the supply.

The delivery stage (free on board ship or wagon) and the place of take-over will be available on request to the Commission services on 17 June 1996 (Tel. (32 2) 295 12 81 or 296 29 36, fax (32 2) 296 64 46).

Article 2

1. In accordance with Article 4 of Regulation (EC) No 2009/95 the offers shall be presented to the following address:

Commission of the European Communities,
EAGGF-Guarantee,
Division VI/G.2 (Office 10/5 or 10/8),
Rue de la Loi/Wetstraat 130,
B-1049 Brussels.

The closing date for the lodgement of tenders shall be 19 June 1996 at 12 noon (Brussels time).

In the case of non-acceptance of offers on 19 June, a second closing date for the lodgement of offers shall be 28 June 1996 at 12 noon (Brussels time).

In this case all of the dates referred to in Article 1 and Annex I shall be carried forward by 10 days.

2. The offer shall relate to the supply of the total quantities of the lot referred to in Article 1 (3).

In the case of transport by rail, the tenderer must submit a letter of guarantee issued by the rail authorities of the country of first entry into the CIS certifying the availability of the means of transport as well as the wagons necessary for the proper execution of the operation. Article 12 (2) of Regulation (EC) No 2009/95 is applicable also in the case of non-payment to the railway authorities of the different Republics of the CIS crossed.

3. The tendering security referred to in Article 6 (1) (f) of Regulation (EC) No 2009/95 is fixed at ECU 25 per tonne of flour.

4. The security referred to in Article 8 (2) of Regulation (EC) No 2009/95 is fixed at ECU 380 per tonne of flour.

Article 3

The take-over certificate referred to in the second indent of Article 10 (1) (a) of Regulation (EC) No 2009/95 shall be established at the places and by the authorities referred to in Annex II, on the basis of the model in Annex IV.

Article 4

For the payment provided for at Article 13 of Regulation (EC) No 2009/95, the designated control agency shall deliver, upon completion of that operation, a certificate certifying the total removal of the quantities for each destination, countersigned by the producer of the flour or his representative, in accordance with the model in Annex III.

Article 5

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 June 1996.

For the Commission

Franz FISCHLER

Member of the Commission

*ANNEX I***Lot**

TURKMENISTAN: 9 000 tonnes (net) of common wheat flour.

Delivery stage:

Frontier point to be designated by the tenderer (goods not unloaded).

Final delivery date at the frontier point:

- 3 000 tonnes by 14 August 1996,
- 3 000 tonnes by 19 August 1996,
- 3 000 tonnes by 23 August 1996.

*ANNEX II***Place of take-over in Turkmenistan**

1. Frontier point to be designated by the tenderer — goods not unloaded.

However, for the wagons of which the seals affixed by the representatives of the Commission are not intact at the designated frontier points, the take-over certificate may not be issued until after unloading and the quantitative and qualitative control of the goods to be effected at the first station inside the country at which unloading is possible.

2. Authority entitled to deliver the take-over certificate:

Association for Bread Production of Turkmenistan,
(Turkmenchleboprodukt),
Ashkabad,
Kemine Str. 102,
Mr Nuriev, Chairman.
Tel. 7 3632 25 15 28.
Fax 7 3632 25 58 79.

ANNEX III

Regulation (EC) No 997/96

CERTIFICATE OF REMOVAL

I, the undersigned
(name/first name/position)

acting on behalf of

certify that the following goods have been taken over:

Product:		
Packaging:		
Total quantity in tonnes (net): (gross):		
Number	of sacks:	
	of 'Big-Bags':	
Place and date of takeover:		
Name of boat:		
Name and address of transport company:		

Name and address of the monitoring agency: Name and signature of its on-the-spot representative:

Observations or remarks:

.....

Signature and stamp
of the producer

.....

ANNEX IV

Regulation (EC) No 997/96

Train No

TAKEOVER CERTIFICATE ON THE ARRIVAL OF THE RAIL-WAGONS IN THE COUNTRIES OF DESTINATION

I, the undersigned
(name/first name/position)

acting on behalf of

certify that the goods indicated below have been taken over:

Type of product:

Place and date of takeover:

Wagon numbers	Seal numbers	Quantity (net weight)	No of packets	Date frontier crossed	Quantities (!) Signature and remarks
1.
2.
3.
4.
5.
6.
7.
8.
9.
10.

(!) To be completed only for the wagons which have been the subject of a check, inserting the weight found.

Name and address of the transport company:

Name and address of the monitoring agency:

Observations and remarks:

.....

Representative of monitoring agency
Name, signature and stamp

Name, signature and stamp of the beneficiary

.....

.....

.....

.....

COMMISSION REGULATION (EC) No 998/96

of 4 June 1996

establishing a system for the surveillance of imports of fresh sour cherries originating in the Republics of Bosnia-Herzegovina, Croatia and Slovenia and the former Yugoslav Republic of Macedonia

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3355/94 of 22 December 1994 concerning the arrangements applicable to the import into the Community of products originating in the Republics of Bosnia-Herzegovina, Croatia and Slovenia and the former Yugoslav Republic of Macedonia ⁽¹⁾, as amended by Regulation (EC) No 3032/95 ⁽²⁾, and in particular Article 9 thereof,

Whereas Regulation (EC) No 3355/94 provides for the grant of tariff concessions for fresh sour cherries originating in the Republics referred to above within the limit of an annual ceiling of 3 000 tonnes;

Whereas, in order to ensure that these provisions are properly applied, imports of fresh sour cherries originating in the Republics of Bosnia-Herzegovina, Croatia and Slovenia and the former Yugoslav Republic of Macedonia should be subject to a system of import licences; whereas the special rules governing that system should be laid down;

Whereas exceptions to certain provisions of Commission Regulation (EEC) No 3719/88 of 16 November 1988 laying down detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products ⁽³⁾, as last amended by Regulation (EC) No 2137/95 ⁽⁴⁾, should be made to avoid exceeding the quantity fixed in Regulation (EC) No 3355/94;

Whereas import licences are issued using the most detailed CN code; whereas the combined nomenclature comprises seven codes according to the periods of importation of sour cherries; whereas provision should accordingly be made for the issue of import licences for the seven CN codes concerned; whereas, moreover, the period of validity of licences take into account the time for transporting the product to the Community;

Whereas, in order to ensure the proper operation of this system, provision should be made for weekly notification by the Member States of the quantities relating to unused or partly unused licences,

HAS ADOPTED THIS REGULATION:

Article 1

1. Imports into the Community of fresh sour cherries falling within CN codes 0809 20 11, 0809 20 21, 0809 20 31, 0809 20 41, 0809 20 51, 0809 20 61 and 0809 20 71 and originating in the Republics of Bosnia-Herzegovina, Croatia and Slovenia and the former Yugoslav Republic of Macedonia shall be subject to the production of an import licence issued by the Member States concerned to any applicant for such a licence irrespective of the place of his establishment in the Community.
2. The issue of an import licence shall be conditional on the lodging of a security guaranteeing that import will take place during the period of validity of the licence.

Article 2

1. Regulation (EEC) No 3719/88 shall apply to import licences for fresh sour cherries originating in the Republics referred to in Article 1 subject to the specific provisions of this Regulation.

Notwithstanding Article 8 (4) of the abovementioned Regulation, the provisions permitting a tolerance for quantities in excess shall not apply.

2. CN codes 0809 20 11, 0809 20 21, 0809 20 31, 0809 20 41, 0809 20 51, 0809 20 61 and 0809 20 71 must be marked in Section 16 of applications for licences and of import licences.
3. The security shall be ECU 0,72 per 100 kilograms net.
4. Import licences shall be valid for 20 days from the date of actual issue.

Except in cases of *force majeure*, the security shall be forfeit in whole or in part if the transaction is not carried out or is only partially carried out within that period.

⁽¹⁾ OJ No L 353, 31. 12. 1994, p. 1.

⁽²⁾ OJ No L 316, 30. 12. 1995, p. 4.

⁽³⁾ OJ No L 331, 2. 12. 1988, p. 1.

⁽⁴⁾ OJ No L 214, 8. 9. 1995, p. 21.

Article 3

1. The Republic(s) of origin concerned must be marked in Section 8 of applications for licences and of import licences proper as the country or countries of origin of the product. Import licences shall be valid for products originating in the Republic(s) in question only.

2. Import licences shall be issued on the fifth working day following the day on which the application was lodged unless measures are taken within that time.

Article 4

Member States shall notify the Commission of:

1. the quantities of fresh sour cherries corresponding to the import licences applied for.

Such quantities shall be notified at the following intervals:

— each Wednesday for applications lodged on Mondays and Tuesdays,

— each Friday for applications lodged on Wednesdays and Thursdays,

— each Monday for applications lodged on Friday of the previous week;

2. the quantities corresponding to import licences not used or partly used, amounting to the difference between the quantities deducted on the back of the licences and the quantities for which the latter were issued.

Such quantities shall be notified on Wednesday each week as regards data received the previous week;

3. if no application for an import licence is lodged during one of the periods mentioned in point 1 or if there are no quantities unused within the meaning of point 2, the Member State in question shall so inform the Commission on the days indicated in this Article.

Article 5

This Regulation shall enter into force on the eighth day following its publication in the *Official Journal of the European Communities*.

It shall apply until 31 December 1996.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 June 1996.

For the Commission

Franz FISCHLER

Member of the Commission

COMMISSION REGULATION (EC) No 999/96
of 4 June 1996
amending Regulation (EEC) No 3886/92 laying down detailed rules for the
application of the premium schemes provided for in the beef and veal sector in
respect of the processing premium

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 805/68 of 27 June 1968 on the common organization of the market in beef and veal⁽¹⁾, as last amended by Regulation (EC) No 894/96⁽²⁾, and in particular Article 4 (i) (4) thereof,

Whereas application of the processing premium introduced by Article 4 (i) of Regulation (EEC) No 805/68, pursuant to Commission Regulation (EEC) No 3886/92⁽³⁾, as last amended by Regulation (EC) No 1850/95⁽⁴⁾, may result in unfair treatment as regards the penalties applicable where the number of animals for which an application is made does not tally with the number of eligible animals presented for processing; whereas Article 49 of Regulation (EEC) No 3886/92 should therefore be amended;

Whereas, in order to avoid economic repercussions for the operators concerned, the measure should apply from the actual date of application of the processing premium;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Beef and Veal,

HAS ADOPTED THIS REGULATION:

Article 1

Article 49 (3) of Regulation (EEC) No 3886/92 is hereby replaced by the following:

'3. Where it is found that the animals presented for processing do not correspond to those referred to in paragraph 1, the premium shall be paid for the number of eligible animals presented less the number of ineligible animals presented.'

Article 2

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

It shall apply from 20 April 1996.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 June 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 148, 28. 6. 1968, p. 24.

⁽²⁾ OJ No L 125, 23. 5. 1996, p. 1.

⁽³⁾ OJ No L 391, 31. 12. 1992, p. 20.

⁽⁴⁾ OJ No L 177, 28. 7. 1995, p. 45.

COMMISSION REGULATION (EC) No 1000/96
of 4 June 1996

amending Regulation (EEC) No 1538/91 introducing detailed rules for implementing Council Regulation (EEC) No 1906/90 on certain marketing standards for poultry

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

HAS ADOPTED THIS REGULATION:

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1906/90 of 26 June 1990 on certain marketing standards for poultry⁽¹⁾, as last amended by Regulation (EC) No 3204/93⁽²⁾, and in particular Article 9 thereof,

Whereas Commission Regulation (EEC) No 1538/91⁽³⁾, as last amended by Regulation (EC) No 205/96⁽⁴⁾, introduces detailed rules for implementing the marketing standards for poultry;

Whereas, in the light of the experience gained, the definition of a capon and the criteria relating to it in Annex IV of Regulation (EEC) No 1538/91 should be amended;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Poultrymeat and Eggs,

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 June 1996.

For the Commission

Franz FISCHLER

Member of the Commission

Article 1

Regulation (EEC) No 1538/91 is amended as follows:

1. In Article 1 (1) (a) the third indent is replaced by the following:

‘— capon: male fowl castrated surgically before reaching sexual maturity and slaughtered at a minimum age of 140 days: after castration the capons must be fattened for at least 77 days.’

2. Annex IV is amended as follows:

— the second indent in the second indent of point (c) is replaced by the following:

‘— 2 m² per duck or per capon’,

— the second indent in the last indent of point (d) is replaced by the following:

‘— for capons: four weeks’.

Article 2

This Regulation shall enter into force on the seventh day following its publication in the *Official Journal of the European Communities*.

⁽¹⁾ OJ No L 173, 6. 7. 1990, p. 1.

⁽²⁾ OJ No L 289, 24. 11. 1993, p. 3.

⁽³⁾ OJ No L 143, 7. 6. 1991, p. 11.

⁽⁴⁾ OJ No L 27, 3. 2. 1996, p. 6.

COMMISSION REGULATION (EC) No 1001/96
of 4 June 1996

amending Regulation (EC) No 1487/95 establishing the supply balance for the
Canary Islands for products from the pigmeat sector and fixing the aid for
products coming from the Community

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European
Community,

Having regard to Council Regulation (EEC) No 1601/92
of 15 June 1992 introducing specific measures for the
Canary Islands concerning certain agricultural products⁽¹⁾,
as last amended by Commission Regulation (EC) No
2537/95⁽²⁾, and in particular Article 4 (4) thereof,

Whereas the amounts of aid for the supply of pigmeat
products to the Canary Islands have been laid down in
Commission Regulation (EC) No 1487/95 establishing
the supply balance for the Canary Islands for products
from the pigmeat sector and fixing the aid for products
coming from the Community⁽³⁾, as amended by Regula-
tion (EC) No 2951/94⁽⁴⁾;

Whereas, to develop the production potential of the archi-
pelago and satisfy the increase in local demand, the
number of pure-bred breeding pigs should be increased;

Whereas the measures provided for in this Regulation are
in accordance with the opinion of the Management
Committee for Pigmeat,

HAS ADOPTED THIS REGULATION:

Article 1

Annex III to Regulation (EC) No 1487/95 is replaced by
the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the day of its
publication in the *Official Journal of the European
Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member
States.

Done at Brussels, 4 June 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 173, 27. 6. 1992, p. 13.

⁽²⁾ OJ No L 260, 31. 10. 1995, p. 10.

⁽³⁾ OJ No L 145, 29. 6. 1995, p. 63.

⁽⁴⁾ OJ No L 308, 21. 12. 1995, p. 41.

ANNEX

ANNEX III

Supply in the Canary Islands of pure-bred breeding pigs originating in the Community for the period from 1 July 1995 to 30 June 1996

CN code	Description of the goods	Number of animals to supply	Aid (ECU/head)
0103 10 00	Pure-bred breeding pigs ⁽¹⁾ :		
	— male animals	160	483
	— female animals	4 000	423

⁽¹⁾ Inclusion in this sub-position is subject to the conditions provided for by the Community provisions which regulate the matter.

COMMISSION REGULATION (EC) No 1002/96

of 4 June 1996

establishing the standard import values for determining the entry price of certain fruit and vegetables

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables⁽¹⁾, as last amended by Regulation (EC) No 2933/95⁽²⁾, and in particular Article 4 (1) thereof,

Having regard to Council Regulation (EEC) No 3813/92 of 28 December 1992 on the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy⁽³⁾, as last amended by Regulation (EC) No 150/95⁽⁴⁾, and in particular Article 3 (3) thereof,

Whereas Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commis-

sion fixes the standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto;

Whereas, in compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 5 June 1996.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 June 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 337, 24. 12. 1994, p. 66.

⁽²⁾ OJ No L 307, 20. 12. 1995, p. 21.

⁽³⁾ OJ No L 387, 31. 12. 1992, p. 1.

⁽⁴⁾ OJ No L 22, 31. 1. 1995, p. 1.

ANNEX

to the Commission Regulation of 4 June 1996 establishing the standard import values for determining the entry price of certain fruit and vegetables

<i>(ECU/100 kg)</i>			<i>(ECU/100 kg)</i>		
CN code	Third country code (1)	Standard import value	CN code	Third country code (1)	Standard import value
0702 00 35	052	84,7	0808 10 61, 0808 10 63, 0808 10 69	528	61,7
	060	80,2		600	84,0
	064	59,6		624	103,9
	066	41,7		999	83,7
	068	62,3		039	109,5
	204	46,7		052	64,0
	208	44,0		064	78,6
	212	97,5		284	72,1
	624	95,8		388	73,5
	999	68,1		400	72,3
	ex 0707 00 25	052		82,7	404
053		156,2	416	72,7	
060		61,0	508	72,2	
066		53,8	512	65,8	
068		69,1	524	65,9	
204		144,3	528	65,9	
624		87,1	624	86,5	
999		93,5	728	107,3	
0709 10 20	220	317,0	800	78,0	
	999	317,0	804	99,7	
0709 90 77	052	55,2	999	78,0	
	204	77,5	0809 10 20	052	64,6
	412	54,2	061	51,3	
	624	151,9	064	105,3	
	999	84,7	999	73,7	
0805 30 30	052	132,2	0809 20 49	052	144,3
	204	88,8	061	182,0	
	220	74,0	064	254,1	
	388	79,5	068	262,6	
	400	74,3	400	291,5	
	512	54,8	600	94,9	
	520	66,5	624	363,9	
	524	100,8	676	166,2	
		999	219,9		

(1) Country nomenclature as fixed by Commission Regulation (EC) No 68/96 (OJ No L 14, 19. 1. 1996, p. 16). Code '999' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 1003/96

of 4 June 1996

determining the percentage of quantities covered by applications for export licences for poultrymeat which may be accepted

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 1372/95 of 16 June 1995 laying down detailed rules for implementing the system of export licences in the poultrymeat sector⁽¹⁾, as last amended by Regulation (EC) No 180/96⁽²⁾, and in particular Article 3 (4) thereof,Whereas Regulation (EC) No 1372/95 provides for specific measures where applications for export licences concern quantities and/or expenditure which exceed the normal trade patterns or where there is a risk that they will be exceeded, taking account of the limit referred to in Article 8 (11) of Council Regulation (EEC) No 2777/75⁽³⁾, as last amended by Commission Regulation (EC) No 2916/95⁽⁴⁾, and/or the corresponding expenditure during the period in question;

Whereas uncertainty is a feature of the market in certain poultrymeat products; whereas the impending adjustment of the refunds applicable to those products has led to the submission of applications for export licences for specula-

tive ends; whereas there is a risk that the issue of licences for the quantities applied for from 27 to 31 May 1996 may lead to an overrun in the quantities of the products concerned normally disposed of by way of trade; whereas applications covering the products concerned in respect of which export licences have not yet been granted should be rejected,

HAS ADOPTED THIS REGULATION:

Article 1

No further action shall be taken in respect of applications pending for export licences for poultrymeat submitted pursuant to Regulation (EC) No 1372/95 in respect of category 1 of Annex I to that Regulation which should have been issued from 5 June 1996.

Article 2

This Regulation shall enter into force on 5 June 1996.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 June 1996.

For the Commission

Franz FISCHLER

Member of the Commission⁽¹⁾ OJ No L 133, 17. 6. 1995, p. 26.⁽²⁾ OJ No L 25, 1. 2. 1996, p. 27.⁽³⁾ OJ No L 282, 1. 11. 1975, p. 77.⁽⁴⁾ OJ No L 305, 19. 12. 1995, p. 49.

COMMISSION REGULATION (EC) No 1004/96
of 4 June 1996
amending the import duties in the cereals sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organization of the market in cereals ⁽¹⁾, as last amended by Regulation (EC) No 923/96 ⁽²⁾,

Having regard to Commission Regulation (EC) No 1502/95 of 29 June 1995 laying down detailed rules for the application of Council Regulation (EEC) No 1766/92 for the 1995/96 marketing year as regards import duties in the cereals sector ⁽³⁾, as last amended by Regulation (EC) No 346/96 ⁽⁴⁾, and in particular Article 2 (1) thereof,

Whereas the import duties in the cereals sector are fixed by Commission Regulation (EC) No 966/96 ⁽⁵⁾;

Whereas Article 2 (1) of Regulation (EC) No 966/96 provides that if during the period of application, the

average import duty calculated differs by ECU 5 per tonne from the duty fixed, a corresponding adjustment is to be made; whereas such a difference has arisen; whereas it is therefore necessary to adjust the import duties fixed in Regulation (EC) No 966/96,

HAS ADOPTED THIS REGULATION:

Article 1

Annexes I and II to Regulation (EC) No 966/96 are hereby replaced by Annexes I and II to this Regulation.

Article 2

This Regulation shall enter into force on 5 June 1996.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 June 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 181, 1. 7. 1992, p. 21.

⁽²⁾ OJ No L 126, 24. 5. 1996, p. 37.

⁽³⁾ OJ No L 147, 30. 6. 1995, p. 13.

⁽⁴⁾ OJ No L 49, 28. 2. 1996, p. 5.

⁽⁵⁾ OJ No L 131, 1. 6. 1996, p. 3.

ANNEX I

Import duties for the products listed in Article 10 (2) of Regulation (EEC) No 1766/92

CN code	Description	Import duty by land inland waterway or sea from Mediterranean, the Black Sea or Baltic Sea ports (ECU/tonne)	Import duty by sea from other ports ⁽²⁾ (ECU/tonne)
1001 10 00	Durum wheat ⁽¹⁾	0,00	0,00
1001 90 91	Common wheat seed	0,00	0,00
1001 90 99	Common high quality wheat other than for sowing ⁽²⁾	0,00	0,00
	medium quality	0,00	0,00
	low quality	16,64	6,64
1002 00 00	Rye	49,98	39,98
1003 00 10	Barley, seed	49,98	39,98
1003 00 90	Barley, other ⁽²⁾	49,98	39,98
1005 10 90	Maize seed other than hybrid	28,89	18,89
1005 90 00	Maize other than seed ⁽²⁾	28,89	18,89
1007 00 90	Grain sorghum other than hybrids for sowing	49,98	39,98

⁽¹⁾ In the case of durum wheat not meeting the minimum quality requirements referred to in Annex I to Regulation (EC) No 1502/95, the duty applicable is that fixed for low-quality common wheat.

⁽²⁾ For goods arriving in the Community via the Atlantic Ocean (Article 2 (4) of Regulation (EC) No 1502/95), the importer may benefit from a reduction in the duty of:

- ECU 3 per tonne, where the port of unloading is on the Mediterranean Sea, or
- ECU 2 per tonne, where the port of unloading is in Ireland, the United Kingdom, Denmark, Sweden, Finland or the Atlantic Coasts of the Iberian Peninsula.

⁽³⁾ The importer may benefit from a flat-rate reduction of ECU 14 or 8 per tonne, where the conditions laid down in Article 2 (5) of Regulation (EC) No 1502/95 are met.

ANNEX II

Factors for calculating duties (period from 22. 5. 1996 to 3. 6. 1996):

1. Averages over the two-week period preceding the day of fixing:

Exchange quotations	Minneapolis	Kansas-City	Chicago	Chicago	Mid-America	Mid-America
Product (% proteins at 12 % humidity)	HRS2. 14 %	HRW2. 11 %	SRW2	YC3	HAD2	US barley 2
Quotation (ECU/tonne)	183,69	186,12	159,97	154,76	202,59 (¹)	138,14 (¹)
Gulf premium (ECU/tonne)	—	21,37	20,68	13,41	—	—
Great lake premium (ECU/tonne)	25,75	—	—	—	—	—

(¹) Fob Duluth.

2. Freight/cost: Gulf of Mexico — Rotterdam: ECU 11,56 per tonne; Great Lakes — Rotterdam: ECU 20,73 per tonne.

3. Subsidy (third paragraph of Article 4 (2) of Regulation (EC) No 1502/95: ECU 0,00 per tonne).

COMMISSION REGULATION (EC) No 1005/96

of 4 June 1996

amending representative prices and additional duties for the import of certain products in the sugar sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector ⁽¹⁾, as last amended by Regulation (EC) No 1101/95 ⁽²⁾,

Having regard to Commission Regulation (EC) No 1423/95 of 23 June 1995 laying down detailed implementing rules for the import of products in the sugar sector other than molasses ⁽³⁾, as amended by Regulation (EC) No 2528/95 ⁽⁴⁾, and in particular the second subparagraph of Article 1 (2), and Article 3 (1) thereof,

Whereas the amounts of the representative prices and additional duties applicable to the import of white sugar, raw sugar and certain syrups are fixed by Commission Regulation (EC) No 1568/95 ⁽⁵⁾, as last amended by Regulation (EC) No 987/96 ⁽⁶⁾;

Whereas it follows from applying the general and detailed fixing rules contained in Regulation (EC) No 1423/95 to the information known to the Commission that the representative prices and additional duties at present in force should be altered to the amounts set out in the Annex hereto,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties on imports of the products referred to in Article 1 of Regulation (EC) No 1423/95 shall be as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 5 June 1996.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 June 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 177, 1. 7. 1981, p. 4.

⁽²⁾ OJ No L 110, 17. 5. 1995, p. 1.

⁽³⁾ OJ No L 141, 24. 6. 1995, p. 16.

⁽⁴⁾ OJ No L 258, 28. 10. 1995, p. 50.

⁽⁵⁾ OJ No L 150, 1. 7. 1995, p. 36.

⁽⁶⁾ OJ No L 131, 1. 6. 1996, p. 57.

ANNEX

to the Commission Regulation of 4 June 1996 amending representative prices and the amounts of additional duties applicable to imports of white sugar, raw sugar and products covered by CN code 1702 90 99

(ECU)

CN code	Amount of representative prices per 100 kg net of product concerned	Amount of additional duty per 100 kg net of product concerned
1701 11 10 ⁽¹⁾	23,96	4,32
1701 11 90 ⁽¹⁾	23,96	9,55
1701 12 10 ⁽¹⁾	23,96	4,13
1701 12 90 ⁽¹⁾	23,96	9,12
1701 91 00 ⁽²⁾	31,39	9,54
1701 99 10 ⁽²⁾	31,39	5,02
1701 99 90 ⁽²⁾	31,39	5,02
1702 90 99 ⁽³⁾	0,31	0,34

⁽¹⁾ For the standard quality as defined in Article 1 of amended Council Regulation (EEC) No 431/68 (OJ No L 89, 10. 4. 1968, p. 3).

⁽²⁾ For the standard quality as defined in Article 1 of Council Regulation (EEC) No 793/72 (OJ No L 94, 21. 4. 1972, p. 1).

⁽³⁾ By 1 % sucrose content.

COUNCIL REGULATION (EC) No 1006/96

of 3 June 1996

imposing a definitive anti-dumping duty on imports of powdered activated carbon originating in the People's Republic of China

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community⁽¹⁾, and in particular Article 23 thereof,

Having regard to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community⁽²⁾, and in particular Article 12 thereof,

Having regard to the proposal submitted by the Commission after consultation within the Advisory Committee,

Whereas:

A. PROVISIONAL MEASURES

- (1) The Commission, by Regulation (EC) No 1984/95⁽³⁾, hereinafter referred to as 'the provisional duty Regulation', imposed a provisional anti-dumping duty on imports into the Community of powdered activated carbon (hereinafter referred to as 'PAC') originating in the People's Republic of China and falling within CN code ex 3802 10 00.

By Regulation (EC) No 2736/95⁽⁴⁾, the Council extended the validity of this duty for a period of two months.

- (2) Subsequent to the imposition of the provisional anti-dumping duty, one Chinese exporter, the complainants and other interested parties presented written submissions, making known their views on the provisional findings. Where requested, hearings were granted by the Commission. In particular, nine importers/distributors who are members of the Community of Activated Carbon Importing Companies in Europe (hereinafter referred to as 'Cacic') presented joint submissions concerning the Commission's findings.

- (3) In addition, following the imposition of the provisional anti-dumping duty, a company based in the United States of America (USA) submitted to the Commission that it started exporting PAC produced in a joint venture in the People's Republic of China on a private-label basis to the Community during 1994 (i.e. after the investigation period) and requested to be exempted from any definitive duty. The company was advised that such an exemption could only be granted after a newcomer review investigation had been requested and carried out under the provisions of Article 11 (4) of Regulation (EC) No 3283/94. Furthermore, as this proceeding relates to exports from a non-market economy country, the company was advised that it would also have to show to the satisfaction of the Community Institutions that, in its particular case, individual treatment should be granted. Nevertheless, certain comments of a general nature which the company made had also been raised by other interested parties and were therefore already taken into account, where appropriate.

- (4) As mentioned in recital 76 of the provisional duty Regulation, at that stage of the investigation, no public utility user or industrial user of PAC had made any submissions to the Commission. Subsequent to the imposition of the provisional anti-dumping measures, however, several such users made their views known to the Commission.

In addition, certain importers/distributors submitted that the Commission should approach 'major' PAC users in order to obtain information on the evolution of their consumption during the last few years and also to find out how they perceived Chinese PAC in comparison to the Community produced product. As the Commission could agree to this request, simple questionnaires were sent to numerous PAC users situated in the Community. In total, 22 users situated in six different Member States were approached by the Commission. Meaningful comments or replies to the questionnaire were only received from 12 of these users, representing approximately 6 % of total Community consumption. Details of the additional information collected are given below in recitals 62 to 66 of this Regulation.

- (5) The Commission continued to seek and verify all other information it deemed to be necessary for its definitive findings and also reviewed certain aspects of the calculations made in the provisional duty Regulation to establish dumping, undercutting and the injury elimination level. The parties were informed of these revised calculations and also of

⁽¹⁾ OJ No L 56, 6. 3. 1996, p. 1.

⁽²⁾ OJ No L 209, 2. 8. 1988, p. 1. Regulation as last amended by Regulation (EC) No 522/94 (OJ No L 66, 10. 3. 1994, p. 10).

⁽³⁾ OJ No L 192, 15. 8. 1995, p. 14.

⁽⁴⁾ OJ No L 285, 29. 11. 1995, p. 2.

the essential facts and considerations on the basis of which it was intended to recommend the imposition of a definitive anti-dumping duty and the definitive collection of the amounts secured by way of a provisional duty. They were also granted a period within which to make representations subsequent to the disclosure. Their representations were considered and, where appropriate, the Commission's findings were modified to take account of them.

B. PROCEDURAL QUESTIONS RAISED

- (6) As concerns the actual initiation of this investigation, Cacic argued that the complaint lodged by the European Chemical Industry Council (hereinafter referred to as 'Cefic') was 'factually incomplete', contained 'false allegations' and omitted 'a number of relevant facts which would have prevented the Commission from initiating this investigation'. In support of these arguments, Cacic stated that the complainants had omitted the names and addresses of importers known to them in several Member States and, as a consequence, these importers were unable to participate in the investigation. Cacic also argued that the Commission was made aware of many wrong addresses and mistakes in the complaint but did not take sufficient measures to investigate the situation in all Member States.

Cacic also claimed that the Commission had rejected the cooperation of an importer/distributor in Sweden and, because of this, the provisional duty Regulation did not address the situation in all Community markets. In consequence, Cacic considered that the provisional duty Regulation not only infringed the rights of importers in the new Member States but was also defective in its market analysis.

- (7) As concerns the remark made by Cacic concerning the importers omitted from the complaint, it has to be pointed out that when the Commission was made aware of the existence of these companies early in the proceeding, questionnaires requesting information were immediately sent to them. The Commission is not in a position at the initiation stage of an investigation to know all the importers or exporters concerned by the proceeding, as it initially relies on information provided in the complaint. In this particular case, the Commission was satisfied that the complainant had furnished all the relevant information it had in its possession. Furthermore, it should be remembered that one of the purposes of a notice of initiation of an anti-dumping proceeding published in the *Official Journal of the European Communities* is to invite

all interested parties to come forward and participate in such a proceeding.

With regard to Cacic's point concerning the incorrect addresses of certain interested parties in the complaint, it should be noted that the Commission sent out questionnaires for a second time to these companies when it was advised of the errors by one of the known importers.

Concerning the allegation that the cooperation of one Swedish importer/distributor had been rejected by the Commission, it should be pointed out that this company made itself known in February 1995 and was informed that due to the advanced stage of the investigation it was not possible for it to complete a questionnaire. The company in question was advised, however, that its comments were most welcome, particularly as far as Community interest was concerned. Subsequent to this, the company only contacted the Commission again after provisional duties were imposed and actually declared that it had not made any imports of PAC from the People's Republic of China during the investigation period.

- (8) In view of the foregoing, it is considered that the rights of defence of all interested parties were respected. As concerns the claim that the Commission's investigation did not address all markets and that its analysis is therefore defective, this question is dealt with below in recital 67 of this Regulation.

C. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

- (9) Certain parties reiterated arguments that had made previously, namely that Chinese PAC should not be considered as a like product to PAC produced in the Community (or to PAC produced in the USA, the analogue country). These parties submitted that in view of the many different grades of PAC on the market and their different production methods, the different raw materials used and the diverse technical characteristics imparted to the finished product, it was an over-simplification on the part of the Commission to treat them all as one like product.
- (10) One importer/distributor repeated its argument that the Chinese PAC grade 'GA' (which was chemically activated using zinc) is extremely efficient for waste-water treatment, particularly in comparison to Community-produced PAC normally used for this purpose. The company therefore submitted again that this Chinese PAC grade should not be considered as a like product to the Community-produced grades. In this respect, a major user stated that the Chinese PAC grade it had been purchasing for waste-water treatment from the importer/

distributor in question was, in economic terms, preferable to certain Community-produced grades. In other words, the Chinese PAC grade was of a better quality and at a competitive price in comparison to some Community-produced grades. This does not, of course, mean there are no better quality Community-produced grades — it simply means that the Community-produced grades of a similar quality are more expensive and therefore not normally used for waste-water treatment.

The same importer/distributor further argued that this 'GA' grade is also not a like product as it has a lower purity in comparison to the PAC activated chemically in the Community by phosphoric acid. It was claimed, therefore, that it cannot be used in many applications where Community-produced PAC is used.

- (11) In respect of the above observations, it should be noted that the investigation revealed that the 'GA' grade was sold in the Community to many different types of users to which the Community procedures are also selling their PAC grades (e.g. the food industry, the chemical industry as well as for water treatment). In addition, the sole cooperating Chinese exporter itself declared that its 'GA' grade is suitable for many uses including the chemical, pharmaceutical and food industries. This was also confirmed during the course of the investigation by certain importers/distributors.
- (12) Another distributor claimed that the Chinese PAC grade 'GA' is a very efficient grade when used in wine production and, as there is no zinc-activated PAC produced in the Community, it should not be considered as a like product. In this respect, it should be pointed out that while there may be no Community production of chemically activated PAC using zinc (see recitals 11 to 17 of the provisional duty Regulation), the investigation showed that there are equivalent Community-produced grades which have been activated by means of phosphoric acid and developed specifically for the wine industry. This was indirectly admitted by the distributor itself when it claimed that a high anti-dumping duty on Chinese PAC would force it to pull out of the Community market thus leaving only the two main Community producers to compete for this particular PAC sales sector.
- (13) It was also submitted that it was inappropriate to compare chemically activated PAC produced in the

USA to that produced in the People's Republic of China as these countries used different chemical activation agents for their PAC production. In this respect, it is considered that although the activating agents are not always the same, the production method used is similar (see recital 13 of the provisional duty Regulation). In addition, the raw materials used in the USA are identical to those used in the People's Republic of China. This leads to end products which are sufficiently alike for them to be comparable.

- (14) From the above, it is concluded that while there can be certain differences between PAC grades imported from the People's Republic of China and those produced in the Community and the USA, as already explained in recitals 18 and 19 of the provisional duty Regulation, the finished products nevertheless remain sufficiently similar in terms of their physical characteristics for them all to be considered as like products within the meaning of Article 2 (12) of Regulation (EEC) No 2423/88. Indeed, all of the arguments presented in the previous recitals of this Regulation refer only to potential differences in quality and, furthermore, none of the interested parties has provided evidence that imported Chinese PAC is not in direct competition with PAC produced in the Community and the USA. Accordingly, the provisions of recitals 17, 20 and 21 of the provisional duty Regulation are confirmed.

D. COMMUNITY INDUSTRY

- (15) No new arguments were received in connection with recital 22 of the provisional duty Regulation, therefore these findings are confirmed.

E. DUMPING

1. Normal value — choice of analogue country

- (16) Certain interested parties questioned the suitability of the USA as the analogue country in this particular case. It was argued that the large modern plants in the USA could not be compared to the smaller, traditional production plants in the People's Republic of China and that differences in the cost of investment and depreciation in the USA rendered any such comparison as 'absurd'.

- (17) The argument put forward completely overlooks, however, the fact that the People's Republic of China does not have a market economy and that various aspects of a producer's input and output are directly controlled by the State. This intervention impedes the establishment of reliable domestic prices and costs and it is for this reason that an analogue country is sought for the purposes of establishing normal value. In all cases, the Commission will use the most appropriate analogue country, given the circumstances of the case and, if necessary, make due adjustments. In this particular case, for the reasons stated in recital 25 of the provisional duty Regulation, the choice of the USA as the analogue country was not considered unreasonable.
- (18) In connection also with the choice of an analogue country, these parties also made the assumption that the unidentified cooperating parties in the USA were related to Community producers and that this was not conducive to objective results. Despite being requested to do so, the Commission is not in a position to reveal the names of the cooperating US producers as their average domestic sales prices (and technical specifications of the grades taken for normal value comparison purposes) have been disclosed to the importers and the cooperating Chinese exporter. To divulge their names as well would constitute a breach of confidentiality. It should also be remembered that these producers were visited by the Commission and the data provided was the subject of an on-the-spot verification. In addition, the domestic sales which formed the basis for the normal value calculations were at profitable levels, only to unrelated customers and were representative of US domestic market prices. Therefore, the question of whether or not these US producers were related to Community producers is totally irrelevant.
- (19) Another interested party questioned why Malaysia had not been taken as the analogue country instead of the USA since the average Malaysian export price to the Community, as indicated in Eurostat during the investigation period (1 January to 31 December 1993), was lower than the average Chinese export price during the same period. This party also proposed that the average Malaysian export price to the Community (obtained from Eurostat) be used for establishing normal value for Chinese steam-activated PAC. It also submitted that since Malaysia does not produce chemically activated PAC, a theoretical export price for Malaysian chemically activated PAC should be used to establish normal value for Chinese chemically activated PAC.
- (20) This proposal for establishing normal value in Malaysia on the basis of an average export price obtained from Eurostat for many different unknown grades (not all of which may be PAC), contradicts the request of all the other interested parties that all comparisons for dumping and injury purposes should be made on the basis of data referring to comparable individual PAC grades for each of the two activation methods separately. Accordingly, this proposal could not be accepted.
- (21) Another reason for not selecting Malaysia as the analogue country in this particular case is given in recital 25 of the provisional duty Regulation. While the major Malaysian producer of PAC known to the Commission had been approached, this company did not in fact respond to the Commission's request for information. It should also be noted that available information indicates Malaysia produces only steam-activated PAC while, like the People's Republic of China, the USA produces and sells on its domestic market both steam and chemically activated PAC grades.
- (22) Accordingly, the conclusions set out in recital 26 of the provisional duty Regulation concerning the choice of the analogue country are confirmed.

2. Normal value

- (23) For the purpose of definitive findings, normal value was established on the basis of the methods used in recitals 27 and 28 of the provisional duty Regulation.

3. Export price

- (24) A duly substantiated request was received from the sole cooperating Chinese exporter concerning the incorrect attribution of a commission to certain export transactions which was made in the export price calculation. An adjustment was made accordingly.
- (25) No other arguments were received in connection with the findings in recitals 29 to 32 of the provisional duty Regulations. Therefore, these findings are confirmed.

4. Comparison

- (26) The Commission provided to all interested parties, upon request, additional technical specifications as well as basic uses for certain US PAC grades which had been used for product comparison purposes.

(27) Certain parties argued that the comparisons made between the Chinese export prices and the normal values were based on inadmissible simplifications. They reiterated a previous submission made that independent laboratory analyses should be carried out in order to allow what they considered to be a 'fair comparison' between Chinese and US PAC grades for the dumping calculations as well as between Chinese and Community-produced grades for the undercutting and underselling calculations (see recitals 35, 46 and 47 of the provisional duty Regulation).

(28) It should be noted that the importer/distributor which first proposed the use of independent laboratory analyses, had itself made comparisons between Chinese and Community-produced PAC grades in its submissions to the Commission during 1994 and even indicated a US PAC grade which it considered to be comparable to the Chinese. Indeed, the Commission used certain of these comparisons where the products appear to have similar commercial specifications and basic uses. It was only in January 1995 that this company came up with the proposal for independent laboratory analyses.

In this respect, it should be recalled that the investigation showed that different PAC grades, irrespective of their origin, are interchangeable to a great extent as far as their basic applications are concerned. Indeed, as explained in recitals 14 and 15 of the provisional duty Regulation, different PAC grades sold for the same applications may have certain differences as far as their precise technical specifications are concerned and it is for the user to select the most cost-effective PAC grade for its particular needs. Such differences can be found in the available specification sheets issued by the producers or the importers/distributors for the general information of users or which accompany sales invoices, purchase contracts, etc. The Commission has used these specification sheets, together with the basic known applications, in order to make comparisons between prices of apparently similar PAC grades thus avoiding, at the request of certain interested parties, the use of overall PAC average prices. It was therefore considered that detailed laboratory analyses would not assist further this particular aspect of the investigation.

(29) The same company requested a meeting with the complainants and 'possibly with a neutral authority' in order to discuss product comparisons. As the

possibility of such a meeting is provided for in Article 7 (6) of Regulation (EEC) No 2423/88, the Commission approached the complainants with this request. Cefic stated, however, that such a meeting was not necessary in their view since they considered all relevant information and technical expertise at their disposal to make meaningful comparisons had already been provided to the Commission. Therefore, no such meeting was held between the parties directly concerned.

(30) Although all interested parties and in particular the importers/distributors (which have also sufficient expert knowledge on Chinese, Community and even US-produced PAC) were asked to propose substantiated specific alternative comparisons or even adjustments for differences in physical characteristics between the different PAC grades, only a limited amount of relevant information was supplied. This information did, however, cast doubt upon the appropriateness of the comparison the Commission had made for one Chinese steam-activated PAC grade and, accordingly, the Commission changed the comparison made for this particular Chinese grade.

(31) It is therefore confirmed that the grade-by-grade comparisons made by the Commission on the basis of available commercial technical specifications and known uses should be maintained.

(32) It was also submitted that the prices taken in the US market in order to calculate the dumping margin were not at the same level of trade and that adjustments should be made accordingly. In particular, it was argued that an importer/distributor of Chinese PAC in the Community does not perform the same function as a distributor of US origin product in the USA and that costs such as repacking, storage, financing, technical services/development and quality assurance are all elements which are built into the domestic sales prices of the US producers, but not into the Chinese export price. The parties which raised this particular issue did not, however, propose specific levels for such adjustments.

(33) As a general remark, it should be noted that the Commission established normal value on the basis of US distributor-delivered domestic prices (i.e. at the same level of trade with the Chinese exports to importers/distributors in the Community). As provided for in Article 2 (10) of Regulation (EEC) No 2423/88, only adjustments to take account of differences affecting price comparability (e.g. selling expenses) can be made. In this respect, as is

indicated in recital 34 of the provisional duty Regulation, the Commission adjusted the US domestic prices used in the comparisons so as to take account of all discounts, rebates, commissions and packing costs.

- (34) Concerning repacking, the investigation showed the Chinese PAC is always packed in bags which are shipped to the Community in cargo containers. Certain Community importers/distributors claimed, however, that these bags are not of an acceptable quality to their customers and rebagging before resale is therefore necessary. In this respect, it should be noted that, as mentioned in the provisional duty Regulation, the Commission had already adjusted the US domestic price downwards to take account of all packing costs incurred by the US producers, therefore no further adjustment or allowance can be granted.
- (35) The argument that there are no storage costs built into the Chinese export prices while such costs are included in the US prices is not considered to be realistic. Indeed, it is considered inevitable that the Chinese export prices also contain a certain element for storage costs as the product would have to be stored until it is of an economically viable quantity for export shipment and/or fulfil the delivery timing clauses of the sales contracts. No differences can therefore be established for the storage costs which are considered to be included in both the US and Chinese prices.
- (36) With regard to financing costs built into US domestic prices and not into Chinese export prices, it should be remembered that under free market economy conditions, regardless of their functions as importers, distributors, producers, traders, etc., all such companies incur these type of expenses. This would also be the case for the Chinese exporters and producers if they too had to operate under free market conditions. As this is not the case, this argument is considered irrelevant for the purposes of this proceeding. As far as the payment terms granted by the Chinese exporters for exports to the Community and by the cooperating US producers for their domestic sales, these were found to be similar. No adjustment for this purpose is therefore necessary.
- (37) Concerning the question of technical services/development and quality assurance costs, the investigation showed that although the Chinese exporters guarantee the quality of the delivered product in their sales contracts and should therefore incur quality assurance costs, they do not provide technical assistance or product development for their customers. As PAC is a customer (i.e. user)-oriented product and very often producers develop specific qualities for the needs of certain customers, it was found that these types of expenditure constitute a part of the selling costs incurred by the US pro-

ducers, although recorded in their accounts under 'research and development' costs. Accordingly, an adjustment was made to the domestic sales prices of each producer in order to net-back these actual technical assistance and product development costs incurred by each producer.

5. Dumping margins

- (38) In the light of the conclusions set out above with regard to the determination of normal value and export price, and the comparison between the two, the definitive examination of the facts showed the existence of dumping in respect of imports of the product concerned originating in the People's Republic of China.
- (39) Taking into account the change made concerning the alternative comparison for one PAC grade, the correct attribution of certain commission and an adjustment granted to normal value for technical assistance and product development costs, the weighted average dumping margin expressed as a percentage of the net, free-at-Community-frontier price, before duty, is 69,9 %.

F. INJURY

1. Community consumption

- (40) One party argued that for the purposes of examining trends in Community consumption, the Commission should have considered not only the period 1990 to the investigation period but also previous years as well, since this would have demonstrated a decline in consumption (instead of the small increase of 3,3 % which was observed over the period 1990 to 1993). It is alleged that if such an analysis over a longer period had been carried out, the effects of the closure of a large PAC production plant in Germany before 1990 would have given different trends as regards Community consumption.
- (41) It is common practice for the Community institutions to examine trends in consumption, import volumes, market shares, prices, etc. over a period of several years (normally four years including the investigation period). This practice was followed in the present case as it was considered appropriate for giving an objective view of the development of the market situation for all parties concerned. It should, however, be noted that even if the period under analysis were to be extended and the trend in consumption were to change, the trends relating to the Community producers' market share (i.e. declining) as well as those of Chinese imports (i.e. increasing), would anyhow remain the same.

- (42) Certain importers/distributors also claimed that significant quantities of PAC were shipped to the Community from the People's Republic of China but never actually put into 'free circulation' (i.e. by being entered to bonded warehouse and then sold on to third countries outside the Community). It was also submitted that Chinese PAC was put into free circulation within the Community but then re-exported to third countries. In order to clarify this situation, the Commission requested specific data and documentation from the parties concerned. These parties failed, however, to provide the necessary information which would enable the Commission to attribute the actual year of import to these re-exports of Chinese PAC and thus allow their claims that lower quantities of PAC had actually been consumed in the Community than had been found in the Commission's investigation.

2. Volume and market share of dumped imports

- (43) Apart from the arguments presented in the previous recital of this Regulation, no new submissions were made concerning the volume and market share of dumped imports. Therefore, the findings in recitals 37 to 44 of the provisional duty Regulation are confirmed.

3. Prices of the dumped imports and price undercutting

- (44) As with the comparisons made by the Commission in order to establish dumping, it was again submitted by certain interested parties that comparisons for undercutting purposes between Community-produced PAC grades and PAC grades imported from the People's Republic of China should be made on the basis of independent laboratory analyses.

It was also argued that the technical specifications of the different PAC grades used by the Commission for comparison purposes were incomplete.

In recitals 46 and 47 of the provisional duty Regulation, as well as in recitals 27 to 31 of this Regulation, it has been explained why the comparisons made on the basis of available commercial, technical specifications and uses of the PAC concerned were considered sufficient for the purposes of this investigation. The Commission used the commercial, technical specifications issued by the Community producers themselves as well as the Chinese PAC technical specifications normally accompanying the purchase contracts of the importers.

- (45) It should also be noted that although the Commission's comparisons were disclosed to all interested parties well before the imposition of provisional measures, no specific alternative comparisons or even adjustments for any differences in physical

characteristics between different PAC grades were proposed by any interested party. One could have expected that the importers/distributors, which in certain cases are also trading in Community-produced PAC, would have the necessary expertise to provide the abovementioned information, if they cared to do so.

- (46) It was claimed that the market price of Chinese PAC in the Community is at the level of the Community producers or, in some cases, even higher. While it may well be the case that some export transactions for Chinese PAC grades are made at similar or even higher price levels to certain transactions involving some of the Community producers' grades (see recital 48 of the provisional duty Regulation), it should not be forgotten that the Community producers' prices, overall, were significantly undercut by dumped Chinese import prices.

- (47) With regard to the actual level of undercutting found, it should be recalled that on a grade-by-grade basis, the Community producers' weighted average net ex-works sales prices in the Community to users were compared to the weighted average import prices of the equivalent Chinese grades, adjusted to duty-paid net ex-warehouse levels.

It was submitted, however, that in uplifting Chinese import prices to make them ex-warehouse and thus at a comparable level of trade and commercial stage to the Community producers ex-works sales prices, the Commission had not taken into account all costs incurred by the Community importers/distributors, nor an appropriate profit margin. This is incorrect since, as indicated during the course of the investigation to the cooperating parties, an adjustment of 27 % was added to the Chinese cif import prices for this purpose.

- (48) It should be stressed that this percentage represents the weighted average of all costs claimed by the cooperating importers (customs duty which had been paid, transport, warehousing, repacking, financing, depreciation, etc.) and a reasonable profit margin based on the importers'/distributors' profit and loss accounts. Nevertheless, in conformity with the adjustment granted for establishing normal value with regard to technical assistance and customer specific product development costs, which are assumed not to be in the Chinese prices, it has been decided, for the purpose of definitive calculations of undercutting, to make a downwards adjustment to the sales prices of each Community producer to take account of such selling costs incurred by that producer during the investigation period.

- (49) On this basis, revised undercutting margins of up to 35 % have been calculated. The weighted average, however, of these revised undercutting margins is 21 %.

4. Situation of the Community industry

- (50) As no new arguments were presented concerning production, production capacity, stocks, sales and market share, profitability and employment (recitals 51 to 59 of the provisional duty Regulation), these findings are confirmed.

5. Conclusions concerning injury

- (51) In the light of the above and in the absence of any other substantiated arguments, the conclusions set out in recitals 60 and 61 of the provisional duty Regulation that the Community industry concerned suffered material injury within the meaning of Article 4 (1) of Regulation (EEC) No 2423/88 are confirmed.

G. CAUSATION

1. General remarks

- (52) A number of interested parties reiterated claims made previously concerning causation of injury. These parties claimed that the Commission, when arriving at its provisional findings and disclosing the essential facts and considerations upon which it had the intention to propose definitive measures, had not sufficiently taken account of the arguments raised by them. As shown below, this contention is not correct since the points in question were explicitly addressed by the Commission in recitals 62 to 71 of the provisional duty Regulation.
- (53) The importers continued to argue that there was a downturn in demand in the Community for PAC between 1990 and the investigation period caused by developments in technology and increasing use of recyclable activated carbons. The Commission acknowledged in recital 70 of the provisional duty Regulation that there may have been an increasing demand for these alternative products, however, this does not necessarily mean that the demand for PAC has dropped. As stated in recitals 42, 62 and 70 of the provisional duty Regulation, demand (i.e. Community consumption) actually increased by 3,3 % between 1990 and the investigation period. However, the most important factor to be considered is that sales of the Community producers decreased while imports (and particularly dumped imports from China) rose significantly.
- (54) It was also argued that the closure of a large German PAC production plant before 1990 (referred to in recital 40 of this Regulation) caused an increase in Chinese imports since the marketing partner of this producer claimed that it was 'obliged' to replace the Community-produced

product with Chinese PAC, even though this company was also acting as a distributor of PAC produced by other Community producers as well as an importer/distributor of PAC from several third countries. While it is accepted that this marketing partner had to look elsewhere for its PAC purchases, such a justification for increased imports of Chinese PAC does not, however, alter the fact that such imports were made at dumped prices which significantly undercut the Community producers' prices and thereby caused material injury.

- (55) Referring to recitals 45 and 56 of the provisional duty Regulation, one party argued that Chinese PAC imports could not have caused injury to the Community industry as the average prices of such imports increased by 10,6 % between 1990 and 1993 and, moreover, the average PAC sales prices of the Community producers as a whole also increased during the same period. In this respect, it should also be recalled that the overall increase in the Community-producers' prices was only 1,4 % over this period and that in certain cases, the prices of Community-produced PAC even decreased. Taking into account the significant price undercutting of 21,0 % established for 1993, the conclusion must therefore be drawn that there was even higher undercutting in 1990 (when Chinese imports started to penetrate the Community market) and not that there is an absence of causation between Chinese dumped imports and the injury suffered by the Community industry.
- (56) Arguments were put forward that the financial difficulties of the Community producers were caused not by Chinese imports but, instead, mainly by significant increases in the cost of production of the producers and, in the case of one of them, by particularly high raw material costs.
- Although Community producers should be able to expect to sell their products at prices which cover all costs in a market where fair competition is prevailing, in the light of comments made by several interested parties the Commission re-examined the overall situation concerning the evolution of the cost of production of the cooperating Community producers. The conclusion was drawn that in order to reflect costs normally incurred, certain additional raw material costs of an exceptional nature incurred during the investigation period by one Community producer should not be taken into account when establishing the injury elimination level. This approach is confirmed.
- (57) Certain interested parties also continued to argue concerning the impact on the Community market of apparently low priced imports of PAC from Malaysia. No new arguments of substance were,

however, presented by these parties and it is considered that the reasoning given in recitals 67 and 68 of the provisional duty Regulation adequately answers the points already raised.

- (58) As explained in recital 68 of the provisional duty Regulation, the Commission had no evidence that exports from Malaysia were at dumped price levels during the investigation period. While certain evidence was submitted to the Commission concerning allegedly dumped Malaysian exports, this in fact referred to the year 1994 (one year after the investigation period) and, therefore, no link between any possible Malaysian dumping in 1994 and injury suffered by the Community industry during the investigation period could be established on the basis of the evidence provided.
- (59) Certain interested parties put forward a calculation which attempted to show that even if Community-produced PAC equivalent to all the Chinese imports had been sold instead by the Community producers during the investigation period, these Community producers would still have made significant losses. This calculation overlooks, however, the fact that the actual sales volumes and values achieved by the Community producers during that period were, in reality, influenced by the low priced dumped Chinese imports and for this reason could not form the basis of such a theoretical calculation. Therefore, this calculation is considered to be flawed and cannot demonstrate the hypothetical financial situation of the Community producers if Chinese PAC imports were not present on the Community market.
- (60) It was also alleged by certain parties that the Community producers were selling PAC outside the Community at much lower prices than in the Community and, therefore, the price level on the Community market was not the only reason for their actual 'economic' situation. As indicated in recital 69 of the provisional duty Regulation, the Commission found that the Community producers' sales outside the Community were made at profitable levels and therefore at much higher prices than the PAC sold inside the Community at a loss. In fact, the weighted average selling price of all grades of PAC sold outside the Community by the cooperating Community producers increased from ECU 1 792 per tonne in 1990, to ECU 1 839 per tonne in the investigation period. The allegation, as put forward, is therefore based on incorrect assumptions. Nevertheless, the impact of the declining sales volumes of Community producers outside the Community is acknowledged in recitals 69 and 71 of the provisional duty Regulation.

2. Conclusions concerning cause of injury

- (61) In the light of the above and in the absence of any other meaningful, substantiated arguments, the conclusions set out in recital 71 of the provisional duty Regulation are confirmed.

H. COMMUNITY INTEREST

- (62) As mentioned in recital 4 of this Regulation, 22 companies, most of them put forward by certain importers/distributors as 'major' users of PAC situated in six different Member States, were approached by the Commission after the imposition of provisional measures. Meaningful comments or replies to a simple questionnaire were received from only 12 users, representing approximately 6 % of total Community consumption.
- (63) As concerns the PAC purchases of these 12 users, five declared that their PAC consumption was stable, four declared they had decreasing consumption and three declared they had increasing consumption.
- (64) Of the users which replied to the questionnaire or submitted comments, seven indicated that Community and Chinese PAC prices were comparable, but only two of them gave the trade names of the grades they had compared. Examination of the specifications of the Community-produced grades compared by these two users showed, however, that the Chinese product was technically superior to that produced in the Community and, therefore, not comparable for the purposes of this investigation. Two other users also indicated that Chinese PAC is much less expensive than the same quality of PAC produced in the Community. Three users indicated that they had chosen Chinese PAC because of its quality in direct relation to its price. On the other hand, another user stated it had chosen the Community product for exactly the same reason. Two other users had changed from Chinese PAC to that produced in the Community. In view of the conflicting nature of the information received from the users, no decisive conclusion can be drawn from this data.
- (65) Furthermore, despite being so requested, no substantiated comments were made by the users concerning the impact that anti-dumping measures on Chinese PAC would have on their operating budgets. Most of the users did, however, argue that a high anti-dumping duty might mean Chinese imports being excluded from the Community market, thus, perhaps, reducing the level of competition.

- (66) In this respect, it should be repeated that the purpose of trade defence measures is to eliminate the trade distorting effects of the injurious dumping and to restore effective competition. Accordingly, no different conclusions other than those established in recitals 75 and 76 of the provisional duty Regulation could be reached.
- (67) One Swedish importer/distributor argued that the imposition of anti-dumping measures on Chinese PAC would have a profoundly detrimental effect on its business. However, this company declared that there were no imports of Chinese PAC into its Scandinavian sales territory (Sweden, Finland, Denmark) during the investigation period. This importer also argued that the Commission should have taken Sweden and Finland into consideration in its investigation even though they were not members of the Community during the investigation period. In this respect, the Commission notes that the total PAC consumption in Sweden and Finland is estimated to be approximately 700 tonnes per annum, or about 2 % of total Community consumption. Given also that there were no imports of Chinese PAC there during the investigation period, it is considered that even if data for these two new Member States concerning imports, sales, consumption had been included in the findings, the impact would have been insignificant.
- (68) In the light of the above, it is considered that the conclusions drawn by the Commission in the provisional duty Regulation concerning Community interest should be confirmed. Indeed, no compelling reasons have come to light which would lead to the conclusion that adopting definitive measures would not be in the interest of the Community.

I. UNDERTAKING

- (69) An undertaking based on a combination of one minimum price and a quantitative limit for exports of chemically activated PAC was proposed by the sole cooperating Chinese exporter. It was suggested by this exporter that the Chinese authorities could guarantee the monitoring of the execution of such an undertaking. However, the Chinese authorities

themselves made no such commitment. This suggestion did not, moreover, contain any specific price or quantity level, nor refer to the company's steam-activated PAC exports to the Community. In this respect, it should be remembered that PAC exists in many different grades which have different prices. Therefore, an undertaking with one average minimum price could not be accepted. Furthermore, if an undertaking on a grade-by-grade basis had been offered, the monitoring of such an undertaking would have been virtually impossible as the exact grades this company will export to the Community could not be controlled against official statistics (which do not refer to import data on a grade-by-grade basis).

- (70) It should also be noted that although this Chinese exporter, which is in reality a trading company, may be the largest exporter of Chinese PAC to the Community, it does not represent the totality or even the majority of Chinese PAC exports to the Community. Given that there are several other exporters and that the Chinese authorities themselves have not indicated their willingness to guarantee the execution of such an undertaking, this course of action is not considered appropriate for this case.
- (71) The exporter was advised accordingly that an undertaking could not be accepted. This approach is confirmed.

J. DUTY

- (72) As concerns the detailed calculations used to establish the injury elimination level in the provisional duty Regulation, the actual weighted average net ex-works sales prices of those Community-produced PAC grades considered to be comparable to the imported Chinese grades were uplifted on an individual basis by the weighted average loss of all the Community producers, to levels which yielded a reasonable profit margin of 5 %. In this regard, Cefic argued that the reasonable profit margin to be added on to the break-even PAC sales prices of the Community producers in order to establish the injury elimination level should be based only on profitable sales realized by the Community producers in their activated carbon activities and not on

an average profit which also includes loss-making PAC sales. Furthermore, it was submitted that the 5 % pre-tax profit is too low to secure a reasonable return on investments particularly as in 1990, before major market penetration by Chinese imports, the Community producers were achieving on average a 9,6 % profit on their PAC sales in the Community.

(73) In this respect, it should be made clear that the average profit margins earned by each of the three cooperating Community producers on their total turnover of all activities relating to activated carbon, excluding PAC sold in the Community at a loss, ranged from 4,1 % to 5,4 % during the investigation period. It should also be noted that as only 70 % of the lost PAC sales volumes of the Community producers between 1990 and the investigation period have been taken over by dumped Chinese imports, it is unreasonable for the purposes of this exercise to uplift the break-even prices of the Community producers by the full profit margin of 9,6 % which they enjoyed in 1990.

(74) In the light, however, of all the above comments made by interested parties, certain aspects of the methodology used for the provisional measures have been reviewed and an alternative method is now considered to be the most appropriate to calculate break-even (i.e. full cost of production) and reasonable profit-yielding price levels for the different grades of the Community producers which were compared to each Chinese grade.

(75) In this respect, the full cost of production per grade for each Community producer, adjusted where appropriate (see recital 56 of this Regulation), was taken and to this a 5 % profit was added. In order to make correct comparisons, a downwards adjustment was then made to these theoretical, profit-yielding prices to take account of technical assistance and product development selling costs incurred during the investigation period by each one of these producers (see recital 48 of this Regulation).

(76) The average ex-warehouse selling price (i.e. cif import price plus 27 % for importers'/distributors' mark-up) for each imported Chinese grade was then compared to a single weighted-average profit-yielding Community producers' price. This single

Community producers' price for each Chinese grade was calculated for injury elimination purposes using the individual grade prices by Community producer as established in the previous recital (weighted according to quantities sold by each Community producer).

(77) Any difference resulting from the abovementioned comparison (weighted according to the quantities imported) was the injury elimination amount. The total injury elimination amount was then expressed as a percentage of the total Chinese cif import value.

(78) The above methodology is confirmed and the revised injury elimination amount, expressed as a percentage of the net, free-at-Community-frontier price, before duty, is 38,6 %.

Given that this revised injury elimination level is still lower than the revised dumping margin established (see recital 39 of the present Regulation), definitive anti-dumping duties should be imposed on the basis of the injury elimination level. As far as the form of the definitive duty is concerned, it is considered that the structure of a State-controlled economy gives the Chinese exporters considerable room for manoeuvre to decrease their export prices. Therefore, in order to diminish the risk of absorption of the duty by the Chinese exporters a specific duty (i.e. a fixed amount per tonne) is more appropriate in this case than an *ad valorem* duty or a variable duty.

The amount of such a duty has been calculated on the basis of the injury elimination level mentioned above and is ECU 323 per tonne (net weight). This is confirmed by the Council.

(79) The Commission will examine the situation of the market following the imposition of anti-dumping measures and, should circumstances, in particular as regards price evolution, warrant a review, this shall be initiated two years after the adoption of definitive measures.

K. COLLECTION OF PROVISIONAL DUTIES

(80) In view of the change in the form of the duty, the Council considers that it is not appropriate in this particular case to collect definitively the provisional anti-dumping duty,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of powdered activated carbon falling within CN code ex 3802 10 00 (Taric additional code 3802 10 00*91) originating in the People's Republic of China.

2. The amount of the definitive anti-dumping duty shall be ECU 323 per tonne (net weight).

3. Unless otherwise specified, the provisions in force concerning customs duties shall apply to the said duty.

Article 2

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 3 June 1996.

For the Council

The President

C. A. CIAMPI

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 September 1995

relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89

(IV/M.553 — RTL/Veronica/Endemol)

(Only the English text is authentic)

(96/346/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽¹⁾, and in particular Articles 8 (3) and 22 thereof,

Having regard to the Commission Decision of 22 May 1995 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations ⁽²⁾,

Whereas:

- (1) On 21 April 1995 the Commission received a request from the Dutch Government pursuant to Article 22 of Council Regulation (EEC) No 4064/89 (Merger Regulation) to examine the proposed joint venture Holland Media Groep SA (HMG) between RTL 4 SA (RTL), Vereniging Veronica Omroeporganisatie (Veronica) and Endemol Entertainment Holding BV (Endemol). The operation was made known to the Dutch Government on 23 March 1995 by means of a press release sent

by the parties to the Dutch Government. The request pursuant to Article 22 has therefore been made within the one-month period provided for in Article 22 (4).

- (2) After examination of the abovementioned request the Commission found that this request was admissible within the meaning of Article 22 of the Merger Regulation and that the concentration raised serious doubts as to its compatibility with the common market. By decision of 22 May 1995, the Commission accordingly initiated proceedings pursuant to Article 6 (1) (c) in conjunction with Article 22 of the Merger Regulation.

I. PARTIES

- (3) RTL is a company incorporated under the laws of Luxembourg which supplies mainly Dutch-speaking TV and radio programmes broadcast under the responsibility of Compagnie Luxembourgeoise de Télédiffusion (CLT). CLT holds — directly and indirectly — 47,27 % of the share capital of RTL. CLT is a broadcasting company, established under the laws of Luxembourg, involved in television, radio, publishing and related businesses in various national markets. The consolidated turnover of CLT in 1993 was ECU 1 937 million. The Dutch publishing company NV Verenigd Bezit (VNU) holds indirectly 38 % in RTL. RTL broadcasts two free commercial TV channels in the Dutch language, RTL 4 and RTL 5, which are directed to the Netherlands.

⁽¹⁾ OJ No L 395, 30. 12. 1989, p. 1. Corrigendum: OJ No L 257, 21. 9. 1990, p. 13.

⁽²⁾ OJ No C 160, 5. 6. 1996, p. 3.

- (4) Veronica is an association established under the laws of the Netherlands acting on the Dutch TV and radio market until September 1995 as a public broadcasting organization. Veronica was one of the three public broadcasting organizations that broadcast their programmes on the public channel 'Nederland 2'. In 1994 Veronica announced its intention to leave the public broadcasting system in order to become a commercial broadcaster. The decision to withdraw from the public broadcasting system became binding in January 1995 when Veronica did not apply for a new licence to operate as a public broadcaster as from 1 September 1995.
- (5) Endemol is a company established under the laws of the Netherlands. Endemol is the result of a merger between JE Entertainment BV and John de Mol Communications BV in 1994. Endemol is an independent producer of TV programmes, the centre of its activities being in the Netherlands.

II. THE OPERATION

- (6) The purpose of the operation is the creation of a new company, HMG, the business of which is the packaging and supply of TV and radio programmes broadcast by itself, CLT, Veronica or others to the Netherlands and Luxembourg. In view of the fact that the normal suspensions provisions set out in the Merger Regulation do not apply to cases initiated under Article 22, the parties have been entitled to complete the operation in this case, as described more fully below.

RTL holds 51 % of the shares of HGM while Veronica and Endemol, through the holding company Veronica Media Groep (VMG), hold the remaining 49 %. RTL has also acquired 20 % of the share capital in Veronica Blad BV (a subsidiary of Veronica which publishes the weekly TV magazine of Veronica) and 24,99 % in Endemol.

- (7) All existing radio and TV activities of the parties that are directed to the Netherlands have been transferred to HMG.

The assets transferred by RTL include the TV channels RTL 4 and RTL 5 and related assets, the RTL rock radio channel, the right for HMG to benefit from CLT's broadcasting licence ('concession'), the business consisting of the supply and packaging of mainly Dutch-speaking television and radio programmes to be broadcast in the Netherlands and Luxembourg, and its 50 % shareholding in IPN SA (IPN), the advertising company which sells TV advertising time for the RTL 4 and RTL 5 channels.

- (8) The assets transferred by Veronica and Endemol include the Veronica TV channel and related assets, and the Endemol radio activities (i.e. the Holland FM Radio channel).

- (9) The TV programmes of HMG have been broadcast since 1 September 1995 through three separate channels. The RTL 4 and RTL 5 channels are broadcast under CLT's Luxembourg broadcasting licence ('concession'). The Veronica channel is broadcast under a Dutch licence for commercial broadcasting.

III. CONCENTRATION

- (10) The operation constitutes a concentration within the meaning of Article 3 of the Merger Regulation. HMG is a concentrative joint venture.

On the one hand, [...] (*)

- (11) [...].

Even if the interpretation of Article 3 (4) now put forward by the parties was correct [...], the Commission's view is that there is still joint control of HMG. The fact that there is a casting vote for a parent company in case that reconciliation is not possible despite the best efforts of all parent companies, does not necessarily mean that there is no joint control (see notice on the notion of a concentration OJ No C 385 of 31 December 1994, p. 5 (paragraph 37)). This is, in particular, the case where each parent company provides a contribution to a joint venture which is vital for its operation (paragraph 34). In the present case, the basic purpose of the joint venture is to combine the two RTL channels with the new commercial Veronica channel and to ensure the supply of programmes from Endemol which is, according to the parties, vital for maintaining the profile of the HMG channels. Both the RTL side and the Veronica-Endemol side thus provide a contribution which is crucial to the operation of HMG. In these circumstances, the parent companies of HMG are only able to operate the joint venture with each other's agreement on the most important strategic decisions. The use of the contested casting vote by RTL, therefore, would in practice be limited to unusual situations and does not prevent the joint venture from being jointly controlled.

- (12) However, even in the event that there was no joint control of HMG within the meaning of Article 3 of the Merger Regulation, there would, nevertheless, be a concentration in the present case in the form of the acquisition of sole control by RTL over the assets transferred by VMG to HMG. In the specific circumstances of this case, this would not change the assessment set out below. In particular, the assessment of the effects of the concentration on the production market would remain the same, since there would still be a structural link between Endemol and HMG (see paragraph 100 below).

(*) Deleted — business secret.

- (13) Since the parent companies transfer to HMG virtually all their activities in the markets of the joint venture (commercial TV and radio in the Netherlands) there is no scope for coordination of the competitive behaviour of the parents outside the joint venture.

IV. NO COMMUNITY DIMENSION

- (14) On the basis of the figures provided by the parties the combined aggregate worldwide turnover threshold of ECU 5 thousand million is not met. It follows that the proposed concentration has no Community dimension within the meaning of Article 1 of the Merger Regulation.
- (15) It can therefore be left open whether or not the VNU is an undertaking concerned within the meaning of Article 1 of the Merger Regulation. If it is not an undertaking concerned, only one of the parties (RTL) attains an aggregate Community-wide turnover of more than ECU 250 million.

V. EFFECT ON TRADE BETWEEN MEMBER STATES

- (16) The concentration affects trade between Member States within the meaning of Article 22 (3) of the Merger Regulation. The creation of the joint venture will influence the conditions for new entrants on the Dutch TV broadcasting market and the TV advertising market, including broadcasters from outside the Netherlands. It will also have an impact on the market for the acquisition of foreign (in particular English) language programmes within the Netherlands. In addition, the joint venture, HMG, is itself a company based in Luxembourg and at least the two channels RTL 4 and RTL 5 are broadcast under the licence ('concession') conferred by the Grand Duchy of Luxembourg. Moreover, Dutch public TV channels are fed in through cable networks in Belgium. A change in the structure of the Dutch TV market will therefore have at least an indirect impact on the TV markets in Belgium. Furthermore, if the legal situation in Belgium with regard to VTM is changed so as to result in increased competition from foreign channels on this market, such competition would be likely, in particular, from Dutch commercial channels, including the HMG channels.

VI. ASSESSMENT UNDER ARTICLE 2 OF THE MERGER REGULATION

A. Relevant product markets

- (17) The concentration has an impact on the following:

(i) TV broadcasting

As explained in more detail below, all TV broadcasters compete against each other for audience shares. However, in view of the fact that there is no direct trade relationship between broadcasters of 'free' TV channels, on the 'supply side' and, viewers on the 'demand side', it might be argued that TV broadcasting does not constitute a market in the strict economic sense of this notion. Since it is not necessary to decide upon this issue for the purposes of the present case the issue is left open. However, given the fact that, in any event, the terms 'broadcasting market' and 'viewers' market' are in such common use by all concerned, the analysis in this decision adopts the terminology generally recognized in this sector;

(ii) the market for TV advertising;

(iii) the market for independently produced Dutch TV programmes, i.e. TV productions excluding in-house productions produced by the Netherlands broadcasters.

Given the competitive structure of the market, and since the market shares related to the radio stations transferred to HMG are very low, the Commission considers that the operation does not create or strengthen a dominant position in the markets for radio broadcasting and radio advertising.

- (18) The parties argued that the Commission's enquiry in the present case must be limited to the market for TV advertising since the Dutch Government had invited the Commission to examine whether the concentration would create or strengthen a dominant position as a result of which effective competition in the TV advertising market would be significantly impeded within the Netherlands. Since the Dutch Government did not identify competition problems related to other markets, any examination of other markets would, therefore, in the view of the parties, exceed the mandate contained in the request of the Dutch Government.

- (19) The Commission cannot agree with the opinion of the parties. First, Article 22 (3) expressly states that the Commission's finding is related to the concentration in question, and not to specific aspects thereof, such as, for instance, specific product markets. In this respect, Article 22 differs from Article 9. Under the latter, the Commission can

only refer a concentration with regard to a distinct market within a Member State, having regard to the products and services in question and the geographic reference market (Article 9 (3)). It is generally possible to identify markets where competition problems arise only after the examination of the concentration which the Commission has to carry out following the request of the government in question. In this respect, Article 22 provides for the same procedure as for cases having a Community dimension. Moreover, it would be difficult for a Member State to assess markets in which a competition problem may or may not occur where, as in the present case, the Member State concerned has no real investigatory powers in the absence of national provisions relating to merger control.

(i) TV broadcasting

- (20) In TV broadcasting, also commonly described as the viewers' market, broadcasters compete for audience shares. This is true, in particular, for commercial TV financed through advertising and for public broadcasters at least partially financed through advertising, since the audience shares in the broadcasting market are a determinant factor for their success in the TV advertising markets. There may also be competition for audience shares between, on the one hand, broadcasters financed through advertising and, on the other hand, public broadcasters financed only through licence fees or pay-TV suppliers financed through subscription fees. Even in the case of those broadcasters which do not carry TV advertising, audience share remains an important indicator of the attractiveness and acceptance of the broadcasting channels by the general public.

On the basis of the above, the viewers market may include all TV broadcasters. However, in terms of trade relationships between broadcasters on the supply side and viewers on the demand side a distinction has to be drawn between on the one hand the market for TV advertising, where broadcasters compete for advertising revenue and, on the other hand, the market of pay-TV, where pay-TV suppliers compete for subscriptions.

- (21) In the Netherlands, the public broadcasters are financed through both licence fees and advertising. There is, furthermore, one pay-TV supplier. For the reasons outlined above, all TV broadcasters whose programmes are distributed in the Netherlands are included in the analysis of the viewers' market set out below.

For traditional reasons, all available data on audience shares in the Netherlands has always

included that part of the audience which is related to home video. Although it appears that home video is not part of the TV broadcasting market, the analysis of audience shares, set out below, also incorporates home video. However, this does not affect the analysis of the case because the audience share attributed to home video has no relevance for the position of the broadcasters on the TV advertising market.

(ii) The market for TV advertising

- (22) Competition in the TV advertising market takes place either through the trade relationship between TV broadcasters and advertisers directly, or alternatively, through agencies which represent advertisers in their contacts with broadcasters.

- (23) The market for TV advertising must be distinguished from advertising through other media, in particular through the print media. The consumers targeted through the various types of advertising may differ considerably. In addition, the techniques employed (i.e. short films for TV advertising, graphics for magazines) together with the related production costs, are also entirely different for the various media. Furthermore, the prices in terms of targeted consumers reached are different. In the Netherlands, for example, the cost per thousand advertising contacts in 1993 was US \$ 11,22 for TV advertising (average over a whole day) as opposed to US \$ 5,04 for advertising in magazines⁽¹⁾. Although there may be fluctuations between TV advertising and other media, which are dealt with in more detail below, it is concluded that TV advertising and advertising in print media are distinct markets.

(iii) The market for independently produced Dutch TV programmes, i.e. TV productions excluding in-house productions

- (24) As explained in more detail in paragraphs 89 to 90 below, independent production of Dutch TV programmes constitutes a relevant product market which is separate from the market of in-house productions produced by broadcasters. In-house productions are mainly used by broadcasters for captive use only. These productions do not compete with those of the independent producers. The market for independent production is characterized by the trading relationship between broadcasters who need programmes to broadcast on their channels, and independent producers, suppliers of these programmes.

⁽¹⁾ Source: Young & Rubicam *Media in Europe, European Media Cost Comparison 1993*.

B. Geographic market

TV broadcasting

- (25) The relevant geographic market for TV broadcasting is in the present case limited to the Netherlands. The relevant factors to be taken into account include the applicable regulatory regime, the existing language barriers, cultural factors and other conditions of competition prevailing in this market (e.g. the structure of the market for cable networks). On the basis of these elements there is a clear distinction to be made between the Netherlands and other countries.
- (26) With respect to Flanders in Belgium, the differences in regulatory requirements (e.g. the specific Dutch system for public broadcasting, exclusive licence for commercial TV in Belgium for VTM) are such that TV broadcasting directed to the Netherlands competes in a geographic market which is distinct even from this neighbouring region. Moreover, RTL 4 and RTL 5 are not distributed in Belgium. Nederland 1, 2 and 3 are received in Belgium, since they are fed into the Belgian cable networks. However, in 1994 they attained prime time (6 p.m. — 12 p.m.) audience shares of only 3 %, 4 % and 2 %, respectively (while attaining 16 %, 17 %, 18 % respectively on the Dutch territory). The Belgian commercial channel VTM cannot be received in the Netherlands, since it is only distributed through the cable networks in Belgium. The Flemish public channels TV 1 and TV 2 are fed into the cable networks in the Netherlands where in 1994 they attained in prime time an audience share of only 2 % and 1 %, respectively (while attaining together 22 % of the Belgian TV market). Cultural barriers constitute a major obstacle to the interpenetration of the Dutch and the Belgian TV markets. TV programmes are broadcast in the same language in Belgium and in the Netherlands. Nevertheless, the differences in verbal expressions, in national taste, and in preferences for certain TV personalities over others are such that, according to the parties and all other broadcasters and producers contacted by the Commission, the TV markets in the Netherlands and the Flanders region of Belgium are to be considered as different geographic markets.

TV advertising

- (27) There is also a separate geographic market for TV advertising directed towards Dutch consumers which has to be distinguished from the TV advertising market in Belgium.
- (28) Radically different conditions of competition exist with respect to competition for advertising revenue. In the Netherlands, the 50 % subsidiary of RTL - IPN - competes with STER, the joint operation of the public broadcasting organizations, for adverti-

sing revenue. In Belgium, VTM until recently has been the only commercial channel permitted to sell commercial advertising. The Dutch STER (which is the only institution to be considered, since RTL 4 and RTL 5 are not broadcast in Belgium), which sells advertising time for the Dutch public broadcasters, does not take account of the impact of advertising on the Flemish part of Belgium, which means that it does not include the TV audience in this region in its rating cards. Similarly, VTM does not sell any advertising time in the Netherlands. In addition, regulatory rules on advertising are different in Belgium and in the Netherlands (e.g. in Belgium there are limitations concerning commercials directed to children around children's programmes, and with regard to the references to price in the course of TV advertising). Moreover, in the same way as for TV broadcasting, as described above, there are cultural barriers (differences in verbal expressions, in taste, preferences for certain presenters of advertising over another) which have to be taken into account in the assessment of the geographic market and which lead to the conclusion that a separate geographic market limited to the territory of the Netherlands exists for TV advertising.

Independent Dutch TV productions

- (29) There is a separate geographic market for independent Dutch TV productions. The Belgian Flanders region has to be excluded from the relevant market. Cultural differences are such that virtually no Dutch productions are bought in Belgium and no Belgian productions are bought in the Netherlands. This is confirmed by the Commission's investigation in this case: of all Dutch producers questioned on this point — including Endemol —, only three have indicated that they sold some TV production to Belgium. These sales are minimal in value when compared to the total value of the Dutch independent production market. Differences between the TV productions of the two countries are particularly relevant for entertainment programmes including, for instance, shows and sit-coms and for programmes related to political and cultural features. It is difficult to attract audiences in the Flemish region of Belgium by a programme using stars who are well-known in the Netherlands and not in Flanders and, similarly, it is difficult to attract the Dutch audience with programmes produced for the Belgian audience.

C. Effects of the concentration

- (30) The three markets described above are interconnected in such a way that the position of HMG or its parents in one market has a direct impact on their position in the other markets. The audience share in the viewers' market is an essential factor for determining the market position in the TV

advertising market. High revenues achieved in the advertising market enable the acquisition of more attractive programmes and sports rights, which in turn improves the position in the viewers' market. Preferred access to the most attractive programmes strengthens the position in both the TV advertising and viewers' markets while the link of Endemol as a producer with the biggest broadcaster in the Netherlands strengthens its position in the market for independent production. In particular, as explained in detail below, the combination of the strengths of the partners within HMG confers upon the joint venture itself and also Endemol a very strong position vis-à-vis their respective competitors.

1. TV broadcasting

(i) *The structure of the Dutch TV broadcasting market before the creation of HMG*

- (31) TV broadcasting in the Netherlands includes public and commercial broadcasters. In addition to channels specifically directed to the Netherlands, there are also channels from abroad not specifically

— AVRO	(independent liberal,	648 000 members),
— EO	(evangelical,	532 000 members),
— KRO	(Roman Catholic,	615 000 members),
— NCRV	(Christian,	548 000 members),
— TROS	(independent popular,	530 000 members),
— VARA	(social democrat,	531 000 members),
— VOO (Veronica)	(independent young people,	1 036 000 members),
— VPRO	(social critical,	543 000 members).

The total number of members of these associations (4 983 000 members) represents 89 % of Dutch households. The structure of each channel as divided between these associations is the following:

NED 1	NED 2	NED 3
AVRO	EO	VARA
KRO	TROS	VPRO
NCRV	VOO	NOS

The *Commissariaat voor de Media* determines the broadcasting time, as a proportion of total broadcasting time, attributed to each of these organizations as well as the days, or periods within a day, when they may broadcast. In addition, the *Commissariaat* attributes broadcasting time on the three channels to more than 35 other broadcasting organizations and bodies such as educational

directed to the Netherlands, which are fed in through the Dutch cable network.

- (32) The public sector broadcasts three channels, namely, Nederland 1, 2 and 3. These channels are run by *Nederlandse Omroepprogramma Stichting* (NOS) on behalf of eight major public broadcasting organizations (Algemene Omroepvereniging (AVRO), Vereniging Evangelische Omroep (EO), Katholieke Radio Omroep (KRO), Nederlandse Christelijke Radio Vereniging (NCRV), TROS, Omroepvereniging VARA (VARA), Veronica Omroep Organisatie (VOO) -Veronica-, Omroepvereniging VPRO (VPRO)). NOS is an umbrella organization providing administrative services and which also broadcasts itself, mainly news and sports programmes. These organizations have an 'A' status (which determines the amount of time each organization is entitled to broadcast, that is 676 hours of television per year on a designated channel) which is conferred once an organization has obtained at least 450 000 members. Traditionally, these organizations reflect cultural and political differences existing in the Netherlands, including protestants, catholics, liberals and socialists. According to the *OMROEP Handboek 1994/95* (page 2), the basic characteristics of the major eight organizations are the following:

cooperations (Educom, NOT, RVU and Teleac), churches (e.g. IKON, RKK) and social and cultural groups (e.g. HOSS, Socutera), the *Minister van Algemene Zaken* (Prime Minister's Office) and the political parties.

- (33) The structure of the public broadcasters resulting from this configuration is quite complex and lacks flexibility. Discussions between the organizations are necessary in order to be able to broadcast. Coordination of programming between them is currently difficult. The Dutch Government has informed the Commission of its attempts to improve the current coordination of programming between the organizations. These attempts move in two directions, in order to achieve better vertical coordination between organizations broadcasting on the same channel and also to achieve horizontal coordination between the different channels. However, it is doubtful whether these attempts will lead to a significant change within the next five

years. The differences of opinions and political orientations are such that vertical coordination will remain difficult in practice for some years at least and horizontal coordination will probably also be limited with respect to the actual content of programmes.

(34) Commercial broadcasters in the Netherlands include channels broadcast in Dutch and channels broadcast in a foreign language. Channels broadcast in Dutch include RTL 4 and RTL 5 and some special interest or niche channels, such as Kindernet and Eurosport. In addition, there are newcomers which include the channel SBS 6 (intended to be broadcast from September 1995) and special interest channels like TV 10 Gold and The Music Factory (Arcade's channels), which began broadcasting in May this year. Channels broadcasting in foreign languages include ARD, WDR, BBC, TV 5, RAI.

(35) Whilst the public channels are distributed by cable and terrestrial transmission (covering 98 % of Dutch households), the commercial broadcasters are mainly distributed via cable networks. In 1994, RTL 4 and RTL 5 reached about 93 % of Dutch households. For a company to be able to broadcast in the Netherlands it must demonstrate its ability to reach at least 30 % of the population connected to the cable networks in the first year of transmission, and 60 % of the population in the second year of transmission. It appears, however, that this legal requirement may be abandoned in the future, in accordance with current proposals to amend the media law in this respect.

(36) RTL began broadcasting in the Netherlands in 1989 when the RTL 4 channel was introduced. Before that year, the public channels had about 80 % of the Dutch viewers' market. By 1992, their share had declined to 53 % of total viewing. The yearly average market shares on the Dutch TV market are (1994 figures in prime time, i. e. 6 p.m. — 12 p.m.) the following:

— Nederland 1:	16 %
— Nederland 2:	17 %
— Nederland 3:	18 %
— RTL 4:	26 %
— RTL 5:	6 %
— Others (foreign channels, pay TV, video):	17 %

In 1994, the public broadcasters attained a 51 % market share, RTL 4 and RTL 5 32 %, the other broadcasters together 17 %. In the first three months of 1995 the market shares of RTL 4 and RTL 5 increased to 34,3 %.

(ii) *Structure of the TV broadcasting market in the Netherlands following the concentration*

(37) In accordance with its previously declared intention, Veronica committed itself to leave the public broadcasting system at the beginning of 1995 and to become a fully-fledged commercial broadcaster, operating seven days a week instead of two and half days. Veronica has obtained a licence from the Dutch authorities to operate a commercial channel and began broadcasting on 1 September 1995.

(38) Without the creation of HMG, Veronica would have been the strongest commercial competitor of RTL 4 and RTL 5. As a result of the creation of the joint venture, however, the programmes of RTL 4, RTL 5 and Veronica will be coordinated. Consequently, HMG will become the strongest broadcaster in the Netherlands.

(39) In the business plan for HMG (drafted in January 1995), the parties expected the three channels to obtain a combined audience share of [...] in 1996 (RTL 4 [...], RTL 5 [...]). The parties now argue that these figures must be corrected since they consider that the new commercial broadcaster SBS, which began broadcasting at the end of August 1995, will attain a better market position than the parties originally envisaged. The parties now expect HMG to attain an audience share of [...] if SBS attains 4 %, and [...] if SBS attains 8 %.

(40) The position of HMG on the broadcasting market will be determined, on the one hand, by the specific strengths of this combination and, on the other hand, by the ability of the public broadcasters, and other commercial broadcasters, in particular SBS, to compete against HMG.

(iii) *Strengths of HMG*

(41) RTL 4 and RTL 5 are the only Dutch commercial channels offering a full programme service to date. The RTL 4 channel, operating since 1989, has established an average annual audience share of 26 %. Its programmes are mainly geared towards families. One particular target group is housewives. RTL 4 can be characterized as the station of the stars, its image derived in particular from entertainment programmes. The success of RTL 4 in this context can be illustrated by the fact that, out of the 56 non-sports programmes with the highest audience ratings in the 1993/94 season, RTL 4 broadcast 33 of these programmes. The RTL 5 channel was introduced in 1993, and, in the meantime, has attained an annual average audience share of 6 %. Its programmes are directed partially towards young people.

Since RTL 4 SA belongs to the CLT group it has access to the large resources of this group, which also operates strong and successful television channels in other European countries.

- (42) Veronica is generally acknowledged as being the most popular public broadcaster. On the days it broadcasted on Netherlands 2 Veronica's audience share varied between 17 % in June and July 1994 and 25 % in November 1994. Veronica is the broadcasting association with by far the highest number of members (more than one million as opposed to 500 000-600 000 for each of the other associations). The main target group of Veronica is young people, in particular the 20 to 34 age group, including young families. It is also slightly more male orientated than the RTL channels. As demonstrated by its slogan 'young, wild and exciting', Veronica's image is that of a modern and dynamic television station. Its successful programmes include, for instance, the weekly show 'All you need is love' which, in terms of audience rating, is one of the highest ranking non-sports programmes.
- (43) The combination of the three channels RTL 4, RTL 5 and Veronica enables HMG to coordinate their programme schedules in order to attract a maximum of viewers and to react against any competing channel. Unlike a situation where Veronica would have been a commercial channel on its own, there will be no competition between Veronica and the RTL channels. On the contrary, HMG can coordinate the targeting of the different viewer's groups and provide complementary programme schedules on all three channels throughout the day.
- (44) The main target groups are covered by RTL 4 and Veronica. RTL 5, therefore, can be used as a 'fighting channel' which can directly counteract the programming of competing channels and, in particular, the programmes of new entrants on the market. In fact, in the HMG 'trend letter' to the personnel of HMG, the Programme Director of HMG stated that RTL 5 will become the fighting channel and will be the most flexible station of the Netherlands which will, through its programming, when necessary, immediately anticipate competing channels.
- (45) The combination of the RTL channels and Veronica is further strengthened by HMG's structural link to Endemol, one of its parent companies. As explained in more detail below (see paragraphs 91 to 97), Endemol is by far the biggest Dutch independent producer of TV programmes. Endemol owns the rights to and produces the most popular TV programmes. It has favoured access to successful TV programme formats and has the most popular TV personalities under contract, many on an exclusive basis. Endemol was already in the past

the main programme supplier to RTL 4 and RTL 5 as well as Veronica. However, this relationship is now based on a structural link which guarantees the preferential access of the three channels to the most successful productions made by Endemol. While such preferential access flows from the structural link in itself, it is also illustrated by the production agreement between HMG and Endemol which, *inter alia*, grants HMG [...].

- (46) Another shareholder in HMG is VENU, one of the leading Dutch publishers. VNU publishes a large number of general family weekly magazines (e. g. *Libelle*, *Margriet*, *Panorama*, *Story* and *Nieuwe Revue*) which incorporate television programme information and other features which may promote specific programmes and stars. A structural link between a TV broadcaster and print media dealing, *inter alia*, with TV-related features can be used to promote the TV programmes of the broadcasters. This may occur, despite the existence of statutes on editorial independence, since experience shows that ownership of print media tends to influence the general orientations of the media. Furthermore, there can be direct cooperation between broadcasters and print media owners which are linked. An example is the health and beauty magazine *Top Santé* in which VNU owns 40 %. This magazine is related to the television programme broadcast under the same name by RTL 4. No other Dutch broadcaster has similar links to print media.

In this context, it is also of importance that the Veronica association owns *Veronica Gids* the largest Dutch TV programme guide with a weekly circulation of more than 1,2 million copies and a market share for TV guides of around 25 %. This confers upon the three channels of HMG a major competitive advantage for the promotion of their programmes.

(iv) *Possibilities for the public broadcasters to react*

- (47) In contrast to HMG, the public broadcasters are not able to coordinate programming on the three public channels in such a way as to provide complementary programme schedules. As outlined above (in recital 33), the different orientations of the various public broadcasting organizations make it inherently difficult for them to achieve coordinated programme schedules on each of the channels and to provide each channel with a specific image or identity. The targeting of import viewer groups, therefore, is much more difficult for Nederland 1, 2 and 3 individually than for RTL 4, RTL 5 and Veronica. Furthermore, experience shows that the overall framework of public broadcasting in the

Netherlands renders it difficult to coordinate programme scheduling as between the three channels. It happens that the same type of programme is broadcast at the same time on more than one public channel. Even if there are attempts to improve horizontal and vertical coordination in public broadcasting, it appears that, for the reasons outlined above, such attempts can only achieve a limited degree of success over the next five years. Any significant improvement would probably require a radical change of the public broadcasting system itself.

- (48) The parties argue that the public broadcasters have a guaranteed source of revenue from the licence fees, which amounted to more than Fl 900 million in 1994 and which, together with the advertising revenue, amounted to more than Fl 1,4 billion, thereby conferring upon the public broadcasters a strong competitive advantage. It must be noted, however, that the licence fees and revenue from radio and TV advertising are not only earmarked for NOS and the eight major broadcasting organizations. The revenue of the Dutch Ministry of Culture available for the total public broadcasting system in the Netherlands in 1994 was composed of Fl 968 million derived from licence fees, Fl 460 million derived from radio and TV advertising and Fl 18 million interest revenue. The total amount of Fl 1,446 billion was spread as follows:

	(Fl million)
Nationwide public TV and radio broadcasting	1 059
NOB (transmission, studios, archives, radio orchestra, etc.)	120
Dutch world radio	79
Regional TV and radio broadcasting	24
Foundations, etc. (stimulating funds for Dutch productions)	72
Reserves	87
Others	5
Total	1 446

It follows that this budget and also, in particular, the revenue from the licence fees, has to cover a large number of different items which go far beyond the financing of NOS and the eight major broadcasting associations. Even the amount of around Fl 1 billion which is earmarked for the nationwide broadcasting is not all available for the TV activities of these organizations. This amount also covers the financing of the public radio stations (Fl 217 millions) and the more than 35 organizations and bodies mentioned above which

also broadcast via the three public channels. With respect to the eight major organizations, each of them received Fl 58,5 million in 1994 from the total public income derived from licence fees and advertising revenue. NOS received Fl 180 million (Fl 129 million for general programming, Fl 35 million for events, Fl 8 for teletext, Fl 7 million for minorities and Friesland television). The advertising revenue (Fl 460 million) is totally earmarked for nationwide TV and radio broadcasting. The total budget of Fl 1 059 million for these activities is covered to the extent of Fl 600. The advertising revenue, therefore, accounts for around 43 % of the budget for all nationwide public TV and radio activities.

On the basis of the above, it can be concluded that the licence fees are intended to finance a broad and complex system of public broadcasting, including radio and TV. NOS, as a TV broadcaster, and the other eight major associations receive only a certain proportion of the licence fee income. Moreover, the advertising revenue plays an important role for them.

- (49) In considering the amount of guaranteed income for the public TV broadcasters derived from licence fees, account should be taken of the fact that the level of staff, and hence overhead costs, of the public broadcasters is much higher than that of their commercial competitor RTL 4. The number of employees of the nine principal public broadcasting organizations amounts to around 2 300 whilst RTL 4 and RTL 5 operate on the basis of around 350 employees. HMG, operating three channels like the public broadcasters, will have a staff of around 500 employees. This is still less than one quarter of the staff employed by the public broadcasters. More generally, the complexity of the Dutch public broadcasting system, in particular, the multiplicity of broadcasting organizations and related assets inevitably leads to comparatively higher costs for the public broadcasters as compared with commercial broadcasters.

- (50) The parties point out that, in 1995, in addition to the normal licence fee income, the public broadcasters will receive an additional Fl 67 million funding. It should be noted, however, that this additional income, which is sourced from the reserves of the public broadcasters, would appear to be a one-off sum.

- (51) By contrast, as explained in detail below, there will be a significant long-term reduction in the advertising revenue of the public broadcasters following the creation of HMG due to the position which HMG will attain on the TV advertising market. This loss of revenue will have a direct impact on the production budget of the public broadcasters which, in turn, will have repercussions on the

viewers' market. These repercussions will be particularly significant if the public broadcasters either lose the right to broadcast major sports events to HMG or are obliged to bid very high amounts in order to keep these rights⁽¹⁾. The parties contend that, whilst the sports rights for the Dutch soccer league currently cost Fl 17 million, this cost is expected by some to increase to Fl 75 million in 1995/96.

In general terms, the parties argue that the acquisition of sports rights requires large investments which can not be counterbalanced by the resulting revenues obtained from advertising, and that, therefore, it is mainly public broadcasters with public funding who would be prepared to pay for such rights. However, the Chairman of HMG stated explicitly [...].

- (52) A further disadvantage for the public broadcasters will result from the structural link between HMG and Endemol which will provide HMG with preferential access to the most attractive Endemol formats and programmes. It follows that the public broadcasters are not likely to obtain these programmes. This will make it particularly difficult to fill the gap created by Veronica's departure from the public system since the success of Veronica's programming was to a large degree linked to productions from Endemol.
- (53) For the reasons outlined above, which constitute an essential structural element of the Dutch TV market, the possibilities for the public broadcasters to compete against the new entity HMG in the viewers' market are limited. More generally, the very nature of public broadcasting limits the ability of the public broadcasters to react in a commercial manner to a commercial broadcaster such as HMG. Whilst HMG can optimize its programming from a commercial point of view in order to attract a maximum of viewers, the public mission of the public broadcasting associations does not permit them to try to behave in the same manner. The public mission requires that the three public channels provide at least a minimum of programmes which are directed towards the whole spectrum of viewers, including those programmes which are attractive for only a limited number of viewers (e. g. arts and other cultural programmes and information programmes for minorities, etc.).

(v) *Market entrance of SBS*

- (54) On 28 August 1995 SBS, a new Dutch commercial broadcaster started broadcasting in the Netherlands. SBS will provide a general entertainment

programme channel (SBS 6), including 45 % Dutch language productions. SBS is owned by the Scandinavian Broadcasting System (SBS) which was established in 1990 and which operates commercial TV channels in Scandinavia and, since February 1995, a Dutch-language channel (VT 4) directed to the Flemish region of Belgium. The turnover of the SBS group was around USD 700 million in 1994.

- (55) The parties argue that SBS will be a strong competitor to the three HMG channels. It appears, however, that the scope for SBS to compete in the Netherlands is limited in comparison to HMG. RTL 4 and RTL 5 are well established commercial channels in the Netherlands, and Veronica, while new as a commercial broadcaster, is nevertheless well-known to the Dutch TV audience in general and its one-million-plus members in particular. By contrast, the SBS 6 channel is totally new to the Dutch audience and will have to develop an image from scratch. In addition, SBS will only be able to operate one channel, as opposed to the three channels of HMG, which permits the latter to provide overall coordinated and complementary programming scheduling and the coordinated targeting of all viewer target groups.
- (56) The parties stress that SBS has announced that the SBS 6 channel will have an annual programme budget of Fl 70 million. The parties conclude from this that SBS will be a major player on the market and will achieve a market share of at least 8 %, if not more. However, it appears that a programme budget of this Fl 70 million for a full commercial channel in the Netherlands is relatively small. According to the business plan of HMG, the programme budget for the Veronica channel alone is around Fl [...].
- (57) The parties argue, furthermore, that the most important shareholders in SBS are the US companies ABC and Viacom and that SBS could, therefore, rely on the financial and programme resources of these companies. However, it should be noted that Viacom has no direct stake but only an option to acquire 6 %. Furthermore SBS itself is a relatively small company compared, for instance, to the CLT group.

Moreover, by contrast to CLT which has a strategic interest in supporting the number one broadcaster in the Netherlands, one may question whether a US media company such as ABC, holding a stake of 23,4 % in SBS, would have an equivalent strategic interest in supporting a relatively small Dutch channel beyond establishing a certain foothold in the Netherlands. Moreover, it should be noted that ABC has no film rights of its own. It is true that SBS has concluded an agreement with Paramount Pictures, a subsidiary of Viacom, which provides SBS access to the Paramount library. However, SBS will not be able to capitalize on this opportunity in the next two to three years [...].

⁽¹⁾ It is true that NOS, as a member of the European Broadcasting Union (EBU) has preferential access to certain sports events. However, this does not include, in particular, the Dutch soccer league.

- (58) The parties argue, furthermore, that SBS could obtain preferable access to the film rights of the Walt Disney Corporation through the proposed acquisition of Capital Cities — ABC by Walt Disney. However, it should be noted that CLT recently entered into a joint venture with Walt Disney, which will operate the new German TV channel Super RTL. It appears that this operation forms part of a broader cooperation between CLT and Disney to develop jointly Disney channels in European countries. In addition, it should be noted that ABC has a stake in the German TV channel RTL 2, where CLT is another shareholder. [...].
- (59) Furthermore, in general terms, the requirement under Dutch law that a new commercial channel must have access to cable networks covering at least 30 % of households over at least five provinces is, for the time being, a major hurdle for new commercial channels which are not yet known to the TV audience. Given this requirement, SBS has had to face a strong negotiating position of the cable companies in order to attain this threshold and to attain a broad coverage of the Dutch TV audience (currently at 45 %). By contrast, Veronica has already obtained full access to all Dutch cable systems as a result of its pre-existing presence in the Netherlands as a public broadcaster and its popularity amongst TV viewers. Even if the requirement of a certain coverage of the Dutch cable networks were to be abandoned in the future, in practice there will still be the necessity to cover a significant amount of households connected to the cable network in order to enter the Dutch TV market, given that the terrestrial frequencies in the Netherlands are reserved for the public broadcasters and that there are relatively few satellite households in the Netherlands, due to the broad coverage of the cable networks. This need to be fed into the cable networks and the control of these networks over capacity within these networks in any event confers a strong negotiating position on the Dutch cable operators vis-à-vis any newcomer, which constitutes a major hurdle for the latter. This situation is likely to be aggravated by the fact that, in accordance with proposals to amend the current media law, cable operators would be able to operate TV channels themselves and to offer their own packages of TV channels which would lead to a further negotiating advantage for the cable operators themselves.
- (60) Finally, SBS is particularly vulnerable to the possibility that HMG could use RTL 5 as a 'fighting channel' against new competitors in the market. In fact, SBS stated in the hearing that the programme schedule of RTL 5, which has recently been announced, is an exact copy of the schedule put out to advertisers earlier by SBS. As a result, SBS has been forced to change its schedule in an attempt to distinguish itself from HMG, and fears that this change will reduce the possibility for SBS 6 to retain its audience over an evening.
- (61) It follows that, whilst the successful entry on to the Dutch market would in any event be difficult, the chances for SBS to attain a significant position on the Dutch TV market are rendered even more difficult as a result of the creation of HMG.
- (vi) *Other channels*
- (62) There are some other small Dutch language channels operating in the Netherlands, which are mainly special interest channels such as Kindernet (children), Eurosport (sports programmes) or regional or local stations. These channels have not achieved a significant market share to date.
- In addition, the Dutch company Arcade has recently launched two channels, the Music Factory and TV 10 Gold. The former is a music channel. In the event that this channel attains a certain market share, this could be mainly to the detriment of the pan-European music channel MTV which is fed into Dutch TV cable networks. TV 10 Gold is principally a re-run channel which broadcasts existing productions, such as old TV series.
- (63) The abovementioned channels are all limited with respect to the scope of their programmes. Any attempt by these channels to extend their scope of programming to any significant extent would be faced with the strong position of the three HMG channels. The existence of HMG, therefore, can only serve to discourage and probably dissuade any such attempts. With respect to the public broadcasting associations, it should be noted that they had the same opportunity as Veronica to become a commercial channel. However, they all applied at the beginning of this year for a licence as a public broadcaster for the next five years. Therefore, at least during this period, there will be no new commercial channel from the side of the public broadcasters.
- (vii) *Conclusion*
- (64) For all the abovementioned reasons, HMG will achieve a very strong position in the TV broadcasting market in the Netherlands. This is likely to be in the order of around 42 to 43 % and will give the three HMG channels a higher market share than the three public channels collectively. In any event, the market position is likely to be at least around 40 % which would place HMG and the three public channels more or less on the same level. However, it is not necessary to determine the precise audience share since, for the competitive assessment in this case, the prime significance of the audience share is that it is the most important parameter for determining market power in the TV advertising market. As explained below, the Commission's view is that HMG will obtain a dominant position in the TV advertising market in either of the two situations.

2. Impact of HMG on the TV advertising market

(i) Structure before the creation of HMG

(65) In 1994 the market share of the public broadcasters as a group in the Netherlands, and of RTL, was around 50 % each. It is noted that RTL had an equal share of the TV advertising market although its audience share was significantly lower than that of the public broadcasters. In fact, RTL 4 and RTL 5 enjoyed a bonus factor of 1,3 (that is, if the channels which do not broadcast directly to the Netherlands market are excluded i.e. those representing the 17 % audience share, the audience share of RTL 4 and RTL 5 was 38,6 % in 1994, which leads to a bonus factor of 1,3 in the TV advertising market since the market share in the latter was 50 %). This bonus factor can be explained, *inter alia*, by the restrictions imposed on the public channels under Dutch media law. The amount of advertising they may broadcast is limited to 6,5 % of total broadcasting time. Furthermore, the public broadcasters are not permitted to interrupt programmes for advertising. In contrast to this, RTL, as a commercial broadcaster, is only limited by the rules incorporating the 1989 Television Broadcasting Directive (which limits advertising to a maximum of 15 % of total broadcasting time and, more importantly, permits commercial breaks within certain limitations). In practice, the possibility of commercial breaks in particular confers a considerable commercial advantage upon RTL. As a commercial broadcaster Veronica now enjoys the same advantage vis-à-vis the public broadcasters.

(66) More generally, the RTL channels enjoyed in the past, and the HMG channels will enjoy in the future, further competitive advantages in the TV advertising market vis-à-vis the public broadcasters. Whilst RTL was able (and HMG will be able) to provide its channels with a specific profile by covering specific target groups, it is much more difficult for the public broadcasters to develop a profile for their channels. Since several public broadcasting organizations are required to share the same channel, the broadcaster, in fact, changes from day to day. Given the different general orientations of the several public broadcasting organizations, it is difficult if not impossible for a public channel to create a coherent programming schedule and, therefore, to develop a permanent identity and profile. In addition, the constraints on the public broadcasters resulting from their public mission and their organizational structure render it much more difficult for them to provide a programme environment on a permanent basis which is particularly attractive for the advertising industry. With respect to the public mission, it should be noted that at least 10 % of its programme is related to culture (including a

minimum of 5 % arts) and 15 % to information and education. Furthermore, it should also be noted that not only the licence fees but also the advertising revenue (which is obtained by STER) are first transferred to the Dutch State. As outlined above, NOS subsequently receives a market share of these revenues on the basis of a budget approved by the Dutch Government. The other eight major broadcasting organizations each receive an equal share of the revenues from the licence fee and advertising income. It is obvious that such a system removes some of the incentives for the public broadcasters to provide programmes mainly with a view to maximizing advertising revenue.

(ii) Situation after the creation of HMG

(67) In their business plan the parties expect to attain a market share of [...] in the Dutch TV advertising market in terms of spot revenue in 1996, which would increase to [...] in 1999. The parties now argue that this figure must be reassessed since the competitive potential of SBS is stronger than was considered to be the case at the beginning of the year. According to the parties, the market share of HMG will be [...] in the event that SBS attains a market share of 8 %. The bonus factor now attributed by the parties to HMG is [...].

(68) As outlined above, it is probable that the three channels of HMG would attain an audience share of 42 to 43 %. An audience share of 42 % of the total market would result in a market share of 50,6 % where the foreign stations are excluded. Based on a bonus factor of 1,3 (that of RTL 4 and RTL 5 in the past), this would lead to a share in the TV advertising market of 65,8 %. Based on bonus factor of 1,2 [...], the three HMG channels would attain 60,7 % of the TV advertising market.

(69) The Commission ordered an econometric study carried out by a consultant company experienced in the Dutch media market. (A copy of this study was sent to the parties). The study is based on an economic market model and makes use of some basic parameters relevant for the development of the TV advertising market in the Netherlands and the position of players in this market. The model calculated market shares in the TV advertising market based on alternative assumptions of future audience structures of broadcasters in the Netherlands.

(70) The first scenario takes the assumptions [...] but corrects this figure by taking into account a 4 % market share for SBS 6⁽¹⁾. The assumptions of the market shares in 1996 are as follows:

⁽¹⁾ In the study the 4 % is attributed to SBS/Arcade. However, as explained above, the market share gained by Arcade would mainly be to the detriment of MTV and could be included therefore in the market shares of the non-domestic channels.

Assumptions about audience market shares in 1996*(6 p.m. to 12 p.m.)*

Veronica	16,4 %
<u>RTL 4 and RTL 5</u>	<u>26 %</u>
HMG	42,4 %
NEDS ⁽¹⁾	36,6 %
SBS 6	4 %
Foreign stations	17 %

⁽¹⁾ Nederland 1, Nederland 2 and Nederland 3 combined.

On the basis of these assumptions the share of TV advertising revenue would be the following for 1996:

Share of TV advertising revenue (1996)

Veronica	24,2 %
<u>RTL 4 and RTL 5</u>	<u>38,5 %</u>
HMG	62,7 %
NEDS	31,7 %
SBS 6	5,6 %

- (71) The second scenario is similar to the first except that SBS 6 would obtain a market share of 8 %. Accordingly, the audience market share assumptions are as follows:

Assumptions about audience market shares in 1996*(6 p.m. to 12 p.m.)*

Veronica	15,5 %
<u>RTL 4 and RTL 5</u>	<u>24,8 %</u>
HMG	40,3 %
NEDS	34,7 %
SBS 6	8 %
Foreign stations	17 %

On the basis of these assumptions, the market shares in the TV advertising market would be as follows:

Share of TV advertising revenue (1996)

Veronica	22,8 %
<u>RTL 4 and RTL 5</u>	<u>36,3 %</u>
HMG	59,1 %
NEDS	29,9 %
SBS 6	11 %

Both of these scenarios were based on the assumption that the three HMG channels could collectively attain a higher audience share than the public broadcasters.

- (72) Another series of scenarios were based on the assumption that the three HMG channels would attain an audience market share equivalent to that of the public broadcasters.

On the basis of a 39,5 % audience share for both the public broadcasters and also for HMG, and a market share of 4 % for SBS 6, the model calculated the market shares in the TV advertising market as follows:

Share of advertising revenue (1996)

Veronica	22,3 %
<u>RTL 4 and RTL 5</u>	<u>37,2 %</u>
HMG	59,5 %
NEDS	34,9 %
SBS 6	5,6 %

On the basis of a 37,5 % audience share for both the public broadcasters and also for HMG, and a market share of 8 % for SBS 6, the model calculated the market shares in the TV advertising market as follows:

Share of TV advertising revenue (1996)

Veronica	21 %
<u>RTL 4 and RTL 5</u>	<u>35 %</u>
HMG	56 %
NEDS	32,9 %
SBS 6	11 %

- (73) In the three of the four scenarios described above, the market share of HMG in the TV advertising market was around 60 % or more. In one scenario it was still at the level of 56 % ⁽¹⁾.
- (74) Given the abovementioned expectations of the parties, the bonus factor for HMG and the results of the econometric model, it is highly likely that the market share of HMG in the TV advertising market will be at least 60 %.

⁽¹⁾ The assumption of the audience shares on which this scenario was based, however, does not appear to be realistic. The same is true for other theoretical scenarios calculated by the model in the study.

(75) Indeed, there are indications that this market share figure could be significantly higher in 1996 itself or at least over time. The important parameters for the future development of HMG's position in the TV advertising market are, in particular, the following:

- improvement in audience ratings and audience shares,
- flexibility in offering suitable slots on the three HMG channels including commercial breaks,
- possibility offering package deals to advertisers,
- sponsoring.

(It should be noted that not all of these parameters were fully taken into account in the study referred to above).

(76) Given the strategic advantages of HMG as a combination of three channels as outlined above, and its preferential access to the most popular Endemol productions, it can be expected that HMG's share of the viewers' market and its audience ratings will increase over time. This will be even more true if HMG is able to acquire the rights to important sports events, such as the rights to the Dutch soccer league. Although the parties argue that advertising revenue generated by sports programmes frequently does not cover the cost of the rights themselves, the broadcasting of sports programmes can be a major feature for the profile of a channel and overall, therefore, can be reasonable from a commercial perspective. Furthermore, given that HMG operates three channels, it has a good opportunity to maximize the use of the rights in broadcasting and advertising terms.

(77) The possibility to make use of commercial breaks generally confers a major advantage on commercial broadcasters. This advantage is further strengthened if a commercial broadcaster operates three channels which are fully coordinated. HMG can maximize the possibility to offer suitable lots to the advertising industry, for example, by offering slots for specific target groups across the three channels in a complementary manner.

(78) More generally, HMG can offer package deals to advertisers which go beyond the normal practice of granting rebates on the basis of the total value of advertising time purchased. HMG can, in commercial terms, link advertising on one channel with advertising on one or more of its other channels. This can be achieved through devising a tariff structure to this effect which makes such a package compelling for advertisers. This can also be achieved through offering hidden discounts to advertisers, for example, by offering a certain amount of free advertising time on a channel

which is not performing as well as the others. In principle, STER is also able to offer package deals for the three public channels since it acts as a sales organization for all public broadcasters. However, the package deals offered by HMG are likely to be more commercially attractive than those offered by STER because, given the structure of the public broadcasting system, it is difficult to develop a specific profile for each of the public channels and to cover specific target groups.

(79) A further important factor in TV advertising is sponsoring. It should be noted that the market shares in the TV advertising market outlined above are only related to spot advertising and do not include other kinds of non-spot advertising. Non-spot advertising includes the following:

- bill-boarding (that is, indicating that a programme was supported by a brand),
- in-script advertising (e.g. presenting a specific product or brand during a talk-show),
- in-programme branding (e.g. presenting the brands of products which are gained as prizes in a game-show),
- charity programmes, which promote charitable organizations,
- lotteries, sponsored by advertisers,
- consumer advice programmes, sponsored e.g. by banks or health organizations,
- product placement (i.e. the promotion of specific brands in a drama or other production by drawing the attention of the viewer to the brands used in the programme).

(80) It is estimated that these types of sponsoring account for at least 10 % of the overall TV advertising market in the Netherlands. Given the restrictions imposed on the public broadcasters with respect to sponsoring, non-spot advertising in the Netherlands is largely carried out by RTL 4 and RTL 5. It is likely, therefore, that HMG, with its three channels, will retain this position in the future. It is obvious that deals on sponsoring can also be linked to the sale of spot advertising. The position of HMG in the sponsoring segment on the advertising market will, in turn, strengthen its position in the spot advertising market.

(iii) *Position of advertisers*

(81) The parties argue that the TV advertising market generally is a buyers' market in which advertisers purchase advertising time from both STER, representing the public broadcasters, and IPN, representing RTL 4 and RTL 5, and switch easily between them.

According to the parties, the high level of competition within the Dutch TV advertising market is further evidenced by the fact that, since 1990, there has been an average decrease in prices of 6,3 % (corrected to take account of inflation).

- (82) However, this line of argument overlooks, first the fact that the competitive situation to date will radically change as a result of the creation of HMG. Unlike the situation in the past, where RTL has operated only two channels and targeted (with its main channel RTL 4) primarily older families and housewives, HMG, by adding the Veronica channel which targets young families and has a male orientation, will cover all the main target groups which are interesting for advertisers. Given the expected audience share of HMG and its competitive advantages in the TV advertising market, described

above, it will be extremely difficult for advertisers to avoid buying advertising time on the HMG channels. Advertisers, therefore, will be dependent on IPN so that it would be almost impossible for advertisers to play STER off against IPN and to avoid a situation where HMG sets the prices.

Secondly, it is true that there was an average price decrease of 6,3 % if the year 1990 is taken as the reference year. However, this is due to the fact that there was a sharp price decrease from 1990 to 1991 following RTL 4's entry on to the market. By contrast, when a comparison of prices is made using 1991 as the reference year the development of prices clearly shows an increase in real prices i.e. corrected for inflation. According to the statistics of VEA (the association of the advertising agencies) the prices developed as follows in terms of price per thousand contacts.

Index (1991 = 100)	1991	1992	1993	1994	1995 Prognosis
12.00 p.m. to 12.00 p.m.	100	107	102	108	114
6.00 p.m. to 12.00 p.m.	100	108	104	111	120

(This table of the VEA does not take into account the development of special rebates granted to advertisers since no official data is available. The VEA estimates that, due to a certain increase in these rebates, the index for 1994 for 12.00 p.m. to 12.00 p.m. would be around 104 instead of 108. This means, however, that there would still be a significant increase in real prices with the period under consideration leading to an index, including rebates, of 107 in 1995 for 12.00 p.m. to 12 p.m. and 110 for 6.00 p.m. to 12 p.m.).

It follows that the entrance of RTL 4 in the market opened competition and led, in the short term, to a substantial decrease in prices. However, since 1991, by which time RTL 4 had become established on the market, the development of the advertising prices was clearly above the general inflation rate and the price increase was particularly high in prime time viewing hours (6.00 p.m. to 12 p.m.). It is doubtful, therefore, whether, even in the past, the market was as competitive as argued by the parties and, in any event, a price development as outlined above is not very indicative of a buyers' market.

a new advertising strategy rather than to a reaction to changes in prices. This can be evidenced by the fact that there was a significant and continuing growth in the TV advertising market even though price increases, after inflation, for advertising in magazines and newspapers were below the TV advertising during the years 1991 to 1995 (index 1995: magazines 106, newspapers 103).

(iv) *Potential new entrants*

- (83) The parties argue, furthermore, that the TV advertising market cannot be seen over time in isolation since advertisers shift parts of their advertising budget over time from TV advertising to print media and vice versa. It is true that, for certain brands, the proportion of TV advertising in the media-mix of their advertising campaigns may increase or decrease over time. However, it will always be necessary for a number of advertisers to have at least a part of total advertising on TV. Changes in the various proportions are due more to
- (84) The parties argue that the Dutch TV advertising market will experience substantial growth in the future and therefore, will attract the entrance of newcomers. According to the general expectation in the market, an average annual growth rate of 8 % appears to be realistic. However, an 8 % growth in value does not necessarily result in an 8 % increase in TV advertising time sold. This figure also includes the increase in prices due to general inflation and also, as in the past, price increases in real terms.

(85) It appears that an average annual growth rate of TV advertising revenue of around 8 % over the next four years leaves only limited scope for newcomers. The business plan of the parties shows an increase of their expected spot advertising revenues in 1997 of [...], in 1998 of [...] and in 1999 of [...]. This means an average annual growth of [...]. Given the high market share of the parties (at least 60 % in 1996), an average annual growth of the TV advertising revenues of HMG which is above the expected general growth of the market would clearly lead to a situation where the largest part of the growth of the TV advertising market is captured by HMG. Furthermore, it can be expected that the other broadcasters active in the Dutch TV advertising market will try to retain as much of their market share, which will already be at a relatively low level in 1996. It can be expected, therefore, that despite the comparatively high future growth of the Dutch TV advertising market there will be no significant room for market entrants.

(86) Furthermore, the strengths of HMG, as outlined above, constitute a major obstacle for new entrants. It would be difficult for any newcomer to build up a programme schedule for the Dutch market which would be attractive for advertisers since the main targets are already covered by HMG. Every newcomer could have to face the power of the three combined HMG channels and the latter's possibilities to react immediately to new entrants, *inter alia*, by using RTL 5 as a fighting channel. The existence of HMG, therefore, is, in itself, dissuasive for the market entry of any potential newcomer.

(v) *Conclusion*

(87) For the reasons outlined above, HMG will be the clear market leader in the Dutch TV advertising market having a market position high above the other players in the market and will be in a position to counteract all active attempts to compete from existing players and will render the entrance of newcomers to this market very difficult. In this context it should be noted that a number of media buying agencies and advertisers, whilst generally welcoming Veronica's decision to become a commercial broadcaster, expressed concerns on the combination of the RTL channels and Veronica in HMG.

On the basis of the analysis above, the Commission has reached the conclusion that the creation of HMG will lead to a dominant position in the Dutch TV advertising market.

3. Market for Dutch independent TV production

(i) *Situation before the creation of HMG*

(88) Dutch language TV production is carried out either by independent producers or through the in-house production of Dutch broadcasters. Whilst RTL 4 and RTL 5 have only limited in-house production, the public broadcasters produce a significant proportion of programmes themselves. This is particularly true for NOS which, in terms of hours broadcast, has more than 80 % in-house production (based on a breakdown for programmes broadcast in March and November 1994). With respect to the other public broadcasters, programmes produced by independent producers range, in terms of hours broadcast, from less than 10 % for VPRO to around 50 % or more for Veronica and TROS. However, these figures relate to the total number of hours broadcast, including programmes purchased from abroad. Furthermore, these figures are based on hours of programmes and not on the value of the productions in question. In particular, for Veronica and TROS, which have the highest proportion of independent productions, around half to two-thirds of independent productions are accounted for by entertainment shows which are normally expensive. The share of independent TV productions, therefore, will be significantly higher in terms of value rather than volume. In this context, it should also be noted that the in-house production of the public broadcasters is frequently limited to short life productions (such as news, low budget game shows, talk shows) which are normally only broadcast one time. They do not constitute, therefore, a real asset. In contrast, big entertainment, and drama series produced mainly by independent producers, are usually exploited on a number of occasions and constitute an asset.

(89) The in-house production of the public broadcasters is essentially used for their own purposes. Although these productions are sometimes offered on the international market, they are normally not offered to other broadcasters in the Dutch TV market. There is, therefore, no direct competition between in-house production and programmes produced by independent producers which are offered on the market. The parties argue, however, that in-house production should be included in a general market for Dutch TV productions since a broadcaster will always have to make a 'make or buy decision' with regard to production. This is not, in fact, the case. A public broadcaster with a significant amount of in-house production will have undergone considerable investment in production facilities and, in particular, will have engaged the necessary personnel for this production, which is an important cost factor. In fact, as outlined above, the high number of employees of the public broadcasters as compared with commercial broadcasters, is due, to

a considerable extent, to personnel employed for in-house production. In these circumstances, it is not possible for a public broadcaster to have a free choice to decide whether to produce a programme itself or to commission it to an independent producer. If a public broadcaster were to increase orders from independent producers to a significant extent to the detriment of its in-house production, the broadcaster would have to pay the high overhead and personnel costs for the in-house production facilities without obtaining an adequate return on these costs in terms of programmes produced. Such a policy, therefore, would not be feasible in commercial terms, at least not in the long run. There is, therefore, a market which is limited to independent TV productions, and does not include programmes for captive use.

(90) Furthermore, it appears that, in overall terms, in-house production is largely geared to certain categories of programmes such as, news, other information, culture, youth, documentaries, sports and some types of entertainment. In these segments, the experience and know-how gained by the public broadcasters means that they do not have to rely on independent producers. However, the public broadcasters are not generally recognized as producers of large scale entertainment programmes such as those provided by Endemol and they have indicated that it would be very problematic for them to switch this kind of entertainment to in-house production. Overall, therefore, the structure of the in-house production of the public producers does not provide a significant countervailing power to the position enjoyed by Endemol in the market for independent productions.

(91) The market for independent TV producers in the Netherlands has the following structure:

- one very big producer (Endemol),
- a few relatively small but significant producers,
- and
- a large number of very small producers (1 to 10 employees).

Based on the value of programmes produced in 1994 the market share structure is as follows:

- Endemol: clearly more than 50 %
- IDTV: 5-10 %,
- 4 producers: 2-5 % each
- 5 producers: 1-2 % each
- Rest (around 75): < 1 % each

This market structure shows that Endemol has an overwhelming position in this market. In fact, the company Endemol results from the merger of the previously two largest Dutch producers JE Entertainment BV and John de Mol Communications BV, which took place in 1994.

The parties argue that the calculation of the market share should be based on the volume of hours produced rather than the value of programmes. Such an approach, however, would give a completely misleading description of the players in the market. According to the investigation of the Commission, their TV productions range in value, per hour, between Fl 30 000 for e.g. cheap documentaries and Fl 300 000 for e.g. expensive dramas and entertainment programmes. In these circumstances, the only appropriate calculation of the market shares is that based on value rather than volume.

(92) In addition to its extremely high market share when compared to its competitors, Endemol possesses a number of further strengths which confers upon it a market position far above its competitors.

Endemol owns a large number of the most popular Dutch formats and, due to its size and its huge resources as compared with the other independent producers, has preferential access to foreign formats which are then adapted to the Dutch audience. For example, in the last three years, more than [...] programmes produced by JE Entertainment BV or John de Mol were based on foreign formats directly licensed to these companies. (The parties argue that a number of these formats were broadcast in 1992, 1993 and 1994 and that only [...] programmes were produced by Endemol during this period based on foreign formats owned directly by Endemol).

(93) Endemol has a high number of the most popular Dutch TV personalities under contract, many on an exclusive basis. Endemol currently has [...] exclusive contracts with TV personalities and has lost only [...] stars in recent years, [...]. Furthermore, Endemol is the only Dutch producer which has the possibility to offer TV stars other media opportunities (e.g. theatre shows), given its activities in other forms of entertainment e.g. in theatre and tours. Finally, Endemol has its own agency for stars. Given these facilities, Endemol can build up stars and bind them to the company in a manner which is not possible for other Dutch producers.

(94) The parties contest that Endemol has the most successful formats and preferential access to foreign formats. They also contest that they have the most successful stars under contract. However, in the investigation carried out by the Commission, these points raised strong concerns for a large number of independent producers and also the public and other commercial broadcasters. They all confirmed the conclusions reached by the Commission as outlined above.

(95) Based on the resources outlined above, Endemol produces the most popular entertainment programmes in the Netherlands. For example, in the 1993/94 season, 28 of the 56 non-sports programmes with the highest audience rating were produced by Endemol. Endemol's programmes are normally broadcast in prime time. They have provided a major contribution to the success of RTL 4 and Veronica and have also contributed appreciably to the determination of the profile of these channels.

(96) Furthermore, Endemol has large activities outside the Netherlands. The value of its international productions currently amounts to around Fl [...] per annum, compared with around Fl [...] for Dutch productions. These international activities further improve the position of Endemol with respect to foreign formats and provide further resources to its businesses which, in turn, strengthen its position on the Dutch production market. None of Endemol's competitors in the Netherlands has comparable international activities.

(97) For the abovementioned reasons, it is concluded that Endemol already has a dominant position on the market for Dutch language independent TV productions in the Netherlands.

(ii) *Effects of the creation of HMG*

(98) Since Endemol is a parent company of HMG, it has obtained, through the creation of this joint venture, a structural link to the future leading broadcaster in the Netherlands. It is true that Endemol, even before the creation of HMG, was already the main programme supplier for RTL 4 and RTL 5 and also Veronica. However, by contrast to the past, Endemol, due to its participation in HMG, now has a large sales basis for its product which is safe and cannot be attacked by competitors. This can be illustrated by the guarantee granted to Endemol in the production agreement concluded between HMG and Endemol, referred to above. According to this agreement, HMG guarantees to purchase [...] of the value of its Dutch language programmes requirements from Endemol. This means, even in 1996, a guaranteed value of FL [...] for productions will be supplied by Endemol.

[...] This demonstrates the strategic importance of Endemol's link to HMG.

(99) Moreover, the abovementioned amount is only the minimum of supplies from Endemol to HMG which is guaranteed. As a parent company, Endemol can use its influence in HMG to obtain even more orders from HMG. No other producer in the Netherlands has a similar possibility to have a safe sales basis for its production and to influence the programme acquisition of a broadcaster.

(100) The parties now argue that Endemol will have no relevant influence on HMG since, in their view, Endemol does not have joint control over HMG. As outlined above, however, the Commission has reached the conclusion that HMG is jointly controlled by RTL, on the one hand, and Veronica and Endemol through VMG, on the other hand. Furthermore, even in the absence of joint control, through its structural link to HMG, Endemol is in a position to influence the general programming and programme acquisition policy of HMG in a manner which strengthens Endemol's current position on the market for independent production.

In economic terms, VMG is a vehicle for the pooling of the participations of Veronica and Endemol in HMG, which together amount to 49 % in HMG. RTL, on the one hand and VMG, on the other hand, are equally represented in the shareholders' meeting in which the major strategic decisions relating to the commercial behaviour of HMG are taken. The participation of Endemol in HMG amounts to 23 % (47 % of 49 %). A participation of 23 % in a company which is active in a downstream market has to be seen as a strategic participation, rather than a financial one. This is even more the case where this participation is combined with a substantial representation of the shareholder in the decision-making body of this company. The shareholder will be able to obtain all information on the strategic decisions and will be involved in the discussions and decision-making procedure, where it can, in particular, influence decisions related to the upstream market where it is itself active.

This general evaluation is even more valid in the present case given the supply relationship between RTL and Veronica, respectively, which have obtained the majority of their programmes from Endemol in the past. The parties themselves have stated that this supply relationship was a major factor in determining the image of the channels RTL 4, RTL 5 and Veronica and that this supply relationship would also be a major factor for the future success of HMG. Against this factual background, it would be unrealistic to assume that the participation of Endemol in HMG is a mere financial participation, and does not confer any relevant influence on Endemol.

- (101) The new situation resulting from the creation of HMG strengthens significantly Endemol's already powerful position on the Dutch production market. Endemol is able to foreclose the access of other producers to HMG as the largest broadcaster in the Netherlands and, in particular, to the additional programmes needed by Veronica as a seven day channel. The parties themselves have stressed the point that the Endemol productions will determine to an appreciable extent the image of RTL 4 and RTL 5 and Veronica.
- (102) With respect to productions supplied to other broadcasters, Endemol, following the creation of HMG, can even more successfully counteract any competition from other independent productions given its large and guaranteed sales basis. The same is true with respect to the access to attractive formats and the exclusive relationship with the most popular stars.
- (103) The parties argue that, in the future, there will be an increase in demand for Dutch language productions given the additional programmes needed by Veronica as a commercial channel, as well by the public broadcasters in order to fill the gap created by Veronica's departure, and also by SBS 6 as a new entrant. However, it should be noted that the largest part of the additional demand for Dutch productions will emanate from Veronica, which will require additional programming for four and a half days' broadcasting. By contrast, the public broadcasters have to fill only a gap of two and a half days' broadcasting, resulting from Veronica's departure from the public system. In this context, it is also doubtful whether the additional programmes ordered by the public broadcasters would have a comparable value to the programmes ordered by Veronica given the losses in advertising revenue of the public broadcasters resulting from the creation of HMG. With respect to SBS, it should be noted that Veronica's programme budget, as outlined above, is nearly three times that of SBS 6. It follows that the largest part of the value of additional programmes will be accounted for by Veronica, which is captured by Endemol. With respect to the remaining additional programmes, Endemol, as explained above, is in a much better position than its competitors.
- (104) Given its sales basis in HMG and its influence on programme slots on the HMG channels, it can be expected that Endemol will be successful in entering programme segments where it is not present to date to any significant degree; for example, documentaries. This would have further negative consequences for the possibilities of the small Dutch TV producers to carry on their business.
- (iii) *Conclusion*
- (105) For the abovementioned reasons, the Commission has reached the conclusion that, as a result of the establishment of HMG, the dominant position of Endemol on the independent Dutch TV production market will be strengthened.
- (iv) *Article 22*
- (106) The parties argue that, under Article 22 (3), the question is not whether in any way the concentration affects trade between Member States but, rather, the extent to which the concentration affects trade between Member States. In the view of the parties, the impact of the concentration on the Dutch TV broadcasting and advertising markets and, in particular, on the Dutch production markets, does not have a sufficient effect on trade between Member States to empower the Commission to act against HMG.
- (107) This line of argument put forward by the parties is not clear. It seems that the parties are of the opinion that the Commission can only intervene under Article 22 with respect to effects on trade between Member States. This would mean that the examination under Article 22 would be limited to those aspects which go beyond the market in the territory of the Member State which made the request. In such circumstances, however, the whole purpose of Article 22 would be meaningless, and would be contrary to the interpretation of Article 22 (5) pursuant to which 'the Commission shall take only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State.'
- Alternatively, the parties may be of the opinion that there should be a specific test for the effect on trade between Member States, which is different from the normal test e.g. under Article 86. In such a case, however, the nature of such a test is not clear at all. In fact, Article 22 (2) provides that the concentration in question must have an effect on trade between Member States. There are no indications at all that this effect must be of a higher degree than under the other competition rules in EC law.
- (108) The arguments put forward by the parties make sense only if they are understood to mean that the Commission cannot base a negative decision under Article 22 on a dominant position in a specific product or geographic market if the concentration has no effect on trade between Member States with respect to such a market, although there is such an effect on other markets concerned by the operation. It can be left open if such an interpretation of Article 22 would be correct. Even if the strengthening of Endemol's dominant position in the market for independent Dutch TV production did not, in itself, have a direct effect on trade between

Member States, the three markets under consideration, as outlined above, are interlinked and the impact of the concentration on the production market changes the conditions of competition in the other markets. Furthermore, the parties have stated themselves that Endemol's participation in HMG is necessary to improve its market position for TV production outside the Netherlands. In this context, it should also be noted that the concentration increases further the capacity for Endemol to purchase foreign formats, given its preferential access to the biggest commercial broadcaster in the Netherlands.

- (109) The parties argue, furthermore, that in a procedure under Article 22 the Commission is not empowered to declare a concentration to be incompatible with the common market without having examined whether other measures are sufficient to restore competition. In the view of the parties, this follows from the provision of Article 22 (5), as mentioned above. This opinion, however, is based on a misunderstanding of the purpose and function of Article 22 (5). Under Article 22 (3) the Commission is entitled to adopt the decisions provided for in Articles 8 (2) second subparagraph 3 and 4. If, in the absence of sufficient commitments within the meaning of Article 8 (2) given by the parties, the Commission has to adopt a negative decision under Article 8 (3), the Commission may also adopt a decision under Article 8 (4) in order to restore conditions of effective competition where the concentration has already been completed. In this situation, Article 22 (5) limits the measures to be taken under Article 8 (4) to those which are strictly necessary to maintain or restore effective competition on the territory of the Member State in question. In the event that the concentration has not yet been completed, Article 22 (5) ensures that the negative decision of the Commission would be limited to the dominant position created or reinforced in the Member State which made the request in order to maintain effective competition in this Member State.

(v) *Other arguments of the parties*

- (110) The parties argue that they need HMG in its current structure in order to be competitive vis-à-vis multinational players in the TV market and to be best placed with respect to participation in the future multimedia market. In this context, however, it should be noted that CLT is already itself a large multinational media group. It is difficult to see why the parties need such a strong position in the Dutch TV market to the detriment of other Dutch broadcasters. With respect to future multi-media markets and, in particular, future digital TV, it should be noted that HMG is, for the time being, mainly geared to be active in the current analogue

TV environment. In any event, if the parties want to be active in future digital TV, it is again difficult to see why they need this particular combination of leading channels, together with the dominant producer. It appears that, given the combined strength of the parties, HMG could become the only major player in the future digital TV. This could even be counterproductive to the development of digital TV in the Netherlands.

VII. UNDERTAKINGS PROPOSED BY THE PARTIES

- (111) The parties have submitted proposal for undertakings in order to remove the doubts raised as to the compatibility of the concentration with the common market. The essential features of these proposals are the following:

[...]

- (112) The proposals related to RTL 5 are not sufficient to avoid the creation of a dominant position for HMG on the TV advertising market. On the basis of the parties proposals, HMG would retain a substantial influence in RTL 5, [...]. It cannot be expected, therefore, that RTL 5 would actively compete against the HMG channels [...].

[...] The proposals of the parties related to RTL 5 cannot, therefore be considered to be an adequate measure to establish RTL 5 as a viable independent competitor.

Moreover, there is a risk that a divestiture of RTL 5 would prove not to be feasible on the basis that no potential purchaser could ultimately be found. Even if such a divestiture could be completed it is not possible to evaluate fully, at this stage, whether such a divestiture would be sufficient to reduce the market position of HMG to a level below that of dominance. [...]

Furthermore, the competitive potential of RTL 5 would also depend on the manner in which the channel is run pending its sale to a third party. In this context it should be noted that, [...].

- (113) With respect to the undertaking related to Endemol, [...]. The question whether the undertaking as a whole removes the competition problems in the Dutch TV production market, however, does not need to be finally decided upon since the undertaking related to RTL 5 is not sufficient to resolve the competition problems in the TV advertising market and the concentration, therefore, cannot be authorized on the basis of the proposals made by the parties.

VIII. ANCILLARY RESTRAINTS

- (114) The Commission's view is that the production agreement concluded between HMG and Endemol cannot be considered as an ancillary restraint within the meaning Article 8 (2) second subparagraph of the Merger Regulation. The guarantee for Endemol to supply [...] of the value of HMG's need for Dutch-language productions, together with [...], as set out in this agreement, is a restriction which is not necessary to the implementation of the concentration.

IX. CONCLUSION

- (115) For the reasons outlined above, the Commission has reached the conclusion that the concentration will lead to the creation of a dominant position in the TV advertising market in the Netherlands and to the strengthening of a dominant position for Endemol in the market for independent Dutch-language TV production in the Netherlands through which effective competition in the Netherlands will be significantly hindered. The concentration must therefore be declared incompatible with the common market, in accordance with Article 8 (3) in conjunction with Article 22 (3) of the Merger Regulation.
- (116) The concentration in the present case has already been completed since HMG has been created, all assets have been transferred to HMG and broadcasting within the framework of HMG has begun on 1 September 1995.

The Commission has decided not to include measures in application of Article 8 (4) in this Decision under Article 8 (3). The Commission will adopt a separate decision under Article 8 (4) in order to restore effective competition on the above-mentioned markets. Before such a decision is taken, the Commission invites the parties to propose appropriate measures within a period of three months from the notification of this decision in order to restore effective competition in the

market for TV advertising and independent Dutch TV production in the Netherlands,

HAS ADOPTED THIS DECISION:

Article 1

The concentration in the form of the creation of the joint venture Holland Media Groep is declared incompatible with the common market. The Commission invites the parties to propose appropriate measures within a period of three months from the notification of this decision in order to restore effective competition in the market for TV advertising and independent Dutch TV production in the Netherlands.

Article 2

This Decision is addressed to:

1. Compagnie Luxembourgeoise de Télédiffusion SA (CLT)
45 Boulevard Pierre Frieden
L-Luxembourg
2. NV Verenigd Bezit VNU (VNU)
Ceylonpoort 5-25
NL-2036 AA Haarlem
3. RTL 4 SA
Villa Louvigny
Allée Marconi
L-2850 Luxembourg
PO box 1122,
L-1011 Luxembourg
4. Veronica Omroeporganisatie (VOO) BV
Laapersveld 75
NL-1213 VB Hilversum
5. Endemol Entertainment Holding
Zevenend 45
NL-1251 RL Laren

Done at Brussels, 20 September 1995.

For the Commission

Karel VAN MIERT

Member of the Commission