II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 October 1978

relating to a proceeding under Article 85 of the EEC Treaty (IV/29.133 — WANO Schwarzpulver)

(Only the English and German texts are authentic)

(78/921/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 [1], and in particular Articles 1, 3 and 4 thereof,

Having regard to the notification to the Commission made on 28 October 1975 by Imperial Chemical Industries Ltd, Millbank, London SW1P 3JF, England, and Wasagchemie GmbH, 4300 Essen 1, Rolandstraße 9, Federal Republic of Germany, pursuant to Article 4 of Regulation No 17, concerning their participation in a joint venture company for the manufacture and sale of blackpowder, which notification included in the alternative an application for negative clearance,

Having regard to the Commission Decision of 23 May 1978 to initiate proceedings in this case,

Having heard the undertakings concerned in accordance with Article 19 (1) of Regulation No 17 and having offered the undertakings concerned an opportunity of being heard in accordance with Commission Regulation No 99/63/EEC of 25 July 1963 [2], which opportunity the undertakings declined,

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions delivered pursuant to Article 10 of Regulation No 17 on 27 September 1978,

Whereas :

I. THE FACTS

1. Subject matter

(a) This case concerns agreements between the parties identified below for the manufacture and sale of blackpowder in joint venture. Blackpowder is an explosive. Its characteristics and uses are described in I (4) below.

(b) The agreements comprise :

(i) a shareholders' agreement dated 14 October 1975 and related agreements notified on 28 October 1975 for the equal ownership and control of companies in the Federal Republic of Germany concerned in the manufacture and sale of blackpowder, namely WANO Schwarzpulver GmbH and WANO Schwarzpulver & Co Kunigunde KG (together herein called 'WANO'). The agreements were made by and between (A) Bohlen Industrie AG (BOHLEN), including controlled subsidiary companies of BOHLEN and (B) controlled subsidiary companies of Imperial Chemical Industries Ltd (ICI). The signatories of these agreements include :

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.

(A) BOHLEN ;
Wasagchemie GmbH (WASAG), a controlled subsidiary company of BOHLEN ;

(B) Nobel's Explosive Company Ltd (NEC), a controlled subsidiary company of ICI ;

(ii) a letter of intent signed by NEC and WASAG and dated 30 July 1974 which preceded the notified agreements and which outlines the intention of the parties to cooperate and participate in WANO.

(c) For the purposes of this case and where appropriate within the context, BOHLEN as well as WASAG and other companies directly or indirectly owned or controlled by BOHLEN are herein collectively called 'WASAG' ; and ICI as well as NEC and other companies directly or indirectly owned or controlled by ICI are herein collectively called 'ICI'. WASAG and ICI are herein sometimes together referred to as 'the parties' and WANO as 'the joint venture' or 'the joint venture company'.

2. The parties

(a) BOHLEN, established in the Federal Republic of Germany, has interests, partly through its controlled subsidiary companies, in the development, manufacture and sale of diverse products, including chemicals and chemical intermediates and explosives (and devices used in conjunction with explosives), plastics and consumer goods. BOHLEN has numerous subsidiary companies in the Federal Republic of Germany, in other Community countries and elsewhere. In 1974 BOHLEN's consolidated group turnover was DM 296 016 000.

(b) Imperial Chemical Industries Ltd, established in the United Kingdom, has interests, partly through its controlled subsidiary companies, in the development, manufacture and sale of diverse products, including chemicals (and chemical intermediates and derivatives) and explosives (and devices used in conjunction with explosives), plastics, synthetic fibres, dyes and paints. ICI has numerous subsidiary companies in the United Kingdom, in other Community countries and elsewhere. In 1976 ICI's consolidated group turnover was £ 4 135 000 000.

3. The agreements

(a) The result of the agreements referred to in I (1) (b) above is that ICI, on the happening of certain events, will purchase shares and will make certain other capital contributions so as to achieve joint and equal control of WANO with WASAG. WANO is at present wholly owned by WASAG and, as now constituted, supplies the blackpowder requirements of WASAG. Since 1974 deliveries from WANO and WASAG were also made to ICI. Progressively the scale of such deliveries to ICI was increased to correspond to the phasing out by ICI of its own production of blackpowder. When in October 1976 ICI closed its blackpowder plant, supplies by WANO met all or substantially all of ICI's blackpowder requirements.

(b) The notified agreements and information supplied by the parties disclose the following additional matters :

(i) The letter of intent of 30 July 1974 which foreshadowed the phasing out of blackpowder production by ICI and the ultimate closure of its plant provided :

'4. NEC would continue to operate its existing blackpowder plant only until its customers and own requirements can effectively be transferred to the new company (the joint venture).

5. Subject to (4), NEC and WASAG would buy their total requirements of those grades of blackpowder manufactured by the new company, from the new company on terms to be agreed'.

The letter of intent also provided in clause 2 that NEC and WASAG would 'assign to WANO all their business including know-how, patents and goodwill relating to the manufacture and sale of blackpowder'.

(ii) The notified agreements ensure equal control by the parties of WANO and an equal sharing by each of WANO's profits and losses. No question relating to blackpowder, including its production and sale by WANO, can be resolved by unilateral action of one shareholder or party. WANO is to operate under the management of general managers (Geschäftsführer), appointed in equal number by each party. The articles of association further stipulate that certain specified important decisions on matters outside the normal day-to-day running of WANO require the consent of both parties in a shareholders' general meeting. For the distribution in the United Kingdom and the Federal Republic of Germany of blackpowder produced by WANO, the letter of intent provided 'the new

company would also appoint NEC to be its exclusive distributor of blackpowder in the UK and WASAG to be its exclusive distributor thereof in West Germany, in each case on terms to be agreed'.

4. Blackpowder

(a) *The product*

(i) Blackpowder is one of the oldest known explosives. It is produced in the form of a powder, the grain size and shape of which determine the rate of burning and amount of gas released. Its basic ingredients are charcoal, sodium nitrate, potassium nitrate and sulphur, although for some purposes sulphurless powder is produced. The size of grain is, apart from the presence of sulphur, the most important technical characteristic of the product.

(ii) The main uses of blackpowder are in the manufacture of fireworks, other pyrotechnical devices, safety fuses and for blasting. Small quantities are used for military purposes. In none of these uses, except in the case of blasting, are other types of explosive substitutable. However, where blackpowder is used for blasting, it is so used because its relatively low power tends not to shatter the material required to be dislodged by the explosion. In the view of ICI and WASAG it is therefore the most suitable explosive for blasting slate and monumental and other decorative stones.

(iii) An important use of blackpowder is the manufacture of safety fuse which is composed of fine-grain blackpowder contained in a tubular casing. The fuse is designed to burn at a predetermined rate so that the delay before an explosion occurs can be accurately predicted from the length of the fuse used. Safety fuse thus forms part of an initiating process for some types of explosive operations. It can be used directly to ignite blackpowder.

(iv) In common with other explosive substances, the transport and storage of blackpowder is subject to governmental regulation and licensing. Such regulations which were said by the parties to be broadly similar in the United Kingdom and the Federal Republic generally require that buildings in which explosives are stored be isolated, with the resultant 'sterilization' of surrounding land. According to information supplied by ICI, the minimum investments required by a distributor for the acquisition of necessary storage and transport facilities for blackpowder in the United Kingdom would amount to not less than about £350 000. This would allow for the acquisition of a relatively small-size magazine with a 40 to 50 tonne capacity, steel portable storage facilities and a sufficient number of vans for the carriage of blackpowder.

There are generally no restrictions on the amounts of blackpowder that may be carried by sea in vessels chartered for the purpose of transporting explosives. However, harbour regulations generally limit the quantities that may be loaded or unloaded at one time. Notwithstanding the effect of these regulations, ICI was able to make export sales of blackpowder, for example, to Ireland, Norway, the United States of America and other countries and WASAG to Belgium, France, the Netherlands, Sweden, Egypt, Argentina and elsewhere.

(b) *The position of ICI in the market*

(i) Following an explosion in December 1974 which reduced capacity by some 40 % at ICI's blackpowder plant at Ardeer, Scotland, ICI decided to cease production permanently and progressively phased out production, until in October 1976 it shut down its plant. Immediately subsequent to the explosion, ICI's annual production was around ... tonnes in 1975 and dropped to around ... tonnes in 1976. Prior to the explosion at its plant, ICI's annual production had been between ... and ... tonnes. ICI had produced blackpowder for blasting, use in fireworks and other pyrotechnical devices, safety fuse and for military applications. In all the above fields of use, except for safety fuse which ICI manufactures itself, ICI supplied and now continues to supply blackpowder for incorporation or further processing by the customer into a device ; but this does not apply to blasting powder where the product may be used without further preparation.

(ii) ICI was the only producer of blackpowder in the United Kingom and the only supplier, and continues for all practical purposes to be the only supplier, to United Kingdom civilian customers. Sales of blackpowder to customers in the United Kingdom amount to around

500 tonnes per annum. According to ICI, the proportions of its sales of blackpowder in 1975, inclusive of home and export sales, attributable to various uses were :

	% *(by quantity)*
Fireworks powders	...
Military powders and propellants	...
Blasting powders	...
	100

The above figures exclude fuse powder retained by ICI for its manufacture of safety fuse. Corresponding figures which include the use of blackpowder also for safety fuse manufacture are :

	% *(by quantity)*
Fireworks powders	...
Military powders and propellants	...
Blasting powders	...
Safety fuse powder	...
	100 (1)

ICI has had export markets for blackpowder of at least ... tonnes per annum.

(iii) ICI is also by far the leading producer of safety fuse in the Community. Some ... tonnes of blackpowder per annum has been used by ICI for the manufacture of some ... million feet of safety fuse, most of which (approximately ... by value) has been exported from the United Kingdom. Small quantities of safety fuse have been sold by ICI in Belgium, Luxembourg and Denmark, and sales of around two million feet per annum have been made in Ireland, the remainder being sold outside the Community.

(iv) In order to meet its requirement of ... tonnes of blackpowder from a plant with a single shift capacity in 1975 of only ... tonnes, ICI had been obliged to purchase blackpowder from other manufacturers. In 1975 this shortfall was entirely met by deliveries of ... tonnes from WASAG and, since the start of operations by WANO under WASAG's control, has continued to be met from the production of WANO. ICI's 1975 production of ... tonnes of blackpowder represented ... of a Community total production of around 3 450 tonnes.

(v) ICI controls within the United Kingdom extensive and suitable storage and transport facilities for explosives, including blackpowder, and operates two 500 tonne coasters for the transport of explosives by sea.

(c) *The position of WASAG in the market*

(i) The blackpowder works of WASAG in Kunigunde, now operated by WANO, produced around 750 tonnes of blackpowder per annum until 1974. In 1974 production was increased to 872 tonnes and in 1975 to 1 185 tonnes. WASAG then planned to increase production to a level of around ... tonnes in the course of 1976 and 1977 and has substantially fulfilled this target. WASAG produces blackpowder for all its uses to which this product is normally put. Except for safety and firework fuses, WASAG produces no devices but supplies blackpowder to customers for incorporation or further processing into a device.

(ii) Of the two blackpowder manufacturers in the Federal Republic of Germany, WASAG and Dynamit Nobel AG (DNAG), WASAG manufactures more than two thirds of the blackpowder produced in that country. On the basis of a rate production, through the operation of WANO, in the region of ... tonnes, WASAG is the largest producer by far of blackpowder in the Community. WASAG is furthermore the only producer of safety fuse, safety fuse powder and powder for military purposes in the Federal Republic.

(iii) The sales of blackpowder by WASAG in its home market amount to around ... tonnes. Export sales, excluding deliveries to ICI, have amounted to around ... tonnes, of which around ... tonnes are sold within the Community (1974 : ... tonnes, 1975 : ... tonnes). WASAG supplies blackpowder to fulfil the entire demand of the Belgian market.

(iv) Most of WASAG's production of safety fuse, of around ... million metres, is sold within the Federal Republic. Export sales account for less than a quarter of the total. The most important customer of WASAG in its home market for safety fuse is DNAG, which company accounts for up to ... of WASAG's home sales.

(1) ICI letters of 27 January and 16 March 1976, Appendix 2.

(v) For the distribution and storage of its products WASAG has transport and magazine facilities in the Federal Republic.

(d) *Other producers*

Apart from DNAG (referred to in I (4) (c) above), the only other notable producers of blackpowder in the Community are Société nationale des poudres et explosifs SA in France (SNPE) and SIPE Nobel Spa in Italy (SIPE). Their annual production of blackpowder is respectively in the region of ... tonnes. Both have production capacities which are considerably under-used. SNPE has facilities to manufacture ... tonnes of blackpowder per annum, and during 1975 and 1977 supplied blackpowder to the United Kingdom. No production is undertaken in Belgium, Denmark, Ireland, the Netherlands or Luxembourg.

5. Proceedings with the parties

Following receipt by the parties of the Commission's statement of objections of 24 May 1978, they informed the Commission (ICI by letters of 30 June 1978 and WASAG by letter from its legal advisers of 29 June 1978) that they wished to withdraw the notification in this case. ICI also stated, but the letter from WASAG's legal advisers did not say so explictly, that it had been decided, after consultation between the parties, not to implement the notified agreements. The letter from WASAG's legal advisers declined the Commission's invitation for a hearing. The letters challenged in general terms and without being specific or giving reasons the findings and conclusions set out in the Commission's statement of objections.

II. APPLICABILITY OF ARTICLE 85 (1)

Article 85 (1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

1. The parties are undertakings and the notified agreements are agreements within the terms of Article 85 (1).

2. The agreements have the object and, if implemented, will have the effect of restricting competition as follows :

(a) Independently of the proposed joint participation in WANO, each of the parties has substantial separate interests in the business of blackpowder. ICI was a producer and supplier and, since the closure of its works in October 1976, continues as a purchaser and supplier of blackpowder for its home market in the United Kingdom and for export. Within the United Kingdom it fulfils almost the entire demand for blackpowder. ICI controls within the United Kingdom a comprehensive network, if not by far the most effective existing network there, of storage, transportation and distribution facilities for explosives, including blackpowder. WANO manufacture blackpowder and, apart from its export sales, supplies about 50 % of the blackpowder required in the Federal Republic of Germany. As a result of their joint participation in WANO, the parties would be likely to coordinate their conduct in the manufacture and sale of blackpowder. Since the agreements confer equal control of the joint venture upon each party, neither would make independent business decisions on any matter of importance concerning planning, financing, research, development, manufacture or sale of blackpowder. The joint venture would control the production for not less than 58 % of the sales of blackpowder in the Community.

(b) So far as the United Kingdom market for blackpowder is concerned, the agreements and ICI's participation in the joint venture would have the effect that ICI would make all or substantially all of its future blackpowder purchases from the production of the joint venture, rather than leave itself free to obtain blackpowder also from other sources which are available in the Community, thereby committing the entire or substantially entire future blackpowder requirements solely to the production of the joint venture.

(i) An internal ICI memorandum (investment proposal : A 132, 9 April 1975) states that the parties 'will both draw their total requirements of blackpowder from WANO and act as exclusive distributors in the UK and West Germany respectively. Other sales will be made by the joint company on the best terms available'.

(ii) A passage in a letter dated 9 September 1976 from ICI to one of its customers also confirms that 'in future we (ICI) will purchase all our requirements (of blackpowder) from this company (WANO)'.

(c) Parties who hold significant stakes in a joint venture will not in general within the field of such a joint venture compete with each other's activities or with the activities of the joint venture, even if they are contractually free to do so. In this case in particular, neither party could afford to ignore the existence or the purpose of the joint venture. Neither party would be likely to expend its independently available effort or resources over and above those required by the joint venture, in order to market blackpowder in competition with the other party or in competition with the joint venture. Each party would be likely to obtain from the production of the joint venture the same type of blackpowder and at uniform prices. Each of the parties would align its conduct in the marketing of blackpowder to that of the other party and to that of the joint venture. The parties would not, to their own detriment, compete with each other or with the joint venture, either in respect of the prices at which blackpowder would be sold to users or in respect of the effort to be deployed to promote sales with particular customers or in particular geographical areas.

(d) The existence of a joint venture in one field provides opportunities and inducements to parent companies who have related interests also in other areas to enlarge their common activities so as to impair competition between them also in those other areas. In this case, both parties have, apart from their activity in the joint venture, also other overlapping, related and competitive interests, notably in the fields of explosives in general, accessories for explosives and in particular in the manufacture and sale of safety fuse. This coincidence of activities and interests of the parties in other areas can be expected to lead to an impairment of competition between them also in these other areas. So far as ICI is concerned, participation on their part was motivated not solely by a sharing in the production of blackpowder, but also by an intent to establish an association with WASAG with a view to its subsequent enlargement into other related markets outside the field of blackpowder, including the market for safety fuse. In respect of safety fuse, ICI is the only manufacturer and supplier in the United Kingdom and WASAG is the only manufacturer in the Federal Republic of Germany and each party could have been regarded as the other's natural potential competitor in the other's national home market and throughout the Community. The combined safety fuse production of ICI and WASAG amounts to more than 60 million metres per annum, double the aggregate production of all other safety fuse producers in the Community. Through the control of the operations of the joint venture the parties would knowingly give themselves opportunities and strong inducements for cooperation in aligning their prices and in the sharing of markets for safety fuse. Moreover, the parties would jointly control the quantities and prices of any blackpowder to be sold by the joint venture for safety fuse production by any third-party competitors. ICI have stated (appendix 6 of the letter of 16 March 1976) that 'it remains quite possible that NEC might at some future date seek to supply WASAG's safety fuse requirements'.

(e) All the foregoing restrictive effects are significantly underlined by the considerable importance of the parties on the affected markets within the Community.

3. (a) The parties have argued in correspondance and at meetings that the notified agreements, if implemented, would not restrict competition. They submitted that, even in the absence of the notified agreements, the only possible supplier of blackpowder of acceptable grades and varieties and on acceptable terms for the entire or substantially entire United Kingdom demand was and would be likely to remain WANO. In addition, except in the case of the smaller countries, national markets within the Community were traditionally supplied by their national suppliers. So far as blackpowder for defence uses was concerned, this position was founded on military security reasons. Moreover, in general, the transport and storage of blackpowder was closely controlled by national regulations. These imposed requirements which non-national suppliers found it difficult and impractical to meet, mainly for reasons of cost. It was submitted for example that WANO could not, independently of ICI, export blackpowder direct into the United Kingdom. From this the parties concluded that there was no actual competition now and no real potential for future competition to be restricted by the notified agreements if these were put into effect. The relevant arguments of the parties have been the following :

(i) even in the absence of ICI participation in WANO and in the absence of contractual commitments towards WANO, ICI would have no practical alternative to purchasing its blackpowder requirements for the United Kingdom demand from WANO. WANO had the only plant which was capable of supplying the right qualities of blackpowder for safety fuse, blasting, fireworks, propulsion and other applications which were suitable to meet United Kingdom demand ;

(ii) so far as military requirements were concerned, the United Kingdom Ministry of Defence were insisting that these were fulfilled by WANO ; firstly, because only WANO could meet the specifications and, secondly, because WANO was an approved supplier to the Ministry of Defence and supplies from other sources would raise military security problems.

(b) The foregoing submissions are at variance with and are in all essential respects rebutted by the following :

(i) manufacturers of blackpowder in France and Italy, namely, Société nationale des poudres et explosifs (SNPE), and SIPE Nobel Spa (SIPE) have stated to the Commission that they are able and willing to supply blackpowder (including sulphurless powder for military applications) for United Kingdom requirements. Both these companies have considerable overcapacities and have confirmed that they can supply blackpowder, also to meet any likely new specification requirements, for military and civil uses. During 1975 and 1977, SNPE supplied in four separate shipments a total of 2 550 kg of cartridge blackpowder for the United Kingdom. While the quantities concerned were relatively small, they were not entirely insignificant and tend to show that United Kingdom demand does not by its nature need to be wholly dependent on blackpowder available from WANO and also that it is not necessarily uneconomic to ship small quantities. ICI have themselves conceded in response to a direct question put to them by the Commission that blackpowder of suitable grades for fuse, blasting and fireworks applications could be supplied from Italy and for fireworks and blasting uses from France. Blackpowder for these uses represents a high proportion of the total United Kingdom blackpowder demand (see I (4) (b) (ii) above). But in this regard, ICI have in general terms referred to 'transportation, security and economic factors' which made these other sources of supply 'impractical' (1) ;

(ii) the alleged importance, stressed by ICI, of the security aspects of the importation into the United Kingdom of blackpowder for military uses is negatived by statements made by the United Kingdom Ministry of Defence according to which foreign supplies do not raise security problems ;

(iii) so far as transport is concerned, all suppliers of blackpowder need to conform to public safety requirements and regularly take these into account. WASAG, SNPE and SIPE have geographically widespread markets and are accustomed to have their blackpowder dispatched by road, rail and sea. Apart from its inland distribution facilities in the United Kingdom, ICI operate two 500 tonne coasters which regularly carry explosives by sea. According to ICI, in response to Commission enquiries, shipments of explosives, including blackpowder, on the ICI coasters are made from time to time between United Kingdom ports and, for example, Rouen, Bremen, Hamburg, Lisbon, Barcelona and Norwegian and Finnish ports.

(c) The parties' submission therefore, according to which there is no likely prospect of potential competition for the supply for United Kingdom demand of blackpowder on the part of Community manufacturers other than WANO, is an assesment which cannot be sustained. While in past years the control by ICI within the United Kingdom of transportation, storage and distribution facilities for blackpowder may well have had the effect of precluding or of substantially limiting the marketing of blackpowder other than that of ICI's choice, it is apparent that there exists a demand for blackpowder within the United Kingdom for which suppliers other than WANO could compete, particularly if ICI were to be left free as a merchant to market blackpowder also from such suppliers.

4. Contrary to the submission of the parties, the agreements, if implemented, would affect trade between Member States in respect of all the restrictions referred to in II (2) above and, in particular, as follows.

(a) The current demand for blackpowder in the Community is estimated at about 2 800 tonnes per annum, approximately as follows :

(1) ICI letter of 29 June 1977.

Member State		*Tonnes*
Belgium/Luxembourg		150
Denmark	less than	50
Ireland	less than	10
France		200
Federal Republic of Germany		800
Italy		400
Netherlands		300
United Kingdom		500
(Use within EEC of blackpowder for safety fuse		400)
		2 800

Blackpowder is currently manufactured in Community countries approximately as follows :

Member State	*Tonnes*
France	350
Federal Republic of Germany	2 400 (1)
Italy	500
	3 250

(the excess of production over demand is exported).

(b) ICI's participation in the joint venture would have the effects outlined in II (2) (a) to (d) above, that :

(i) ICI would purchase blackpowder for substantially the entire future United Kingdom blackpowder demand solely from the production of the joint venture because ICI would not be likely to make purchases also from other available sources of supply in France and Italy which would accordingly be excluded from the United Kingdom ;

(ii) United Kingdom customers would for the foreseeable future be deprived of opportunities to purchase blackpowder of such varieties and at such prices as would be available from manufacturers in France or Italy or elsewhere ;

(iii) additional barriers would be created to the entry into the United Kingdom of supplies of blackpowder from France, Italy or elsewhere, so as to deprive suppliers other than WANO of opportunities to make sales for United Kingdom requirements.

(c) Concerning the effect on inter-Member State trading, the parties have submitted that, for a number of reasons, a competitive Community market for blackpowder did not exist prior to the making of the notified agreements and would not be likely to come about in the foreseeable future, so as to be affected by the notified agreements. These submissions raise in substance the points outlined in II (3) (a) above and cannot be sustained for the reasons set out in II (3) (b) above.

(d) Even if it were assumed that the circumstances put forward by the parties amounted at present to insuperable or near-insuperable obstacles to independent imports into the United Kingdom, this submission does not meet the Commission's case that ICI, in implementing the notified agreements and in participating in the joint venture, would :

(i) no longer leave itself free to purchase blackpowder for resale on the best terms from time to time available from any source, whether WANO or not ; and

(ii) increase and ensure the continuation of the difficulties faced by independent importers.

5. The effect of the restrictions on competition outlined above would be likely to be appreciable because :

(a) both parties are groups of significant industrial importance ;

(b) both have considerable financial resources ;

(c) WASAG controls a substantial share of the supply of and each party controls a substantial share of the distribution facilities for blackpowder in the Community ; and

(d) the product of the proposed joint venture is an essential homogeneous commodity in a highly oligopolistic market.

6. Article 85 (1) therefore applies to the notified agreements.

III. APPLICABILITY OF ARTICLE 85 (3)

Under Article 85 (3) of the Treaty, the provisions of Article 85 (1) of the Treaty may be declared inapplicable in the case of any agreement which contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not :

(1) This figure includes an estimated production by WANO of about 2 000 tonnes.

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

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

1. The implementation of the agreements would afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question in that the implementation of the agreements would result in the insulation of the United Kingdom market by precluding sales into the United Kingdom by suppliers other than WANO and by shutting out all possibilities of competition by WANO in respect of sales into the United Kingdom which are independent of ICI.

2. Accordingly, questions of contribution to the improvement of the production or distribution of goods or to the promotion of technical progress do not fall to be considered, although the parties have submitted that Article 85 (3) should be applied to the agreements. However, they have not demonstrated that the production of blackpowder would be improved as a result of the agreements. Although the parties initially alleged in their notification that the pooled technology and resources of ICI and WASAG would enable manufacture on a scale sufficient to justify developing new processes, it was later admitted that no really new processes were likely for the manufacture of blackpowder (1). The composition and method of manufacture of blackpowder have remained essentially the same for centuries and no radically new process or methods of manufacture can reasonably be expected to occur by reason of the joint venture. Although the supply by WASAG of all or part of the United Kingdom market for blackpowder would enable an increased rate of use of its plant and on the assumption (which has not been demonstrated) that this could result in economies of scale, these could be obtained independently of any participation by ICI in the capital of WANO.

3. The parties have also claimed that the implementation of the notified agreements would lead to a greater security of supply for blackpowder and that, in particular, ICI's participation in the joint venture was necessary for it to obtain suitable supplies of blakpowder and to guarantee supplies of suitable qualities to its customers in the United Kingdom and elsewhere. Security of supply in these circumstances, in which there are considerable under-used production capacities, is not a benefit sufficient for the purposes of Article 85 (3). The structure of the industry is such as to exclude any probability of long-term shortage.

4. Even on the asumption (which is not fulfilled) that the agreements, if implemented, could contribute to an improvement in the production or distribution of goods or to the promotion of technical or economic progress, a fair share of any such benefits would not become available to consumers. The result of the agreement would be to enable ICI, an existing monopoly distributor of blackpowder in the United Kingdom, also to become, jointly with WASAG, a monopoly producer of blackpowder for the United Kingdom. In that position ICI would be subject to negligible competitive pressure to pass on to the consumer any savings made by increased efficiency.

5. The agreements do not therefore satisfy the tests of exemption of Article 85 (3).

IV

In the agreements it was provided that they would not come into operation until approved by the Commission, but the parties in one important respect have been acting as if they were already in force. ICI have been buying from WANO and this necessarily affects the position of other suppliers.

Under the circumstances there remains an interest for the Commission to establish clearly, in particular for the benefit of third parties, that the agreements in question came under Article 85 (1) and could not benefit from the exempion under Article 85 (3). This decision is without prejudice to any view that the Commission may take of any other arrangement which the parties may make in the future,

HAS ADOPTED THIS DECISION :

Article 1

The shareholders' agreement dated 14 October 1975 and the related agreements notified on 28 October 1975 and entered into by Bohlen Industrie AG, Wasagchemie GmbH and other companies controlled by them on the one hand and by Imperial Chemical Industries Ltd and other companies controlled by it on the other hand concerning their joint participation in a joint venture company for the manufacture and sale of blackpowder infringe Article 85 (1) of the Treaty establishing the European Economic Community, and may not be implemented.

(1) Meeting between representatives of ICI and the Commission, London, 23 February 1976.

Article 2

Article 85 (3) of the Treaty is not applicable to the agreements referred to in Article 1 above.

Article 3

This Decision is addressed to :

1. Imperial Chemical Industries Ltd,
   Millbank, London SWIP 3JF, England
   and to that company on behalf of its subsidiary companies.
2. Bohlen Industries AG, 4300 Essen, Huyssenallee 85

   and

   Wasagchemie GmbH, 4300 Essen, Rolandstraße 9, Federal Republic of Germany

   and to those companies on behalf of their respective subsidiary companies.

Done at Brussels, 20 October 1978.

For the Commission

Raymond VOUEL

Member of the Commission