II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 5 September 1979

relating to a proceeding under Article 85 of the EEC Treaty (IV/29.021 — BP Kemi — DDSF)

(Only the Danish text is authentic)

(79/934/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 Article 3 thereof,

Having regard to the application made to the Commission under Article 3 (2) (b) of Regulation No 17 on 18 March 1975 by A/S Atka, Copenhagen, Denmark,

Having regard to the Commission Decision of 24 April 1978 to initiate proceedings against BP Kemi A/S and A/S De Danske Spritfabrikker,

Having heard the undertakings concerned in accordance with Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63 (2),

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions obtained pursuant to Article 10 of Regulation No 17 on 13 February 1979,

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

Whereas:

I. THE FACTS

1. The subject of the proceedings

1 These proceedings concern the cooperation between BP Kemi A/S (hereinafter referred to as BP Kemi), a wholly-owned subsidiary of the group headed by the British Petroleum Co. Ltd (hereinafter referred to as BP), and A/S De Danske Spritfabrikker (hereinafter referred to as DDSF) in the field of distribution of synthetic ethanol in Denmark during the period 1 July 1973 to 31 December 1976.

2. The product

2 Ethanol is a colourless, clear liquid with a fresh and characteristic odour. It is completely miscible with water and many solvents, oils, chemicals and chemical products. Ethanol can be produced either on the basis of a raw material which is extracted from mineral oil or gas or on the basis of sugar-holding raw materials (for instance wine, fruits, potatoes, grain or molasses). The first type of ethanol, which has been available only since 1945, is called synthetic ethanol, and the second is called agricultural ethanol.

The two kinds of ethanol do not differ from each other physically or chemically; in fact it is only

recently that a method of distinguishing them has been developed, though it has always been possible for experts within the trade to distinguish them by smell.

3 Ethanol is used in particular in the production of potable spirits, vinegar, pharmaceutical products, cosmetics, solvents, products for domestic applications ('household spirit') and for chemical synthesis. As agricultural and synthetic ethanol technically can be used for the same purposes, and since the costs of production of the latter are the lower (although they have increased considerably with the increase in the oil prices since 1973), the production of agricultural ethanol is protected in the different Member States through provisions which restrict the use of synthetic ethanol. Both the means by which protection is ensured and the extent of the protection vary from Member State to Member State; thus in the United Kingdom and Denmark synthetic ethanol may be used for all purposes except potable spirits and vinegar, whereas in Germany it may be used for chemical synthesis and solvent purposes only and in France it may normally be used for chemical synthesis only.

3. Production

4 In 1976 the total output of agricultural ethanol in the EEC was 7 million hl of which the major part was produced in France (2·4 million hl), Italy (2 million hl) and Germany (0·9 million hl). Output in the United Kingdom was 0·5 million hl and output in Denmark was 0·2 million hl, all of which was produced by DDSF.

5 Annex 1 gives details of synthetic ethanol output. The largest producer in the EEC is the United Kingdom undertaking BP Chemicals Limited (hereinafter referred to as BPCL); like BP Kemi, BPCL is a wholly-owned subsidiary of the BP Group. The only other producers of synthetic ethanol in the EEC are SODES, France, Veba-Chemie AG, Germany, Erdölchemie GmbH, Germany (a joint subsidiary of Bayer and German BP), and British Celanese, United Kingdom. However, British Celanese does not market synthetic ethanol, its output being used only by the company itself.

6 In 1976 the total output of these undertakings was 4·6 million hl of synthetic ethanol. The output of each undertaking as well as its production capacity are indicated in the following table.

(in 1 000 hl)

	Synthetic etanol	
	Output in 1976	Production capacity
BPCL	2 080	2 970
SODES	895	1 230
Veba-Chemie	1 232	1 640
Erdölchemie		760
British Celanese	440	500

Until July 1973 DDSF also produced synthetic ethanol; its yearly output was then around 150 000 hl.

4. The undertakings

7 BPCL produces around 45 % of the synthetic ethanol produced for sale in the EEC. Through undertakings of the BP Group, this ethanol is sold in a number of EEC countries, including the United Kingdom, Ireland, Belgium and Denmark. In 1977 the total turnover from BPCL's sales of synthetic ethanol in the EEC was £ 32·73 million (around Dkr 335 million) of which £ 2·65 million (around Dkr 27 million) relates to products sold in Denmark. Its total sales of agricultural ethanol in 1977 amounted to £ 5·43 million (around Dkr 55 million), all of which was sold in the United Kingdom and Ireland.

8 BP Kemi is a trading undertaking, operating only in Denmark, which sells petrochemical products such as detergents, plastic raw materials and different grades of ethanol. The total turnover of the company in 1975 was around Dkr 119 million (excluding taxes) of which around Dkr . . .(1) million came from the sale of ethanol.

BP Kemi decided late in 1977 to install facilities for drumming and full denaturing in Denmark; these facilities became operative on 1 April 1978. Until then BP Kemi was in general supplying its customers with ethanol only by bulk road tanker.

9 DDSF is primarily a production undertaking whose main product is agricultural ethanol. After opening a new factory in 1975 it produces

(1) In the published version of this Decision, some data have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17, concerning non-disclosure of business secrets.

150 000 to 160 000 hl of this product a year. A major part thereof is used by the undertaking itself in the production of schnapps and other potable spirits, but some is sold to producers of vinegar, fruit wines, etc. and some has previously been exported to BPCL pursuant to an agreement between DDSF and BPCL of 4 November 1975 (in 1975/76 some . . . . . hl and in 1976/77 some . . . . . hl).

10 DDSF has not been producing synthetic ethanol since July 1973, and the synthetic ethanol which the company is now buying is undergoing only simple processes (denaturing, addition of certain substances, etc.) before it is resold; some ethanol is even being resold without any further treatment. In 1974 DDSF bought . . . . . hl of ethanol, and in 1977 around . . . . . hl, all of which was supplied by BP Kemi.

11 The total turnover of DDSF in 1975 was around Dkr 275 million (taxes excluded) of which around Dkr 35 million came from the sale of ethanol. The total exports of the company to other EEC countries in 1975 were around Dkr 3 million (taxes excluded); this amount rose to ..... million, when the exports of agricultural ethanol to BPCL took place.

12 The complainant, Atka A/S, Copenhagen, owns 100 % of the shares in Atka Kemi A/S, Roskilde, Denmark. Atka Kemi A/S was selling household spirits in bottles in competition with DDSF and had around 25 % of this market in Denmark up to 1 March 1974, when it stopped its activities for financial reasons. Since 1971 it had been purchasing synthetic ethanol from BP Kemi

5. Regulations concerning trade in synthetic ethanol

13 In the United Kingdom there have been no restrictions in respect of production or exports of synthetic ethanol since the country became a member of the EEC on 1 January 1973.

14 In Denmark, DDSF enjoyed the sole production rights for alcohol, including synthetic ethanol, until the end of 1972 under a concession from the Danish Ministry of Commerce; imports were subject to a licensing system. However, in connection with Danish membership of the EEC on 1 January 1973, the production concession was terminated and the licensing system was altered so that, in practice, any applications for imports rights were granted.

15 During the period from 1 January 1973 to 30 June 1977, customs duties were levied on imports of ethanol into Denmark from the original Member States, including France and Germany, whereas at no time since 1 January 1973 have customs duties been levied in respect of ethanol imported into Denmark from the United Kingdom, since both Denmark and the United Kingdom had been members of the European Free Trade Association.

16 Duties on ethanol imported into Denmark from the original Member States have been reduced from Dkr 30 per hectolitre to zero. Depending on the selling price, which rose substantially as a result of the oil crisis, the proportion of the selling price accounted for by import duties was 21·2 to 25·2 % on 1 April 1973, 11·8 to 15·4 % on 1 January 1974, 7·8 to 9·3 % on 1 April 1974, and fell to 5 % and lower on 1 January 1975 (for details see Annex 2).

17 Amongst the original Member States, exports and imports were under the control of official bodies in both France and Germany until 1977. One effect was that authorizations to export from these countries were given only to the extent that adequate quantities for consumption on the respective domestic markets were ensured. Nevertheless, as Annex 1 shows, even in 1973 considerable quantities were exported from these countries; in 1973 the total exports from France and Germany to other EEC Member States were 334 000 hl and 125 000 hl respectively, and in 1976 the corresponding figures were 120 000 hl and 40 000 hl. These figure include substantial exports to Denmark; thus in 1973 15 000 hl and 2 000 hl were exported from France and Germany respectively to Denmark (1); in 1976 exports from France and Germany to Denmark were 14 000 hl and 8 000 hl respectively (see Annex 3).

6. Prices

18 Annex 4 shows the prices applied in the individual Member States. The price of ethanol varies greatly according to the amount purchased (either in an individual delivery or over the year) and according to the purity and the use to which it is to be put, so that it has not been possible to produce representative average prices. Nevertheless average minimum and maximum prices for ethanol for particular uses do permit a sufficiently precise comparison.

(1) Although it cannot be verified statistically, it is possible that these exports were partially intended not for consumption in Denmark but for re-export, in which case the duty paid would have been reimbursed.

19 It emerges that prices in Denmark have been without exception higher than in France and United Kingdom, and higher even than in other countries with no domestic output, such as the Benelux countries. Prices in Germany are higher than in France and the United Kingdom, and only slightly lower than in Denmark. It should be borne in mind that these are domestic prices fixed or influenced by the public authorities. Export prices are not controlled and may be lower, as is shown by the offer made to DDSF in April 1976 concerning ethanol produced by Veba-Chemie; this offer was about 20 % below the domestic German price, causing BP Kemi to lower its price by 10 % in order to keep DDSF as a customer. In 1973 and later, French suppliers also tried to secure a better foothold in the Danish market by making offers to DDSF.

20 Certain quantities are occasionally offered on the market at particularly low prices (the spot market). As the parties have stated, these quantities are not sufficient to completely cover requirements such as those of DDSF on a regular basis, but they do influence the supply structure to an appreciable extent. In this connection it may be noted that in the United States, which is the biggest producer of synthetic ethanol in the world, only 70 % of capacity is utilized, and as transport costs are in no way prohibitive, United States undertakings are capable of supplying to Europe and indeed have supplied to Denmark.

7. The history of the agreements

21 As a result of the regulations applied in Denmark, DDSF was in 1972 the only producer of synthetic (and agricultural) ethanol in Denmark and was by far the largest distributor. Furthermore, it was the only undertaking which had at its disposal the necessary facilities for supplying customers with synthetic ethanol in bottles, cans and drums. But its production facilities were relatively old and small, it had to pay a higher price for the necessary raw materials than its foreign competitors. DDSF therefore realized that it could not continue a profitable production of synthetic ethanol for very long and, after having invited quotations from different companies, it entered into negotiations with BPCL in 1972.

22 BPCL had in 1968 started to expand its synthetic ethanol production capacity in the UK, and as from 1971 BP Kemi had started to supply four or five big customers in Denmark who were able to obtain import licences from the Danish authorities.

23 During the negotiations with BPCL, DDSF tried to get the sole distribution rights for BP ethanol in Denmark, arguing that it was the biggest undertaking on the Danish spirits market. This request was refused by the BP Group, however, because as BP Kemi stated, 'our main interest was to continue to sell synthetic ethanol of BP Group origin to the larger accounts to whom we could supply in bulk, leaving DDSF to supply the smaller customers, the speciality grades and the packed business which they were better equipped to handle. Indeed our limited facilities for handling ethanol do not permit any appreciable increase in the range of activities'.

24 When it became clear to DDSF that it could not obtain the sole distribution rights, it wanted instead to get 'effective protection against the potential threat inherent in the fact that our supplier at the same time was our competitor'.

25 At the end of 1972 an understanding was reached between DDSF and BPCL, and DDSF informed customers in a circular letter of 22 December 1972 that it had decided to stop production of synthetic ethanol as from 1 July 1973 and that from 1 January 1973 it would begin charging the lower prices which would be applied for imported spirit. Yet it was only after further negotiations between DDSF and BP Kemi, which carried on the negotiations on behalf of the BP Group, that a 'Purchasing Agreement' and a 'Cooperation Agreement' were entered into.

8. The agreements

26 The Purchasing Agreement was signed by BP Kemi and DDSF on 26 March 1973 and 12 April 1973 respectively, and came into force on 1 July 1973.

It included the following provisions:

(a) DDSF was to buy its total requirements of undenatured synthetic ethanol from BP Kemi;

(b) BP Kemi would have no obligation to supply DDSF in any calendar year with more than 25 000 tonnes of ethanol (DDSF's requirements did not exceed . . . . tonnes);

(c) DDSF would be free to buy quantities of ethanol in excess of 25 000 tonnes from third parties, provided that it first gave BP Kemi the opportunity of supplying such excess quantities on the same terms and conditions as those laid down for the 25 000 tonnes;

(d) either party could terminate the agreement by giving not less than 12 months' written notice, such notice not to expire earlier than 30 June 1979;

(e) the prices fixed in the contract could be increased by BP Kemi for any reason, not less than six months' notice being given to expire on 1 January. If DDSF should find that the increase was unreasonable a procedure of meetings was provided for, and if agreement had not been reached by 31 October either party could then terminate the agreement by giving six months' notice. Beyond this the price could be increased as a result *inter alia* of changes in the exchange rate.

27 The Cooperation Agreement was not signed by the parties, nor dated, but according to BP Kemi it was designed to complement the Purchasing Agreement and it was only made a separate arrangement because this was 'simply more convenient'. The parties started to comply with the terms of the Cooperation Agreement as from 1 July 1973 when the Purchasing Agreement came into force, and it was due to last as long as the Purchasing Agreement was in force, i.e. at least until mid-1979.

28 The Cooperation Agreement included the following provisions:

(a) BP Kemi could sell yearly up to 25 % of the combined DDSF and BP Kemi annual sales of spirits in Denmark. This share was to apply unchanged during the period of validity of the main contract;

(b) BP Kemi was to pay compensation to DDSF if BP Kemi's sales should exceed the 25 % limit. The amount of compensation per litre was calculated as the difference between the list price minus quantity rebate and yearly bonus on the one side and the invoiced price plus BP Kemi's distribution costs on the other;

(c) BP Kemi was to forward a monthly statement to DDSF concerning sales of ethanol showing the quantity sold to each customer, and DDSF was to inform BP Kemi each month of its total sales, as well as of its individual sales to customers purchasing over 100 000 litres;

(d) BP Kemi was to keep to the listed prices of DDSF for ethanol and in principle to apply the same conditions of payment as DDSF. Detailed stipulations were laid down as to the calculation of net prices to customers buying more than 100 000 litres a year, and it was provided that discussions were to take place between the parties if the stipulations needed to be departed from. In respect of customers with special prices, i.e. customers with an annual consumption of more than 500 000 litres, it was provided that they could be accorded special terms of credit which in each case had to be discussed beforehand between DDSF and BP Kemi;

(e) BP Kemi would in the main interest itself in customers having an annual consumption of at least 100 000 litres, and it did not envisage selling 'A spirits' or ethanol in bottles;

(f) in so far as DDSF could prove an offer at a lower price from another source, BP Kemi would either match this price or withdraw from the contract, provided that the offer fulfilled a number of detailed conditions regarding *inter alia* quantity and quality (a so-called 'English clause'); the quantity involved in the present case had to correspond to DDSF's requirements for at least a year.

29 The parties informed the Commission that the Cooperation Agreement was terminated with effect as from 31 December 1974. The termination took place after discussions which were not put in writing as minutes, protocols or the like. DDSF has indicated that the Cooperation Agreement was terminated because of practical difficulties caused by the application of the terms, particularly in the field of prices, and BP Kemi has stated that it felt that the arrangements on quota and compensation and on prices were a hindrance to the development of its own sales efforts.

30 In connection with the termination of the Cooperation Agreement, BP Kemi undertook to pay to DDSF an amount of Dkr 2·2 million. This amount represented the compensation which the parties calculated that BP Kemi would have had to pay to DDSF until the termination of the Cooperation Agreement on 30 June 1979. The amount was calculated on the basis of the expected trend in the market shares of the parties and with regard to the advantage to DDSF of receiving the compensation in 1975.

31 DDSF has stated that this obligation was undertaken by BP Kemi because the termination of the Cooperation Agreement without compensation would have meant a complete shift in the preconditions under which DDSF had entered into the Purchasing Agreement.

The payment never took place, however, because after the Commission had sent the first request for information to the parties in January 1976, the parties decided to suspend the payment pending the outcome of the proceedings.

32 On 2 September 1975 BP Kemi and DDSF signed an addendum to the Purchasing Agreement; according to BP Kemi the addendum operated retroactively from 1 January of the same year.

DDSF informed the Commission that the addendum was entered into at its own initiative because it was eager to have an English clause regulating the purchasing obligation.

33 According to the addendum, it formed part of, and was to be regarded as additional to, the Purchasing Agreement. It contained an English clause which DDSF could invoke to a greater extent than the previous one in the Cooperation Agreement; the clause in the addendum could be invoked if the offer came from a 'serious Western European supplier of alcohol' and concerned 'not less than two million litres in shipments of not less than 500 000 litres for delivery over not more than six months'. If the clause was invoked, BP Kemi could either reduce its price or the quantity which DDSF was obliged to buy, but in the latter event BP Kemi was also entitled to terminate the agreement.

By letter dated 11 July 1978 DDSF terminated the Purchasing Agreement, with effect from 15 July 1979. The parties do not however rule out a continuation of contractual links.

9. **The behaviour of the parties**

(a) *Market position*

34 The following table shows the total sales of ethanol in Denmark and the market shares of DDSF and BP Kemi in that country in the years 1973 to 1977.

Year	Total sales in 1 000 hl	DDSF	BP Kemi	Others	BP Kemi as % of DDSF + BP Kemi
1973	.....	71 %	21 %	8 %	23 %
1974	.....	66 %	30 %	4 %	31 %
1975	.....	58 %	34 %	8 %	37 %
1976	.....	56 %	28 %	16 %	33 %
1977	.....	45 %	37 %	18 %	45 %

The major part of the quantity sold by 'others' comes from France and Germany.

(b) *Supplies to DDSF*

35 Since the Purchasing Agreement came into force in 1973, DDSF has received a number of offers from other sources of supply; the offers have been made partly at the initiative of these sources and partly at the initiative of DDSF. Only on one occasion was a contract entered into as a result thereof; this was in 1973 when DDSF, with the approval of BP Kemi, bought a small amount from a Norwegian company. On another occasion, in 1976, when BP Kemi's price was Dkr 2·09 per litre 100 %, DDSF was offered ethanol produced by Veba-Chemie at a price of Dkr 1·92—1·95 per litre 100 %; influenced by this offer, however, BP Kemi reduced its price to Dkr 1·88, with the result that no contract with Veba-Chemie was entered into.

36 In all other cases the prices offered have been higher than those applied by BP Kemi at the same time. Thus no further negotiations took place between DDSF and the French trading undertaking SOFECIA, which effects sales of ethanol produced by SODES amongst others, when SOFECIA on 24 April 1973 offered DDSF ethanol at a price which in the latter's opinion was considerably higher than the price agreed between DDSF and BP Kemi. This was despite the fact that, according to an internal DDSF document of 24 January 1973, the representative of SOFECIA, in connection with an offer of 23 January 1973 'to supply spirit to cover the consumption in this country' had indicated that 'these prices were proposals and that he was ready to negotiate them'.

37 According to another internal DDSF document dated 18 October 1973 a meeting took place between DDSF and SODES on 17 October 1973 where it was decided to maintain the contact, although SODES 'understood that (because of the purchasing obligation) there was no immediate possibility for supplies of spirits from SODES to DDSF'.

At the same meeting SODES indicated that it would 'continue the supplies to Denmark to the present extent'.

(c) *Exchange of information*

38 In July 1973 BP Kemi and DDSF started to exchange detailed information each month concerning quantities sold to individual customers, in accordance with the terms of the Cooperation Agreement. BP Kemi has

acknowledged that although the Cooperation Agreement was terminated formally as from 31 December 1974, this exchange of information continued until the end of 1976. The continuation of this information arrangement is also indicated by a list forwarded to the Commission by BP Kemi showing the quantities sold by BP Kemi and DDSF in 1975 and 1976 to individual 'spirit customers'.

It should be noted that the Commission had informed the parties in writing in December 1976 that the stipulations of the Cooperation Agreement appeared to violate Article 85 (1) of the EEC Treaty.

(d) *Customers of BP Kemi*

39 BP Kemi has acknowledged that it did not supply any customer having an annual consumption of less than 100 000 litres during the validity of the Cooperation Agreement. Only when this agreement was formally terminated did it start to sell to customers taking less than 100 000 litres. It had four such customers in 1975, six in 1976 and seven in 1977.

(e) *Prices*

40 The parties do not deny that BP Kemi was applying the same prices as DDSF to comparable customers during the validity of the Cooperation Agreement, and that it continued to do so after the formal termination of this agreement. In fact, BP Kemi has stated that 'the price competition started in September of 1976 and has continued to an increasing extent since then'. However, the parties have indicated only one example in 1976 of BP Kemi undercutting the prices charged by DDSF, and they have not contested the examples given by the Commission in the Statement of Objections of identical prices being charged by the parties in the last months of 1976. Examples of different prices being charged become more frequent only in the course of 1977.

(f) *Compensation*

41 As BP Kemi had only 23% of the combined sales by itself and DDSF in 1973, and thus did not exceed the 25 % limit laid down in the Cooperation Agreement, no compensation was paid to DDSF in that year. In 1974, when BP Kemi's share of the combined sales had increased to 31 %, it paid compensation of Dkr 217 628·20 to DDSF. As indicated above, payment of the Dkr 2·2 million which BP Kemi undertook to pay to DDSF in connection with the termination of the Cooperation Agreement has been postponed pending the outcome of the case.

10. The complaint

42 The complaint of 18 March 1975 states that Atka Kemi A/S stopped production because DDSF and BP Kemi were charging the same prices for bulk spirits. As Atka Kemi A/S had been buying ethanol from BP Kemi and was a potential customer of DDSF, which had formerly supplied Atka Kemi A/S, it had the legitimate interest in the case required by Article 3 (2) (b) of Regulation No 17.

II. APPLICABILITY OF ARTICLE 85 (1)

43 Article 85 (1) of the Treaty establishing the European Economic Community prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which

(a) directly of indirectly fix purchase or selling prices or any other trading conditions;

(b) limit for control production, markets, technical development, or investment;

(c) share markets or sources of supply.

A. AGREEMENTS AND CONCERTED PRACTICES BETWEEN UNDERTAKINGS

44 1. DDSF and BP Kemi are undertakings within the meaning of Article 85 (1).

45 2. The Purchasing Agreement, which came into force on 1 July 1973, the Cooperation Agreement, which began to operate on the same date, and the addendum of 2 September 1975 are agreements within the meaning of Article 85 (1). Although the Cooperation Agreement was never signed, it was nevertheless applied by both parties, as is indicated in particular by the payment to DDSF of Dkr 217 628·20 by BP Kemi as compensation in 1974.

46 The Cooperation Agreement and Purchasing Agreement form a unit. Not only did the Cooperation Agreement refer to the Purchasing Agreement as 'the main contract', but clauses of the Cooperation Agreement must be considered a necessary counterpart to the obligation to buy only from BP Kemi during six years which DDSF had undertaken in the Purchasing Agreement, and this purchasing obligation must be considered a precondition of at least some of the obligations undertaken by BP Kemi in the Cooperation Agreement. This close connection between the two agreements is also shown by the fact that the addendum was a supplement to the Purchasing Agreement, whereas its content, including the English clause, replaced stipulations which previously had been contained in the Cooperation Agreement.

47 The close connection between the agreements, uncontested by the parties, is a result of the interplay of their interests.

48 When DDSF, because of its old production installations, and the termination of its protected position on the Danish market, decided to enter into negotiations with the BP Group, it had for many years been practically the only undertaking selling ethanol in Denmark. When it became clear that BP Kemi would not grant it sole distribution rights for ethanol in Denmark, it was in DDSF's interest that BP Kemi should guarantee it the supply of the quantities it needed. BP Kemi, on its side, was at that time incapable of supplying the entire Danish market by itself, since it did not have the necessary contacts with users of ethanol; nor did it have the necessary denaturing, drumming, canning and bottling facilities in Denmark for supplying speciality grades and small customers. It was in the interests of BP Kemi and of BPCL to supply DDSF's total requirements; if DDSF undertook to buy only from BP Kemi, this would ensure that BP Kemi — and thus BPCL — supplied more than 90 % of the ethanol market in Denmark, representing around 10 % of BPCL's yearly ethanol production.

49 However, an obligation on DDSF to buy only from BP Kemi would have given a decisive competitive advantage to BP Kemi in respect of supplies to the larger customers in the short term and in respect of the whole market in the long term, since BP Kemi, by charging DDSF the same price as other purchasers in Denmark, could make it difficult for DDSF to compete in sales to customers whom BP Kemi was able to supply. DDSF would therefore have been willing to enter into a purchasing obligation which would continue after the customs duties had become insignificant only if this obligation were counterbalanced by some protection of its interests. The terms which DDSF and BP Kemi agreed upon in this respect were laid down in the Cooperation Agreement.

50 3. A number of the essential terms of the Cooperation Agreement continued to be applied for two years after the end of 1974, i. e. up to the end of 1976, when BP Kemi and DDSF were first informed of the Commission's views on the Cooperation Agreement.

51 It is not disputed that the parties continued to exchange information to the same extent as before.

52 The parties also continued to charge the same prices to comparable customers. BP Kemi has stated that it started competing on prices from September 1976 onwards, but has not supplied any concrete facts to counter the examples given by the Commission to show that similar pricing continued up to the end of 1976. Cases in which BP Kemi's and DDSF's prices differed become more frequent only in the course of 1977, and mainly in the second half of that year.

53 Both parties have held that the similar prices charged were not the result of an agreement or a concerted practice but were the natural outcome of the market mechanism: BP Kemi had to follow the market leader and align its prices on DDSF's published price lists. Against this it should be pointed out that as DDSF's supplier BP Kemi at all times had an inherent market advantage, and was in a position to exploit it, as became clear in 1977, although DDSF was at that time still the market leader. At no time did market conditions force BP Kemi to align its prices on those of its customer and after the termination of the compensation arrangement it had a clear economic interest in expanding its sales at the expense of DDSF. Moreover, there seems to be a contradiction between the view of the parties that it was 'normal' that BP Kemi followed DDSF's prices and DDSF's statement that the price stipulation in the Cooperation Agreement 'was aimed at giving DDSF a necessary protection against the only supplier of DDSF undercutting it'; in fact this statement shows that DDSF

considered it 'normal' that BP Kemi should use its better supply position to undercut DDSF at a time when DDSF's position in the market was stronger than it became later.

54 It does not seem possible that the parties could have continued the application of the same prices to individual customers without coordination. An application of identical prices may not by itself prove a concerted practice, but it may amount to strong evidence of such a practice when it is unlikely to occur in the normal conditions of the market; such evidence is further reinforced when the companies concerned were previously bound by an express price stipulation and when they regularly exchange detailed information concerning quantities sold to individual customers. Similarly, it does not seem possible that the exchange of sensitive information of the said kind could take place without coordination of the behaviour of the parties, in particular when such behaviour was previously laid down in an express stipulation. In 1974, when the express stipulations of the Cooperation Agreement were still in force, BP Kemi's share of the combined sales amounted to 31 % and it did not change significantly in 1975 and 1976: in 1975 it was 37 % and in 1976 it fell back to 33 %. Only in 1977, when the exchange of information and the application of similar prices had been terminated did it rise to 45 %.

55 In view of the circumstances, the continued exchange of information and the continued application of similar prices can be explained only as the outcome of a concerted practice within the meaning of Article 85 (1). This concerted practice replaced the corresponding express stipulations of the Cooperation Agreement — which were applied by the parties during the period 1 July 1973 to 31 December 1974 — and was followed by them from 1 January 1975 until the end of 1976.

56 A further clause in the Cooperation Agreement, the English clause, appeared so important that in a modified form it was included in the addendum to the Purchasing Agreement, and that according to BP Kemi it was even applied from the date of formal termination of the Cooperation Agreement. The purpose of this clause was to exclude any doubt about the possibility of purchasing from other producers and to leave it to BP Kemi in each case to decide whether DDSF should be allowed to purchase from other suppliers. In March 1975, when the Cooperation Agreement had been formally terminated, but the addendum had not yet been agreed, DDSF entered into contact with the French producer SODES; however, this did not lead to the conclusion of a contract.

B. RESTRICTION OF COMPETITION WITHIN THE COMMON MARKET

1. Restriction of competition with third parties

57 Contrary to the view of the parties the question here is not at whose wish DDSF's obligation to buy its total requirements of synthetic ethanol from BP Kemi was agreed upon, whether the principal motive was DDSF's desire for secure supplies or BP Kemi's desire for secure sales, or whether the purchasing obligation suited both parties' interests. The decisive question is whether the obligation had the restriction of competition as its object or effect.

58 As the Court of Justice has pointed out 'competiton may be distorted within the meaning of Article 85 (1) not only by agreements which limit it as between the parties, but also by agreements which prevent or restrict the competition which might take place between one of them and third parties. For this purpose, it is irrelevant whether the parties to the agreement are or are not on a footing of equality as regards their position and function in the economy. This applies all the more, since, by such an agreement, the parties might seek, by preventing or limiting the competition of third parties in respect of the products, to create or guarantee for their benefit an unjustified advantage at the expense of the consumer or user, contrary to the general aims of Article 85' (1).

59 When a purchaser undertakes to buy all his requirements for a given product from one manufacturer during a certain period, other manufacturers of the product in question are prevented from supplying the purchaser with the product during the period concerned. Thus all competition between the manufacturer who gets

(1) Judgment of the Court of Justice in joined cases 56 and 58/64 (Consten and Grundig v. Commission) [1966] ECR, 299, 339.

such a contract and other manufacturers of the product is excluded during this period in so far as supplies to the purchaser in question are concerned. Depending *inter alia*, on the length of the period and on the economic context, including the market shares and positions of the purchaser and seller such a purchasing obligation may constitute a restriction on competition within the meaning of Article 85 (1).

60 It is true that when any agreement concerning the purchase of a given quantity of a product has been concluded, other producers of the product in question are excluded to that extent (but no further) from covering the needs of the purchaser, but such producers are able to compete for each such contract before it is signed. This is the result of the normal role of competition which gives any interested party the possibility of putting forward his offer and which enables the purchaser to decide freely which of the offers is the most attractive when all factors are taken into account. However, when a purchasing obligation of a longer duration is entered into, the relationship of supply is frozen and the role of offer and demand is eliminated to the disadvantage of *inter alia* new competitors who are thereby prevented from supplying this customer and old competitors who in the meantime may have become more competitive than the actual supplier. If the conditions of the market are thereby influenced to an appreciable extent, it is possible that competition is restricted within the meaning of Article 85 (1).

61 In the present case the purchasing obligation means that all foreign suppliers except BPCL are prevented for a period of six years from selling to DDSF which represents not only the largest, but also in a number of respects the only practical sales possibility for them in Denmark. The restrictive character of this obligation on the part of DDSF is not affected by the fact that BP Kemi has no obligation to supply DDSF with more than 25 000 tonnes a year. DDSF is obliged to purchase all its requirements up to 25 000 tonnes from BP Kemi, with a resulting exclusion of other suppliers in respect of such quantities. Furthermore, since the actual consumption of DDSF has not exceeded ..... hl, which corresponds to approximately ... tonnes (the specific gravity of pure alcohol is around 0·8), the limit of 25 000 tonnes is of no practical importance. Moreover, even if the limit of 25 000 tonnes were reached, this would not mean that DDSF would be free to buy possible quantities in excess of 25 000 tonnes from other sources of supply since in such a situation DDSF would be obliged first to give BP Kemi the opportunity of supplying such excess quantities.

62 The parties have argued that the English clause in its different versions means a protection of the interests of DDSF since DDSF as a result of the clause can buy at a lower price when the conditions of the clause are fulfilled, and since the clause means that such purchases may possibly be made from another supplier. However, the conditions for the clause coming into play are so severe that its practical importance is limited. The clause, moreover, by its nature confirms the restrictive relationship between the parties and means a protection of the interests of BP Kemi.

63 The English clause in the Cooperation Agreement, according to its terms, could be invoked only if the quantity offered by the competitor corresponded to DDSF's total annual requirements; thus the purchase of smaller quantities from other suppliers was not possible. However, even if DDSF had found another supplier who could have supplied DDSF with its annual requirement, DDSF might have abstained from invoking the clause since this, according to the clause, would have meant that BP Kemi could withdraw from the contract.

The English clause contained in the addendum relaxes the purchasing obligation only to an insignificant extent. Minimum purchases are still provided for, the quantity being not less than two million litres in shipments of not less than 500 000 litres for delivery over not more than six months. Moreover, the offer has to come from a 'serious Western European supplier of alcohol'. This excludes *inter alia* offers of smaller quantities from West European countries, and occasional offers on the spot market, which are frequently used by consumers to supplement existing supplies in order to cover their requirements. Although DDSF could not afford to be completely dependent on such sources, their use as a supplement would have been economically attractive. Furthermore, even if DDSF should receive an offer fulfilling the said conditions, DDSF might not invoke the clause for fear that BP Kemi would use the right this gives it to terminate the agreement.

64 In so far as the conditions for the application of, for instance, the English clause in the addendum could have been fulfilled and DDSF, as a result could decide to apply the clause, the result is that BP Kemi was being informed of details of an offer made by one of its competitors; such information concerning the market behaviour and supply possibilities of a competitor would be of importance to BP Kemi. Consequently the English clause restricted competition between BP Kemi and its competitors because it provided it with information about their prices which it would not otherwise have been likely to get. The application of the English clause also means that it was up to BP Kemi in each case to decide, in view of all circumstances, whether a competitor who was offering ethanol at lower prices and under the other conditions stipulated in the clause was to be allowed to supply DDSF. DDSF was not free to purchase from such a competitor if BP Kemi decided to meet the price offered by this competitor; it not being necessary for BP Kemi to underquote the competitor's offer. This is not contradicted by the fact that BP Kemi in the case of the offer concerning ethanol produced by Veba-Chemie actually offered a lower price.

65 In spite of the alleged advantage of the English clause for DDSF, it is even doubtful whether the clause could help in bringing the prices down to the level prevailing in a competitive situation. In a competitive situation it would be expected that a supplier who learns that his price has been underquoted by a competitor would seek to get the order through a further price reduction, but a competitor with knowledge of the English clause might not reduce his price further, if this were possible, because he might think such a reduction was likely to be useless.

66 The purchasing obligation as supplemented by the English clause appreciably limits — and limited — other suppliers than BP Kemi's chances of selling on the Danish market. The overcapacity existing everywhere shows that quantities could be made available by such other sources of supply and the transport costs play only a secondary role as for instance shown by the fact that certain imports from the USA take place. As to prices, the prices on the Danish market were always attractive, even for producers from countries in which relatively high domestic prices apply, such as Germany for example. In practice synthetic ethanol produced by Veba-Chemie had been offered to DDSF at a price lower than that charged by BP Kemi. It is, of course, true that import duties were levied upon imports into Denmark until 30 June 1977 but even in 1973 when they made up 25·2 % of the selling price they did not prevent foreign suppliers from making offers or proposals of negotiation to DDSF in order to begin business with DDSF and to enter a new market which shortly would be no longer cut off by customs tariffs. If DDSF had not been bound by the purchasing obligation as supplemented by the English clause, DDSF would also have been free itself to look for offers on the spot market or elsewhere which did not fulfil the conditions of the English clause but which would have been economically attractive for the company. DDSF was thus deprived of the possibility of using other sources, either occasionally or on a permanent basis and with a view to growth, and thus to lessen the degree of its dependence on BP Kemi.

67 The restrictive effects of the purchasing obligation as supplemented by the English clause are particularly clear in the market in question. The undertaking tied to BP Kemi by these clauses, DDSF, is the largest buyer on the Danish market with a market share of 71 % in 1973 and 56 % in 1976. Considering that BP Kemi itself had a market share in the said years of 21 % and 28 % respectively, only a minor part of the market was open to other suppliers. Moreover, supply is oligopolistic throughout the Community. Apart from BPCL the only producers to be taken into consideration are SODES in France and Veba-Chemie and Erdölchemie in Germany. However, Erdölchemie is not a really independent competitor; it is a joint undertaking in which Bayer and BP (through a German subsidiary) each holds a 50 % stake, and which, since Bayer has no other interests in the ethanol field, is strongly influenced by BP. Apart from these producers, there are only a few suppliers to be considered as competitors of BP Kemi on the Danish market; these trade in ethanol produced in the Community or in non-member countries and sell only limited quantities.

68 When on such a market, which already displays a weak competitive structure, one of the most important suppliers enters into long-term contracts with one of the most important purchasers, which induce the purchaser to take all his requirements or the major part of his

requirements from the same supplier, there exists an appreciable disadvantage for the supplier's competitors and for purchasers, and there is thus a restriction of competition for the purposes of Article 85 (1). A six-year agreement certainly goes beyond what is appropriate under EEC rules of competition to the nature of the legal and economic relationship between the parties. Certainly DDSF's interest in a regular guaranteed supply is to be recognized, as is BPCL's interest in lasting and steady sales of its output. But these interests could be met by concluding purchasing agreements stipulating fixed quantities, without reference to the purchaser's unspecified or not precisely specified requirements and without the restrictions resulting from an English clause; such agreements could be regularly renewed after renegotiating to adapt them to changing interests and the shifting competitive position.

69 DDSF has argued that since DDSF can terminate the purchasing obligation every time agreement cannot be obtained between the company and BP Kemi in respect of price increases made by BP Kemi, what is under consideration is not a binding six-year agreement but a number of successive agreements made every time price increases have taken place and only entered into after negotiations where each of the parties has been free to defend its interests.

However, the purchasing obligation has been entered into for six years. It is binding for the parties during this period and it is in no way automatically terminated by a price increase.

70 DDSF has further referred to the official Danish statistics concerning foreign trade and indicated that, since the import prices (duties excluded) since 1973 have been lower for ethanol imported from the United Kingdom than from any other EEC country, DDSF would in any case only have bought ethanol produced by BPCL.

As regards this argument it should be indicated that when DDSF is buying from BP Kemi it is not paying the import price but a higher price which contains the profit of BP Kemi; a comparison of import prices does not therefore seem to be relevant. Moreover, offers which are not accepted, such as the favourable offer concerning ethanol from Veba-Chemie, which did not result in a sale because of the subsequent price reduction made by BP Kemi, naturally do not appear from the statistics. Also, it should be noted that the import prices from other countries concern relatively small quantities and therefore do not reflect the more favourable prices which DDSF would probably have obtained, if it had been free to buy from sources other than BP.

71 BP Kemi has argued that the purchasing obligation has not restricted competition because of the governmental measures applied in France and Germany; these measures have meant that exports from these countries have only been allowed to the extent that national requirements could be met.

However, the production capacities in France and Germany exceed the actual production in these countries to a significant extent and considerable exports from Germany and in particular from France have taken place. To Denmark, for instance, in 1976 — when the governmental measures in France and in Germany were still in force and when the customs duties in Denmark were insignificant — the exports were around 14 000 hl from France and around 8 000 hl from Germany. Furthermore, SOFECIA in January 1973 offered DDSF ethanol 'to cover the consumption in Denmark' and in October 1973 DDSF and SODES decided to maintain the contact, although SODES 'understood that (because of the purchasing obligation) there was no immediate possibility for supplies of spirits from SODES to DDSF'. It also seems that SODES did not foresee any difficulties in continuing its supplies to other customers in Denmark.

Under these circumstances it must be assumed that the governmental measures in France and Germany would not have prevented DDSF from getting at least some of its supplies from manufacturers in these countries if the company had been free to do so.

2. Restriction of competition between BP Kemi and DDSF

(a) *General*

72 BP Kemi and DDSF have contended that the competition between them is not a type of competition which is protected by Article 85 (1).

Their argumentation may be summarized as follows:

73 Although formally BP Kemi — and not BPCL — is the party to the agreements, this is merely the result of the internal allocation of tasks within the BP Group. In effect therefore, the agreements should be considered as having been made between a producer, BPCL, which was incapable of supplying the entire Danish market, and a distributor, DDSF, which was wholly dependent on BPCL for its supplies. Thus each party was dependent on the other, and the situation was fundamentally the same as that which exists in a sole distributorship arrangement where the producer has reserved to himself the right of selling the contract product to certain customers in the territory of the sole distributor. Competition between a producer and a sole distributor is not the kind of competition which Article 85 is designed to protect; in fact, it is of the essence of any sole distribution arrangement that the freedom of the producer to sell in the distributor's allotted territory be restricted, and it would be senseless to require a manufacturer in such a situation to compete with his distributor since, in the long run, the result would necessarily be the elimination of the distributor with no resulting benefit for competition in general.

74 The Commission agrees with the parties that since both BP Kemi and BPCL belong to the BP Group BPCL should be included in the assessment of the agreements with DDSF. It is not true to say, however, that there is no competition between BP Kemi and DDSF to which Article 85 (1) applies.

75 The competition between the parties in this case is protected by Article 85 (1). The Court of Justice has ruled that Article 85 (1) makes no distinction between businesses operating in competition with each other at the same level or between businesses not competing with each other and operating at different levels and that it is not possible to make a distinction where the Treaty does not make one [1]. However, Article 85 (1) makes no distinction either between the said categories of agreements and arrangements between businesses operating at different levels and competing with each other. Consequently, an agreement between such competing businesses at different levels may have the object or effect of restricting competition within the meaning of Article 85 (1).

76 That there is competition between the parties is shown among other things by what happened in 1977, when BP Kemi began to compete with DDSF on prices, with the result that DDSF's market share was reduced. Moreover, the parties have elsewhere referred to the fact that prices constitute only one dimension of competition, and that the range of offers and customer service also play a role in competition for customers. Lastly, on the price clause in the Cooperation Agreement, DDSF has itself stated that it was 'intended to provide DDSF with the necessary protection against undercutting by its own supplier'.

77 Of course a producer is not obliged to enter the territory of his sole distributor, but if circumstances prompt him to do so, either directly or through a subsidiary or affiliated company, he becomes an operator on the market in the territory like the distributor. Economically he then exercises functions on the market similar to those of the distributor, and any restriction of his free behaviour on the market becomes a restriction of competition just as a restriction in an agreement between two distributors on the market.

To exclude the relationship between a manufacturer and his distributor in a given territory from the application of the rules of competition would mean that they could freely agree to sell at identical prices or to divide customers between them. The producer and the dealer may have completely different views on sales policy, which will find their expression in different prices, terms and customer service, to the advantage of the customer.

(b) *Exchange of information*

78 BP Kemi regularly informed DDSF of its sales of ethanol, indicating the quantities sold to each customer; DDSF regularly informed BP Kemi of its total sales as well as of its sales to each customer in the case of 100 000 litres and above. An exchange of information of this kind means that both parties are informed of important aspects of the conduct of the other, and that a system of solidarity and reciprocal influence is established between them, necessarily leading to a coordination of their market behaviour, on prices amongst other things (see (c) below). Thus

[1] Judgment of the Court of Justice in Case 32/65 (Italy v. Council and Commission), [1966] ECR, 389, 407.

the normal risks of competition are replaced by practical cooperation leading to conditions which differ from those obtained in a normal market. Conduct such as this is contrary to Article 85 (1).

79 The parties have referred to the Commission Decision of 15 December 1975 in the SABA case [1], which held that an agreed exchange of information between a manufacturer and a dealer did not consitute a restriction of competition within the meaning of Article 85 (1). In the said decision the Commission stated that the obligation imposed on SABA's sole distributors to inform SABA upon request of their gross income and of discounts granted to their customers and to supply any information required by SABA's representatives was not in itself to be regarded as a means of restricting competition, as long as SABA refrained from recommending them not to sell products which were covered by the agreement outside their own area or to apply particular prices, and did not offer advantages or threaten disadvantages in order to achieve these ends. As SABA itself did not sell in the territories of the sole distributors, the information would only have restrictive effects if it were used to influence the market behaviour of the sole distributors. In the present case, however, the exchange of information has a restrictive effect on the market behaviour of each of the recipients.

(c) *Customer allocation and market sharing*

80 The information arrangement was supplemented by a clause according to which BP Kemi would, in the main, interest itself in customers having an annual ethanol consumption of at least 100 000 litres. The parties have stated that this clause merely reflected the fact that BP Kemi at that time did not have the necessary facilities to supply the smaller customers. But if this were so there would have been no reason to provide for such a restrictive obligation. And in 1975, when the Cooperation Agreeement had been ended, but the facilities of BP Kemi were still the same, BP Kemi started to supply customers with an annual consumption of less than 100 000 litres. There was, therefore, agreement in principle between BP Kemi and DDSF on the customers each was to supply, which hindered any more effective competition between them, to the disadvantage of consumers.

(d) *Price protection*

81 The obligation undertaken by BP Kemi in the Cooperation Agreement to follow the list prices of DDSF, as well as the later concerted application of identical prices, prevented BP Kemi from freely fixing its sales prices and had the object and effect of restricting price competition between the parties. In the same way the obligation contained in the Cooperation Agreement on the part of BP Kemi to follow in principle the conditions of payment of DDSF meant a restriction of competition between the parties in this field.

(e) *Quota and compensation arrangement*

82 The application of the price clause was supplemented by the quota and compensation arrangement. According to this arrangement, BP Kemi had to pay DDSF compensation corresponding to the benefit which BP Kemi would have obtained itself by selling at DDSF's list prices in so far as BP Kemi's sales exceeded 25 % of the combined sales of the companies. Since the 25 % limit was actually reached, BP Kemi had no economic interest in increasing its market share above the 25 % limit at the expense of DDSF; in particular it had no interest in doing so by means of a price reduction since this would have meant a loss to BP Kemi. Consequently the arrangement encouraged BP Kemi to follow DDSF's prices and thus reinforced the express price stipulation by *inter alia* making control of its application unnecessary. The quota and compensation arrangement also meant the BP Kemi had to pay to DDSF 75 % of the profit resulting from selling to customers who had not previously been supplied by DDSF. Because the arrangement was based on DDSF's listed prices, BP Kemi had no strong incentive to deviate from the prices laid down in DDSF's price list when selling to such customers. Indeed, the arrangement reduced the incentive which BP Kemi would normally have to sell to new customers. The quota and compensation arrangement therefore was likely to influence the

[1] OJ No L 28, 3. 2. 1976, p. 19.

conditions of competition between BP Kemi and its competitors apart from DDSF too.

C. EFFECTS ON TRADE BETWEEN MEMBER STATES

83 During the whole of the period under consideration, i. e. from 1 July 1973 until the end of 1976, the restrictive cooperation between BP Kemi and DDSF was such as to affect trade between Member States.

84 All ethanol sold in Denmark is imported, most of it from other EEC Member States. Pursuant to the Purchasing Agreement, DDSF, which for many years was the only supplier of ethanol on the Danish market and which is still the largest importer and seller of ethanol in Denmark, was obliged only to buy ethanol produced by BPCL, which is the largest producer of the product in the EEC and which also exports to a number of other Member States. Because of the close connection between this purchasing obligation and the other restrictions applied by the parties the purchasing obligation is related to the Cooperation Agreement and to the concerted practice which replaced this agreement and cannot be considered in the light of the Purchasing Agreement only.

85 The purchasing obligation rendered the import of ethanol into Denmark from Member States other than the UK more difficult. It prevented all suppliers (producers and dealers from any country) except BP Kemi — and thus BPCL — from selling through DDSF. The same applied to offers of ethanol on the spot market, which, although it operates in irregular and limited quantities, appreciably influences the competition structure and the price level. Thus only 'serious Western European' producers were in a position even to submit offers to DDSF; even in this case, as the example from 1976 shows, BP Kemi was able to step in to keep such a supplier off the market.

86 Exports into Denmark from Member States other than the UK would have been possible in the absence of the purchasing obligation. The capacity of the German and French producers is not fully utilized; they export to a range of countries. Transport costs play only a secondary role. On 1 July 1973 customs duties were still relatively high; but this did not prevent producers from other Member States from submitting offers which would have been attractive to both sides in the long term, after the planned scaling down of duties. Indeed, there were imports from other countries than the United Kingdom, even if these may have been partly intended for re-export. By 1 April 1974 the relative burden of import duties had fallen to between 7·8 % and 9·3 %, and was to fall further in 1975 and 1976. The general level of prices in Denmark was sufficiently high to make exports to Denmark from Member States other than the UK attractive in spite of the customs duties.

87 As DDSF and BP Kemi during the period covered by this decision sold more than 80 % — and during most of the period more than 90 % — of the ethanol sold on the Danish market the Danish customers were therefore in the main offered only ethanol produced by the UK company BPCL in this period. Because of the coordinated behaviour between DDSF and BP Kemi — which acted on behalf of BPCL — concerning exchange of information, prices, conditions of payment, sharing of customers and quota and compensation the Danish customers furthermore had practically no possibility of choice between independent offers of ethanol of BPCL origin. As a result of this coordinated behaviour DDSF and BP Kemi together had such a strong position on the Danish market that the dufficulties for other suppliers than BPCL of penetrating the Danish market due to the purchasing obligation were reinforced. Thus the quota and compensation arrangement meant that if BP Kemi could not satisfy a particular customer's needs BP Kemi would benefit if the customers bought from DDSF because this would increase the sales which BP Kemi could make without exceeding the 25 % limit. On the whole, the fact that BP Kemi and DDSF could maintain their combined position on the market resulting from the restrictions during a period of three and a half years shows that the cooperation between them was likely to cause trade flows to develop between Denmark and other territories of the common market differently from what would otherwise have occurred.

88 This meant that the positive effect of the opening up of the Danish market which was the object of accession to the Community were to a great extent as far as ethanol was concerned neutralized by the cooperation between the parties.

D. APPRECIABLE EFFECTS

89 The restrictive effects of the exclusive purchasing obligation which prevented or hindered other

manufacturers from supplying DDSF ('interbrand' competition) were reinforced by restrictions of competition between the parties themselves ('intra brand' competition), as described above, so as to worsen the position of consumers even further. In view of the importance of the parties on the Danish market, a substantial part of the common market, this limitation of the various forms of competition undoubtedly had an appreciable effect.

90 Consequently, the cooperation between BP Kemi and DDSF has violated Article 85 (1).

III. INAPPLICABILITY OF REGULATION No 67/67/EEC

91 The parties have argued that Regulation No 67/67/EEC applies to the Purchasing Agreement concluded between them, so that the agreement is exempt from Article 85 (1) of the EEC Treaty. This argument cannot be accepted.

92 The block exemption defined in Article 1 (1) of Regulation 67/67/EEC applies to agreements to which only two undertakings are party and whereby:

(a) one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common market; or

(b) one party agrees with the other to purchase only from that other certain goods for resale; or

(c) the two undertakings have entered into obligations, as in (a) and (b) above, with each other in respect of exclusive supply and purchase for resale.

93 The Purchasing Agreement is clearly not an exclusive distribution agreement to which subparagraphs (a) and (c) of this provision would apply. DDSF's efforts to secure the exclusive distribution rights for BP ethanol in Denmark failed because the BP Group wanted to sell its own products on the Danish market (see above under points 23 and 24). BP Kemi has been carrying out this intention since 1973, supplying significant quantities of ethanol directly to large customers in Denmark, and certain of these quantities have been purchased for resale.

94 Contrary to the view of the parties, the Purchasing Agreement does not fall within the category of agreements exempted by Article 1 (1) (b) of the Regulation either.

95 In interpreting and applying this provision we cannot confine ourselves solely to the letter of the text; its spirit and purpose and its function within the general objectives of the Regulation have also to be considered. As is clear from its recitals, Regulation No 67/67/EEC is intended to facilitate the distribution of goods within the common market. Exclusive supply and purchasing agreements concluded with a view to the resale of the goods are exempted under Article 85 (3) from the general prohibition on restrictive practices, in spite of their restrictive effects, because in general they facilitate the general sale of the product, make it possible to carry out more intensive marketing, and ensure continuation of supplies to customers while at the same time rationalizing distribution. However, such improvements in distribution exist only where the parties apply a clear vertical separation of activities. The economic justification for exclusive arrangements applies where the supplier is not developing his own active sales activities in the territory allocated to the dealer and thus does not enter into competition with him there. This principle is the distinctive factor in the exclusive distribution agreements defined in Article 1 (1) (a) and (c) of the Regulation. It also applies to those defined under subparagraph (b).

96 The Purchasing Agreement concluded by the parties does not meet these conditions. In DDSF's main sales area, Denmark, DDSF and BP Kemi compete in respect of goods covered by the agreement. Both take their offers to what is, essentially, the same category of customers. This fact also explains why protective clauses in DDSF's favour were included in the cooperation agreement, stating that BP Kemi should follow DDSF's list prices and that BP Kemi should compensate DDSF if its annual sales were to exceed a quarter of the two undertakings' combined sales. The Purchasing Agreement is therefore partly a 'horizontal' agreement, concluded between two undertakings at the same level of trade, limiting the commercial freedom of the party undertaking to purchase exclusively from the other and the access of other suppliers

to the Danish market, without however introducing any improvement in the distribution of goods which would tend to outweigh these disadvantages. An agreement of this kind clearly runs contrary to the spirit of Article 1 (1) (b) of Regulation No 67/67/EEC.

97 Even if the Purchasing Agreement were covered by Article 1 (1) (b), the block exemption defined in Regulation No 67/67/EEC would not apply to it. The Regulation does not permit the parties to an exclusive purchasing agreement to enter into restrictive obligations other than the exclusive purchasing obligation itself. In the present case the exclusive purchasing obligation is inseparably linked with a number of supplementary restrictions; these are the arrangements between BP Kemi and DDSF on sales quotas and compensation, prices and conditions of payment, customer-market sharing and exchange of information as well as the English clause. The fact that these arrangements were laid down in a separate document does not alter the position. As has been pointed out, the Purchasing Agreement and the Cooperation Agreement form one economic unit. They must therefore be considered together in assessing whether or not Regulation No 67/67/EEC applies.

IV. INAPPLICABILITY OF ARTICLE 85 (3)

98 Article 85 (3) states that the provisions of Article 85 (1) may be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any concerted practice or category of concerted practices

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

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

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

99 Under Article 4 (1) of Regulation No 17, agreements and concerted practices must be notified to the Commission in order to obtain an individual exemption under Article 85 (3). No such notification took place.

100 Under Article 4 (2) (1) of the same Regulation, the requirement to notify does not apply to agreements and concerted practices where the only parties thereto are undertakings from one Member State and the agreements and practices do not relate either to imports or exports between Member States.

101 The subject of the arrangements is ethanol imported into Denmark from the United Kingdom, and the arrangements prevent the most important distributor in Denmark from importing from other sources of supply in the common market; no such sources of supply exist in Denmark. For these reasons the arrangements 'relate to' imports and exports within the meaning of Article 4 (2) (1) of Regulation No 17. Although the parties which have signed the Purchasing Agreement and are acting in accordance with the agreements and the concerted practice in question are both situated in Denmark, the arrangements furthermore do not involve undertakings in only one Member State because one of the parties is selling only goods which are imported from a company in another Member State and this other company and the party in question are both controlled by the same third company. In effect, therefore, the arrangements, as admitted by the parties (*cf.* point 73), should be considered as having been made between BPCL and DDSF. The fact that the agreements were made formally between BP Kemi and DDSF makes no difference. If this was not so the benefit of Article 4 (2) could be obtained merely by delegating the formal conclusion of agreements to local subsidiaries. In any case, the parties have conceded that Article 4 (2) (1) is not applicable.

102 For formal reasons it is therefore not necessary to consider the question of whether an exemption could have been granted under Article 85 (3).

V. APPLICABILITY OF ARTICLE 3 OF REGULATION No 17

103 The subject of these proceedings is the cooperation as actually practised between BP

Kemi and DDSF, which has been investigated up to the end of 1976. Comprehensive further investigation to cover market behaviour since 1977 has not been considered necessary, as DDSF has given notice of the termination of the existing contractual relations with effect as from 15 July 1979 and as no fine is being imposed in the absence of proof of negligent or intentional infringement in this case.

As the parties have denied that their cooperation infringed Article 85 (1), and as they have raised the prospect of fresh negotiations, it is necessary by decision to establish in what respects their cooperation between 1 July 1973 and the end of 1976 constituted an infringement of Article 85 (1). This will also inform the parties that they may render themselves liable to fresh proceedings under Article 85 if the present contractual relationship is extended or replaced in such a way that DDSF is *de jure* or *de facto* tied to a single producer in respect of its total requirements or a major part of its requirements of synthetic ethanol, excluding or obstructing other European or non-European suppliers of large or small quantities,

HAS ADOPTED THIS DECISION:

Article 1

BP Kemi A/S and A/S De Danske Spritfabrikker have, as a result of:

(a) the obligation on A/S De Danske Spritfabrikker to obtain its total requirements of synthetic ethanol from BP Kemi A/S pursuant to the stipulations of the Purchasing Agreement of 12 April 1973 as supplemented by the English clause in its different versions during the period 1 July 1973 to 31 December 1976;

(b) the exchange of information concerning quantities sold to individual customers pursuant to the stipulations of the Cooperation Agreement during the period 1 July 1973 to 31 December 1974 and as a result of a concerted practice during the period 1 January 1975 to 31 December 1976;

(c) the sharing of customers pursuant to the stipulations of the Cooperation Agreement during the period 1 July 1973 to 31 December 1974;

(d) the application of similar prices pursuant to the stipulations of the Cooperation Agreement during the period 1 July 1973 to 31 December 1974 and as a result of a concerted practice during the period 1 January 1975 to 31 December 1976;

(e) the application of similar conditions of payment pursuant to the stipulations of the Cooperation Agreement during the period 1 July 1973 to 31 December 1974; and

(f) the application of the quota — and compensation arrangement pursuant to the stipulations of the Cooperation Agreement during the period 1 July 1973 to 31 December 1974,

infringed Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

This Decision is addressed to:

BP Kemi A/S, Øresundsvej 152, 2300 Copenhagen S, Denmark,

and

A/S De Danske Spritfabrikker, Raffinaderivej 10, Postboks 1256,

2300 Copenhagen S, Denmark.

Done at Brussels, 5 September 1979.

For the Commission

Raymond VOUEL

Member of the Commission

ANNEX 1

Production and exports by producers of synthetic ethanol in the EEC

(in 1 000 hl)

	France						Germany						United Kingdom					
	1972	1973	1974	1975	1976	1977	1972	1973	1974	1975	1976	1977	1972	1973	1974	1975	1976	1977
Production	1 071	1 203	1 167	1 222	895	1 205	973	1 197	1 522	1 117	1 232	1 280		1 786	2 930	1 980	2 520	2 723
Capacity					1 230						2 400						3 470	
Export: World	901	673	536	105	311	680	35	136	116	28	43·8	46·1	205	182	689	404	455	590
France	·	·	·	·	·	·	—	(32)	38	—	0·3	0·5	—	—	—	—	x	x
Belgium/Luxembourg	15	60	69	10	21	22·2	28	20	23	16	33	35·3	—	—	—	266 (3)	x	x
Netherlands	17	88	81	42	—	14·7	—	77	(4)	—	0·3	0·2	—	—	—	21	x	x
Germany	2	—	—	—	22·1	33	·	·	·	·	·	·	—	—	—	—	—	—
Italy	204	174	90	35	51·5	81·4	—	26	12	—	0·4	0·6	—	—	—	—	x	x
United Kingdom	—	—	85	(4)	11·1	12·4	—	—	—	—	0·1	0·1	·	·	·	·	·	·
Ireland	—	—	—	—	—	—	—	—	—	—	0·2	0·1	x	x	x	(67)	x	x
Denmark	(19) (2)	12	5	6	14·2	23·5	—	2	2	6	6·5	4·8	(29)	(178)	(194)	(188)	(181·5)	(151·3)

(1) *Source:* Council document S/788/77 of 23 May 1977.
(2) Figures in brackets: import figures.
(3) BP keeps a stock in Antwerp.
(x) A precise break down of the export figures has not been made.

ANNEX 2

Customs duties levied on imports of ethanol into Denmark from the original Member States

	Customs duties in Dkr/100 l	% of selling prices			
		DRAA (1) for chemical synthesis		Ethanol as solvents	
		Dkr/100 l (2)	%	Dkr/100 l (2)	%
1. 1. 1972	30	95	31·6		
1. 4. 1973	24	95	25·2	113	21·2
1. 1. 1974	18	117	15·4	153	11·8
1. 4. 1974	18	194	9·3	231	7·8
1. 7. 1974	18	226	8·0	248	7·3
1. 1. 1975	12	225	5·3	283	4·2
1. 10. 1975	12	208	5·8	263	4·6
1. 1. 1976	6	200	3·0	263	2·3
1. 7. 1977	0	199	0	253	0

(1) Abreviation of Doubly Rectified Absolute Alcohol.
(2) Information given by the parties.

ANNEX 3

Imports of synthetic ethanol into Denmark

(in 1 000 hl)

Origin	1972 (1)	1973 (1)	1974	1975	1976	1977
United Kingdom	29	83	185	183	181	139
France	19	15	6	6	14	21
Germany	—	2	2	5	8	5
United States	—	—	—	4	7	8
Sweden	—	—	—	—	0·1	0·1
Norway	—	6	—	—	—	—
Other	—	3	1	—	—	—

Source: Council document S/788/77 of 23 May 1977.
(1) In these years DDSF was still producing synthetic ethanol.

ANNEX 4

Prices for synthetic alcohol (S) and molasses alcohol (M) in the Member States

		1973			1974			1975			1976			1977		
		I	II	III	I	II	III	I	II	III	I	II	III	I (1)	II	III
Germany	S	18—19	18·6—20	18·6—20	23—27	24·6—29·4	24·6—29·4	25—30	29·4	29·4	30—32	32·2—32·9	32·2—32·9	36—38	38—40·3	38—40·3
	M	38—43			49—55			51—57			50—55			54—67		
France	S	9—12	11·9—14·1	16·4—16·2	12—18	15·7—23·4	15·8—26·9	21	23·8—25·3	27·3—29	21	26·5—23·1	28·6—24·9	22	26·8—27·2	28·7—29
	M	16			15			22			22			24		
Italy	S	—			—			—			—			—		
	M	32—44			35—44			25—36			22—32			33—34		
Belgium/ Luxembourg	S	12—15			28—29			29			21—29			25—41		
	M	20—39			23—47			30—54			33—52			37—60		
Netherlands	S	16—20			21—27			24—27			23—24			18		
	M	16—39			21—46			24—26			23—46			28—51		
United Kingdom	S	12	11 — 9·8	15·3—13·9	19	20·3—19·4	20—23·5	26	22—23·8	25·6—27·6	26	26·8—24·7	30·2—27·6	30	29·5—31·5	34·6—37·8
	M	36			33			38			34			43		
Ireland	S	12			19			26			26			30		
	M	29			49			47			48			51		
Denmark	S	15	12·5	14·9	15—32	15·5—29·9	20·2 — 32·6	34—37	34·1—27·5	37·4—34·7	33—34	26·4—25·9	34·7—33·4	38	30·1—29·6	38·3—39·6
	M	21—28			28—40			41			37			43		

I: *Source:* Council document S/788/77 of 23 May 1977 (based upon information provided by the Member States).
The highest and the lowest average prices depend upon the application, the quantity supplied and the time of the contract.

II and III: Information given by the parties on the basis of the official sales prices (Germany and France) or the price charged by wholesalers (United Kingdom and Denmark).

II: Information concerning prices for alcohol for chemical synthesis.

III: Information concerning prices for alcohol for the production of solvents.

(1) Information concerning January 1977.

(2) Because of national regulations practically no synthetic ethanol was used in Italy; in the Netherlands such use only began to any appreciable extent in 1977.