COMMISSION DECISION

of 16 October 1980

relating to a proceeding under Article 85 of the EEC Treaty

(IV/197 — Industrieverband Solnhofener Natursteinplatten eV)

(Only the German text is authentic)

(80/1074/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 2, 5 and 7 thereof,

Having regard to the notification to the Commission made on 25 October 1962 pursuant to Article 5 of Regulation No 17 concerning the association under civil law named 'Exportkartell Solnhofener Natursteinplatten',

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

Having regard to the dissolution on 30 June 1980 of the 'Exportkartell Solnhofener Natursteinplatten' and the setting up on the same day of the association named 'Industrieverband Solnhofener Natursteinplatten eV' and the consequent amendments of the original notification.

Having regard to the Notice pursuant to Article 19 (3) of Regulation No 17 publishing the main points of the notification and its amendments in Official Journal No C 159 of 28 June 1980,

Having regard to the opinion delivered on 15 July 1980 by the Advisory Committee on Restrictive Practices and Dominant Positions in accordance with Article 10 of Regulation No 17,

Whereas:

I. THE FACTS

1. The product

1 Solnhofen natural stone is a kind of stratified limestone found only in the Altmühl valley in the Franconian Jura south of Treuchtlingen. It is the most valuable form of Jurassic limestone and is distinguished from other forms of limestone by its extraordinary resistance to pressure and by the fineness and consistency of its grain that have made it a world-famous lithographic stone. Apart from being used as lithographic stone it is also used for wall and floor coverings, for window sills, for steps and stairs, as decorative wall claddings and as ornamental paving. It is found in strata of consistent thicknesses ('Flinze') (generally between 7 mm and 27 cm) lying horizontally on top of each other, generally separated by strata of friable rock ('Fäulen'), and is quarried by the manual separation of strata. The material obtained from thin strata is used in its natural thickness and almost exclusively with quarry-rough upper surfaces; only material taken from the less common thick strata is machine-sawn into heavy slabs, particularly for stair treads. Sawn slabs without a natural upper surface are ground and can be polished.

2 Because its structure is so fine Solnhofen stone naturally has such an even surface that slabs with the unworked or lightly-ground surface can be used not only outdoors, but as floor coverings in buildings of all kinds, where it has the advantage that its surface is at the same time smooth and yet non-slip. The most important characteristic of Solnhofen stone, however, is the aesthetic quality of its natural surface, which has a matt finish with variegated shades of light and warm colours; the brown and black crystals (dendrite) it often contains enhance its decorative value. The combined presence of several beneficial properties so typical of Solnhofen stone distinguishes it from other types of natural stone which may be considered for the same interior and exterior uses and has found great favour with well-informed customers interested in an individual building style.

3 The result is that demand for Solnhofen stone with the natural surface is found not only in

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

Germany but also in other countries, and even in countries that have their own natural stone deposits. France and Belgium are the main export markets for Solnhofen stone in the EEC, virtually all the stone sold there having the rough surface.

4 Quarriable deposits are found in the highlands flanking the Altmühl valley in the area of Langenaltheim, Solnhofen and Mörnsheim and around Eichstätt. In that region there are about 45 small and medium-sized firms that produce the stone. They get the raw material they require mainly from their own quarries. They also buy part of their requirements from independent stone workers.

2. The Exportkartell Solnhofener Natursteinplatten

5 On 2 August 1961, 19 of the abovementioned small and medium-sized firms jointly set up the association under civil law named 'Exportkartelle Solnhofener Natursteinplatten'. A number of firms subsequently joined the cartel and some members left or ceased their business activities so that at the time of the dissolution of the cartel it had 29 members.

6 The first paragraph of Clause 2 of the contract of association defined the company's objects as being 'to secure and promote exports of Solnhofen natural stone slabs excluding lithographic stone'.

7 The second paragraph of Clause 2 read: 'To this end, prices, discounts and terms of sale shall be fixed for export business, and shall constitute an integral part of this contract of association (see Annexes 1 to 3)'. The Annexes consisted of a list of base prices to be charged in export business, a list of discounts to be allowed on these base prices, and a list of terms of payment to be applied to exports. Clause 11 of the contract of association read: 'The general meeting shall have power to: ... (b) amend the contract of association; (c) determine provisions for attaining the company's objects .... (h) determine prices, discounts and terms of sale'.

8 Clause 12 of the contract of association read: 'Members undertake in relation to the Association that they will comply with the prices, discounts and terms of sale determined for the export trade'.

9 Pursuant to Clause 11 of the contract of association, the terms of payment were subsequently amended and supplemented by other terms in accordance with practice in the trade.

10 Likewise new export price lists were produced periodically, generally each year, which served as base prices for exports to EC markets and were subsequently extended to all exports as the export business expanded.

11 Furthermore, pursuant to Clause 11 of the contract of association, the discounts were modified several times.

12 Lastly, it was provided that foreign importers or agents acting as marketing intermediaries should also comply with the current base prices and with the maximum rates of discount for their customers. Provision was accordingly made for increasing prices or for reducing discounts and commissions where domestic customers doing export business or foreign importers or agents undercut the Association's prices.

13 In practice, compliance with the discounts and terms of business determined by the Association could only be partly enforced. In the contract of association the members had agreed to supervisory measures and to the imposition of penalties in the event of infringement, but penalties were never actually imposed.

14 Regarding the customary exchange of slabs of different thicknesses and dimensions within the industry arrangements were made to see that members purchased only from other members. Efforts were made to see that in addition members delivered only to other members. In practice, however, neither arrangement was strictly observed.

15 In 1976 the Belgian and French customers were for the first time given an aggregated sales bonus, calculated on the basis of the sum of all purchases in the year from all members of the Association.

3. Markets and customers in the EC

16 The main export market in the EC of the member firms is France, followed by

Belgium-Luxembourg and the Netherlands. In these countries the member firms have a share of more than 50 % of the market for Solnhofen natural stone. They generally sell through sales intermediaries acting as sales representatives or doing business both on their own account and as commission agents. These sales intermediaries sell to merchants in the construction material, stone and tiling trades and through non-specialized distribution outlets.

4. The 'Industrieverband Solnhofener Natursteinplatten eV' Association

17 After the Commission had informed the members of the Exportkartell Solnhofener Natursteinplatten that their cooperation hitherto was incompatible with Article 85 of the EEC Treaty, the firms terminated the contract of 2 August 1961 and all other measures taken to attain the Association's objects. The Exportkartell Solnhofer Natursteinplatten was dissolved with effect from 30 June 1980 and replaced the same day by a new Association named 'Industrieverband Solnhofener Natursteinplatten eV'.

18 The Articles of the new Association contain the following main provisions:

(a) The Association is to pursue solely the interests of its members; its activities are entirely financed by the membership dues.

(b) The main objects of the Association are:

— to promote the quarrying and processing of Solnhofen natural stone and its distribution in Germany and elsewhere;

— to guarantee quality and compliance with building regulations and standards concerning the thickness and dimensions of Solnhofen natural stone;

— to establish new markets and outlets by means of advertising;

— to facilitate cross deliveries of finished stone and purchases of unfinished stone within the industry, which includes the necessary joint fixing of base prices for cross-deliveries of materials between producers and the annual joint negotiation of reference prices for the purchase of unfinished stone from independent stone workers;

— to promote and supervise the training of apprentices and to attend to the welfare interests of employees of member firms;

— to exchange information and to represent members which are small and medium-sized firms and to offer them an advisory service in technical, management and legal matters.

(c) The Association has devised the 'Industrieverband Solnhofener Natursteinplatten' Association seal in a characteristic form of script which members may use in their business.

(d) Membership of the Association is open to any person or firm engaged in quarrying and/or processing and/or selling Solnhofen natural stone. New admissions are decided upon by the Management Committee.

(e) The Committee may expel any member who:

— fails to pay the membership fee or other contributions after having received two written reminders; or

— deliberately acts in a manner which is grossly detrimental to the interests of the association.

An expelled member may appeal against the resolution expelling him to the general meeting of members, whose decision is final

Members may resign, such resignation to be effective at the end of a financial year, provided that at least six months' notice has been given.

19 The need for exchange within the industry of finished and unfinished stone referred to under (b) arises from the special circumstances characterising the quarrying of Solnhofen natural stone. Since the slabs obtained from their strata are, with the exception of the less-common thick pieces, left in their natural thickness and the dimensions of the finished slabs depend on the widely differing dimensions of the raw material, undertakings which do not quarry a large number of strata at the same time can produce from their own quarries only a constantly changing and incomplete assortment of products.

20 To guarantee their supply capability and maintain business relations with their customers, most producers of Solnhofen slabs therefore rely on purchases from other producers to complete their stocks. There are also undertakings whose raw materials can be processed only into finished slabs of thicknesses and dimensions for which there is insufficient demand among their customers; these undertakings must try to dispose of their excess production elsewhere. Both can be achieved by exchanges of finished stone between the individual producers.

21 In addition, many undertakings are obliged, or prefer, to buy unworked stone and process it into finished slabs themselves. The suppliers are mainly local independent stoneworkers ('Hackstockmeister').

22 The prices which are used as a basis for the exchange of materials between producers represent a common yardstick for assessing the value of slabs produced in a wide variety of sizes, thicknesses and colours, irrespective of their origin. Their application not only makes it easier to compare the various products, but also guarantees regular reciprocal supplies in the long term. Since the producers already know in advance how stone at their disposal at the time, as well as stone which is for the time being still not available in their quarries or is not present there at all is valued when exchanges are made, they are better placed to judge what quantities they should stock with a view to possible subsequent orders from their customers or should make available to other undertakings and to what extent they can give customers quotations for slabs of dimensions not available in their own quarries.

23 The interest of firms making products from Solnhofen natural stone in having regular supplies also accounts for their custom of jointly negotiating each year with independent stoneworkers the reference prices of unworked stone purchased from them.

24 5. The Commission received no observations from third parties in response to its Notice containing a summary of the notification and announcing its intention to give negative clearance for the articles of the 'Industrieverband Solnhofener Natursteinplatten eV'.

II. LEGAL ASSESSMENT

A. Exportkartell Solnhofener Natursteinplatten: applicability of Article 85 (1) and non-applicability of Article 85 (3) of the EEC Treaty

25 Article 85 (1) 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 directly or indirectly fix purchase or selling prices or any other trading conditions (Article 85 (1) (a)).

26 1. The contract of association concluded on 2 August 1961, the various annexes that formed integral parts of it and the various measures taken in pursuance of the Association's objects were agreements between undertakings, decisions by associations of undertakings or concerted practices within the meaning of Article 85 (1).

27 2. The rules governing the collective fixing of base prices, discounts and terms of sale for exports and foreign resales (contract of association, second paragraph of Clause 2, Clause 11 (c) and (h) and Clause 12) and the further measures for their implementation had the object of restricting competition within the meaning of Article 85 (1) (a) of the EEC Treaty, as far as they concerned exports to or resales in other Member States. To the extent that they were complied with in practice they had the effect of restricting the business freedom both of member firms and of other German and foreign firms at the first stage of distribution, and even of outsiders, and thus substantially restricted the scope of choice of foreign customers at the second stage of distribution.

28 3. The collective grant of an aggregated sales bonus for Belgian and French customers was likewise caught by the prohibition in Article 85 (1). In order to obtain the maximum bonus customers were intended to be induced thereby to place all their purchase orders with members of the Association and to refrain from buying from non-members, even when more favourable terms were available. Such a discount system places other suppliers at a competitive disadvantage, since they have to surmount an artificial,

collectively erected barrier when supplying members' customers and this generates business for the members (1).

29 4. The activities of the association as they were set out in the contract of association and other rules were likely to affect trade between Member States since, as described at 2 above, they had as their object and effect to restrict the business freedom of members and other firms and reduce the scope of choice of foreign customers, so that exports of Solnhofen natural stone, particularly to France and Belgium, where the best outlets were to be found, could not develop in the same way nor in the same volume as they would have done in the absence of the association.

30 Even if one were to reject the existence of a separate market for Solnhofen natural stone and take as a relevant market all natural stone which is usable for wall and floor covering (in which the members of the association would have a correspondingly smaller share), this would not alter the conclusion that the restrictions of competition which resulted from the contract of association and the supplementary provisions were appreciable and likely to appreciably affect trade between Member States. In view of the gravity of the restrictions of competition in question, namely the collective fixing of export prices by competing producers when related, on the one hand, to the obligation imposed on firms at the first stage of distribution to maintain the export price levels of the association and, on the other, to the declared intention to exclude non-members from the exchange of material which is customary in the trade, and in view of the fact that the association embraced most of the trade and thus was of some considerable economic significance, the agreements in question cannot be dismissed as insignificant from the point of view of EEC law on restrictive practices. For the same reason the Commission Notice of 19 December 1977 concerning agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community (2), did not apply in this case.

(1) Cf. Commission Decision of 29 December 1970 concerning the discount agreement of the association of German ceramic wall and floor tilemakers, OJ No L 10, 13. 1. 1971, p. 15.

(2) OJ No C 313, 29. 12. 1977, p. 3.

31 5. In the notification of the contract of association of 2 August 1961 and in subsequent statements the firms concerned contended that the association had various beneficial effects. It was only as a result of the support given by it in the export trade that many of the smaller firms were able to export at all. Consequently the association increased the number of firms supplying the market outside Germany. The stability of prices and quality guaranteed by it maintained customer interest in Solnhofen natural stone products and enabled foreign importers to maintain stocks. The effect of its uniform price policy was to enable all traders to obtain supplies, however large or small they might be, and thus to prevent the formation of oligopolies or monopolies at the distribution stage. Lastly the association helped to preserve jobs in an area with a weak economic structure.

32 6. In contrast to the views of the firms concerned, this association did not meet the conditions for applying Article 85 (3). The agreements, decisions and concerted practices of the members had, as already stated, serious restrictions of competition as their object. Against this, it is questionable to what extent the claimed beneficial effects of the cooperation between the firms concerned actually arose and to that extent they were attributable to agreements restricting competition. This however may be disregarded in the present case. In any event the advantages of the association were not sufficient to counterbalance the serious disadvantages which arose for dealers and consumers, in particular through the exclusion of price competition. The agreement on the fixing of export prices, discounts and terms of business and the other related restrictions of competition which were effected or planned did not therefore contribute towards significant objective improvements or progress within the meaning of Article 85 (3). Thus the first condition for exemption from the prohibition of restrictive practices was not fulfilled.

B. Articles of the 'Industrieverband Solnhofener Natursteinplatten e V' Association: non-applicability of Article 85 (1) of the EEC Treaty

33 The articles of the 'Industrieverband Solnhofener Natursteinplatten eV' Association constitute an agreement between undertakings.

34 Membership of the Association has the effect that the relevant firms, all of which are small or medium-sized, receive assistance in their business activities.

35 The activities provided for in the Association's articles include those activities of the Exportkartell Solnhofener Natursteinplatten which did not have the effect of restricting competition and to which the Commission did not object — efforts directed towards quality control, observance of building regulations and standards, the development of technical improvements, the training of qualified personnel, joint advertising, expanded supply capacity of individual firms through the exchange of materials between members, and the support given to small exporters.

36 All firms doing business in the industry may become members of the Association and any member may leave the Association at the end of a financial year. The observance of six months' notice and the appointment of the last day of a financial year as the date on which membership may be terminated are in accordance with the circumstances of the industry, which pursues a seasonal activity and therefore plans and implements any joint activities, and especially the joint advertising, on an annual basis.

37 The members of the Association are free to use the Association seal. It is purely an advertising symbol and is not therefore a restriction of competition.

38 The remaining joint advertising and the other services rendered to members by the Association through an employed business manager are financed by means of contributions and fees supplied by members. It is therefore quite reasonable for such services to be generally reserved for members. But it may be assumed that the advertising activities of the Association and certain of its other activities, for example the training of apprentices, will also be of benefit to non-members.

39 Non-member firms may participate in the exchanges of unfinished and finished stone within the industry, which the Association seeks to facilitate.

40 The organization of deliveries between fellow-members through the Association does not contravene the prohibition in Article 85 (1) in the present case.

Only by mutually supplementing their stocks are those producers who can only assemble from their own materials a limited selection of natural stone slabs varying in each case in thickness, dimensions and colours able to compete with each other with a full range. The contribution of the Association is limited here to technical assistance. The Association has as little influence over the quantities of finished materials exchanged between the individual producers as on the composition of the individual deliveries, the conditions for which are fixed in each case by the contracting parties concerned.

Nevertheless, the joint fixing of base prices for the exchange of materials can, by its very nature, represent a restriction of competition. Even where the base price cannot be equated with the purchase price actually agreed for the slabs supplied by one producer to another, but merely forms the basis for determining the price, it must be assumed that it restricts the individual freedom of negotiation of the contracting parties and tends to unify artificially the conditions of the supplies agreed between producers.

The system of base prices applies, however, only to deliveries between fellow-members effected within a small area of one Member State and thus does not concern international trade. Moreover, this system is not likely to restrict trade between Member States indirectly to any significant extent. The quantities exchanged between the producers are generally of minor importance compared with the overall production of the undertaking in question. Under these conditions, the incidence upon costs for the producer concerned could only be minimal even if the prices for additional purchases of slabs were competely uniform. There is, however, no question of uniform prices for the exchange of materials. The base price is subject to discounts, the amount of which fluctuates from one case to another according to the quantities ordered, the order situation of the supplier or the urgency of the requirement, so that the prices actually agreed vary. Moreover, the prices for the exchange of materials applied in reality only represent one of several factors determining the selling price. The other price components such as profit margins, customer discounts or remuneration of distributors are individually fixed by each producer, without there being any

models or rates for calculating these. Under these circumstances, in the case in question the jointly fixed base prices for the exchange of materials have no appreciable effect on the selling prices which customers in other Member States are charged.

41 The joint negotiation of reference prices for the purchase of material supplied by independent stoneworkers is also not covered by the terms of Article 85 (1) as it is not capable of appreciably affecting trade between Member States. The quantity of additional raw material purchased by those producers which export to other Member States varies according to producer and is constantly changing so that its effect on the costs of these producers varies to the same extent. There is therefore no ground for considering that in this case the joint negotiation of purchase prices could exercise an appreciable influence towards price uniformity as a cost factor to be taken into account in establishing the value of the finished product. Furthermore, the prices paid by the different producers are not identical since the independent stoneworkers can charge extra when immediate delivery is required or the order is for slabs of unusual size or colour and since terms of delivery may be separately negotiated in respect of handling and transport. Finally, where the independent stoneworkers operate in quarries belonging to their customers, prices are reduced in consideration for the use of those quarries, such reduction being also separately negotiated in each case. All other costs, particularly in respect of processing slabs, are calculated separately by the producers. Profit margins, discounts and agents' commissions are also fixed individually by each firm. In view of these circumstances there are no grounds for considering that the joint fixing of these reference prices for the purchase of unfinished stone has an appreciable effect on the level of prices charged for exports to the other Member States.

42 Following the declaration by the members in a unanimous decision on the dissolution of the Association under civil law named 'Exportkartell Solnhofener Natursteinplatten', renouncing with immediate effect all measures applied for the purpose of influencing the fixing of prices and conditions *vis-à-vis* members, non-members, agents and customers in the EEC, the Commission does not at present have any basis for assuming that any influence on the selling prices of members of the Association still exists or is intended. Nor is there any ground for believing that members of the new Association will be coordinating their price policy in the future. The very structure of the export markets for Solnhofen natural stone in the EEC, with a number of large undertakings as customers, while the suppliers are all small or medium-sized undertakings, should prevent any tendency towards uniform pricing.

43 In view of the abovementioned facts, the lack of homogeneity of the finished products and the structure of the markets, any distortion of export prices of Solnhofen natural stone, in particular the fixing of artificially uniform prices as a result of the joint fixing of base prices for exchanges and reference prices for supplementary purchases, can be discounted, so that the fixing of these prices is not, in this case, capable of affecting trade between Member States.

44 Since none of the other provisions of the articles of the Association call for action by the Commission on the basis of Article 85 (1), negative clearance can be given for these Articles in accordance with Article 2 of Regulation No 17.

C. Applicability of Article 7 (1) of Regulation No 17

45 Article 7 (1) of Regulation No 17 applies to the contract of association of 2 August 1961, by which was established the cooperation between manufacturers of Solnhofen natural stone slabs, including the measures determining and applying base prices, discounts, sales conditions and terms of payment on the basis of that contract. The contract was already in force when Regulation No 17 entered into force on 13 March 1962 and was notified before the date appointed by Article 5 (1) of the Regulation — 1 November 1962. As has already been stated (II, A, 6), these agreements did not satisfy the requirements for exemption under Article 85 (3). With the dissolution of the Association under civil law 'Exportkartell Solnhofener Natursteinplatten' and the formation in its place of the 'Industrieverband Solnhofener Natursteinplatten' the undertakings in question have altered their

agreements in such a manner that they are no longer caught by Article 85 (1). The prohibition contained in Article 85 (1) accordingly applies only for a period fixed by the Commission.

46 In applying Article 7 (1) of Regulation No 17, consideration must be given to the fact that the undertakings in question have not applied their agreements, decisions or concerted practices since the Commission communicated its statement of objections. They have informed the Commission of their intention to modify their cooperation to bring it in line with EEC competition rules, and in accordance with the Commission's opinion, have dissolved Exportkartell Solnhofener Natursteinplatten within a reasonable period and replaced it with Industrieverband Solnhofener Natursteinplatten.

47 The Commission therefore has adequate grounds for declaring that the prohibition contained in Article 85 (1) does not apply for the whole of the period between the entry into force of Regulation No 17 and the termination of the Contract of Association.

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession the Commission has no grounds for action under Article 85 (1) of the Treaty establishing the European Economic Community in respect of the articles of the association named 'Industrieverband Solnhofener Natursteinplatten eV' formed on 30 June 1980.

Article 2

Pursuant to Article 7 (1) of Regulation No 17, the prohibition contained in Article 85 (1) of the EEC Treaty does not apply to the contract of association establishing the association under civil law named 'Exportkartell Solnhofener Natursteinplatten' and to the measures determining and applying base prices, discounts, sales conditions and terms of payment on the basis of that contract for the period from 13 March 1962 to 30 June 1980.

Article 3

This Decision is addressed to the Association 'Industrieverband Solnhofener Natursteinplatten eV', D — 8834 Pappenheim.

Done at Brussels, 16 October 1980.

For the Commission

Raymond VOUEL

Member of the Commission