II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 9 July 1980

relating to a proceeding under Article 85 of the EEC Treaty (IV/27.958 National Sulphuric Acid Association)

(Only the English text is authentic)

(80/917/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 4, 7 and 8 thereof,

Having regard to the notification made on 29 June 1973 by the National Sulphuric Acid Association Limited, Piccadilly House, Jermyn Street, London, United Kingdom, pursuant to Article 4 of Regulation No 17, requesting that the Rules for Sulphur Pool (No 2), a decision of the said Association, being an association of undertakings, dated 1 January 1956 and of which the notified version was amended on 19 March 1980, should, in so far as the decision be found to come within the scope of Article 85 (1) of the EEC Treaty, be declared exempt from the application of that paragraph by virtue of paragraph 3 of the Article in question,

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

Having published a summary of the notification pursuant to Article 19 (3) of Regulation No 17 in Official Journal No C 91 of 12 April 1980,

Having regard to the opinion delivered on 21 May 1980 pursuant to Article 10 of Regulation No 17 by th Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. Object of the proceedings

1. These proceedings concern a decision termed Rules for Sulphur Pool (No 2) of an association of undertakings, the National Sulphuric Acid Association Limited (hereinafter called 'the Association'), a company limited by guarantee and incorporated in the United Kingdom. The Rules grant to a Management Committee of the Pool the power to negotiate for and to purchase the quantity of a Pool member's sulphur requirements as specified in advance by the member and not to be less than 25 % of his total requirements.

B. Sulphur and sulphuric acid

2. Sulphuric acid is one of the most widely used of all manufactured chemical products. It is generally used in processes involving chemical reactions with other substances, these processes creating a wide variety of products. The principal products involving the use of sulphuric acid are phosphate fertilizers, paint, fibres, detergents and soap, sulphate of ammonia and various chemicals. In 1979 the UK production of sulphuric acid was 3·6 million tonnes (100 % H_2SO_4).

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

3. The principal raw material used for the manufacture of sulphuric acid in the United Kingdom is sulphur, sometimes referred to as elemental sulphur or brimstone, occuring in nature or under the ground as the element sulphur or recovered as a by-product from other processes. Sulphuric acid may also be manufactured from sulphur-bearing materials such as pyrites, anhydrite, spent oxide and zinc blend. Approximately one tonne of sulphur produces three tonnes of sulphuric acid.

4. Elemental sulphur is a homogeneous commodity and there is a relatively small number of major world producers, currently about eight. The market is a world market and prices for sulphur are largely determined by the balance between world supply and world demand. Prices are also affected by the production rate of producers, stock levels, use of alternative materials and industrial output in the consuming countries.

5. In the UK the sulphuric acid produced by Pool members is either sold to third parties (about 30 %) or used captively as a chemical agent in the process of producing some further product.

6. The United Kingdom depends for its requirements of elemental sulphur almost entirely upon imports. In 1979 the UK imported more than one million tonnes of elemental sulphur for sulphuric acid production, accounting for more than 95 % of the sulphur used in the production of sulphuric acid. The remaining tonnage came from indigenous sources, mainly recovered as a by-product from oil refinery processes.

7. The imported elemental sulphur upon which the United Kingdom depends is obtainable principally from producers situated in Poland, France, Mexico, the USA and Canada.

8. In the early 1960s there were still substantially only three sources of supply of elemental sulphur available, namely Sulexco in the USA, Mexico, and Société nationale Elf Aquitaine (SNEA) in France. Sulexco was the preponderant supplier. One other source which had been recently discovered, the sour gas fields of the western provinces of Canada, was not really an economic source of supply for the United Kingdom because of high freight rates.

9. At this time significant developments took place in relation to liquid sulphur. Sulphur, whether mined by the Frasch process or recovered from other sources, is recovered in molten form and only solidifies on cooling. Until 1964 all elemental sulphur shipped to the UK was shipped in solid form on ordinary cargo ships chartered by the Pool. However technical developments took place in the USA which enabled sulphur to be delivered in molten form both overland using road or rail tanker and by sea using specially constructed bulk tankers discharging at special terminals.

10. Liquid sulphur has many advantages over solid sulphur. Solid sulphur has to be liquified by a melting process before use ; it is more expensive to handle ; it has to be stored by the user ; and it is more liable to cause pollution. But all the advantages of liquid sulphur were denied to the United Kingdom as long as there were no terminals at which the sulphur-carrying vessels could discharge.

11. Negotiations with Sulexco having come to nothing, the Mexican and French suppliers indicated their willingness to construct their own liquid sulphur terminals at Immingham once they were satisfied that they were likely to achieve an offtake of about 150 000 tonnes per annum from their respective terminals. Separate French and Mexican terminals were duly constructed at Immingham, the French terminal opening in 1964 and the Mexican terminal in 1965. At erminals such as these the sulphur is piped out of the tanker into heated pipes and thence into the supplier's storage tanks which are also heated. Further shipments from the supplier keep the storage tanks 'topped up'. From the storage tanks the sulphur is collected by te user by road tanker, often daily unless a company has facilities to receive direct through pipelines.

12. By the end of the 1960's a new possible source of supply had presented itself, namely Poland. Shipments were first taken from the Polish State trading company Ciech in 1969 and by 1972 Poland ranked after France and Mexico as the Pool's third largest supplier. But all Polish shipments were solid sulphur because Ciech had no liquid terminal. In 1972/73, however, Ciech opened a liquid terminal at Runcorn on the Manchester Ship Canal with an annual throughput of 350 000 tonnes initially, later building up to 400 000 tonnes.

13. By 1973, therefore, there were three main sources of supply of liquid sulphur in the United Kingdom, the French and the Mexican discharging at Immingham and the Polish discharging from Runcorn. The Immingham and Runcorn areas together include 15 plants representing about 60 % of the UK production of sulphuric acid. This geographic proximity of liquid sulphur terminals to the premises of liquid sulphur users is, in view of the high road transport costs involved, a necessary requirement for the economic viability of any such terminal. Indeed,

the costs are such that were the liquid sulphur to be carried more than a fairly short distance by road, about 40 miles (60 kilometres), a more economic alternative would be sought.

14. In recent years there have been two marked trends in sulphuric acid making in the UK, first towards the greater use of elemental sulphur in acid making rather than other sulphur-bearing materials such as anhydrite, pyrites etc., and secondly towards the greater use of liquid rather than solid sulphur.

15. The decline in the use of other sulphur-bearing materials over the past 10 years has taken place because elemental sulphur is substantially more economic and easier to use than other materials. With the single exception of one Pool member's plant at Avonmouth producing smelter acid as a by-product in the production of zinc concentrates, all Pool members' plants in the UK are now based on elemental sulphur and cannot use other sulphur-bearing materials unless converted at considerable expense.

16. As to the trend towards liquid sulphur, it now accounts for over 80 % of the elemental sulphur imported into the UK. This trend has occurred because of the advantages of liquid sulphur already referred to above (paragraph 10) and with the movement of major sulphuric acid producers at Teesside and Cumbria from anhydrite-using plants to elemental sulphur-using plants, liquid terminals have been constructed by SNEA at Teesside and by Duval, an American sulphur supplier, at Workington in Cumbria transhipping from their larger transatlantic terminal at Antwerp.

17. Solid sulphur is shipped from France, Poland and Canada. Canadian sulphur is sold mainly through the Canadian export company Cansulex and by Shell Canada. Solid sulphur is shipped into a number of ports, in as close proximity as possible to the plant of the users concerned but road transport costs are not as important to the situation of the terminal as for liquid sulphur. The price paid for solid sulphur by the Pool is generally lower than that paid for liquid, reflecting the additional handling and melting costs associated with solid sulphur. Pool members requiring solid sulphur thus pay slightly less for their raw material than liquid users.

18. As already seen, the liquid elemental sulphur upon which the UK is substantially dependent is shipped from four main sources to terminals effectively controlled by the suppliers. In 1977 the tonnages shipped to the Pool were as follows :

Liquid sulphur 1977	*1 000 tonnes*
Polish State trading company, Ciech :	
— Runcorn terminal	255·160
SNEA :	
— Immingham terminal	88·920
— Teesside terminal	122·094
Mexico APSA :	
— Immingham terminal	132·813
Duval (USA) :	
— Workington terminal	137·721
Total (82·1 % of total imports)	736·708

19. The balance of the sulphur imported by the Pool in 1977 was solid sulphur, which was shipped to eight UK ports. The tonnages were as follows :

Solid sulphur 1977	*1 000 tonnes*	
Ciech	72·271	
SNEA	57·208	
Shell Canada	30·479	
	159·958	(17·9 % of total)
Combined total (Liquid/solid)	896·666	

C. The Association and its buying pool

20. The Association was formed in 1919, when its objects were stated to be the establishment of the sulphuric acid industry in the United Kingdom on a permanently prosperous basis, the creation of new outlets for the consumption of sulphuric acid and the finding of means of disposing of surplus sulphuric acid production.

21. The membership of the Association consists of all major manufacturers of sulphuric acid in the United Kingdom and Ireland, accounting for virtually the total manufacturing capacity in these two countries.

22. In 1956 the members of the Association formed, by the adoption of the Rules for Sulphur Pool (No 2), a joint buying pool for the purchase of elemental sulphur for all members who also wished to be members of the Pool. Initially, all members of the Association obtained all their supplies via the Pool and thus the Pool had the task of negotiating for, purchasing and supplying the total requirements in elemental sulphur of the producers of more than 96 % of all sulphuric acid manufactured in the

United Kingdom. After representations by the Commission this exclusivity in purchasing has been restricted to an obligation on the members to purchase a minimum of 25 % of their total requirements.

23. The 19 companies currently members of the Pool have widely varying requirements in sulphur; five each accounting for more than 10 % of all Pool sales, while nine of the remaining members take 2 % or less. Pool members currently contribute together a little over 80 % of production of sulphuric acid in the United Kingdom. One major producer of sulphuric acid, using about 11 % of all imported sulphur in the United Kingdom (the largest member of the Pool accounts for about 16 % of such sales), although remaining a member of the Association, withdrew from the Pool in 1969. Most Pool members use all or a large part of the sulphuric acid produced by them in the manufacture of products mentioned in paragraph 2 above, which are then marketed throughout the Community. About 30 % of the sulphuric acid is sold directly to third parties. The other major sulphur users in the Community: France, Italy and the Federal Republic of Germany each import less than 40 % of their sulphur requirements from the major world suppliers. The individual sulphuric acid manufacturers in these countries have in general larger capacities than those in the United Kingdom and are less numerous.

24. The current members of the Pool are:

— Albright & Wilson Ltd,
— Associated Octel Co. Ltd,
— Berk Spencer Acids Ltd,
— British Chrome & Chemicals Ltd,
— British Titan Products Co. Ltd,
— Courtaulds Ltd,
— W.H. Cowburn & Cowpar Ltd,
— Croda Synthetic Chemicals Ltd,
— R. & J. Garroway Ltd,
— ICI Ltd,
— ISC Chemicals Ltd,
— Laporte Industries Ltd,
— Leathers's Chemical Co. Ltd,
— Nitrigin Eireann Teoranta,
— Nypro (UK) Ltd,
— Richardsons' Fertilizers Ltd,
— Rohm & Haas (UK) Ltd,
— Scottish Agricultural Industries Ltd,
— Staveley Chemicals Ltd.

25. The operation of the Pool is controlled by a management committee consisting of not more than eight individuals elected annually by the Council of the Association. Each member of the Association can appoint one representative to the Council in respect of every 100 000 tonnes or part of 100 000 tonnes of sulphuric acid produced by that member in the preceding year. The Council determines *inter alia* the terms and conditions of membership.

D. The Amended Sulphur Pool (No 2) Rules

26. The Rules for the Sulphur Pool contain the following provisions.

(a) The price paid by members for sulphur purchased through the Pool is fixed by the management committee. The management committee may fix different prices for different grades of sulphur which will reflect the differences in costs incurred by the Pool in performing its services to different members.

(b) The quantity of sulphur purchased is calculated on a six-monthly forecast by members of their requirements for that period. If the forms or grades of sulphur requested by a member are not available, he is obliged to accept such other forms or grades as the management committee may decide.

(c) If at any time liquid sulphur is not available at competitive prices, the management committee may revert to purchases of solid sulphur. The management committee will, however, endeavour to supply with liquid sulphur any member who is unable or unwilling to accept solid sulphur, such member then being obliged to pay any increased costs the management committee may have incurred in obtaining the liquid sulphur.

(d) The final price charged to each member for solid sulphur cif ship's rail is based on the landed weight of the cargo. Members requiring smaller cargoes bear a proportionately higher charge than members who import larger cargoes. The final price of liquid sulphur is based on the ex-terminal weight of the material delivered to the member.

(e) The sulphur is resold to the members on a no-profit, no-loss basis.

(f) Each member notifies the Pool of the tonnage of sulphur for which he wishes a contract entered into on his behalf for the ensuing period of six months commencing 1 January or 1 July. This tonnage is the member's 'stated requirement' and the member undertakes to purchase on the terms referred to in the Rules and discussed at (a) to (e) above.

(g) Each member is required to purchase from the Pool at least 25 % of the total sulphur acquired by him in any calendar year. Should any member purchase less than 25 % of his annual requirements from the Pool, he shall be deemed to have withdrawn from the Pool from the end of that year. Such a purchaser may apply to rejoin the Pool commencing 1 July or 1 January on giving 12 months notice of his intention to do so.

(h) In order that the Pool can have the information necessary to allow it to be fully aware of the trends in members' purchasing and thus to make any appropriate adjustment to its own purchasing policies, the tonnage acquired from a source other than the Pool must be notified to the management committee not later than 28 days from the end of the calendar month in which a Pool member has acquired such sulphur. This also serves as a check that members are adhering to the Pool Rules concerning quantities purchased through the Pool.

(i) The selection of a terminal port for delivery of the sulphur is subject to the approval of the management committee.

E. Sulphur Pool (No 2) Rules prior to amendment on 19 March 1980

27. (a) Members of the Pool could not import sulphur for acid-making purposes other than through the Pool without the consent of the management committee. There was no restriction on members purchasing sulphur from indigenous sources of supply to be used in the production of sulphuric acid and a number of members purchased recovered sulphur from United Kingdom suppliers supplementary to their Pool supplies. However, such recovered sulphur accounted for no more than 5 % of all sulphur used in the production of sulphuric acid.

(b) Sulphur purchased through the Pool could not be resold or transferred to any non-member of the Pool without the consent of the management committee.

(c) The sulphur imported by the Pool and sold to its members could only be used for acid-making purposes. In exceptional cases a member who used sulphur for both acid-making and other purposes could use the sulphur bought through the Pool for non-acid-making purposes provided a quantity of sulphur equivalent to the amount he had borrowed from his Pool quota was subsequently used for the manufacture of sulphuric acid.

28. After the Commission had objected to the provisions detailed in point 27 (a) to (c) above as not being indispensable to the objectives of the Pool Rules, the Association agreed to remove the offending clauses, i.e. those relating to exclusivity in purchasing, the restriction on use and the restriction on resale. The Pool was limited to purchasing a minimum of 25 % of a member's total sulphur requirements.

II. APPLICABILITY OF ARTICLE 85 (1) OF THE EEC TREATY

29. Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by 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.

30. The members of the Association who have agreed to be bound by the Rules for Sulphur Pool (No 2) are undertakings and the Association is an association of undertakings in terms of Article 85. The Rules for Sulphur Pool (No 2) constitute a decision of an association of undertakings to cooperate in the purchase of elemental sulphur.

31. The Rules of the buying pool have the effect of restricting competition between the members of the Pool.

32. Each member of the Pool, to the extent he is committed to purchasing through the Pool, is prevented from competing with other Pool members to obtain more fabourable terms from the suppliers than those obtained by the management committee.

33. To whatever amount the member is committed, he is deprived of the choice to negotiate terms and conditions with the suppliers which could include, as regards e.g. length of contract and rebates, those terms which would meet the needs of the individual member concerned more specifically than could be obtained by a body acting for a variety of sulphur users with widely varying requirements.

34. More particularly, individual members, to the extent that they are tied to the Pool, cannot purchase sulphur should prices become lower than those paid by the Pool or benefit from a particularly advantageous situation, e.g. where a supplier may have encountered contractual difficulties with another user or where a user wishes to sell surplus stocks. A member may also be unable to use his geographical location to best advantage as regards transport costs since the choice of port is in the hands of the Pool and any port used for a cargo is unlikely to be of equal advantage to all users of that cargo.

35. About 30 % of the sulphuric acid manufactured by the Pool members is sold commercially to third parties and since sulphur accounts for up to 80 % of the production cost of sulphuric acid, the equalising effect the Pool Rules have on the price of sulphur paid by the acid producers is felt in the price of sulphuric acid itself and, at least to some extent, in the prices of the numerous products which require, to a greater or lesser degree, sulphuric acid as a constituent chemical. This is true whether these acid-based products are manufactured by Pool members or by those to whom sulphuric acid is sold. Thus price competition, to the extent that the members purchase through the Pool (i.e. between 25 and 100 % of requirements), is largely eliminated between Pool members selling sulphuric acid, a homogeneous product for which little other competition is possible.

36. Membership of the Pool has the effect of preventing, for at least a six-month period, every member from obtaining at least 25 % of his total sulphur requirements directly from *inter alia* France and from North and Central American producers via the ports of Rotterdam and Antwerp.

Effect on trade between Member States

37. The Sulphur Pool Rules (No 2) are liable to affect appreciably trade between Member States. The French producer of elemental sulphur, Société nationale Elf Aquitaine, supplies large quantities of sulphur to users in a number of Member States and to the Pool. In 1976, for example, about 300 000 tonnes or more than 30 % of the Pool's total requirements were supplied by SNEA. In addition, Mexican, United States and Canadian supplies have their main terminals in Rotterdam or Antwerp and the sulphur is distributed from the ports by road, rail, sea or canal to its eventual destination in a number of Member States including the United Kingdom.

To the extent that Pool members are committed to purchasing through the Pool, suppliers in the Community are exluded from selling directly to those members and thus at least 21 % (taking into account the one major acid manufacture outside the Pool) of all sulphur imported for the UK acid-makers will be supplied to one sales outlet, i.e. the Pool. To this extent sellers in the Community are limited to dealing with a single purchaser and to obtaining a single price for sales of sulphur to the UK.

The supply and price of sulphur also have an important effect on the supply and price of sulphuric acid and therefore on the numerous products in the manufacture of which sulphuric acid is required. These products are marketed throughout the Community by members of the Pool.

III. APPLICABILITY OF ARTICLE 85 (3) OF THE EEC TREATY

38. Under Article 85 (3), the provisions of Article 85 (1) of the EEC Treaty may be declared inapplicable in the case of agreements between undertakings or decisions of associations of undertakings which contribute 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 do 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.

A. Improvements in production and distribution

39. Although the management committee of the Pool dictates to its members the port at which the sulphur is to be discharged and this may not always be the nearest port to the destination of at least part of the cargo, nevertheless the fact that the Pool deals with a number of suppliers and knows its members' requirements leads to the operation of a flexible distribution system acceptable to the members. By contrast to an individual member, especially one with a small sulphur requirement, the Pool can request a supplier with whom it has a contract to deliver a full cargo of sulphur to a particular port. This port will be in the optimum situation for access to most of the various users for whom the sulphur is intended. If liquid sulphur is being purchased, then the supplier with a terminal in the best location, taking into account the destination of the sulphur, would be requested to deliver the required quantity.

40. In view of the very high transport costs for the carriage of liquid sulphur, in particular by road, from

the dockside terminal to the users' plant, the choice of port is very important in any calculation of the price to be paid by a user for delivery at his plant.

41. The advantages to a user of liquid sulphur over solid are detailed in paragraph 10 above, but the fact that United Kingdom sulphur users have been able to obtain those benefits for so long is in no small measure due to the existence of the Pool and the fact that it could guarantee to the suppliers the purchase of at least the minimum quantity of liquid sulphur to make the installation of the required terminals economically viable.

42. In addition, the Pool, as a result of its long-term contracts with different suppliers, can have liquid sulphur supplied at the four terminals in the United Kingdom operated by the suppliers. It therefore has the ability, in the event of a shortage of liquid sulphur at one terminal, to provide, with the supplier's agreement and where transport costs allow, supplies from other terminals to avoid the effects of shortages at members' plants.

43. As regards solid sulphur, the large number of receiving ports gives the Pool the opportunity to switch a vessel to another port or member at short notice if the member for whom the cargo was originally required is unable or unwilling to accept it because of unforeseen circumstances. Similarly, a shipment of solid sulphur can usually be switched by the Pool from one member to another who may be faced with an unforeseen shortage of sulphur.

44. The Pool's operation therefore allows a considerable degree of flexibility in the distribution of both solid and liquid sulphur. This is of advantage to the members and would be difficult, if not impossible, for any member acting individually to achieve since few, if any, Pool members would be in a position to deal with more than one supplier at a time.

45. In general, demand has tended to exceed supply on the market for elemental sulphur and purchasers of large quantities have thus been more likely to obtain security of supply and the most advantageous prices. The Pool, therefore, as potentially one of the largest single purchasers of elemental sulphur in the Community, has been in the position of negotiating with all of the relatively few suppliers in the world from a position of strength. This has generally meant that even in times of shortage the Pool has been able to supply its members with at worst a considerable proportion of their individual requirements and no member has had to stop production of sulphuric acid owing to a lack of availability of sulphur.

46. The existence of the Pool provides price and other advantages to the 14 members who manufacture relatively small quantities of sulphuric acid and have correspondingly small requirements in sulphur. It is likely, especially in periods when demand outstrips supply, that these purchasers of small quantities, accounting for more than half the Pool's membership, would have difficulty in interesting the suppliers in furnishing them with their individual requirements at a reasonable price or even at all. Only when their sulphur needs are agregated, giving the Pool a strong negotiating position with quantities of a size to interest the suppliers, are they assured of obtaining their requirements and at a reasonable price.

B. Consumer benefits

47. The result of these benefits in cost, flexibility in distribution and security of supply of the elemental sulphur is that members of the Pool are assured of obtaining, at a reasonable price, adequate supplies of the raw material to which up to 80 % of the cost of manufacturing sulphuric acid is attributable. Since 30 % of the total quantity of sulphuric acid manufactured by Pool members is sold to third parties, competition between Pool members on the market for sulphuric acid is ensured. In addition, the consumer, i.e. both the user of the sulphuric acid and the user of a product in the manufacture of which sulphuric acid is required, receives the benefit resulting from the activities of the Pool of regular supplies of both sulphuric acid and the many products in the various sectors for which the acid is used at a cost which reflects the price obtained by the Pool for the raw sulphur. These products, which include fertilizers, paint, fibres, detergents and soap, are, as is sulphuric acid itself, sold on markets in which there is competition between Pool members and between Pool members and other manufacturers of the products. This competition ensures that the consumer receives the cost benefits attributable to the Pool's activities both on purchasing sulphuric acid and on any downstream products. If at any time the conditions at which the Pool obtains sulphur are less advantageous than those which could be obtained by members individually, consumers should receive the cost benefits resulting from members being free to purchase up to 75 % of their sulphur requirements from sources outside the Pool.

C. Indispensability of restrictions

48. Although the Commission is aware of the benefits of the joint buying pool in terms of improvements in the distribution of sulphur and the production of sulphuric acid, the associated technical and economic progress and resulting consumer benefits, it must at the same time establish that the Pool Rules contain no restrictions on competition which are not indispensable to the attainment of their objectives and which would eliminate competition in respect of the products concerned.

49. For the Pool to function effectively, it must have a knowledge of the quantities of sulphur which its members wish it to purchase. This knowledge must be available to the Pool in good time to allow meaningful negotiations with the suppliers for specific quantities, albeit usually within certain margins, and for a fixed term. Thus the Pool's task would be greatly hindered if it did not know its members' tonnage requirements for at least the ensuing six month period. That these requirements must amount to a minimum of 25 % of a member's total requirements for any calendar year is a restriction without which the Pool's strong negotiating position with the suppliers would be eroded to too great an extent. This commitment by the members gives the Pool credibility in its negotiations with the suppliers which it would otherwise lack, since the suppliers are well aware of the total manufacturing capacity the Pool represents. Thus, to allow the Pool to attain its objectives or indeed for the Pool to continue to function effectively in the face of relatively few suppliers in a situation where demand frequently outstrips supply, its credibility with the suppliers is of great importance.

D. Elimination of competition

50. In order that the Pool can be certain that its members are adhering to the Rules as regards the commitment to purchase at least 25 % of requirements through the Pool, members are required to inform the Pool of purchases of imported sulphur other than through the Pool. Members can, of course, continue to be members of the Pool while purchasing up to 75 % of their imported requirements from other sources. In addition, one of the largest producers of sulphuric acid in the UK, using about 11 % of the sulphur imported into the UK, is not a member of the Pool. Thus competition in respect of a substantial part of the products concerned is not eliminated.

Removal of past restrictions

51. Prior to the amendments of 19 March 1980 to the Rules (see paragraph 27 (a) to (c) above), they contained restrictions which were not considered by the Commission to be indispensable to the attainment of the objectives of the Rules and which led to the elimination of competition in respect of the product in question. The Pool members were obliged to purchase their full requirement of imported elemental sulphur through the Pool. The effect of this total exclusivity was to prevent competition between Pool members at the stage of purchasing their raw material. Only individual transport costs and the quality of sulphur purchased led to any variation in the price paid by the Pool members. This has the further result of restricting price competition in the market for sulphuric acid, since sulphur constitutes a considerable part (up to 80 %) of the production costs of sulphuric acid. Pool members may now purchase up to 75 % of their requirements from sources other than the Pool and can thus take advantage of fluctuating market conditions to obtain more advantageous terms than offered by the Pool. Any member may, however, continue to purchase exclusively through the Pool and it is likely that many, especially the smaller acid producers, will do so as the quantities they require will be of commercial interest to the suppliers on much fewer occasions than the greater amounts required by the larger acid producers.

52. Pool members were also prevented from selling sulphur to non-members. This prevented members disposing of surplus stocks at the highest price and equally prevented other sulphur users in the United Kingdom or elsewhere in the Community from obtaining sulphur from any Pool member even if stocks allowed.

53. The Rules also obliged members to use the sulphur acquired through the Pool only for acid-making purposes. This restriction on use was related to the restriction on resale in paragraph 52 above and was a result of the artificial distinction previously made in the sulphur market between sulphur for acid-making purposes and 'regular' sulphur, i.e. for all other purposes. Although the terms 'regular' and 'acid-making' sulphur related to one product, the distinction made regarding the use to which the sulphur was put eventually led to different prices being paid for the same raw material.

54. The restrictions on use and resale are therefore not indispensable to the attainment of the Pool's objectives and have been removed from the rules.

IV. APPLICABILITY OF ARTICLES 7 AND 8 OF REGULATION NO 17/62/EEC

55. In accordance with Article 8 (1) of Regulation No 17, a decision in application of Article 85 (3) shall

be issued for a specified period and conditions and obligations may be attached thereto. In addition, under Article 8 (2) of the said Regulation the Commission has a duty to ensure that the requirements of Article 85 (3) continue to be satisfied.

56. The Rules for Sulphur Pool (No 2) have been in operation since 1 January 1956 and were notified to the Commission on 29 June 1973. Following representations by the Commission, the Association in full cooperation with the Commission modified the Pool Rules in such a manner as to satisfy the requirements of Article 85 (3). The Commission therefore intends to apply Article 7 of Regulation No 17 and declare the provisions of Article 85 (1) inapplicable to the notified Pool Rules form 1 January 1973 to 18 March 1980, the day prior to the adoption of the amendments to the Rules. In addition, the amended Pool Rules qualify for exemption in terms of Article 85 (3) and the date on which the exemption will take effect is the date on which the Association amended the Rules to satisfy the texts of Article 85 (3). In determining the duration of the exemption as provided by Article 8 of Regulation No 17, account must be taken of the need to allow the Association to make contracts of a normal duration in the industry concerned. Such supply contracts may be made for periods of up to but generally not longer than eight years. In addition, it is desirable that the Commission should reconsider the grant of the exemption before a lengthy period of time has elapsed, particularly since the Pool Rules have recently been altered and the full effects of these alterations on the markets in question and particularly on consumers in these markets are not yet known.

It appears appropriate therefore to grant the exemption for the period 19 March 1980 until 31 December 1988.

57. In order that the Commission can, during the period of exemption, ensure that the requirements of Article 85 (3) continue to be satisfied, the Association should be obliged to inform the Commission immediately of any amendment whatsoever to the Pool Rules and of any alteration to the practical application of these Rules, including any changes in or refusals of applications for membership. Furthermore, in order that the Commission can be made aware of the effects, if any, of the amendments to the Pool Rules, the Association should be obliged to inform the Commission annually of the sulphur tonnage each Pool member purchased through the Pool and the tonnage purchased from sources other than the Pool.

HAS ADOPTED THIS DECISION :

Article 1

1. The provisions of Article 85 (1) of the Treaty establishing the European Economic Community are, pursuant to Article 85 (3), declared inapplicable to the terms of the decision of the National Sulphuric Acid Association of 1 January 1956 in the form as notified to the Commission on 29 June 1973 bringing into force the Rules for Sulphur Pool (No 2) for the operation of a joint buying pool for the purchase of elemental sulphur imported into the United Kingdom as amended on 19 March 1980. This exemption shall have effect from 19 March 1980 until 31 December 1988.

2. The provisions of Article 85 (1) of the Treaty establishing the European Economic Community are, pursuant to Article 7 of Regulation No 17/62/EEC declared inapplicable for the period 1 January 1973 to 18 March 1980 to the terms of the said decision of the National Sulphuric Acid Association.

Article 2

The Association shall immediately inform the Commission of any amendment or addition to or the discontinuation of the Rules for Sulphur Pool (No 2) specified in Article 1 and of any alteration in the nature or scope of the joint buying pool including any changes in or refusals of applications for membership of the Pool.

The Association shall inform the Commission no later than 31 January in each year of :

(a) the sulphur tonnage each member of the Pool purchased through the Pool in the previous calendar year ; and

(b) the sulphur tonnage each member of the Pool purchased from sources other than the Pool in the previous calendar year.

Article 3

This Decision is addressed to :

— The National Sulphuric Acid Association Ltd, Piccadilly House, Jermyn Street, London, England,
— Albright & Wilson Ltd, 1 Knightsbridge Green, London SWIX 7QD, England,
— Associated Octel Co. Ltd, 20 Berkeley Square, London WIX 6DT, England,
— Berk Spencer Acids Ltd, Abbey Mills Chemical Works, Canning Road, London E15 3NX, England,
— British Chrome & Chemicals Ltd, Urlay Nook, Eaglescliffe, Stockton-on-Tees, Cleveland, TS16 0QG, England,
— British Titan Products Co. Ltd, Billingham, Teesside, Co. Durham, England,
— Courtaulds Ltd, Chemicals Division, Barton Dock Road, Stretford, Manchester M32 0TD, England,
— W. H. Cowburn & Cowpar Ltd, Westingham Road, Trafford Park, Manchester M17 1QB, England,
— Croda Synthetic Chemicals Ltd, PO, Box 8, Knottingley, Yorkshire, WF11 8 BW, England,
— R. & J. Garroway Ltd, 694 Duke Street, Glasgow G31 1LB, Scotland,
— Imperial Chemical Industries Ltd, Imperial Chemical House, Millbank, London SW1P 3JF, England,

— ISC Chemicals Ltd, Borax House, Carlisle Place, London SW1P 1HT, England,
— Laporte Industries Ltd, Hanover House, 14 Hanover Square, London W1R 0BE, England,
— Leather's Chemical Co. Ltd, Rawdon House, Green Lane, Yeadon, Leeds LS19 7XX, England,
— Nitrigin Eireann Teoranta, 60 Nothumberland Road, Dublin 4, Ireland,
— Nypro (UK) Ltd, Flixborough, Near Scunthorpe, Lincolnshire, England,
— Richardsons Fertilizers Ltd, Herdman Channel Road, Belfast BT3 9AP, Northern Ireland,
— Rohm & Haas (UK) Ltd, Lenning House, 2 Masons Avenue, Croydon CR9 3NB, Surrey, England,
— Scottish Agricultural Industries Ltd, 25 Ravelston Terrace, Edinburgh EH4 3ET, Scotland,
— Staveley Chemicals Ltd, Staveley Works, Chesterfield, Derbyshire, S43 2PB, England.

Done at Brussels, 9 July 1980.

For the Commission

Raymond VOUEL

Member of the Commission