II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 13 July 1983

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.174 — Vimpoltu)

(Only the Dutch text is authentic)

(83/361/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Greece, and in particular Articles 3 (1) and 6 thereof,

Having regard to the notification made to the Commission on 11 September 1980 by the Vereniging van Importeurs van en Groothandelaren in Land- en Tuinbouwmachines 'VIMPOLTU' (hereinafter referred to as 'Vimpoltu'), in accordance with Article 4 of Regulation No 17, of the decision adopted by Vimpoltu on 27 May 1980,

Having regard to the application submitted by Vimpoltu to the Commission on the same date for negative clearance of Vimpoltu's abovementioned decision under Article 2 of Regulation No 17 or, failing that, an exemption under Article 85 (3) of the EEC Treaty,

Having decided on 1 July 1982 to open proceedings in Case IV/30.174,

Having given the undertakings concerned the opportunity to reply to the objections raised by the Commission, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

After consultations within the Advisory Committee on Restrictive Practices and Dominant Positions, in accordance with Article 10 of Regulation No 17, on 25 February 1983,

Whereas :

I. THE FACTS

A. Vimpoltu

(1) Vimpoltu is an association which was constituted under Dutch law in 1927. Article 5 of its constitution states its objects as :

(a) to promote the agricultural machinery trade in the broadest sense ;

(b) to foster good relations between those engaged in the agricultural machinery trade ;

(c) to regulate that trade ;

(d) to promote the general interests of its members.

[1] OJ No 13, 21. 2. 1962, p. 204/62.

[2] OJ No 127, 20. 8. 1963, p. 2268/63.

Under Article 5 (2), the association attempts to achieve those objects by *inter alia* laying down conditions for the sale and delivery of agricultural machinery and placing obligations on its members or groups of them regarding observance of such rules as are laid down by it.

(2) Vimpoltu has ordinary, extraordinary and honorary members. Ordinary membership is open on request to partnerships, limited partnerships, public and private limited companies, and individuals of full age, registered or resident in the Netherlands, who independently carry on trade, mainly or exclusively on a wholesale basis, in agricultural machinery which they acquire direct from the manufacturer and who keep stocks of the machinery and of spare parts (Articles 8 and 9 of the constitution).

(3) Membership can end with the member's death or upon his resignation or expulsion. Expulsion is possible only for breaches of the constitution, rules or decisions of the association (Article 10 of the constitution).

(4) By resolution of the general meeting, Vimpoltu can set up divisions charged with promoting the interests of a particular section of the trade (Article 14 of the constitution).

Such divisions are empowered to take decisions on trade in the machinery falling within their ambit. Before becoming effective, such decisions must be approved by the board. After board approval, divisional decisions are notified to all members of the association (Article 24 of the constitution).

(5) The division concerned in this case is Division I, Agricultural tractors, machinery and implements. Vimpoltu has around 20 members in the tractor business who are both importers and wholesalers and who together hold a share of the Dutch tractor market of about 90 %.

B. The farm tractor market in the Netherlands

(6) For some years there has been no farm tractor manufactuer in the Netherlands.

(7) All the tractors required to meet domestic demand are imported, most of them from other Member States (50 % from the Federal Republic of Germany and smaller proportions from the United Kingdom, Italy and France, for example).

(8) The level of imports of tractors in recent years has been (1):

— 1978 : 12 389 units,
— 1979 : 10 651 units,
— 1980 : 8 006 units.

(9) Total sales revenue (2) from new farm tractors has been :

	Vimpoltu members	Cebeco Handelsraad (3) (4)
1975	Fl 145 615 000	
1976	Fl 217 009 000	
1977	Fl 276 673 000	
1978	Fl 276 904 000	
1979	Fl 273 862 000	
1980	Fl 195 285 000	

(10) The Commission has no reason to doubt these figures, which were supplied by the undertakings. The main link between importers and consumers are the farm machinery dealers, of whom there are approximately 1 500. It is difficult to distinguish tractor dealers since general farm machinery dealers provide after-sales service (maintenance and repairs) for all types of farm machinery.

(11) The biggest group of final consumers are the roughly 160 000 agricultural holdings in the Netherlands.

(12) The sales figures supplied by Vimpoltu (see (9) above) indicate that demand for new farm tractors in the Netherlands has been contracting for some years. The deteriorating economic situation is undoubtedly behind this trend. However, it must also be borne in mind that in the Netherlands tractors are often more expensive than in other countries.

(1) Landbouwmechanisatie 32 (1981) 5 (May), p. 541.
(2) At wholesale prices.
(3) Cebeco Handelsraad is a cooperatively-run undertaking which, though not a member of Vimpoltu, applies the Vimpoltu decision.
(4) Pursuant to Article 21 (2) of Regulation No 17, turnover figures are not published in the Official Journal.

The specialist farming press (1) cites several reasons for the higher prices :

(a) Factors involving importers and dealers :

— Foreign manufacturers' pricing : the 'gross' (i.e., indiscounted) retail price to the consumer ultimately depends on the price the importer has to pay to the manufacturer. The prices Dutch importers are charged are, it is claimed, sometimes higher than those paid by importers in other countries.

— Differences in original equipment supplied with tractors sold in the Netherlands and elsewhere (e.g., in the Netherlands tractors have larger, and therefore more expensive, tyres).

— The fact that all tractors sold in the Netherlands have to be imported, which interposes an extra link in the distribution chain between manufacturer and consumer.

(b) Factors involving consumers : the customary haggling over prices means that dealers seek large trade discounts from importers (up to 40 % prior to the Vimpoltu decision). Part of this discount is often passed on to the consumer in the form of a higher trade-in price for his used tractor.

(c) External factors such as exchange rate fluctuations can raise or lower the prices of imported tractors.

C. Vimpoltu's decision of 27 May 1980

(13) The decision is binding on the members of Vimpoltu's agricultural tractors and machinery division and is also applied by Cebeco Handelsraad. It lays down 'fair trading' rules for trade in agricultural tractors and the fittings and accessories supplied as part of their original equipment.

(14) The decision came into effect on 1 September 1980.

(15) Annex 6 to the notification lists among the grounds for the decision :

(a) 'Gross' retail prices (2) had for various reasons become relatively high.

(b) As a result, importers were giving dealers large, but widely varying, discounts off the full prices.

(c) This had produced a confused situation on the tractor market which was to the disadvantage of the consumers/farmers.

According to Vimpoltu, the decision was intended to dispel this confusion, mainly for the benefit of consumers/farmers.

(16) It has transpired from the investigations that in 1979 Smecoma and Bovag (3), which represent virtually all farm-tractor dealers in the Netherlands, were invited by Vimpoltu to take part in consultations to consider what could be done about falling sales and the relatively high recommended retail prices and large trade discounts. Although the talks did not lead to an agreement between Vimpoltu and Smecoma/Bovag on the Vimpoltu decision, the maximum rate of discount that was later laid down in the decision was in line with the wishes the dealers' associations had expressed during the talks. For the dealers, however, it was very important that a maximum rate of discount was coupled with acceptable recommended retail prices and reasonable trade-in prices for used tractors.

(17) The decision prohibits importers from selling tractors to dealers at a total discount per tractor (inclusive of any turnover-related rebates, special allowances or other benefits) exceeding 25 % of the recommended retail price.

(18) Payment terms are normally to be cash. Where credit and/or finance is given, interest of at least 3 % above the current discount rate for promissory notes is to be charged.

(1) Landbouwmechanisatie 29 (1978) 6 (June), article by Mr Crucq.

(2) I.e., the retail prices recommended by the importer.

(3) Stichting Sectie Mechanisatiebedrijven (Agricultural Machinery Dealers' Foundation) and Bond van Motor voertuigbedrijven, Afdeling Mechanisatiebedrijven (Motor Vehicle Dealers' Federation, Agricultural Machinery Section).

(19) As regards delivery terms, the net price to the dealer is to be for delivery to his showroom or warehouse including the costs of preparation or delivery normally borne by the importer.

(20) Special rules are laid down for sales promotions. Sales promotions may consist only of price reductions within the maxima laid down in the decision and introduction and cancellation must be notified with the Secretariat in advance. Fellow importers must also be informed within 10 days of the introduction of sales promotions.

(21) In the event of suspected breaches of the decision's provisions, importers are subject to investigation, which may involve either direct inspections by an accountant or submission of a report by their own accountant.

(22) If a breach is established, fines of up to Fl 10 000 per offence and/or per tractor delivered may be imposed according to the gravity of the offence. Clear deviations from standard practice or behaviour which are designed to serve as a means of granting extra discounts above the maximum permitted percentage are regarded as offences against the agreed rules of fair trading.

(23) All importers are further required to publish and exchange their new price lists before the decision comes into force on 1 September 1980 and on each occasion thereafter when they change their prices. It has been established that the importers did in fact exchange their recommended price lists from 1 September 1980.

(24) The importers also promise their full cooperation in the arrangements to be made with the dealers' organizations for publishing reasonable trade-in prices for second-hand tractors.

(25) Besides the Vimpoltu decision whose terms have just been described, there is also an arrangement in the trade to publish lists of trade-in prices for second-hand tractors. This rests on a decision by the Centraal Orgaan Mechanisatiebedrijven (Central Council of Agricultural Machinery Dealers) [1] (hereinafter referred to as 'the COM') to extend its list of second-hand tractor selling prices which it had published since 1962 to trade-in prices for such tractors, starting in 1981. In reply to a request for information from the Commission, the COM stated that the move was prompted by the fact that the farming press was more interested in the publication of trade-in prices than selling prices, and reflected a demand among the readership of the farming press, namely the trade (see (16) above) and farmers.

(26) The trade-in prices shown in the COM price lists are 'guide' prices which are established by the COM price-list subcommittee in periodical surveys of dealers.

(27) The trade-in price lists are published twice a year by the COM price-list subcommittee. In reply to the Commission's request for information, the COM stated that Vimpoltu and the farming press were not represented on the subcommittee but did attend meetings. A letter sent by the COM to the members of the price-list subcommittee on 29 August 1980, however, refers to Vimpoltu representatives as 'taking part' in a meeting. In reply to the statement of objections, which included the COM's decision in the practices objected to, the COM said it was ending this participation by Vimpoltu representatives.

(28) There is a further arrangement in the trade covering standard terms of business for agricultural machinery. These were adopted following consultations in the Stichting Mechanisatie Centrum (Agricultural Machinery Trade Foundation Centre), Wageningen, by Vimpoltu, Cebeco Handelsraad, the Vereniging van Regionale Importeurs en Groothandelaren in Land- en Tuinbouwmachines (Association of Regional Agricultural and Horticultural Machinery Importers and Wholesalers), the Vereniging van Handelaren in Landbouwwerktuigen en Tractoren (Association of Agricultural Machinery and Tractor Dealers), Smecoma, Bovag, the Vereniging van Importeurs en Fabrikanten van en Groothandelaren in Melkwinning- en -bewaarapparatuur (Association of Milking and Dairy Equipment Importers, Manufacturers and Wholesalers) and by the Landbouwschap (Agriculture Board).

(29) The standard terms can be declared applicable to any offer, order or contract of sale in respect of machinery (including tractors) intended for use by or on behalf of persons resident or established in the Netherlands. They may be applied at all levels of distribution and are

[1] A liaison committee between the two dealers' associations Bovag and Smecoma.

intended to apply to transactions involving new machinery. From the information gathered by the Commission in the course of its investigations it appears that a considerable number of manufacturers and importers apply the standard terms.

(30) The standard terms cover *inter alia* price changes, transfer of ownership and risk, payment terms, placing of tractors in service, warranty, liability, advertising, after-sales service and settlement of disputes. They are supplemented by arbitration rules.

II. LEGAL ASSESSMENT

A. Applicability of Article 85 (1) of the EEC Treaty

(31) Article 85 (1) of the EEC Treaty 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.

(32) Vimpoltu is an association of undertakings trading in agricultural machinery including tractors and therefore constitutes an association of undertakings within the meaning of Article 85 (1).

(33) Vimpoltu's decision constitutes a decision by an association of undertakings within the meaning of Article 85 (1).

(34) Vimpoltu's decision has the object or effect of restricting competition within the common market.

(a) *The anti-competitive effects of Vimpoltu's decision*

(35) The system of maximum discounts and standard delivery and payment terms (see (17) to (20) above) have the effect of preventing:

1. importers from attracting new customers by offering higher discounts or better delivery or payment terms;

2. dealers from obtaining the discounts and delivery and payment terms which might be obtainable if no maximum were laid down and unrestricted competition were allowed to operate on the market, and hence also from passing on part of any such higher discount to their customers.

(36) The special rules on sales promotions prevent importers from introducing such schemes at will without informing Vimpoltu's Secretariat and fellow importers beforehand.

(37) The procedure for dealing with suspected infringements (see (21) above) and the provision for imposing fines (see (22) above) aggravate the restrictive effect of the Vimpoltu decision by encouraging importers to comply with it strictly.

(38) The arrangements for exchanging price lists (see (23) above) may mean that in setting their new prices — which they do in principle independently of one another — importers are influenced by the prices of competitors, so that prices do not vary only in response to changes in market conditions and may differ from what they would have been in the absence of such exchanges of information. Such arrangements can also lead to a degree of standardization of prices by eliminating those which diverge markedly from the average. Furthermore, the system of recommended ('gross') retail prices, fixed independently by importers, may not only affect intra-brand competition by encouraging dealers selling a particular make of tractor to observe the recommended prices, but can also affect inter-brand competition because it allows all importers to predict with a fairly high degree of certainty the pricing policy pursued by their competitors (see judgment of the Court of Justice on 17 October 1972 in Case 8/72 VCH v. Commission [1972] ECR 990, ground 21).

(39) The anticompetitive effect of Vimpoltu's decision is increased by the COM decision to

publish tractor trade-in prices and that of the Stichting Mechanisatie Centrum to draw up standard terms of business. The standard terms are intended to regulate important secondary aspects of competition at both the manufacturer/importer and dealer levels. Given the fact that they are used by a considerable number of importers and dealers, the standard terms (see (30) above) may create greater uniformity in the terms on which business is transacted than would be the case in their absence and they therefore reinforce the restrictions of competition produced by the Vimpoltu decision.

(40) The COM decision has an influence on the Vimpoltu decision. The presence of representatives at meetings of the price-list subcommittee means that Vimpoltu can influence decisions on the trade-in price lists so as to prevent price competition switching from discounts on new tractors, where it is curtailed by the Vimpoltu decision, to trade-in prices. As well as affording the possibility of establishing a concerted practice, the presence of Vimpoltu representatives also gives Vimpoltu a means of *ex post facto* control over whether the desired level of trade-in prices is actually being followed in practice, which could make these prices binding and obligatory. In this way the COM decison serves to support and reinforce the Vimpoltu decision.

(41) In view of COM's undertaking to end the attendance of Vimpoltu representatives at meetings of its price-list subcommittee, however, the Commission has decided not to take any action against the COM decision, on the clear understanding that it will not hesitate to do so in the future if ever there is evidence of agreements, decisions or concerted practices taking the place of the Vimpoltu decision or of anti-competitive practices involving the COM and Vimpoltu regarding used-tractor trade-in prices.

(42) The restriction of competition due to the Vimpoltu decision is the more appreciable because the products to which it relates constitute 90 % of the Dutch tractor market.

(b) *The potential effect of the Vimpoltu decision on trade between Member States*

(43) The said decision, which applies over the whole territory of a Member State to products almost exclusively imported from other Member States, is apt to affect trade between Member States. Its very nature is such that there is a sufficient likelihood that it could affect, directly or indirectly, actually or potentially, trade between Member States in a manner prejudicial to the attainment of a single Community market. The origin and volume of imports of the products make it likely that the restrictions on competition described above will cause the flow of trade to be diverted from the course it would otherwise have followed.

(44) It must be remembered that the decision applies to the sale or resale in the Netherlands of tractors imported almost completely from other Member States. The existence of these restrictions may well considerably inhibit manufacturers and importers from such States who wish to sell tractors in the Netherlands in the type of marketing policy they can pursue and in their ability to compete with one another, given that they are forced to use distribution channels applying the same conditions of sale. The decision may even affect the potential volume of such firms' (manufacturers' or dealers') exports from other Member States to the Netherlands. However, this potential effect must be seen in relation to the contracting market, where the disadvantage possibly sustained by some producers in the shape of reduced exports must be set against the advantage they gain from the Vimpoltu decision in having price competition between them largely eliminated and their respective market shares maintained.

(45) The obligation on Vimpoltu members to exchange their recommended retail prices and any changes thereto may also affect trade between Member States. The general application of the obligation to exchange price information, the anticompetitive aspects of which were described at (38) above, may result in the level of the prices of participating firms differing from that they would have attained in the absence of the obligation, thus directly influencing tractor imports into the Netherlands. The fact that the retail prices are only a guide to dealers and not binding is irrelevant.

B. Inapplicability of Article 85 (3) of the EEC Treaty

(46) Article 85 (3) states that the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement 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.

(47) The abovementioned provisions of the Vimpoltu decision do not satisfy the requirements for exemption laid down by Article 85 (3).

(48) In the notification, it is claimed that the Vimpoltu decision will increase the transparency of the Dutch tractor market, particularly for farmers, and lead to general reductions in the recommended retail prices and discounts in the Netherlands.

(49) The Vimpoltu decision is mainly of benefit to importers and dealers and does not allow farmers a fair share of the benefit. Importers and dealers are seeking by the decision to maintain an agreed price level and so restrict price competition. It is highly probable that, because of the reduced price competition between importers and the reduced competition on discounts between dealers, farmers will be unable to turn any increased market transparency to practical account in negotiating better terms.

(50) Finally, the system affords importers the possibility of restricting competition in respect of a substantial part of the products in question. The 90 % market share held by those belonging to the system leaves foreign suppliers and domestic consumers little scope for evading its influence.

(51) Since, for the reasons set out above, the restrictions on competition produced by Vimpoltu's decision constitute infringements of Article 85 (1) and no exemption can be granted under Article 85 (3), these restrictions are prohibited.

C. Applicability of Article 3 of Regulation No 17

(52) Article 3 of Regulation No 17 states that where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 (1) of the Treaty, it may, by decision, require the undertakings or associations of undertakings concerned to bring such infringement to an end.

(53) For the reasons set out above, Vimpoltu's decision of 27 May 1980 constitutes an infringement of Article 85 (1). The association of undertakings and its member undertakings must therefore be required to terminate the infringement without delay and to refrain from any other agreement or concerted practice having the same object or effect,

HAS ADOPTED THIS DECISION :

Article 1

The decision taken by the Vereniging van Importeurs van en Groothandelaren in Land- en Tuinbouwmachines 'Vimpoltu' on 27 May 1980 laying down maximum discounts, standard delivery and payment terms and rules on sales promotions and the exchange of price information, constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

An exemption under Article 85 (3) of the EEC Treaty in respect of the decision referred to in Article 1 is hereby refused.

Article 3

The Vereniging van Importeurs van en Groothandelaren in Land- en Tuinbouwmachines 'Vimpoltu' shall cease forthwith to apply the decision referred to in Article 1 and shall refrain from taking any action in the future with the same object or effect as that decision.

Article 4

The Vereniging van Importeurs van en Groothandelaren in Land- en Tuinbouwmachines 'Vimpoltu' shall inform its members of this Decision within one month of itself being notified of it and shall inform the Commission of the manner in which this has been done.

Article 5

This Decision is addressed to the Vereniging van Importeurs van en Groothandelaren in Land- en Tuinbouwmachines 'Vimpoltu', The Hague.

This Decision shall be enforceable in accordance with Article 192 of the Treaty establishing the European Economic Community.

Done at Brussels, 13 July 1983.

For the Commission

Frans ANDRIESSEN

Member of the Commission