II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 July 1984

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.863 — BPCL/ICI)

(Only the English text is authentic)

(84/387/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 4, 6 and 8 thereof,

Having regard to the application and notification submitted pursuant to Articles 2 and 4 of Regulation No 17 on 28 January 1983 by Imperial Chemical Industries plc, London, United Kingdom (hereinafter 'ICI'), and on 8 February 1983 by BP Chemicals Limited, London, United Kingdom (hereinafter 'BPCL'), concerning a set of agreements which were made effective as of 1 August 1982,

Having regard to the summary of the notification published (2) pursuant to Article 19 (3) of Regulation No 17,

After consultation within the Advisory Committee on Restrictive Practices and Dominant Positions,

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 20, 27. 1. 1984, p. 9.

Whereas:

I. THE FACTS

A. Subject of the Decision

(1) This Decision concerns the agreements between BPCL and ICI for the mutual sale of certain production units, technical know-how and goodwill for polyvinyl chloride (hereinafter 'PVC') and low-density polyethylene (hereinafter 'LDPE'). It also concerns the decision of BPCL to close down its PVC and chlorine wedge production units not involved in the agreements, and the decision of ICI to close down certain of its LDPE and ethylene production units not involved in the agreements. Finally, it concerns the agreements to change the capacity rights in a jointly owned ethylene cracker and of supply agreements between BPCL and ICI for polyethylene and ethylene.

B. The undertakings

(2) BPCL, a member of the BP group, is a UK company with worldwide interests in several industrial areas. BP activities are concentrated mainly in oil and gas exploration and

production, and petroleum products, but through BPCL it also has interests in chemicals (including PVC and LDPE), which in 1980 were 7 % of BP's turnover of £ 20 656 million. Its chemical interests are concentrated in the United Kingdom and the EEC, having had PVC plants in the United Kingdom only, but having LDPE plants located in the United Kingdom and in other Member States. BPCL also has a joint venture (Erdölchemie) with Bayer for the production of LDPE.

(3) ICI is a UK company with worldwide interests in several industrial areas. Its activities are concentrated primarily in chemicals (87 % of turnover of £ 7 358 million) of which it produces a wide range. Of the turnover in chemicals, 58 % is in western Europe (35 % in the United Kingdom and 23 % in the rest of western Europe). Petro-chemicals and plastics were 26 % of group turnover. ICI has PVC and LDPE plants in both the United Kingdom and the remainder of the EEC.

C. The products

(4) Both PVC and LDPE are petro-chemical plastics, based on the transformation of derivatives of crude oil like naphtha into ethylene. (It should be noted that ethane — a gas often previously flared during oil production — can also be used as a feedstock to replace naphtha). In addition to ethylene, PVC uses vinylchloride monomer which is based on chlorine (brine).

(5) 75 % of LDPE is used for packaging (plastic films and bags, etc.) and 50 % of PVC is used in building and construction materials (pipes, tubings, cables, wires, etc.). The remaining uses cover a very wide range of plastics products manufactured by plastics transformers. Some of the plastics transformers are subsidiaries of the large petro-chemical and plastics producers.

D. The agreements

The main provisions of the agreements which took effect on 1 August 1982 are as follows:

(6) ICI transferred to BPCL its No 5 LDPE plant to Wilton, United Kingdom, together with all necessary associated plant, equipment and facilities and granted BPCL a licence to occupy the LDPE site and to have access necessary in connection with the operation of the LDPE plant. In addition, ICI transferred all the loose plant and equipment associated with the LDPE plant and granted on a non-exclusive basis all necessary rights under ICI's patent rights and technical information to enable BPCL to exploit fully the plant. ICI also transferred the goodwill of all its UK LDPE business.

(7) ICI, for a consideration, agreed to act as the sole and exclusive agent of BPCL for the operational life of No 5 LDPE plant for its operation, care and maintenance. BPCL agrees to operate the plant for three years. For the first three years after the agreement, ICI is to have the right to veto any sale of the plant by BPCL. This veto will not be unreasonably used. Any eventual shutdown or closure costs of the plant will be the responsibility of BPCL.

(8) For a period of five years, ICI will purchase at fair market price from BPCL a large part [1] of its requirements of polyethylene suitable for its 'Visqueen' UK polyethylene sack and bag business.

(9) BPCL transferred to ICI its No 3 PVC resins plant at Barry, United Kingdom, together with all the necessary associated plant, equipment and facilities and granted ICI sub-leases for the PVC site and granted rights of access necessary in connection with the operation of the PVC plant. In addition, BPCL transferred all the loose plant and equipment associated with the PVC plant and granted on a non-exclusive basis all necessary rights under BPCL's patent rights, and technical information to enable ICI to exploit fully the plant. BPCL also transferred the goodwill of all its PVC business.

(10) ICI is to operate the PVC plant and agrees that it will be operated for at least three years. Any eventual shutdown or closure costs of the plant will be the responsibility of ICI. BPCL, for a consideration, agreed to provide, for not less than three years, such services as ICI may reasonably require for the proper safe and efficient operation of the No 3 PVC resins plant.

(11) The ownership and capacity rights in the No 6 ethylene plant (and its associated gasoline treatment plant) and the No 3 butadine plant, all

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[1] The quantities are specified in the agreements notified. For reasons of business secrecy, these quantities have not been published, pursuant to the provisions of Article 21 (2) of Regulation No 17.

at Wilton, have changed from ICI 50 % : BPCL 50 % to ICI 80 % : BPCL 20 %.

(12) For a period of five years, BPCL is to purchase from ICI at Wilton a fixed tonnage per annum [1] of ethylene at fair market prices.

E. Economic effect of the agreements

(13) The western European producers of bulk petro-chemicals are currently facing considerable over-capacity. In addition, the manufacturers will face and are facing increasing competition from producers outside western Europe who have access to cheap feedstocks. Until recently, this resulted in most manufacturers making a loss on petro-chemicals. These losses and over-capacity constitute an incentive for producers to reduce capacity or in certain extreme cases even completely withdraw from certain lines where they have a comparative disadvantage. Reducing capacity allows a producer to run the remaining plants at a higher capacity utilization, thereby reducing costs. In general, but particularly for ethylene, it should be noted that to run petro-chemical plants below capacity or to start up/close down production temporarily, increases unit production costs. In order to stem their particular losses in petro-chemicals, both BPCL and ICI had been developing long-term strategies.

(14) *BPCL's strategy*

In its long-term strategy BPCL saw itself as having a comparative disadvantage for the production of both PVC and the chlorine wedge inputs, and a comparative advantage for polyethylene (including LDPE).

(14.1) BPCL saw the possibility of its eventual total withdrawal from PVC and in fact had already closed one PVC plant before the agreements with ICI. However, total immediate withdrawal from the loss-making PVC sector would only have lead to increased losses. Such a withdrawal would have reduced internal demand for ethylene and so increased unit production costs for the remaining production. This increase in costs of ethylene would have outweighed savings stemming from any PVC closures.

(14.2) BPCL was looking to acquire additional modern LDPE capacity such that it could convert one of its older LDPE plants to linear LDPE production. Such a strategy meant it could offer a full range of polyethylenes to its customers without disruption of supplies.

(14.3) The agreements with ICI allowed BPCL to realize immediately this long-term strategy. The acquisition of a modern LDPE plant and the goodwill for all of ICI's UK LDPE business allowed BPCL to increase plant loading in modern plant and convert an older LDPE to linear LDPE. It also increased internal demand for ethylene. After the sale of its most-modern PVC plant to ICI along with its reduced share of the jointly owned ethylene cracker, BPCL closed down all its remaining PVC plants and chlorine wedge plants thus totally withdrawing from the production of PVC (these closures were not part of the agreements themselves). By disposing of ethylene capacity and increasing demand for ethylene through the acquisition of LDPE capacity, BPCL was able to close down its remaining loss-making PVC plants and chlorine wedge plants without incurring the cost penalties described above.

(14.4) The agreements with ICI were therefore consistent with BPCL's long-term strategy. However, in the absence of any such agreements BPCL would have continued to produce PVC at least in the short and medium term even if only with reduced capacity. Only the overall deal with ICI which gave BPCL simultaneously extra LDPE capacity and reduced its ethylene capacity allowed it to withdraw from PVC production. In fact, the sale of the PVC and chlorine plants to Norsk Hydro which was originally contemplated was dropped when it was realized that this would not solve the problems of its ethylene balance, for which a solution could only be found by a deal involving ICI and the three products in question (PVC, LDPE and ethylene).

(15) *ICI's strategy*

In contrast to BPCL, ICI in its long-term strategy saw itself as having a comparative advantage for the production of PVC and a comparative disadvantage for LDPE.

(15.1) ICI wanted to build up its PVC capacity. In fact ICI had recently acquired or constructed before

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the agreements with BPCL other PVC capacity. This would allow it both to increase loading of its chlorine wedge plants and of its ethylene plants, and so exploit its advanced technologies.

(15.2) ICI was looking for ways to run down its LDPE capacity with possible eventual withdrawal if closures which would allow increased plant loading did not stem the losses. In fact ICI had already before the agreements with BPCL closed down some older LDPE capacity. However, disposal of LDPE capacity by reducing internal demand would have aggravated its ethylene balance.

(15.3) The agreements with BPCL allowed ICI to realize immediately part of this long-term strategy. The acquisition of a modern PVC plant and the goodwill for all BPCL's PVC business allowed ICI to increase plant loading in PVC and chlorine wedge plants. It also increased demand for ethylene. ICI's acquisition of increased capacity in the modern jointly owned ethylene plant meant that it could now satisfy its total internal demand for ethylene from this plant at a higher capacity loading and was thus able to close down its other older and now surplus to requirements ethylene plant. Similarly, the sale of its most-modern UK LDPE plant and the above-described solution to the problem of its ethylene balance allowed it to close all its remaining UK LDPE plants. ICI still had several LDPE plants on the Continent, one of which was closed subsequent to the agreements. None of the abovementioned closures were part of the agreements themselves.

(15.4) The agreements with BPCL were therefore consistent with ICI's long-term strategy. However, in the absence of any such agreements ICI would have continued to produce LDPE in the United Kingdom at least in the short and medium term even if only with reduced capacity. Only the overall deal with BPCL involving the capacities of the three products concerned (LDPE, PVC and ethylene) allowed ICI to make its partial withdrawal from LDPE production and close down an ethylene plant.

(16) The result of the agreements and subsequent plant closures (which did not form part of the agreements themselves) was a specialization of production in the United Kingdom. ICI abandoned the production of LDPE in the United Kingdom, specializing instead in PVC, and BPCL totally abandoned the production of PVC, specializing instead in LDPE.

(17) Both ICI and BPCL claim that the plant closures carried out subsequent to the agreements were not a result of the agreements. Both maintain that these closures were an inevitable consequence of the industry-wide excess capacity and the long-term strategies which were worked out independently to deal with the problem. In the absence of any agreements, these plants, together with the plants which were sold, would have had to be closed sooner or later.

F. The position of the parties on the market

(18) *Ethylene*

(18.1) It is difficult to define a market for ethylene because the bulk of production is consumed internally within the producing company. This is due largely to the difficulties and cost of transport, except by pipeline. It is for the products derived from ethylene, which are traded, that a market can be defined. Notwithstanding this reserve, the following capacity figures are given. In 1981, before the agreements and associated closures, BPCL had 47 % of UK capacity and ICI 40 %. After the deal BPCL has 47 % and ICI 35 %. Esso and Shell are the other UK producers, whose relative importance will be increased once their joint venture at Mossmorron comes into production (foreseen 1985/86).

(18.2) At the level of the EEC, BPCL, as a result of the agreements and associated closures, has 11 % of capacity and ICI 4 %. Even after the agreements, there remain in addition to BPCL and ICI 10 other important producers (i.e. having more than 5 % of EEC capacity) two of which also have production facilities in the United Kingdom. The closure of the ethylene production plant accounts for slightly less than 4 % of EEC ethylene capacity and 23 % of current UK capacity.

(19) *LDPE*

(19.1) Unlike ethylene, LDPE is traded readily between companies (only 11,5 % of sales are for internal use) and imports/exports constitute an important part of sales/production in each Member State — in the United Kingdom 37 % of sales are imports.

(19.2) At the level of the EEC, as a result of the agreements and associated closures, BPCL's share of capacity increases from 7,9 to 10,2 % and ICI's declines from 8,6 to 4 %. Nevertheless, there remain 12 producers with four having larger capacity than BPCL. In 1981 there were 16 producers. In the decrease to 12 producers, capacity has been cut by 14 %.

(19.3) At the level of the United Kingdom, only two producers remain, BPCL and Shell, with 62,5 and 37,5 % respectively of the new, reduced capacity.

(19.4) The reduction in capacity made by ICI in the United Kingdom represents 23 % of UK capacity and 2,5 % of EEC capacity. In addition, ICI's cut of its EEC capacity represents 1,7 % of total EEC capacity.

(20) *PVC*

(20.1) As with LDPE, PVC is traded readily between companies (only 20 % of sales are for internal use) and imports/exports constitute an important part of sales/production in each Member State — in the United Kingdom 30 % of sales are imports.

(20.2) At the level of the EEC, as a result of the agreements and associated closures, ICI's share of capacity increases from 9,8 to 11,1 % and BPCL's share disappears from 3,8 % in 1981 (this includes the closures which were started in 1980). Nevertheless, there remain 13 producers with four having larger capacity than ICI (in 1981, there were 21 producers; in the decrease to 13 producers, capacity has been cut by 3 %).

(20.3) At the level of the United Kingdom, only two producers remain, ICI and Norsk Hydro, with 80 and 20 % respectively of the new, reduced capacity. Previous to the deal, in 1981, ICI had 45 % and BPCL 31 %.

(20.4) The reduction in capacity made by BPCL from 1981 represents 3,3 % of EEC capacity and, excluding the plant mothballed by Norsk Hydro from UK capacity, the reductions represent 23 % of UK capacity.

G. Observations of third parties

(21) No comments were received from third parties in response to the Commission's notice pursuant to Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(22) The agreements in question fall within the scope of the prohibition of Article 85 (1), since they constitute agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object and effect the restriction of competition. The negative clearance requested by ICI and BPCL may not therefore be granted. The agreements may, however, be exempted under Article 85 (3), since its requirements are satisfied.

(23) BPCL and ICI constitute undertakings within the meaning of Article 85 (1).

(24) The agreements in question, in particular the sale both of the most-modern plants and of all of the parties' goodwill on the respective markets with the implied obligation not to compete and the subsequent closures of the plants not specifically included in the same agreements, constitute agreements and concerted practices within the meaning of Article 85 (1).

(25) These agreements and concerted practices have as their object and effect the restriction of competition within the common market.

The anti-competitive effects and object of the agreements and concerted practices

(26) The agreements in question plus the associated closure of PVC, LDPE and ethylene plants must

be seen as a whole, and their economic effect examined. The final result is equivalent to both a production specialization agreement and agreement to limit capacity on the UK market in that BPCL withdraws from the production and distribution of PVC, and ICI from LDPE. Competition is as a consequence restricted appreciably for both products since each party was an important and active competitor before the agreements.

(26.1.) BPCL's sale, both of its most-modern PVC plant and of the goodwill of all its PVC buisness (which prohibits the seller from canvassing his former customers for a reasonable period), effectively preluded BPCL from competing with the purchaser — ICI — thus implicitly forcing BPCL to close all its remaining PVC plants (and associated chlorine wedge plants) not specifically involved in the deal. Once the most-modern plant had been sold, together with all the goodwill, the subsequent closures were immediately inevitable. BPCL could not in practice have sold the output of the older PVC plants which it retained to purchasers who previously were not customers because production costs would have been higher on the remaining older and less-efficient plants, because BPCL's previous penetration of the UK market (where its sales had been concentrated) and the dual or multiple sourcing of most purchasers effectively meant BPCL could not canvass any customers in the United Kingdom and because, in view of the general industry-wide over-capacity, penetration of a new market from such a weak production base was impossible. However, and most importantly, it was the overall agreements with ICI allowing BPCL to solve the problem of its ethylene balance which permitted the latter to close its PVC plant and specialize in the production of LDPE. Without the agreement with ICI involving all these products (ethylene, PVC and LDPE) BPCL's strategy would have been to continue PVC production even if only at a reduced level of capacity. The agreements thus brought about an immediate specialization in the production of LDPE by BPCL by stopping production of PVC which at least in the short term would not otherwise have taken place.

(26.2) In the same way, as a result of its sale both of its most-modern LDPE plant and of the goodwill from all its UK LDPE business, ICI is effectively precluded from competing with the purchaser and had no practical alternative but to close immediately its remaining UK LDPE plants. ICI could not have sold the output of the older LDPE plants it retained on non-UK markets because ICI's non-UK LDPE plants were not themselves running at full capacity, because there was industry-wide surplus capacity and because the LDPE plants in the United Kingdom were the older, less-efficient plants. However, in the absence of any agreements with BPCL, ICI would probably have continued, in line with its long-term strategy, to run down gradually its LDPE business. The agreements thus brought about an immediate partial specialization by ICI in stopping the production of LDPE in the United Kingdom which would not otherwise have taken place, at least in the short term.

(26.3) Because of the sale of the goodwill of its UK LDPE business, ICI's LDPE plants on the Continent are implicitly precluded from competing on the UK market. By the sale of all their UK LDPE goodwill, ICI is prohibited from canvassing its former UK LDPE customers for a reasonable period of time. Given the nature of the UK LDPE market and ICI's former market penetration, this effectively amounts to a prohibition of competition.

(26.4) It should be noted that the sale of all the parties' goodwill on the respective markets, which prohibits the seller from canvassing his former customers for a reasonable period and which in the circumstances of the present case amounts implicitly to an obligation not to compete, is not simply ancillary to the transfer of the assets, because of the fact that goodwill is being transferred without the plant to which it belongs and of the reciprocal nature of these transfers.

(27) In addition, both parties still constitute potential competitors, even though not for the moment in the areas in question, because of the agreements and concerted practices they are precluded from being active competitors.

(27.1) ICI has not completely abandoned business in the field of LDPE since it still possesses plants in the EEC outside the United Kingdom.

(27.2) Both parties are major petro-chemical companies with large financial resources who, in view of the know-how available to them, could relatively easily re-enter the production of PVC or LDPE. In fact, one producer often manufactures both PVC and LDPE (as the parties did before the agreements) since both products are derived from ethylene. Ethylene producers thus have the possibility in general to enter both markets. Even after the agreements both parties will remain ethylene producers.

(27.3) It is not clear that the abandonment of the business in the United Kingdom is irreversible. ICI will continue to run on a day-to-day basis the LDPE plant acquired by BPCL, and BPCL will continue to supply certain services essential for the running of the PVC plant acquired by ICI. Both plants which were sold are still in effect integrated into large sites owned and managed by the sellers. Similarly, there are no problems of reversing the ownership rights as far as the agreement on ethylene is concerned. Nevertheless, even though it may be technically feasible to reverse the decision, it can be assumed that the parties do not envisage such a reversal for the moment.

(28) Further anti-competitive effects of the agreements stem from ICI's right for three years to veto any sale of the plant sold to BPCL since this restricts BPCL's rights to dispose of the plant as it thinks fit. In addition both BPCL and ICI agree to operate their newly acquired LDPE and PVC plants for three years, thus preventing either from closing these plants during this period. These conditions constitute restrictions on competition, since they limit the freedom of the purchaser to operate his productive capacity as he thinks fit.

(29) Finally, the agreement whereby ICI will obtain for five years a large part of its polyethylene for its UK 'Visqueen' business from BPCL at fair market prices constitutes in effect a quasi-exclusive supply agreement. This quasi-exclusive supply agreement precludes other producers from supplying a large part of ICI's requirement and thus constitutes a restriction of competition.

(30) The parties maintain as a reason for excluding the agreement from the scope of Article 85 (1) that the decisions to withdraw from the UK market by ICI and BPCL in LDPE and PVC respectively were inevitable since these decisions were in line with their respective long-term strategies. It is true that competition on the respective markets seemed to be forcing ICI and BPCL to run down their activities but this run-down would not have amounted in the short and medium term to a total withdrawal. In the absence of the agreements, each party would have continued operation even if only on a reduced scale in the areas which it was obliged to abandon. The sale both of the most-modern plant and of the goodwill were the instruments that determined the actual closures and their timing. Therefore it may be concluded that the agreements entailed as an immediate and inevitable consequence a specialization of production and a closure of capacity, and as such fall within the scope of Article 85 (1).

(31) The parties have further argued that the agreements constitute a partial concentration/merger and as such do not fall within the scope of Article 85 (1). Whilst the sale of physical assets may involve elements of partial concentration (see Commission Decision 75/95/EEC — SHV/Chevron [1]), the agreements, and particularly the sale of both the most-modern plant and of all of the parties' goodwill and its reciprocal nature on the respective markets with the implied obligation not to compete and the subsequent closures, go far beyond a simple partial concentration and cannot be considered as such. The foregoing is without prejudice to the question whether such a concentration would justify the non-application of Article 85 (1).

The effect on trade between Member States

(32) Trade between Member States will also be appreciably affected since both PVC and LDPE are traded readily between Member States and both ICI and BPCL were active importers and exporters of both products. Furthermore, ICI's remaining continental LDPE plants are precluded from competing on the UK market. Finally, competitors of ICI and BPCL for both PVC and LDPE are situated in other Member States as well as in the United Kingdom, and these competitors (both those established outside the United Kingdom and trying to sell within that Member State and those UK producers selling on the

[1] OJ No L 38, 12. 2. 1975, p. 14.

Continent in competition with the parties) are likely to be confronted in the future with different trading conditions.

B. Article 85 (3)

(33) The agreements and associated closures discussed above satisfy the conditions for an exemption under Article 85 (3) since they contribute to improving the production or distribution of goods and to promoting technical and economic progress, while allowing consumers a fair share of the resulting benefits and they do not:

— impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or

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

Weighing of the advantages and disadvantages

(34) In view of the industry-wide structural over-capacity for the products in question and the fact that the agreements and associated plant closures reduced this surplus capacity and improved plant loading without eliminating effective competition, the advantages resulting from these agreements and associated plant closures outweigh harmful effects they may entail. The question whether the various conditions for the application of an exemption under Article 85 (3) are fulfilled is examined in detail below.

Improvement of production and distribution, promotion of technical and economic progress

(35) The implicit and reciprocal obligation not to compete enabled ICI and BPCL to close their respective LDPE, PVC, chlorine wedge and ethylene plants, thereby both reducing immediately the industry-wide surplus capacity existing in the EEC and also leading to more-efficient production.

If ICI and BPCL by renouncing competition with each other, and by specializing, thereby manage to keep each other's customers in PVC and LDPE respectively, it will allow them to increase loading capacity both in the production of the product in which they are specializing and in ethylene. This increased loading will reduce unit costs and lead to more-efficient production. In addition, the closures stemmed a loss-making activity for both ICI and BPCL, thus releasing resources for investment which will help promote technical progress. Finally, ICI and BPCL acquired each other's most-modern and efficient plant along with the technology in PVC and LDPE, respectively. This allowed ICI and BPCL to concentrate their production of PVC and LDPE, respectively, in the most-modern plants which, along with the increased loading, should lead to more-efficient production. Given that the over-capacity in the industry is of a structural nature, market forces would have been too slow at bringing about the necessary radical changes. These agreements by their immediate closure of plants, accelerate the tendency to re-establish the equilibrium in supply and demand.

Benefit to consumers

(36) Consumers will benefit from the agreements since supplies will be on a more-secure basis. By the planned transfer of the respective businesses and know-how consumers can rely on continuity of equivalent quality supplies. However, if plants had been subjects to the threat of unilateral closure by the producers, which was a possibility in view of the losses being made, individual customers would not have had this certainty. There would have been an inevitable disruption before supplies of equivalent continuity and quality could have been found.

Moreover, by permitting each party to (partially) withdraw from a loss-making product line, the agreement will permit consumers to benefit in the long run since this will allow the specializing party to be able to liberate resources to finance long-term investment and research and development rather to cover operating costs.

(36.1) Since in this case the potential for effective competition is maintained (see below) and this is a necessary prerequisite, consumers will similarly obtain benefits which will stem from the increased loading of plant and which will bring about reduced unit costs. This increased plant-loading is particularly important as in the present case where there are high fixed costs such that under-utilization of capacity leads to large increases in unit costs. Furthermore, the

maintenance of effective competition is particularly important in industries such as the present case where barriers to entry to firms who have neither produced the products in question nor produce ethylene are high. However, despite the capacity cutbacks, consumers can rely on what is a potentially competitive and economically healthy structure of supply in the Community without having been deprived of their freedom of choice or the benefit of continued competition between the remaining participating firms.

(36.2) The structural over-capacity that has been found in the products in question and the technological constraints on production (mentioned above in point 13) resulted in a market price that was not sufficient to ensure profitability. These short-term losses could not have been sustained in the medium or long term. The price rises for the products in question that have been seen subsequent to the agreements and plant closures were, despite the decrease in unit cost stemming from increased plant loadings, both necessary and inevitable. It must be stressed that these price rises, seen since the agreements and plant closures, are not a result of the agreements and plant closures. They are rather the result of market forces which BPCL and ICI have merely followed. These rises have allowed all producers to re-establish normal levels of profitability from the previous loss-making situation. However, the maintenance of effective competition will ensure that these rises are no more than necessary to establish market prices that are competitive in the medium and long term, and which at the same time will guarantee a healthy industrial structure in the medium and long term. As long as effective competition is maintained, consumers are better served over the medium and long term by a stronger industry, able both to run at efficient capacity loadings and to earn sufficient profits to finance future investments and research and development, even if this implies some short-term price rises.

Indispensability

(37) The restrictions in the agreements for the reciprocal sale of LDPE and PVC plants, and the restrictions implied both by the sale of the most-modern plant and by the sale of the goodwill for all the plants (which brought about a specialization of production and the closure of the remaining plants) were necessary to achieve the beneficial objectives.

Such arrangements allowed the purchaser to have the best chance of improving loading capacities in the most-modern plant. In effect, the specialization by each party in the UK market is a better means of reducing capacity and improving loading than competition itself, since its beneficial effects are felt immediately.

(38) ICI's and BPCL's undertakings to operate for three years their purchased plants are equally necessary to achieve the beneficial objectives. The plants in question are fully integrated into larger sites owned and operated by the seller, and in order to be able to plan with some certainty both the supply of services and other inputs, and its personnel policy, the seller needs, for a limited time after the sale, to know whether the plant will be kept operational. In addition, ICI's right to veto during those years any sale of the plant acquired by BPCL is also indispensable. ICI is to act as the sole and exclusive agent of BPCL in the operation of the LDPE plant acquired by BPCL. In order for ICI to continue effectively the operation of the LDPE plant, it needs to develop a working relationship with the undertaking for whom it is operating this plant. To prevent too many disruptions and allow a stable relationship to develop, for a short period ICI needs a veto over any sale. The fact that this veto will not be unreasonably used means that ICI must have objective reasons before this veto can be applied.

(39) Finally, the agreement whereby ICI will obtain for five years a large part of its polyethylene for its UK 'Visqueen' business from BPCL is an integral part of the overall arrangement and necessary to achieve its objectives. Before the agreements, ICI produced from its own LDPE plants its requirements of polyethylene. As a result of the agreements and closures ICI has no remaining UK capacity and, as a consequence, needs suddenly to be able to find a reliable supplier able to ensure the delivery of the appropriate quantities and grades of polyethylene. By acquiring ICI's plant, BPCL is in the best position to ensure continuation of such supplies. The limiting of this agreement to five

years is sufficient to allow ICI to make a transition from supplying its own polyethylene to being a purchaser. The requirement that only a large part (and not total exclusivity) must be purchased is sufficient to ensure that ICI obtains reliable and adequate supplies from BPCL whilst at the same time allowing it to start purchases from other producers, thus developing alternative sources of supply for the medium and long term.

The agreements in question therefore do not go beyond that which is necessary for the achievement of the beneficial objectives. The parties could not have used less-restrictive means to realize the aforesaid objectives of their arrangement. As such, any restrictions may be considered indispensable.

The elimination of competition

(40) The agreements and associated closures do not afford the parties the possibility of eliminating competition in respect of a substantial part of the relevant market for ethylene, PVC and LDPE.

Ethylene

(40.1) Given the difficulties and costs of transport for ethylene plus the fact that the bulk of it is used for internal use by the producers, the volume of the relevant market is rather small. However, given the number of producers on the market, the potential for effective competition is not eliminated.

PVC and LDPE

(40.2) As a result of the agreements and associated closures, there has been a marked increase in concentration amongst UK producers of PVC and LDPE. In each case only two UK producers remain, with ICI and BPCL for PVC and LDPE, respectively, being by far the most important producers in the United Kingdom. An active and important competitor has been eliminated for each product. However, given the relatively low costs of transportation of these products, it would be exaggerated to define the United Kingdom as the relevant market for both PVC and LDPE. This conclusion is reinforced by the fact that, for both products, imports form an important part of sales. Furthermore, these imports come principally from important European producers of PVC and LDPE other than BPCL and ICI. In the past only a very small percentage of imports was sold to BPCL and ICI. The vast bulk went either directly to the customers (i.e. plastics processors) for PVC and LDPE or to UK marketing subsidiaries of the non-UK based LDPE and PVC producers. Given the distribution network for PVC and LDPE and the active involvement of several important non-UK based producers in the UK market, then the EEC (or wider) could be considered as the relevant market. Thus, on the relevant market for both products, even though there has been some concentration recently in addition to the agreements under discussion, a sufficient number of important producers are still actively involved to ensure that effective competition could potentially be maintained. Furthermore, since BPCL and ICI are not the most-important EEC producers, the agreements and associated closures do not allow them the possibility of eliminating competition in respect of a substantial part of the products in question.

Duration of the exemption and obligations

(41) Pursuant to Article 8 (1) of Regulation No 17, conditions and obligations may be attached to a decision granting exemption under Article 85 (3).

(41.1) In order that the vendor of the plant and goodwill respects his obligation to transfer the full value of the assets which he sells he is prohibited from canvassing his former customers. In the circumstances of this case the seller is implicitly precluded from competing with the purchaser on the markets to which the goodwill relates (see point 26.4 above). However, this restriction on competition should be limited to what is essential for the preservation of the value of the transferred asset and should not exceed a period necessary for this purpose.

(41.2) In this case the purchaser, even though already operating similar plants to those purchased, had difficulties lasting well over 12 months in fully assimilating the transferred technology. In ICI's case the difficulty was to achieve full operational capacity at optimum cost-competitiveness and in BPCL's case to comprehend the new technology and produce grades previously produced on the closed plants. Thus, although the value of the

goodwill was considered not to be a valuable asset relative to the value of the physical plant (there are no long-term supply contracts, customers use multiple sourcing for supplies and middlemen play an active role in the market), because of the technical difficulties described above a period of around four years is warranted when restrictions on competition can be justified.

(41.3) It follows that the LDPE plants which ICI still owns outside the United Kingdom (in the EEC) should not be restricted from competing on the UK market for LDPE beyond the period necessary to transfer the value of the goodwill and assimilate the technology. In order to assist the Commission in ensuring that competition is not being unduly restricted, ICI should transmit a report every three years to the Commission. This report should give the sales of LDPE by ICI or any associated company or subsidiary in the United Kingdom and a breakdown of sales by status of purchaser (i.e. line of business of purchaser and whether it is a wholly or partially owned subsidiary of ICI). It should also give the total production for a similar period of ICI's European and other interests in LDPE. Each report must arrive not later than three months after the end of the period which it covers. The first report should cover the period 1 January 1987 to 31 December 1989.

(41.4) As far as BPCL is concerned, a similar report should be provided if BPCL or any associated company or subsidiary ever acquires any PVC production facilities in Europe or any other area from which imports into the United Kingdom could be viably made.

(41.5) The Commission however reserves the right to ask for any further information that it may consider necessary to assure itself that competition is not being unnecessarily restricted.

(41.6) So that the Commission can perform its supervisory duties pursuant to Article 8 (2) of Regulation No 17, the undertakings to whom this Decision is addressed must be under an obligation to notify to it any amendment or addition to the agreements.

(42) Pursuant to Article 8 (1) of Regulation No 17, a Commission decision in application of Article 85 (3) of the Treaty shall be issued for a specified period.

In order that both BPCL and ICI can exploit fully the specialization of production in the United Kingdom, which is the result of both the acquisition of plants and technology and of the plant closure, within the framework of their respective long-term strategies — strategies which are necessary for any integrated petro-chemical manufacturer — an exemption of 15 years from the date of the notification of the agreement, that is until 27 January 1998, is deemed sufficiently long. Furthermore the aspects of restructuring and capacity reduction involved are developments which must take place within this same long-term strategy framework,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3), the provisions of Article 85 (1) of the EEC Treaty are hereby declared inapplicable for the period 28 January 1983 to 27 January 1998 to the agreements which became effective on 1 August 1982 between Imperial Chemical Industries plc (hereinafter ICI) and BP Chemicals Limited (hereinafter BPCL) concerning the sale of PVC and LDPE business, and the agreements and behaviour associated with and dependent on these aforesaid agreements implying both plant closures and specialization of production in the United Kingdom.

Article 2

The declaration of exemption contained in Article 1 shall be subject to the following obligations:

1. ICI shall transmit during the period of the exemption a report every three years to the Commission, arriving not later than three months after the end of the period which it covers. The first report shall cover the period 1 January 1987 to 31 December 1989 and shall contain the production by ICI (including any associated companies and any partly or wholly owned subsidiaries) of LDPE in Europe or in any other area from which imports into the United Kingdom could be viably made. It shall also contain sales of LDPE in the United Kingdom and a breakdown of these sales by status of the purchaser (that is, line of business of purchaser and whether it is a wholly or partly owned subsidiary of ICI).

2. If during the period of the exemption BPCL (including any associated companies and any partly or wholly owned subsidiaries) acquires any PVC production facilities in Europe or in any other area from which imports into the United Kingdom could be viably made, it shall inform the Commission without delay and transmit a report every three years to the Commission, arriving not later than three months after the end of the period which it covers. This report shall contain production by BPCL (including any associated companies and any partly or wholly owned subsidiaries) of PVC in Europe or in any other area from which imports into the United Kingdom could be viably made, sales of PVC in the United Kingdom and a breakdown of these sales by status of the purchaser (that is, line of business of purchaser and whether it is a wholly or partly owned subsidiary belonging to the BP group).

3. The undertakings to which this Decision is addressed shall inform the Commission forthwith of any amendments or additions to the agreements referred to in Article 1 or of any change in the scope, nature or extent of the cooperation between them in the fields covered by this Decision.

Article 3

This Decision is addressed to the following undertakings:

— Imperial Chemical Industries plc
Imperial Chemical House
Millbank
UK-London SW1P 3JF

— BP Chemicals Limited
Belgrave House
76 Buckingham Palace Road
UK-London SW1 0SU

Done at Brussels, 19 July 1984.

For the Commission

Frans ANDRIESSEN

Member of the Commission