II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 6 August 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.350 — zinc producer group)

(Only the Dutch, English, French and German texts are authentic)

(84/405/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 15 (2) thereof,

Having regard to the Commission decision of 20 July 1982 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to 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 consultation within the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. THE UNDERTAKINGS

The undertakings with which this Decision is concerned are the following zinc producers :

(1) Billiton Nederland BV (Billiton), which has its registered office in The Hague. On 1 January 1969 Billiton acquired a 50 % shareholding in Kempensche Zinkmaatschappig (KZM), and on 1 March 1970 took over the remaining 50 %. Through KZM, Billiton has since 1971 held half the shares of the Budel (Netherlands) smelting plant Budelco BV (Budel), the other half of which is owned by Australian Overseas Smelting Pty (AOS), a subsidiary of Australian Mining and Smelting Europe Ltd (AMSE) (see point 5).

(2) Metallgesellschaft AG (MG), which has its registered office in Frankfurt/Main.

(3) Société Minière et Métallurgie de Penarroya SA (Penarroya), which has its registered office in Paris and owns a majority shareholding in the Italian company Pertusola Sud.

(4) Preussag AG (PAG), which has registered offices in Berlin and Hanover.

(5) The Rio Tinto Zinc Corporation plc (RTZ), whose registered office is in London. RTZ had over the relevant period and/or has shareholdings in the following companies :

— CRS Ltd, which has its registered office in Victoria, Australia, and acts as a holding company,

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

— Australian Mining and Smelting Ltd (AM & S), another holding company with its registered office in Melbourne, Australia,

— ISC Ltd, a company with its registered office in London,

— CRA Ltd, a company with its registered office in Melbourne, Australia,

— Australian Overseas Smelting Pty (AOS) and AM & S Europe Ltd (AMSE), which are both subsidiaries of AM & S. AOS has a 50 % stake in Budelco BV (see point 1). AMSE is AM & S's holding company for the activities of the RTZ group on the European zinc market,

— Commonwealth Smelting Ltd (CSL), a subsidiary of AMSE with its registered office in Avonmouth, United Kingdom.

(6) Union Minière SA (UM), which has its registered office in Brussels and is the parent company of :

— Métallurgie Hoboken-Overpelt SA (MHO),

— Société Prayon (SP) (being wound up),

— Compagnie Royale Asturienne des Mines (CRAM),

— Société Vieille-Montagne (VM).

In addition, during the relevant period UM also had a majority shareholding in Société Générale des Minerais (SGM), which since 1981 it has wholly owned. Some of the subsidiaries were acquired by UM in the course of the period, having previously been independent companies.

B. THE PRODUCT AND ITS MARKET

(7) The raw material for zinc production is upgraded zinc ore, known as zinc concentrate, which is supplied by the mining companies to the smelters. The ore contains other minerals besides zinc. Various smelting processes are used to extract the primary zinc (zinc metal) from the concentrate. The extracted metal can have varying degrees of purity : good ordinary brand (GOB) zinc is 98,5 % pure, special high grade zinc 99,995 %.

Zinc metal (secondary zinc) is also obtained by processing zinc dust, zinc ashes and zinc scrap and by recycling zinc-bearing materials of all kinds.

Zinc metal is processed into various semi-finished and finished products and alloyed with other metals. In many applications zinc can be replaced by aluminium or plastics.

(8) In 1983, world production of zinc was about 6 300 000 tonnes and Community production about 1 300 000 tonnes. The most important zinc producers in the Community in order of production capacity and actual production in 1983 were as follows (figures are rounded) :

('000 tonnes)

Group	Capacity	Production
UM (including MHO, CRAM, VM)	570	390
MG	220	160
PAG	200	180
Penarroya (including Pertusola)	210	170
RTZ (with all subsidiaries)	190	190
Billiton (with Budel)	90	90

The production figures do not necessarily represent sales, since when the market is weak some zinc output is often stockpiled.

Other major zinc producers are located in the Soviet Union (1983 output about 1 050 000 tonnes), Japan (1983 output about 700 000 tonnes), the United States, Canada and Australia. Since the 1960s Community zinc producers' share of world production has been steady at around 20 %, while Japan and the Eastern Bloc countries have together increased their share over this period from around 20 to 25 %.

(9) Zinc smelters are often integrated with zinc mines or zinc processors. Of the companies concerned in this case Penarroya, UM and RTZ were, over the relevant period, integrated with mines. But the integrated mines did not, and do not now, supply all the smelters' ore requirements. The European zinc industry is still therefore dependent on supplies from mines in non-Community zinc-exporting countries (Canada, Peru, Australia and Sweden). 65 % of the zinc ore used in the Community is imported. Other smelters (particularly UM and MG) are integrated with processors.

(10) The supply of zinc concentrates to the smelters and of metal to the processors is usually the subject of long-term contracts between the mines and smelters and the smelters and processors respectively. Under these contracts the price the mines receive for zinc concentrate is tied to the zinc metal price minus a treatment (smelting) charge corresponding to a percentage of the zinc metal price.

(11) The metal price applicable in the long-term supply contracts for concentrates and metal was until 1964 the zinc metal price quoted on the London Metal Exchange (LME). This price was determined daily on the LME by supply and demand by matching the intentions of buyers and sellers. However, the daily fluctuations in the LME zinc price quotation made the price payable under the long-term contracts uncertain. In the event of increases in the LME price, which could be caused by speculation, there was a danger of consumers switching to cheaper substitute materials.

(12) Since the end of the 1970s the individual zinc producers have set their zinc prices themselves, although the transparency of the market and the largely identical market conditions mean that their prices scarcely differ — at least not for long. Once a producer has officially announced his new zinc price and it has been followed by five or six others, it is published in the *Metal Bulletin* as the new 'producer price'.

On 1 March 1984 the price of GOB zinc was around US $ 1 050 per tonne.

(13) The zinc industry has been in a depressed state in recent years. However, the rise in the zinc price since the autumn of 1983 is likely to have brought some improvement.

(14) The situation on the world zinc market is monitored by a United Nations' Zinc Study Group, on which the industry as well as the Member States and the Commission are represented. The Zinc Study Group analyzes market data and production, demand, prices, etc., and passes the results on to the industry, though without recommending particular courses of action.

In doing so, it does no more than a normal trade association would be entitled to do under the competition laws. Community zinc producers have also formed a Comité de Liaison, which also represents the industry *vis-à-vis* the Commission of the European Communities in discussions of industrial policy. Commission officials have naturally been involved in meetings of both bodies.

C. THE AGREEMENT OF 9 AND 10 JULY 1964 BETWEEN THE UNDERTAKINGS

(15) On 9 and 10 July 1964 the major Western zinc mining and smelting companies, except those from Japan, including UM, MG, PAG, Penarroya and RTZ, agreed to form a Zinc Producer Group (ZPG). The initiative to form the group came from the Canadian and Anglo-Australian zinc companies, whilst the Continental European companies joined only after some hesitation.

(16) Under the agreement the members of the ZPG were to introduce as soon as possible a common zinc producer price and to substitute this price for the LME price in their supply contracts with zinc mines and zinc consumers. The zinc producer price was initially set at £ 125, with the objective of reducing it ultimately to £ 100. The price quoted on the LME at the time was £ 140.

(17) To support the producer price, the members of the ZPG further agreed :

— to stop selling zinc on the LME themselves and not to allow their processor customers to offer zinc for sale on the LME,

— to support the LME price by intervention buying if it fell to £ 85 and to put up the cash to do so,

— if necessary, to curtail production to agreed levels.

(18) The producers also agreed to sell zinc only to *bona fide* customers for their own consumption and to forbid them to resell it, and if necessary to curtail sales to agreed levels.

(19) Arrangements were also agreed for the organization and management of the ZPG, the subsequent form of meetings and for various subcommittees to be set up to collect market data and monitor trends.

(20) Finally, the ZPG members agreed that one of their number would always lead in announcing a new producer price and the others would then follow suit. (RTZ minutes of the Zinc Contact Committee held in London on 9 and 10 July 1964, with appendices.)

D. IMPLEMENTATION OF THE AGREEMENT OF 9 AND 10 JULY 1964

(21) Between 1964 and 1977 the ZPG met on at least 30 occasions. At these meetings it agreed new producer prices, the manner of their announcement by a price leader, action to support the zinc price and restrictions of zinc production (including control of investment) and sales. The producer price agreed on 9 and 10 July 1964 was changed at least 12 times during this period.

The producer group's governing body, the Steering Committee, reminded members on these occasions of the July 1964 agreements and exhorted them to abide by the agreements. In 1972 the ZPG published a paper entitled 'Zinc Producer Price Basis — Terms and Definitions (revised 1972)', which summarized the main elements of the 1964 agreements.

(22) Over these 14 years the composition and number of the ZPG membership varied. At the meeting on 2 and 3 September 1964 Budelco BV joined the ZPG. At the meeting on 27 November 1968, the ZPG was even formally dissolved at the instigation of RTZ, which feared repercussions from the British restrictive trade practices legislation. However, the group resumed its meetings in March 1969 in a virtually unchanged form and with RTZ representatives continuing to attend.

I. Implementation of the price agreement

1. *Up to the autumn of 1977*

(23) From July 1964 onwards the ZPG members incorporated the current agreed producer price in their supply contracts both with mining companies and zinc consumers. They also arranged for it to be published in the London *Metal Bulletin* as the 'zinc producer price basis' and agreed that this should be the acknowledged reference in pricing contracts (minutes of the ZPG meeting of 2 and 3 September 1964).

(24) The members of the ZPG by and large observed the producer price, although there were outbreaks of discounting, which prompted the ZPG on several occasions to call for greater price discipline from its members (see RTZ cable of 3 June 1966).

From 1975 onwards discounting became more frequent as there was oversupply and the producer price was considerably above that quoted on the LME (MG discussion paper of 31 October 1977). As a result, the discussion paper said, the producer price introduced in 1964 had for the first time lost its stabilizing effect. The minutes of an MG Management Board meeting held on 31 May 1977 felt that the days of the producer price were numbered.

The then UM subsidiary SP, however, thought the producer price should be maintained at all costs (minutes of MG Management Board meeting held on 16 June 1977) and at the MG Board meeting on 12 July 1977 it was expected that the full producer price could be re-established on the market by the end of September 1977.

(25) AMSE, too, saw the difficulties in 1977 as stemming from the gap between the LME price and the producer price. In a telex dated 21 July 1977 it recommended that the producer price system should be defended by cessation of discounts and narrowing the gap between the LME and the producer price. The continuation of the producer price system, together with more drastic coordinated production cuts by ZPG members, was also said to be necessary, albeit 'illegal', in a telex sent by AMSE on 4 August 1977.

2. *The collusion over price changes*

(26) From the autumn of 1977 there is no further evidence of the producer price being agreed at ZPG meetings.

The MG discussion paper of 31 October 1977 stated that the agreed producer price had provided an almost optimum solution of the problems on the zinc market for over 12 years but considered that the time had come for a pattern of European price leadership to be established — initiated by MG — to restore order on the zinc market.

MG went ahead with changing its zinc price in October 1977 and within days all the other firms concerned in this case followed suit. The price announced by MG was published in the *Metal Bulletin* of 2 November 1977 as the 'producer price'. The minutes of the MG Management Board meeting held on 8 November 1977 noted that a price leadership by European firms had emerged.

A working paper for the MG Supervisory Board meeting of 21 November 1977 remarked in similar vein that the price leadership role which the MG had assumed in recent weeks would in future have to be exercised more by the Europeans than had been the case in the past.

In an MG note dated 5 December 1977 on talks with a Canadian zinc producer it is said that Cominco welcomed the European price leadership by MG and recommended better and faster communications through a trade journal. The minutes of the MG Management Board meeting on 31 January 1978 reported that it had been felt that this time MG should not be the one to initiate the reduction of the producer price.

A telex sent by AMSE to RTZ on 2 February 1978 on the same subject said that AMSE expected a reduction of the producer price before the end of the week and that Billiton might lead followed by the Germans. An AMSE telex sent on 3 February 1978 said that AMSE now understood that 'Billiton are deferring a decision until after the Comité de Liaison meeting. To some extent this may result from consideration of our position.' Immediately after the Comité de Liaison meeting at the beginning of February 1978 the zinc price was uniformly reduced by all the firms concerned from US $ 600 to US $ 550 per tonne.

This price was held until August 1978.

(27) In April 1978 AMSE wanted a higher producer price. In a telex dated 12 April AMSE said that it should move to increase its price only when there would be sufficient follow-through changes to induce the *Metal Bulletin* to publish the new price. 'Regrettably', the telex went on, 'the chance of a successful move has now receded significantly, (because) the Germans, Dutch and Belgian producers are likely to be happy (with the current producer price).' The minutes of the MG Management Board meeting of 13 June 1978 reported that appropriate announcements from only two European smelters were needed for an increase in the producer price.

Between 10 and 21 August 1978 all the firms concerned raised their zinc price to the same level of US $ 625 per tonne (MG note of 23 August 1978).

Similar, more or less simultaneous price changes by all the firms concerned took place between 25 and 27 October 1978 and between 16 and 23 January 1979 (AMSE telex of 23 January 1979).

This parallelism on the part of the producers moved the *Metal Bulletin* of 31 October 1978 to report :

'It was just like the good old days. In a little over 48 hours earlier last week no less than seven zinc producers posted $ 720 per ton by the end of Thursday 26. These were : VM, Asturienne, Penarroya, Preussag ... and Metallgesellschaft. On Friday 27th further moves to $ 720 were announced by ... AMSE ...'

A Billiton memorandum dated 26 April 1979 related that on 25 April 1979 a Billiton representative had met German, French and North American zinc producers the day before and had discussed the future European producer price. The memorandum felt it would be more appropriate if the initiative for a price increase were this time to come from an integrated zinc producer rather than from Billiton and recommended that Billiton should only announce a price increase when a new price had been published in the *Metal Bulletin.*

II. Support of the producer price

1. *Joint action to influence the LME*

(a) Collective abstention from selling

(28) From 1964 onwards ZPG members stopped selling zinc on the LME. Although this agreement lapsed with the ending of the ZPG in 1977, its after-effects still show in the minutes of an MG Management Board meeting held on 14 February 1978 where it is said that in negotiations with the other zinc producers MG should not advocate the course of offloading surplus zinc on the LME.

The agreement not to sell on the LME led to a major reduction in its stocks and often to its handling virtually only lower-quality zinc from Eastern Bloc countries (Billiton note dated 4 June 1973).

(b) Support buying through subsidiaries

(29) The collective abstention from sales of zinc on the LME went hand in hand with joint buying on the Exchange at other times to regulate supply and support the Exchange price.

(aa) Merafine

(30) At the ZPG meeting held on 2 and 3 September 1964 the members agreed that a Swiss company would engage in support buying on the LME, to finance which each member would contribute £ 1 per tonne of zinc production. By the summer of 1965 all the firms concerned in this case had paid their contribution to the company (Merafine SA) either directly or indirectly through subsidiaries which they already owned or later acquired. Merafine made its first appearance as a zinc buyer on the LME in June 1965. It repeatedly engaged in support buying until November 1968. The zinc it bought on the LME was sold by the company outside the European Community, for example in the People's Republic of China (Merafine report of 26 June 1968.

At the meeting of the ZPG held on 27 November 1968 it was decided to wind up Merafine (which in 1968 had a turnover of over SwF 10 million) and to form a new Swiss company Adena Metal SA (capital in 1970 : SwF 12 million).

(bb) Adena

(31) Adena Metal SA was set up in Zürich on 24 January 1969. Under an agreement signed on 30 April 1969 *inter alia* RTZ, UM, Billiton, MG, PAG and Penarroya undertook to subscribe shares in Adena either direct or through associated companies. Adena in turn signed on 27 May 1969 an agreement with a company called Cassamet SA of Zürich, under which Cassamet was to buy zinc on the LME on Adena's behalf. Adena carried out zinc-buying on the LME on the ZPG's instructions, in order to keep the zinc price at the level the ZPG desired, from July 1969 until the middle of 1973. Adena resold the zinc it purchased outside the Community (for example, in North America — Adena document dated 6 June 1973).

On 8 March 1974 the ZPG decided to wind Adena up. Its remaining assets were subsequently distributed between the shareholding members of the ZPG, which included all the firms concerned here. The final accounts of both Adena and Cassamet were submitted on 31 March 1976.

(c) Coordinated individual buying up of zinc on the LME by the producers

(32) At the ZPG meeting on 26 November 1974 the group decided to set up a Market Advisory Committee to fix amounts (quotas) of zinc which each member was to buy on the LME. Instead of buying up zinc on the LME, members had the option of limiting their production in line with the quota or transferring an equivalent tonnage of their production to their stocks, or at least not placing it on the market (undated Steering Committee paper covering the period 1 December 1974 to 28 February 1975).

(33) Of the firms with which this Decision is concerned, MG, Billiton and RTZ chose the buying option and UM, Penarroya and PAG the cuts option. It was agreed that firms choosing to cut output should justify this to the public by falling sales (minutes of ZPG meeting held on 26 November 1974). In putting their chosen option into effect, all the firms had, under the decision, to follow the advice of the Market Advisory Committee (AMSE memorandum of 26 November 1974). The reason for the ZPG decision is summarized in an AMSE memorandum dated 14 January 1975, which says that in November 1974 there was a fear that the 'free' price of zinc would slide, which would have put pressure on the European producer price.

(34) Coordinated zinc-buying on the LME was also agreed by all the firms concerned on various occasions in 1975 and 1976 (minutes of ZPG meeting of 26 February 1975, UM memorandum of 14 March 1975, UM telex of 15 April 1976, AMSE notes of 9 January and 22 April 1976). Between November 1974 and July 1975 the ZPG withdrew over 90 000 tonnes of zinc from the European market to support the producer price (memorandum of 16 July 1975). Over the period July to October 1975 the members agreed to buy 60 000 tonnes on the European zinc market.

(35) In 1977 Billiton, UM, PAG and Penarroya agreed to buy up 75 000 tonnes of North Korean zinc before it reached the LME and not to put it on the European market. This was done, and a memorandum dated 31 December 1977 of the firm Montanore BV which had carried out the buying operation said:

'The result of the action was that in the period December 1976 to March 1977 the LME three months zinc price rose from £ 373 to £ 458 with positive beneficial effect on the price realizations of European producers. The marked improvement in price to producers was probably in the order of about £ 35 per tonne over the total of producers' sales.'

2. *Curtailment of zinc production and investment*

(36) As agreed at the ZPG meeting of 9 and 10 July 1964, the ZPG members subsequently entered into and implemented agreements curtailing zinc output. The purpose of these production cuts was, first, to obtain a planned reduction in supply so as to remove the temptation for ZPG members with surplus zinc that could not be sold at the producer price to offer it for sale on the LME or directly to zinc consumers. This would have caused the LME price to fall and endangered the producer price. Secondly, the production cuts had the object and effect of preventing any surplus zinc being sold in the home market or 'area of influence' of another ZPG member, perhaps at lower prices.

The producers were, however, free not to curtail output if they stockpiled an equivalent amount of their production (RTZ document dated 19 May 1966).

(37) The first agreement on actual restrictions of production was made on 26 May 1966. The reference production tonnages for the individual firms were decided upon by the full ZPG meeting (ZPG document of 18 September 1967).

(38) On 26 June 1968 the producers agreed not to build any new zinc production capacity without first informing the ZPG. They undertook to submit their production figures (tonnes of zinc

produced) to the full ZPG meeting for approval. At the same time they agreed to make an across-the-board 20 % cut in their production (Appendix 1 to the minutes of the ZPG meeting).

Further output limitation agreements were made by all the firms concerned in 1967, 1969 to 1972 (1970 : across-the-board reduction of 15 % — Penarroya note of 30 October 1970) and 1974 to 1976. For October 1975, for example, the ZPG announced production quotas to be observed by all the firms concerned. The reference production tonnage allotted to Penarroya/Pertusola was around 20 000 tonnes and that allotted to RTZ (AMSE) around 42 000 tonnes (AMSE memorandum dated 13 August 1975).

(39) For 1977 there is no longer any evidence that output limitation agreements were made within the framework of ZPG meetings. A telex sent by AMSE on 4 April 1977, however, shows that information about forthcoming production cuts was still being exchanged between zinc producers.

The minutes of the MG Management Board meeting of 13 September 1977 predicted that no binding agreements on production cuts for 1978 would come out of a meeting of the Zinc Study Group (see point 14 above) but, at best, recommendations. The minutes of the MG Management Board meeting held on 28 February 1978 further reveal that MG and PAG had exchanged information about their zinc production plans for 1978.

III. Agreements on sharing markets

1. *The market in 1964*

(40) When the zinc producers decided on 9 and 10 July 1964 to regulate the European and wider world zinc markets, they knew that if the producer price was to be made to stick, besides joint action to influence the LME and agreement on production restrictions, a further link in the chain would be needed, namely protection of the producers' traditional sales territories. In most cases, the only way it would have been possible to penetrate a market was by competing on price and this would have spelled the end of the producer price system (RTZ memorandum dated 16 October 1966).

The zinc producers did not, however, set out to stop the traditional trade flows between Member States which already existed, such as from Belgium and France to Germany.

2. *Basis of the restrictions*

(41) Unlike the other measures, the agreements between ZPG members restricting their sales in each other's home markets were not as a rule adopted by the full ZPG meetings. They tended to be made on the fringe or outside of meetings, since the ZPG, as an organization for regulating the world zinc market, was less concerned with regional markets such as the European Community.

(a) Protection of the German market

(42) A general discussion of the position of the European and particularly German zinc market with reference to possible import restraint was held at the ZPG meeting of 2 and 3 June 1966. Subsequently, several meetings took place between individual firms to agree import restrictions. On 9 June 1966, the Belgian and German zinc producers (VM, MG and PAG) met 'to avoid unnecessary competition' on the German zinc market (RTZ memorandum dated 10 June 1966).

At a meeting in Cologne on 2 November 1967 between PAG and MG, on the one hand, and VM, MHO, SP, CRAM, Penarroya and Billiton (Budel), on the other hand, quotas were agreed for zinc exports from France, Belgium and the Netherlands to Germany, though it was made clear that the bulk of the country's zinc requirements should be supplied by German producers. These quota arrangements were renewed by the firms for 1968 on 8 and 29 April 1968 (PAG memoranda of 13 March and 10 April 1968 and UM memorandum of 3 May 1968). Further import quotas for the German market were agreed by the firms on 1 August 1968 (PAG memorandum of 12 August 1968).

(43) VM took responsibility for monitoring compliance with the arrangements. The firms concerned passed their export figures to VM while PAG and MG sent it the German import

statistics. If there were discrepancies between the two sets of figures, i.e. evidence of additional exports over the quotas allotted to the French, Belgian and Dutch producers, VM made enquiries to find out where they had come from (see, for example, the telexes dated 29 September 1969, 9 March 1970 and 11 November 1970 between MG and UM).

(44) On 20 August 1971, 6 July 1972 and 21 May 1973, talks took place between Billiton and MG about sales limitations by Billiton in Germany, at which Billiton promised to observe 'restraint' on the German market.

(45) On 13 September 1971, representatives of Billiton, KZM, MG, PAG, Penarroya and UM had a meeting at which they agreed quotas for GOB zinc imports into Germany totalling 51 500 tonnes (Billiton memorandum of 16 September 1971). Further talks about import restrictions took place between these firms on 5 June and 13 December 1972 at which such restrictions were agreed for Billiton (KZM), Penarroya and UM.

There were similar talks and contacts about sales restrictions in Germany between PAG, MG and AMSE on 19 March 1974, 5 August and 2 December 1975. It was agreed between PAG and AMSE that AMSE would limit its zinc sales in Germany, possibly on the basis of exchanging a share of the German market for a tie on raw materials.

(46) On 19 September 1975 all the firms here concerned agreed their estimated sales of zinc in Germany for the period September to December 1975 (AMSE memorandum of 2 October 1975).

(47) In separate talks PAG, MG and AMSE agreed to keep in contact about developments on the German zinc market (AMSE notes dated 5 August 1975). PAG and MG were opposed to allowing AMSE to enter the German market (UM memorandum of 13 August 1975). For AMSE the purpose of the talks was to give notice of its desire to start selling on the German market, although there had previously been an agreement at least with MG that ISC would not sell zinc in Germany. The talks between AMSE and MG and PAG also led to agreement by the German firms to limit their sales on the British market in 1976 (AMSE telex to PAG dated 2 December 1975).

(48) At the beginning of February 1976, AMSE enquired into the possibility of selling zinc in Germany under Billiton's quota. MG told AMSE that in the past it had been agreed that ISC would keep out of Germany and MG out of the British market. If AMSE began selling in Germany, MG threatened to take countermeasures in the United Kingdom (MG memorandum dated 5 February 1976). On 1 October 1976, AMSE told MG that it was going to begin selling in Germany, but would do so cautiously and without trying to compete on price, so as not to act as a disruptive influence on the German market (MG note of 1 October 1976).

(49) Talks about zinc sales on the German market also took place between MG and AMSE and Billiton in March and April 1977 (MG minutes of 19 April 1977) and between PAG and AMSE in October and November 1977. At these talks PAG reportedly expressed 'concern' about Billiton's operations on the German market (AMSE notes dated 4 November 1977).

(b) Market-sharing between Billiton and RTZ

(50) In 1971, Billiton and RTZ (CRA) entered into a joint venture involving the Budelco smelter at Budel, the Netherlands. In the 'Heads of Agreement' which the two parent companies signed on 7 May 1971, they divided the Community market between them (clauses 2 to 4) and set quotas for sales outside their respective 'areas of influence' (clauses 5 and 6). All the countries which were then members of the EEC belonged to Billiton's 'area of influence'.

The Heads of Agreement were reviewed at meetings between Billiton and AMSE, the successor of CRA, held on 20 December 1972 and 6 February and 19 April 1973, but were confirmed on these points. To open the European Continent to AMSE would in any case, according to Billiton reports dated 14 February and 23 May 1973, 'conflict with the marketing agreements which other Community zinc producers had with Billiton'.

(51) In 1974, however, Billiton finally had to bow to the increased pressure from AMSE to sell zinc on the Continent. In August 1974, Billiton and AMSE agreed that AMSE could sell 100 tonnes of zinc a month in the fourth quarter of 1974, and 150 tonnes a month throughout 1975, on the Continent through Billiton at £15 a tonne above the producer price. On 17 July 1975 Billiton and AMSE agreed an amendment of the Heads of Agreement allowing AMSE limited access to the Continental market subject to sales quotas. Billiton also acknowledged AMSE's right to seek market quotas on the Continent from other producers (AMSE memorandum of 18 July 1975).

(52) In August 1975, Billiton and AMSE held talks about giving AMSE part of the 15 000 tonne quota Billiton had been allocated by the other European zinc producers for France (AMSE memorandum of 12 September 1975). Billiton also allowed AMSE to sell some 5 000 to 6 000 tonnes in Germany chargeable to Billiton's quota of 10 000 tonnes. AMSE could only supply customers which were not already customers of Billiton, however (note in files of Billiton Metall GmbH dated 28 January 1976). These agreements were by and large carried out (AMSE memorandum dated 20 October 1975).

(53) On 1 October 1975, Billiton and AMSE agreed that the two firms would jointly negotiate with the Continental producers for an increased export quota for 1976 and 1977 (AMSE document entitled 'Marketing in Continental Europe' dated October 1975).

For 1976, Billiton compiled a list of customers which were barred to AMSE, those which could be supplied by both and those to be supplied only by AMSE. AMSE in turn allowed Billiton to supply only certain stated zinc consumers in the United Kingdom, in view of its own restricted access to the French and German markets (telex of 9 February 1976 and AMSE memorandum of 6 May 1976).

(54) Further negotiations between Billiton and AMSE on quotas for zinc sales in the Community occurred in 1977 and 1978. The last documented contact between the two firms at which mutual sales restraint was discussed took place on 27 April 1978 (Billiton note of 2 May 1978).

(c) Other cases of market-sharing

(55) All the firms concerned by this Decision were party to quota agreements restricting zinc shipments between Community countries (AMSE note of 12 May 1975, AMSE telex of 25 June 1975 and the evidence referred to in points 50 and 52).

(56) When AMSE was making increased efforts to sell zinc in other Community countries in 1974 and 1975, it found itself obliged to open discussions with Continental European producers to obtain their consent to its entering their markets (AMSE note of 9 July 1975). Talks duly took place. UM and Pennarroya gave their consent only very grudgingly. Penarroya told AMSE that it now intended to sell zinc in the United Kingdom, but would avoid disturbing the British market too much (AMSE memorandum of 24 January 1974). In February 1975, AMSE and Penarroya discussed the possibility of selling 1 000 tonnes in each other's home markets in 1975.

(57) Other talks between AMSE and Penarroya or UM on the sale of zinc by AMSE in France and Belgium are documented in AMSE papers dated 28 and 31 July and 6 and 27 August 1975 and in UM papers, a record of talks dated 21 August 1975 and a memorandum dated 13 August 1975.

(58) The contacts between AMSE and Penarroya, UM, PAG, MG and Billiton on zinc sales on the Continent by AMSE were also continued in 1976 (MG memorandum of 5 February 1976 and AMSE memorandum of 28 January 1976).

(59) Between 24 October and 4 November 1977, AMSE was again in contact with Billiton, PAG and Penarroya about proposed sales of zinc outside the United Kingdom and PAG and Penarroya reportedly complained about Billiton's and AMSE's sales outside their home markets.

E. EFFECTS OF THE AGREEMENTS

(60) The agreement and actual application of the producer price admittedly dampened the erratic fluctuations of the LME quoted zinc price and mitigated their effects on the mines, smelters and consumers. On the other hand, the agreed producer price involved disadvantages for the firms which were not integrated with mining companies or zinc processors, since they were particularly vulnerable to the effects of a price that diverged from the market level. As early as September 1967, the European custom smelters complained of the 'heavy burden imposed on the (custom) smelters by the maintenance of a producer price system in adverse market conditions at the same time coupled with severe restrictions of smelter output' (ZPG memorandum dated 20 September 1967).

(61) Zinc consumers, too, were largely unable to escape a high producer price, as in 1975 to 1977, by buying on the LME since the LME price was manipulated by the reduction in supply so that it never reflected a true market price and the quantities of zinc traded on the LME were small and the quality poor.

The ZPG was often forced by mounting consumer pressure to lower a producer price which was being kept artificially high (cf. AMSE telexes of 3 February 1971 and 27 October 1972) or not to increase it by as much as it would really have liked (RTZ memorandum of 28 September 1966).

(62) The ZPG members were also not averse to using their collective control over supplies to maintain prices far above those which the market would normally have been prepared to pay (AMSE telex of 25 January 1974).

ZPG members expressed 'horror and dismay' when independent merchants or producers undercut the agreed price (AMSE letter of 19 September 1973).

(63) Yet in spite of these agreements and their application in practice, the ZPG never succeeded in completely eliminating competition, as is shown by the occasional price-discounting by ZPG members and their occasional breaches of production and export quotas.

F. PROCEDURE

(64) The Commission began investigating the activities of the Zinc Producer Group in 1977. Between 14 June 1978 and 30 July 1980, it carried out a total of 19 inspection visits, under Article 14 of Regulation No 17, to the offices of all the undertakings concerned.

One of the inspections gave rise to proceedings before the Court of Justice (case 155/79 [1]) in which judgment was given on 18 May 1982. The Commission waited until the judgment before starting proceedings under Article 85 of the Treaty.

(65) After the opening of formal proceedings by the Commission on 20 July 1982 and the sending of the Statement of Objections, all the undertakings concerned were given the opportunity of inspecting and taking copies of all the Commission's files on the case, except for internal Commission memoranda and papers which the undertakings wished to be kept confidential.

II. LEGAL ASSESSMENT

ARTICLE 85 (1)

A. THE RESTRICTIONS OF COMPETITION

I. The agreement of the producer price and the price support measures

1. *The producer price*

(66) The agreement of a producer price by Billition, MG, PAG, Penarroya, RTZ and UM restricted their freedom to negotiate their purchase prices for zinc concentrates with zinc mining companies and to set their selling prices for zinc metal to zinc metal purchasers to their own best commercial advantage. This agreement had the object and effect of restricting price competition within the European Community. For the purpose of establishing such a restriction of competition it makes no difference whether the

[1] [1982] ECR 1575.

relevant producer price was always actually applied in contracts with mining companies (less the treatment charge) and metal purchasers or whether discounts were sometimes granted. The decisive point is that the agreed producer price was always used as a basis for the actual prices stipulated in purchase and supply contracts for zinc concentrates and metal respectively. The agreement of a producer price was thus a constant, at least indirect influence on the firms' pricing behaviour.

2. *The resale ban, restriction of output and control of investment*

(67) The agreement to forbid their zinc customers to resell (point 18), to keep within collectively agreed and allocated production quotas (points 36 to 39) and to notify investments to the ZPG (point 38) also restricted competition. These agreements obliged the producers to impose restrictions on the economic activity of other firms (the resale ban imposed on zinc purchasers) and they imposed restrictions on the producers' own commercial independence.

(68) The obligation to notify investment projects to the full ZPG meeting which would then proceed to discuss them also represented an encroachment on the commercial independence of the firms involved. The obligation to notify investment plans followed by discussion of the plans by the notifier's competitors far exceeds the acceptable limits of exchanges of information on investment where only the market outlook and production capacity are discussed and no attempt is made to interfere with the individual firm's independence and responsibility regarding its investment policy. The same applies to the exchanges of information or recommendations about cuts in production (point 39). Activities of this kind amount to a concerted practice.

(69) The undertakings' claim that the agreements on the imposition of resale bans, production quotas and notification of investment had no real effect in practice is extremely implausible. The production quotas documented year after year in the minutes of ZPG meetings indicate that the firms largely stuck to them in practice, since otherwise it would have been pointless to keep allocating such quotas. The minutes of meetings at which production quotas were agreed also say nothing about ZPG members failing to observe their quotas. When Penarroya claims it did not reduce its output to the quota level but indeed to some extent increased it, it should be remembered that the ZPG resolution allowed members to produce as much as they liked provided they stockpiled the output. Penarroya's reference to its increased output figures for 1974 and 1976 is therefore a red herring.

(70) As for the resale ban, this obligation was reiterated in 1972 in a ZPG paper (point 17). If the obligation had really had no practical effect, there would have been no point in repeating it eight years after it had first been agreed.

(71) In any case, for Article 85 (1) to be applicable, it is sufficient for there to have been the intention to restrict competition ; it is not necessary for the intention to have been carried out, in full or only in part, that is to say, for the restriction of competition to have been put into effect. Furthermore, the mere fact of agreement on imposition of resale bans, production restrictions and investment controls and of exchanging information and issuing recommendations on production cuts is likely to have inhibited the firms' commercial and competitive independence, since they would have to answer for any breaches of the agreements to the ZPG.

3. *The restriction of zinc sales on the LME and support buying*

(72) The obligation undertaken by the firms not to sell zinc on the LME and under certain circumstances to buy up zinc before it reached the LME and to engage, themselves or through third companies, in buying to support the quoted price also constituted a restriction of competition. Its object and effect was to influence the LME zinc price so that it did not diverge too far from the producer price and so to relieve market pressures on ZPG members to change the producer price. The producers thereby brought the LME price, which was determined by supply and demand, into line with the fixed producer price, thus reducing the competitive pressure exerted by the LME price.

4. *The undertakings' defence of their action*

(73) In their defence, the undertakings concerned in this case have submitted the following argu-

ments : first, that the agreement of the producer price and the price support measures helped to reduce the often unreasonably high zinc prices on the LME ; secondly, that the producer price and the price support measures helped to prevent the violent fluctuations and speculative increases in the LME price and dumping by centrally planned economies ; and thirdly, that over a period of years the producer price did not differ markedly from the quoted LME price, and so 'reflected the market', and that the agreements cannot therefore be said to have had any anticompetitive effects.

In reply to these arguments, the first point to be made is that, in attempting to cope with difficult market conditions or extreme falls in demand, firms must use only means which are consistent with competition. The fixing of purchase or selling prices by competitors is not a legitimate means of combating alleged difficult market conditions. Nor are firms entitled to flout the EEC competition rules because of alleged overcapacity. Even the prevention of alleged dumping practices does not justify attempts to regulate prices and markets through private agreements.

The firms' arguments are also unconvincing because action which is really intended to deal with difficult market conditions does not normally last for over a decade. In addition, for a long period the agreed producer price was higher than the LME price. The LME price in any case cannot be accepted as a gauge of how truly the producer price reflected a market price, since the LME price too was influenced by the firms. Owing to the action of the ZPG members, only marginal quantities of zinc and an unrepresentative range of qualities were traded on the LME.

(74) The firms also submit that government agencies in the Member States and the relevant Commission departments were aware of the price-fixing agreements and support measures and that some Member States' authorities had expressly approved them. However, the fact that Member State authorities had knowledge of, participated in or approved price-fixing agreements does not protect them from the application of the EEC competition rules.

The Commission was aware of the existence of a 'zinc producer price' and of cuts in production. At no time was it known to the Commission officials concerned that the producer price was collusive, nor that production cuts were collusive. If a 'producer price' is published in the technical press it cannot be assumed in principle that this necessarily implies an infringement of Article 85. The members of a trade association may in that association recognize that there is overcapacity without colluding over reductions of capacity. The attempts in the present case to infer that, because an authority knew some of what was going on, it must have known all of the facts, must be rejected.

The same can probably be said for the involvement of authorities of the Member States. At any rate, undertakings cannot obtain protection from the application of the rules on competition merely by allegations that some government department knew or even approved of the utilization of a producer price.

II. The collusion over price changes

(75) When the system of the European producer price under the 1964 agreement ceased in 1977 to be effective, a situation arose in which there did not appear to be a natural price leader which could act independently of its competitors knowing they would almost certainly follow. Moreover, it is established that MG debated internally the need to set up 'a pattern of European leadership', a pointer to the fact that some of the undertakings attempted to substitute for the terminated agreements a kind of guided price leadership.

The situation prevailing in this case seems to have been more characteristic of that which could give rise to what is known in economic theory as 'barometric price leadership' (1). This does not remove from undertakings the ability to 'determine independently the policy which (they intend) to adopt on the common market'. Under such circumstances, parallel pricing behaviour in an oligopoly producing homogeneous goods will not be in itself sufficient evidence of a concerted practice. However, sufficient evidence may result from parallel pricing in combination with other indications, such as contacts between undertakings on desirable

(1) G. J. Stigler, 'The Kinky Oligopoly Demand Curve and Rigid Prices', *Journal of Political Economy*, vol. LV, 1947, p. 431.

price changes prior to price changes, or the exchange of information which reinforces contacts to this kind.

(76) In the present case, there are indications that, between October 1977 and April 1979, MG hoped to go beyond 'barometric price leadership', that other undertakings had contacts amongst themselves, and that there were price changes after such contacts. However, the evidence available is insufficient to qualify the parallel conduct of the undertakings concerned as a concerted practice within the meaning of Articles 85.

III. **Market-sharing**

(77) The agreements between UM, Penarroya, Billiton, AMSE, PAG and MG only to sell agreed and precisely determined quantities of zinc in other producers' traditional sales territories (point 55) and to set export quotas for the German market (points 42 to 49) constituted sales limitations and sharing of markets within the meaning of Article 85 (1). Such agreements are explicitly mentioned as examples of prohibited restrictions of competition in Article 85 (1) (c). The same applies to the export restrictions for the German market agreed between MG and RTZ directly or indirectly through the RTZ subsidiaries ISC and AMSE and to the similar agreements between MG and Billiton and between MG and PAG with RTZ (point 47). These restrictions on exports to Germany were in each cases linked to a reciprocal arrangement whereby MG or PAG could not sell in the home market of the other party (i.e. Holland in Billiton's case and the United Kingdom in that of ISC and AMSE). A particularly clear case of such market sharing existed between AMSE and CRA (both RTZ subsidiaries) and Billiton under their Heads of Agreement (point 50).

(78) The difficulties encountered by AMSE when it began its efforts to sell zinc on the Continent from 1974 onwards (points 55 to 59) also revealed the existence of market-sharing between the Continental producers among themselves and between them and RTZ. The firms agreed both restrictions on RTZ's sales on the Continent and restrictions on the Continental producers' exports to the United Kingdom (point 56).

(79) It is established, therefore, that all the firms concerned in this case set out to restrict, and actually restricted, competition in the form of zinc sales between different Member States. It is true that from 1974 onwards RTZ, through its subsidiary AMSE and the pressure AMSE exerted to enter the Continental zinc market, greatly undermined the export quota arrangements which existed between the other zinc producers. Yet even this penetration of the Continental market by AMSE took place within the framework of agreements and maximum quotas.

(80) The further talks, negotiations and contacts which thereafter took place between the firms concerned about zinc sales in other companies' home markets, whilst they cannot be termed 'agreements' to share markets, nevertheless involved direct approaches between the firms with the aim of controlling zinc shipments between Member States and thus regulating competition. Approaches made with the intention of influencing one of the competitors in his zinc shipments or at least putting the other competitor in the picture about such shipments so that he can modify his own market behaviour accordingly constitute at least a concerted practice. Here, too, the undertakings knowingly substituted practical cooperation for the risks of competition (cf. judgment of the Court of Justice in Suiker Unie, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 [1], Zürchner, Case 172/80 [2]).

(81) The firms also deny that the documentary evidence establishes the existence of agreements since it mainly consists of internal memoranda from individual companies, or if any agreements did exist that they had any practical effect since the firms would have kept to their traditional home markets in any case for private reasons and since the agreements were not applied in practice.

These arguments can be repudiated. First of all, there is no reason to doubt that the matters reported in internal company memoranda accorded with the facts, especially as the reports of agreements or talks about export quotas in different companies' memoranda are consistent (see points 52 to 53 and 56 to 59).

The existence of import restrictions is confirmed by RTZ's well-documented attempts over a period of years to get the Continental European firms to allow it to sell zinc in their respective home markets and their eventual agreement to RTZ exporting certain quantities to their markets. The allocation of import

[1] [1975] ECR 1663 at 1942 and 1966.
[2] [1981] ECR 2021 at 2031.

quotas implies a prohibition to exceed the quantities specified and thus constitutes an indirect, agreed export ban.

The documentary evidence also shows that the firms by and large stuck to the agreed 'quotas'.

(82) In any case, a finding that agreements on import restrictions constituted restrictions of competition within the meaning of Article 85 does not require proof that the restrictions were observed. The firms can therefore be said to be advancing here an argument of last resort.

IV. **Responsibility for the infringements**

(83) The undertakings concerned in this case participated in the anti-competitive agreements and practices either themselves or through dependent subsidiaries or other undertakings controlled by them. In the latter case, the parent companies and subsidiaries or controlled companies are to be regarded as a single economic entity and the parent company is to be held responsible for the actions of its subsidiary.

In the case of the businesses which at the inception of the agreements were independent but were subsequently taken over by Billiton and UM (KZM and Budel in Billiton's case and VM and Asturienne in UM's case), Billiton and UM must be held responsible for the actions of the firms taken over. This is confirmed, for example, by the fact that KZM and Budel's shares of all the costs and distributions arising from the activities of Adena (see point 31) were imputed by the ZPG to Billiton. Hence, Billiton's claim that it was only involved in the ZPG and its agreements from the time it completed its takeover of KZM in 1971 must fail.

(84) The ZPG must be seen as a worldwide cartel whose centre of gravity was always outside the European Community. As well as the firms with which this Decision is concerned, a large number of other firms were involved in it which did not, and do not, have any registered office or subsidiary in the Community and did not operate to any significant extent or only sporadically in the Community. For the ZPG, which controlled about 80 % of the world zinc market, the European Community was only one of several regional markets (see point 8). The initiative to form the ZPG and the driving force which carried it along came from non-Community firms. A report written by MG on the foundation of the ZPG and dated 3 July 1964 speaks of a 'diktat' by the British, Australian and Canadian companies. However, the situation of the zinc market was such that, even in the absence of the restrictive agreements, these third-country companies would not have made any significant contribution to improving competitive conditions in the Community, so that their participation in the ZPG had only indirect effects on the Community.

It is therefore appropriate to consider Article 85 as applying only to the undertakings which were indirectly involved in the manipulation of competition within the Community.

B. THE EFFECT ON TRADE BETWEEN MEMBER STATES

(85) The agreements on sharing markets were inherently liable directly to affect trade between Member States and they had the object of preventing zinc shipments between Member States or keeping them within clearly defined limits. The price-fixing agreements and the collusion over price changes between all the firms concerned in this case also affected trade between Member States in that they were intended to remove the possibility of price competition from zinc imports and succeeded in so doing. The same applies to the agreement to impose a resale ban on customers and to take action to influence the zinc price quotation on the LME. The production and investment controls or restrictions were also calculated to remove the temptation for firms to supply zinc they produced but could not sell in one Member State to customers in other Member States.

All these agreements and concerted practices by the firms concerned had the object and effect of artificially dividing and partitioning off the markets of Member States.

ARTICLE 85 (3)

(86) The second sentence of Article 4 (1) of Regulation No 17 provides that an exemption under Article 85 (3) may be granted only if the agreement decisions or concerted practices of the

kind described in Article 85 (1) have been notified to the Commission. No notification occurred in this case, so that for this reason alone there can be no possibility of an exemption.

(87) The undertakings submit that, despite the absence of notification, the Commission should still consider the agreements for exemption under Article 85 (3) on an 'as if' basis, because the fixing of the producer price improved the production and distribution of zinc and brought benefits both for consumers (because of the price stability which was allegedly achieved) and for the Member States (by helping to control inflation). The following can be said as regards this argument. First of all, it is doubtful, for the reasons stated in point 60, whether the agreements and concerted practices did in fact have any significant benefits. But this question is in any case not relevant, because it is the overall economic utility of the restrictive agreements in question which must be judged, in the light of the principles and objectives of the EEC Treaty. In the present case it is found that the fixing of the producer price, the collusion over price changes, the collective action to influence the zinc price quotation on the LME, the production and investment controls and the market sharing and export restrictions were primarily intended to reduce competition between those involved and to partition off national markets in the Community. Under such circumstances no exemption for the totality of the agreements and practices could have been granted even if they had been notified.

The absence of notification is in any event fatal and the case cannot be considered on an 'as if' basis (Distillers Company Ltd v. Commission, Case 30/78 (1)).

ARTICLE 15 (2) OF REGULATION No 17

A. INTENT

(88) The infringements were committed intentionally by all the undertakings. Not only did they commit the infringements of their own accord, they knew they could be infringing the competition rules.

B. THE DURATION OF THE INFRINGEMENTS

I. Commencement of the infringements

(89) The infringements consisting in agreements to fix the producer price, to manipulate the LME, to restrict and control production and investment and to share markets commenced with the ending of the first meeting of the Zinc Producer Group on 10 July 1964. It does not matter that the infringements may have been put into effect only later.

(90) As far as MG, PAG, Penarroya, RTZ and UM are concerned, therefore, the infringements commenced on 10 July 1964. It makes no difference that RTZ became an undertaking within the European Community only upon the United Kingdom's accession, because the principal effects of the actions were felt within the then Community.

(91) As far as Billiton is concerned, it must be held responsible for the actions of KZM, which it took over, and Budel, and the infringements in its case therefore commenced on the date KZM joined the ZPG, that is 3 September 1964.

II. End of the infringements

(92) The firms concerned did not decide to end the infringements on a given date. Instead, the ZPG gradually fell apart because one by one the firms stopped observing all the agreements and eventually the cohesion between them broke down. Hence, it is difficult to say exactly when the infringements ended. A presumption is therefore exercised in the firms' favour that each type of infringement ended when the last recorded instance of the effect of the relevant agreement or practice occurred.

1. *Fixing of the producer price*

(93) The first occasion on which MG, on the evidence of its own files, changed its zinc price independently and without prior agreement was in October 1977 (see point 26). It may be inferred that up to that time the prior agreement of prices by the firms concerned had its anti-competitive effects. This is borne out by Penarroya's statement that from the end of 1977 onwards, i.e. after the ZPG had ceased operating, Penarroya had taken an independent line.

(94) The end of the producer price agreement can therefore be put at October 1977.

2. *Agreement to influence the LME*

(95) Collectively-agreed measures to influence the LME involving all the firms, or the effects of

(1) [1980] ECR 2229.

such measures, are documented until April 1976 (see point 34). In the case of Billiton, PAG, Penarroya and UM, the infringement can only be said to have ended at the end of 1977 since they were involved in a joint operation to buy up North Korean zinc in that year.

3. *Restriction and control of production and investment*

(96) Binding agreements to restrict production and investment between all the firms concerned are documented until the end of 1975 (see point 38). Collusion over such matters between all the firms concerned (in the form of recommendations) are observable until the autumn of 1977, and individual agreements between MG and PAG until April 1978 (paragraph 39).

4. *Market sharing*

(97) The general agreement and the reciprocal arrangements between the individual firms concerned to keep out of each others' home markets lasted until the end of 1977 (see point 58) and bilateral and multilateral arrangements of this nature between Billiton and AMSE were still made as late as April 1978. As it is not known how long these arrangements had restrictive effects, the end of the infringement as far as Billiton and RTZ are concerned can be put at April 1978 (see point 54).

C. CONTINUING NATURE OF THE INFRINGEMENTS

(98) The infringements did not consist of a series of separate agreements or concerted practices concluded or embarked upon afresh each time the need arose ; the measures all sprang from the basic agreement of 9 and 10 July 1964. Ultimately they were merely a continuing implementation of this agreement adapted to changing circumstances. The changes in the implementation (such as the switch from the use of Merafine to the new firm Adena or from prior agreement of the producer price to mere collusion over intended price changes) do not affect this finding. From 1964 until the dates stated in points 93 to 97 the zinc producers allowed themselves to be guided by the basic agreement of 9 and 10 July 1964. The infringements of Article 85 were therefore continuing infringements within the meaning of Article 1 (2) of Council Regulation (EEC) No 2988/74 (1).

(1) OJ No L 319, 29. 11. 1974, p. 1.

D. GRAVITY OF THE INFRINGEMENTS

(99) Infringements of the types committed by the firms concerned in this case, namely directly or indirectly fixing purchase or selling prices and other trading conditions, limiting or controlling production, markets or investment, and sharing markets, are particularly serious. This is clear from the fact that Article 85 specifically mentions them as examples. They strike at the very foundations of the Community.

In the present case the following factors must be borne in mind, however. First, the undertakings were genuinely attempting to overcome the problems caused by erratic fluctuations in the zinc price quoted on the LME. Secondly, all the firms concerned except RTZ joined the ZPG only to avoid being isolated from the world zinc market on which they were largely dependent. Thirdly, the existence of a zinc producer price was common knowledge, so that it was reasonable for the firms to assume that their behaviour, to the extent that it was publicly known, was not a serious offence.

(100) As far as the limitation and control of production and investment are concerned, the argument of the firms that this was solely intended to prevent oversupply of zinc is plausible. Whilst these agreements on production levels did not lead to a medium or long-term improvement in the structure of supply, on the other hand there is no doubt that the intention behind them was to get the firms out of a difficult economic situation. Moreover, the production cuts were not on sufficient a scale to completely exclude competition. It may also be true that the agreements were not always fully carried out.

(101) The market-sharing agreements at first merely reflected the status quo in 1964 when there were only limited zinc shipments across Member States' borders.

(102) In response to the increasing export pressure which came from the United Kingdom from 1974 onwards, the firms did not close the Continental market completely to UK imports but attempted rather to contain the situation. RTZ also allowed compensatory sales in the United Kingdom as part of the agreements. The

agreements thus did not completely isolate the relevant national markets but merely channelled the import flows. The only moderately restrictive effect of this infringement reduces its seriousness.

(103) In general the agreements never led to a complete exclusion of competition, and it was indeed partly the remaining scope for competition that caused the cartel to break up.

(104) Other mitigating circumstances which must be taken into account in individual firms' favour are the following :

— MG was partly responsible for the ending of the system of fixing the producer price (see point 36),

— Billiton played only a subordinate role in the ZPG and, through the Budel joint venture and the sales pressure this generated on the zinc market, helped to bring about the disintegration of the market-sharing agreements,

— PAG's part in applying the agreements was largely passive and it was a 'hanger-on' rather than a ring-leader in the ZPG ;

— by forcing itself on to the Continental market, RTZ first weakened the anti-competitive effects of the market-sharing agreements and eventually caused their collapse.

In addition, the Commission has taken into account the difficult economic situation in which the Community zinc industry in general and one of the undertakings here concerned in particular found themselves. What is more, all the undertakings concerned cooperated in clearing up the affair after the sending of the Statement of Objections.

After weighing all these factors, the Commission has come to the conclusion that fines of the size that would normally be appropriate for infringements of this type and duration should not be imposed in the present case.

As to the size of the fines relative to the different undertakings in question, the Commission, having taken into account the differences in their respective level of integration had taken into consideration not the value of sales but the production value of zinc metal,

HAS ADOPTED THIS DECISION :

Article 1

1. The undertakings :

— Billiton Nederland BV,

— Metallgesellschaft AG,

— Société Minière et Métallurgie de Penarroya SA,

— Preussag AG,

— Rio Tinto Zinc Corporation plc, and

— Union Minière SA,

infringed Article 85 (1) of the EEC Treaty over the period 10 July 1964 until the dates given below by engaging in the following practices either directly or indirectly through undertakings dependent on or controlled or acquired by them :

— until October 1977, by agreeing a zinc producer price,

— until April 1976, by taking collective action to influence the zinc price quotation on the London Metal Exchange,

— until the autumn of 1977, by agreeing or consulting on restrictions of output and investment,

— until the end of 1976, by agreeing to keep out of each other's home markets,

and by putting such agreements into effect.

2. Metallgesellschaft and Preussag also infringed Article 85 (1) by continuing the agreements on restriction of output beyond the date given above until April 1978 and Billiton and RTZ by continuing the agreements on market sharing until April 1978.

Article 2

As a result of the infringements referred to in Article 1 (1) and (2), the following fines are hereby imposed :

(a) Billiton Nederland BV :

350 000 (three hundred and fifty thousand) ECU, that is Fl 885 157 ;

(b) Metallgesellschaft AG :

500 000 (five hundred thousand) ECU, that is DM 1 120 165 ;

(c) Société Minière et Métallurgie de Penarroya SA :

500 000 (five hundred thousand) ECU, that is FF 3 437 800 ;

(d) Preussag AG :

500 000 (five hundred thousand) ECU, that is DM 1 120 165 ;

(e) Rio Tinto Zinc Corporation plc :

500 000 (five hundred thousand) ECU, that is £ 294 758,50 ;

(f) Union Minière SA :

950 000 (nine hundred and fifty thousand) ECU, that is Bfrs 43 063 310.

Article 3

The fines imposed under Article 2 shall be paid within three months of the date of notification of this Decision into the following accounts of the Commission of the European Communities :

(a) AMRO Bank, Amsterdam, No 41.60.95.518 ;

(b) and (d) Sal. Oppenheim & Cie, Cologne, No 260/00/64910 ;

(c) Société Générale, Paris, No 5.770.006.5 ;

(e) Lloyds Bank Ltd, London, No 108.63.41 ;

(f) Banque Bruxelles-Lambert, Brussels, No 310-0231000-32.

Article 4

The Decision is addressed to the following undertakings :

(a) Billiton Nederland BV,
PO box 436 (Dr. van Zeelandstraat 1),
NL-2260 AK Leidschendam ;

(b) Metallgesellschaft AG,
Reuterweg, 14,
D-6000 Frankfurt am Main ;

(c) Société Minière et Métallurgique de Penarroya,
Tour Maine-Montparnasse,
33, avenue du Maine,
F-75755 Paris Cedex 15 ;

(d) Preussag AG,
Leibnizufer 9,
Postfach 4827,
D-3000 Hannover 1 ;

(e) Rio Tinto Zinc Corporation plc,
PO box 133,
6 St James's Square,
UK-London SW1Y 4LD ;

(f) Union Minière,
Avenue Louise 54,
Boîte 10,
B-1050 Bruxelles.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 6 August 1984.

For the Commission

Frans ANDRIESSEN

Member of the Commission