COMMISSION DECISION

of 13 December 1985

relating to a proceeding under Article 85 of the EEC Treaty (IV/27.591 – London Cocoa Terminal Market Association Limited)

(Only the English text is authentic)

(85/564/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 Article 2 thereof,

Having regard to the notification and application for negative clearance submitted on 29 June 1973 and 20 May 1985 by the London Cocoa Terminal Market Association concerning the Rules and Regulations of the Association,

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

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. FACTS

The London Cocoa Terminal Market Association (LCTMA) is one of many commodity markets established in London. The commodity markets are self-regulatory organizations run by Committees of Management selected by members from amongst themselves, aided by secretariats, and using powers given to them by their members in market rule books. Although the markets are self-regulating, there is an element of supervision by the Bank of England.

The object of the LCTMA is to set up and to administer a terminal market in London for cocoa. A terminal market or a futures market provides organized facilities for concluding contracts for the purchase and sale of a commodity to be delivered at named future dates. Futures markets have been developed primarily to enable persons involved in commodity trading to protect themselves from the risks of adverse price movements.

The LCTMA provides a market floor for trading and price-making, determines various technical questions such as allowable delivery months and the standard contract terms and procures the provision of clearing and settlement facilities. Trading is done on the floor of the market where dealers face each other with bids and offers being made by the system known as 'open outcry'.

The contract currently traded on the Cocoa Market is for 10 tonnes, or a multiple of 10 tonnes, of cocoa beans of a growth and quality defined in detail in Section 4 of the Rules of the LCTMA, delivered at contract price ex-warehouse approved by the LCTMA in the United Kingdom or delivered in approved warehouses in Amsterdam, Antwerp, Hamburg or Rotterdam. Dealing is up to 15 months forward in the delivery months: March, May, July, September and December.

All contracts traded on the London Cocoa Terminal Market must be registered with International Commodities Clearing House Limited ('ICCH'), an independent service company which provides clearing and settlement facilities for the LCTMA. ICCH has substantial capital and reserves and is wholly owned by six clearing banks. The principal functions of ICCH are to maintain and organize a 'daily clearing' of all trades and provide a guarantee for due fulfilment of contracts, in accordance with the rules of the LCTMA, to Clearing Members in whose names such contracts are registered.

There are four classes of membership of the LCTMA. The first two classes of voting members are Broker Members and Home Members who are allowed to trade on the floor of the market. The rules allow a maximum of 18 Broker Members and 36 Home Members. The second two classes are (non-voting) Trade and Non-Trade Members. Their number is not limited.

The criteria specified in the Articles for Broker and Home Membership are broadly similar and require an applicant for membership to meet certain financial requirements. A detailed statement of the criteria in force at the time of application may be obtained from the Secretary. The Broker Members are individuals whereas the Home Members are companies or firms. To become a Broker Member, the

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 204, 13. 8. 1985, p. 7.

applicant must satisfy the Committee that he is carrying on business in the cocoa trade in London. To become a Home Member the candidate must be a Trade Member (or satisfy the criteria for trade membership currently in force).

All Voting Members must be members of the ICCH and must register their contracts with the ICCH which in return for its fee guarantees the performance of the contracts. Voting membership may be transferred provided that the transferee shall be elected in accordance with the Articles. Non-voting membership is not transferable. Trade Members are required to be companies, firms or individuals who in the opinion of the Committee have a *bona fide* and continuing interest in the production or manufacture of or trading in cocoa beans or cocoa products. Non-Trade Members must be companies, firms or individuals who are not eligible for Trade Membership but who are in the opinion of the Committee regular users of the London Cocoa Terminal Market.

An appeal procedure applies if the Committee of Management refuses an application for membership, refuses to grant permission for a transfer of a member's membership or refuses a change in the control or nature of the member's firm or company. The procedure also applies if a member is expelled or suspended and the member is dissatisfied with the Committee's decision. The candidate or member can ask the Committee to reconsider its decision, making such representations and supplying such information as it considers relevant.

Business concluded on the floor of the market between Broker and Home Members may be transacted free of commission. Commission must be charged on all other transactions between members or between members and non-members but rates of commission are freely negotiable. The exemption from the obligation for Broker and Home Members to charge 'a' commission is explained by their ownership of the Market. This causes a variety of extra costs that the other categories of members do not bear because they have no ownership in the Market. Provision is made for an additional commission (equal to the original commission charged on the sale) where cocoa is tendered in fulfilment of a contract by a deliverer who is not a clearing member of ICCH in whose name the contract is registered. This extra commission is paid to the clearing member in whose name the contract is registered with ICCH. In the case of contracts open and closed on the same day, no commission is charged on the closing transaction. For administrative purposes and on behalf of its members, ICCH may collect a sum on account of any commission payable on any contract registrable with it. For this purpose, ICCH may, from time to time, notify its members of the rates of commission to be applied by ICCH to contracts which are registrable with it.

The international futures markets in London are the principal markets used in international commodity merchandising and they contribute to the stability and smooth operation of world trade and to world pricing mechanisms. They are also very large. As for cocoa, the figures below show the relative size of the LCTMA compared with its two most important competitors, i.e. the futures markets for cocoa in Paris and New York.

Annual volumes of trade (lots traded) 1979 – 1984 (1)

Year	London	New York	Paris
1979	839 751	265	18 327
1980	647 307	201 662	4 623
1981	818 979	562 651	7 224
1982	626 693	607 964	7 780
1983	1 336 545	1 162 540	34 125
1984	1 317 706	1 127 752	39 180

(1) One lot is currently 10 tonnes.

II. LEGAL ASSESSMENT

1. The notified Rules and Regulations of the LCTMA are to be considered as agreements within the meaning of Article 85 of the EEC Treaty.

2. The Rules and Regulations as originally notified specified the minimum net rates of commission which could be charged by a member. The Committee had powers to suspend or expel offending members. The rules specified rates of commission which varied according to who was paying and who was receiving the commission, and whether or not the contract was registered in the client's own name. The rates were cheaper if the contract was registered in the client's own name with ICCH, and where a Trade Member or Non-Trade Member was the payer rather than a non-member. The rates were still lower if a Home Member was the payer, and cheapest of all for Broker Members and a sub-class of Home Members called 'City Home Members'. Broker Members have the right to deal free of commission but when dealing for Home, Trade, Non-Trade or non-members, they had in the past to charge the minimum rates of commission specified. If the broker did not trade on the floor of the market but did business through another Broker Member, he had to pay that Broker Member the stated minimum rates of commission. Home Members may deal free of commission on the floor but cannot do business for each other. These may nominate employees to act as their market representatives. If they do not operate on the floor the business must go through a Broker and they had in the past to pay the Broker the appropriate minimum rate of commission. Trade and Non-Trade Members could only deal with each other at or above the stipulated minimum rate of commission. The rules provided that Trade and

Non-Trade Members could be registered as agents who could give orders on behalf of Trade and Non-Trade Members to Broker and Home Members and the latter were permitted to return part of the commission to the agent on certain conditions. The rules provided for a sub-class of Home Member called a City Home Member who could deal through a Broker Member at a reduced rate of commission. The Commission considered the above described system of specified minimum commission rates as a form of price-fixing that violated Article 85 (1) of the EEC Treaty. The LCTMA was requested to abandon the system of fixed minimum rates. The system has now been abolished as such. References to the system in the Rules and Regulations have been deleted. The rules now provide that business concluded on the floor of the market between Broker and Home Members may be transacted free of commission. Commission must be charged on all other transactions between members or between members and non-members. The Commission believes that this obligation is not appreciably restrictive of competition because it only entails the obligation to charge 'a' commission without any reference to the note. It follows that complete freedom exists to negotiate the actual commission rates.

3. Furthermore, as a result of the representations by the Commission, other amendments were also made to the rules concerning membership so that it is now made clear on the face of the Articles that membership is open and the criteria by which applications for membership are judged are objective (see Facts, seventh paragraph, above). The Committee of Management is now required to give reasons when it takes decisions affecting the members' rights of membership. To protect the rights of actual or potential members an appeal procedure has been introduced. As an ultimate resort an appellant would have recourse to the ordinary courts under English law.

4. The publication in the *Official Journal of the European Communities* pursuant to Article 19 (3) of Regulation No 17 did not bring in any representations.

5. The notified Articles of Association and Rules and Regulations, in their amended form, no longer contain any clauses which constitute appreciable restrictions on competition within the common market. Therefore, the Commission, on the basis of the facts in its possession, has no grounds for action under Article 85 (1). Consequently, the Commission is able to issue a negative clearance pursuant to Article 2 of Regulation 17.

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession the Commission has no grounds for action under Article 85 (1) of the EEC Treaty in respect of the Rules and Regulations of the London Cocoa Terminal Market Association as last notified on 20 May 1985.

Article 2

This Decision is addressed to the London Cocoa Terminal Market Association Limited whose registered office is at Cereal House, 58 Mark Lane, London EC3, United Kingdom.

Done at **Brussels**, 13 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission