II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 23 November 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.907 — Peroxygen products)

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

(85/74/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 and 15 thereof,

Having regard to the Commission Decision of 9 September 1983 to open a proceeding on its own initiative pursuant to Article 3 of Regulation No 17,

Having given the parties 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 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 consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

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

Whereas:

I. THE FACTS

The relevant products

(1) The products which are the subject of this Decision are hydrogen peroxide and its derivatives sodium perborate and persulphates. Together with other products which are not the subject of this decision (organic and inorganic peroxides), these collectively form the 'peroxygen' sector. Hydrogen peroxide, the basic product, is a powerful oxidant and besides its important captive use (for the production of sodium perborate and other derivatives) it is used in the paper, textile and chemical industries as a bleach and for the treatment of waste. Sodium perborate, the principal downstream product, is used as a bleaching agent in synthetic detergents and washing powders. Persulphates are inorganic compounds used primarily as polymerization initiators in the plastics industry.

The parties

(2) The undertakings which participated in the agreements and/or concerted practices concerned in the present decision are:

— Solvay et Cie, Brussels (Solvay),

— Laporte Industries (Holdings) PLC, London (Laporte),

— Degussa AG, Frankfurt (Degussa),

— L'Air Liquide SA, Paris (L'Air Liquide),

— Produits Chimiques Ugine Kuhlmann (now Atochem), Paris (PCUK).

The worldwide interests of Solvay and Laporte in the peroxygen sector have since 1970 been coordinated and grouped in a series of jointly-owned companies under the name Interox.

(3) There is however no holding company, board of directors or chief executive for the Interox activities. Overall policy is determined by a Committee drawn equally from senior directors of Solvay and Laporte which has no formal powers of management or control. Liaison between the various Interox companies on marketing, financial and technical matters is effected by a staff known as Interox Co-Ordination and based in the parent companies' offices in London and Brussels. At a day-to-day level the production and marketing activities of each Interox company in the various Member States are carried out by the appropriate Solvay or Laporte subsidiary, the Interox companies in the EEC generally having no working staff but paying for the services of employees of the parent companies.

In October 1983 PCUK was split up and its peroxygen business transferred to Atochem, part of the Elf-Aquitaine group.

L'Air Liquide and Atochem operate joint hydrogen peroxide production facilities (Oxysynthese) but produce sodium perborate independently and have separate sales departments for both products.

Markets and prices

(a) HYDROGEN PEROXIDE

(4) The market in the EEC and elsewhere is characterized by the particularly small number of producers.

The total third-party market (i.e. excluding captive use and sales to other producers) for hydrogen peroxide in the EEC is around 90 000 tonnes (worth some 75 million ECU in 1981).

The Interox grouping holds over half this market, Degussa is in second place with . . . % [1] and the two French producers each account for some . . . %.

In Western Europe the only other producers are Montedison, Eka-Bohus (Sweden) and Foret (Spain). The only other producers of any appreciable scale outside Europe are in the United States and Japan, and imports to the Community are minimal.

(5) Prices for the product vary widely not only between the Member States but also inside each national market according to the sector of utilization: inside the same Member State the price paid by the smallest customers can be up to four times that charged to major users.

The chemical industry, which orders in bulk, tends to pay the lowest prices overall and can negotiate large discounts off list price. Inside each national market there is a very broad price spread with some large chemical customers paying only 40 % of the price paid by other large users. Moreover, price levels in one Member State can be up to twice those applicable in another: the average price in France is generally only half the level prevailing in neighbouring countries.

Details of prices obtained by the Commission show (for instance) that in the first quarter of 1982 the spread of prices for the five largest chemical customers in the United Kingdom was 915 to 1 435 ECU per tonne, and in France, 354 to 737 ECU.

In the paper and textile industries there are a large number of customers often with only small annual offtakes and prices are higher than in the chemical sector. The same phenomenon of substantial differences in average prices between Member States and wide price variations among individual customers is also apparent in these sectors.

The product is homogeneous and all the major producers in Europe employ the same process route (the 'AO' or auto-oxydation process) so that there is no great difference in their cost structures.

[1] In the published version of the Decision, some figures have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

It is significant that in an internal Interox memorandum the product is described as 'effectively a commodity product (0,5 m tpa) ... (selling) at specialty prices and markups' with a 'dauntingly high entrance fee in development costs for would-be producers'. Figures obtained by the Commission show gross profit margins in hydrogen peroxide of typically ... % of sales value.

(b) SODIUM PERBORATE

(6) Western Europe accounts for the major part of world production and consumption of sodium perborate. Again the total number of manufacturers in the EEC is small: besides the hydrogen peroxide producers, which all have downstream production of sodium perborate, only two other chemical concerns manufacture the product and are dependent on bought-in feedstock.

The total EEC market in 1981 was around 450 000 tonnes (value 225 million ECU) of which the Interox grouping had ... % Degussa ... % and the French producers ... % each.

Customers are relatively few in number and consist mainly of the multinational detergent and washing powder producers. Consequently price variations, though not insignificant, are less marked than in the case of hydrogen peroxide.

(c) PERSULPHATES

(7) In the EEC persulphates market the main producer is the Interox company Peroxid-Chemie. Other EEC producers are Degussa and L'Air Liquide. Interox holds about two-thirds of the total market which is around 12 000 tonnes per annum.

Position of EEC producers

(8) The European producers between them account for some three-quarters of world hydrogen peroxide output if their overseas operations are included: the Interox grouping, Degussa and Oxysynthese are respectively the three largest world producers of hydrogen peroxide.

In sodium perborate the Western European producers account for some 80 % of world production, and the Interox group is again the world's largest producer.

The European producers between them account for about half the world output of persulphates.

Summary of the infringements

(9) The investigations carried out by the Commission under Article 14 (3) of Regulation No 17 on 9 and 10 December 1980 and subsequent enquiries under Article 11 of the Regulation showed that:

(a) from at least 1961 the above-named producers have conducted their commercial operations in hydrogen peroxide and sodium perborate in the EEC on the basis of an agreement or understanding that each national market was to be reserved for those producers which manufacture inside the territory in question (the 'home market rule');

(b) on the basis of an agreement originally made in 1958 by which the market share of Solvay in France for both hydrogen peroxide and sodium perborate was to rise to and then remain at one-third of the total national market, the Solvay/Laporte Interox group, L'Air Liquide and PCUK divided the French market between them in equal shares;

(c) on the basis of an agreement in writing made in or about 1969 between Solvay and Degussa, the business of major customers for hydrogen peroxide and sodium perborate in the Benelux was allocated between Degussa and the Solvay/Laporte Interox group in agreed proportions and percentage quotas were fixed for the remaining business ('Benelux agreement');

(d) on the basis of an agreement in writing made in or about 1970 the market for hydrogen peroxide and sodium perborate in Germany was divided between Degussa and the Solvay/Laporte Interox group in the respective proportions of 62 : 38 for hydrogen peroxide and 72 : 28 for sodium perborate and continuous contact took place to ensure that list prices were being respected ('Germany agreement');

(e) on the basis of an agreement made in 1973 the Solvay/Laporte Interox group

and Degussa maintained their world-wide sales of persulphates in the agreed proportion of 70 : 30 and coordinated their pricing policy ('Persulphates agreement').

Details of the arrangements made by the parties to which the Commission takes objection are set out in the paragraphs which follow.

A. THE HOME MARKET RULE

Participants: Solvay, Laporte, Degussa, L'Air Liquide, PCUK (now Atochem)

Separation of national markets

(10) The EEC markets for both hydrogen peroxide and sodium perborate are strictly divided on national lines. Each producer limits its sales to end-users in those Member States where it possesses production facilities.

Thus in Germany, Belgium, the Netherlands and Luxembourg, the Interox group and Degussa are at the same time the only producers and the only suppliers of hydrogen peroxide. L'Air Liquide and Atochem (formerly PCUK) which manufacture in France only (Oxysynthese) do not sell any hydrogen peroxide whatever in these territories.

In France, Interox, L'Air Liquide and Atochem, but not Degussa, operate hydrogen peroxide production plant. The market is equally divided between the first three but Degussa has never sold in France.

In the United Kingdom the Laporte side of Interox is the only producer and enjoys a 100 % monopoly of supply.

The strict separation of the national markets and the absence of intra-Community exchanges is all the more remarkable given the very considerable price differences, particularly as between France and the neighbouring Member States.

(11) A similar market division is apparent in sodium perborate, the only difference being that Degussa, while concentrating on the Benelux and German markets where it owns production facilities, does supply some minor customers with small quantities (less than 1% of the market) in France, Italy and the United Kingdom.

There is also evidence that Interox at least discourages trading across national borders by its customers. Traders in Belgium selling to the German market in 1975 and 1980 were required to cease this activity. The producers also have arrangements of long standing to limit imports of hydrogen peroxide into the EEC particularly from Austria where Alpine is the local producer. This small hydrogen peroxide manufacturer is required to declare to the major producers its EEC sales. It is supposed to limit sales to Belgium to 200 tonnes per annum. When sales by Alpine to France exceeded the 'forecast' it had given the other producers of 70 tonnes per month this resulted in complaints from L'Air Liquide. Interox appears to have believed that this activity could be controlled by an approach to Alpine through Degussa.

The 'home market principle'

(12) Documentation found at Solvay shows that as early as 1961 the producers accepted the principle of respect for 'home markets' as the basis for the organization of the European market.

In 1959 the major producers had formed an association known as 'Bitop' (Bureau International Technique de l'Eau Oxygénée et du Perborate de Soude). This body was supposedly concerned only with technical matters of common interest but it is apparent that it was considered the appropriate forum for reaching agreement on the division of the market between the producers. When Solvay planned in 1961 to expand outside its traditional 'home markets' of Belgium and the Netherlands by setting up new factories in France, Germany and Italy, the established producers in those territories wanted to be 'compensated' for accepting Solvay's presence. At the time Bitop was planning an export quota system for hydrogen peroxide and sodium perborate — to include 'exports' inside the EEC — and the proposal was made to compensate the producers who would have to make room for Solvay on their 'home markets' by giving them an increased share in the export cartel. Those producers who would not

be affected by Solvay's plans — i.e. those located in Austria, Switzerland and the United Kingdom — would give up a third of their exports outside their 'home markets' to those producers which were concerned by Solvay.

(13) At the foundation of the adjusted export quota system, but independent of it, lay the principle of respect for home markets. The export quota system was thus described 'accessory to a geographical sharing (home markets)' (accessoire d'une répartition géographique (home markets)). The same document continues: 'The protection of home markets is applicable in all common market countries.' ('La protection des home-markets vaut pour tous les pays du marché commun'). It is apparent that there were only limited exceptions to the rule: the Austrian producer Alpine had been allocated a small quota for delivery to other European markets. The document observes: 'The Bitop proposal assumes that the home market rule is applied strictly on the Belgian H202 market. However by virtue of a bilateral arrangement between Solvay and Alpine, the latter retains a certain right to deliver in Belgium (200 t telles quelles)'.

The whole tenor of the documentation is that there already existed a consensus of opinion between the producers that the European market was to be organized on the basis of the protection of home markets.

(14) In its reply to a request for information under Article 11 of Regulation No 17, Solvay described the home market rule as 'the old principle whereby it makes good sense for each producer to supply the major part of its output in the country where it produces ... this "rule" existed well before Solvay made its entry into the business independently of the agreements to share export markets'. In their replies to the statement of objections however both Solvay and Laporte deny that Solvay had thereby impliedly admitted the existence of any understanding to this effect between the producers.

(15) A sodium perborate export cartel was set up in 1962 but no details of how the quotas were calculated are available. In the same year Bitrop changed its name to 'CIPP' (Centre d'Information de Peroxydes d'Hydrogène et de Perborate de Soude).

While the manufacturers claim as far as the organization of markets was concerned that CIPP was involved only with quotas to non-EEC countries it is apparent that the 'home market principle' continued to govern their relations with each other in the European market which accounted for 90 % of their business. In 1968 Degussa (which had hitherto manufactured only in Germany) planned to expand by building a new plant in Antwerp. Solvay's reaction to this proposed expansions was to boycott CIPP for 18 months: it clearly considered that Degussa was trespassing on its territory. Their differences were resolved with the conclusion of agreements on the division of both the Benelux and German markets in 1969/70 and Solvay returned to CIPP. In a memorandum of 23 March 1970 a Laporte executive observed: 'The home market principle emerged through this period more or less unscathed'. In a further comment it is made clear that the rôle of CIPP was not confined to third markets: 'it should be borne in mind that the observable activities of CIPP at plenary sessions, both formal and informal, are a very small part of actual achievements. The arguments surrounding and the heat generated on third markets is (sic) no more than a safety valve, tending to disguise the fact that they probably account for a mere 10 % of turnover and even less in terms of profitability'. The implication is that the more serious work of CIPP concerned the stability and organization of the European market.

(16) The abolition of CIPP was already mooted in the memorandum which concluded by observing that as only three producers of any importance were left in Europe — Solvay/Laporte, Degussa, and L'Air Liquide/PCUK — 'there may therefore be scope for advocating the abolition of CIPP and the formation of a smaller but possibly more powerful arrangement consisting of the three producers'.

CIPP was indeed dissolved in 1972 but collaboration between the three major groups continued. An *ad hoc* committee met to administer quotas in third markets but there was also collusion on tendering for capital projects. Generally these would involve the construction of a turnkey plant in a non-EEC country to be operated under licence by a local producer or a joint company. An internal Laporte minute (of unknown date) reads: 'Meet in Paris to discuss common terms. Greece. We should withdraw. Degussa will not offer. Check with the French.' On the one known occasion when an opportunity arose inside

the EEC for a new capital project (for a major chemical producer in Germany in 1979) Degussa expected the 'home market' rule to apply and when told by Laporte that the French producers had been approached said it would like the French to 'protect' i.e. quote a deliberately uncompetitive price to allow Degussa as local producer to obtain the business. (The actual tenders submitted are difficult to compare but in the event the project was abandoned).

(17) A Laporte memorandum dated 18 April 1979 of a meeting with Degussa indicates that the major groups at that time still had a precise understanding on how the European market was to be divided between them and in which countries each was to supply. (The memorandum was headed 'Strictly confidential — do not file' and marked 'RED' in capital letters across the first page. The term 'red note' was apparently used in Laporte to denote documents relating to market sharing agreements which were to be kept secret.) Degussa was planning to abandon production of the hydrogen peroxide substitute sodium peroxide, a product in which it had a monopoly in the EEC. It supplied customers not only in the Benelux and Germany but also in other countries such as France and the United Kingdom. Giving up production would mean that these customers would be in the market for an equivalent quantity of hydrogen peroxide. It is significant that the basic assumption on both sides was not that the producers would compete for the new business, or even that Degussa would in future supply its sodium peroxide customers with hydrogen peroxide, but that the business would normally fall to be divided up in each market in accordance with a pre-existing formula. Thus Degussa would be totally excluded from the United Kingdom and from France, where Interox would gain 100 % and 33 % respectively of the new business. It is significant that the Interox 'normal gain' in Germany and France corresponded with the quotas it had been given under the original market sharing agreements for those countries. Degussa wanted however to have half of all the new business in hydrogen peroxide that would arise, and it is apparent that both parties anticipated that without much difficulty the other producers (particularly the French) could be persuaded to give up some of the benefit they would have gained 'as a reward for the Interox initiative'. It is also significant that Europe is divided into Germany on one hand and 'Interox' markets on the other, and those where other producers are present are referred to as 'those markets where there is sharing', and the producers are described as 'partners'. The assumption that in the United Kingdom Interox's 'normal gain' would be 100 % of the business indicates that it was accepted by the producers that this market was normally reserved for Laporte. Again it is significant that Degussa, while eager to take part of any increased quota in the United Kingdom, assured Laporte that such supplies would be 'fully controllable'.

(18) Laporte and Solvay claim the proposal was never implemented. Whether it was or not is irrelevant: the significance of the proposals is the underlying assumption that any new business would in the normal course of events have to be divided so as to maintain the status quo on each market.

The arguments of the producers

(19) The producers all deny that there exists or existed a general understanding or arrangement between them regarding the division of the EEC market according to a 'home market' principle.

They all contend that the rigidity of the pattens of trade and the confinement by each producer of its sales to particular markets is accounted for not by any agreement or understanding to that effect but by natural market forces. The establishment of the EEC (it is said) has not served to overcome invisible barriers to trade such as the desire of customers for security of supply, their preference for local suppliers, currency fluctuations and transport problems and costs.

(20) It is argued by Solvay that on the demand side the market division results as far as Interox is concerned from the geographical location of its production units and for the other producers from a variety of factors including production capacities and technical problems of transport. Solvay goes on to contend that the rules of competition do not compel a producer to follow an active policy of trade between Member States: restriction of sales to home markets is only unlawful if it

results from collusion which, it is argued, has not been proved. The phenomenon observed by the Commission is said to be the natural result of the oligopoly in hydrogen peroxide and sodium perborate: in such a market there is a natural tendency for prices to stabilize which involves a corresponding equilibrium in market shares.

Unless they enter into a counter-productive price war which will benefit no-one, the producers are thus — according to Solvay — obliged to accept such an equilibrium in the market. Nevertheless for its part Solvay says it adopted at specific moments a policy of attacking particular markets by installing new capacity: such was the case in 1956 when it expanded to France, Germany and Italy. The same situation arose at the end of the 1960's when Degussa set up its Antwerp plant. In order to achieve market penetration producers are obliged to set up plant in the market concerned which will give the other producers reason to fear a real 'war' unless they make room for the new arrival.

(21) Degussa also recognizes that a 'home market' principle exists but claims it results not from collusion but from the independent commercial judgement of the producers in an oligopolistic market. The reason why the French producers did not enter the German market was fear of retaliation from Degussa in France. With regard to its own expansion to the Benelux in 1970 it did so without any prior arrangement with Solvay. Degussa however had assumed that no retaliation would occur because the main customer for its new plant was to be Henkel, its oldest client, to which Solvay could not object.

(22) Laporte admits that the use of the terms 'home market rule' or 'home market principle' was not confined to the documents found by the Commission nor indeed that they were unknown outside Solvay and Laporte. However it argues that the specific references to the 'home market rule' are not inconsistent with the operation of natural market forces and says that the Commission has placed 'undue weight' on the documents and the prejudicial circumstances of their discovery.

Factual conclusions

(23) The Commission does not accept that the strict market separation on national lines which is a characteristic of both the hydrogen peroxide and sodium perborate sectors in the EEC results from natural market forces or the independent commercial judgment of the producers.

It considers that the market separation is the result of an arrangement or understanding of long duration (from at least 1961) between the producers, originally based on an acceptance of the 'home market principle', i.e. that the national markets would be reserved for domestic producers. Where a producer did expand by installing or planning to instal production facilities in a national market previously not within its sphere of operations (as Degussa did in 1968 to 1970) this would be regarded as a disloyal or hostile action: hence Solvay's boycott of CIPP for 18 months. Nevertheless the difference between the two groups concerned was resolved by the conclusion of a detailed market-sharing quota agreement between them on the division of the Benelux market and the maintenance of the status quo in Germany; hence the remark that the principle had emerged 'more or less unscathed'. There was also an agreement for sharing the French market equally between three producers. The Commission does not consider that these bilateral agreements were isolated or discrete arrangements: they formed part of a wider organization of the market based on the allocation of territories to each producer. The whole rationale of these agreements is that the available market is divided between certain producers and they would not have been practicable unless the participants had the certainty that their arrangements on the division of the business, the allocation of customers and on pricing would not be disturbed by incursions from other producers.

The 'red note' of 18 April 1979 shows not only that there were close contacts between Degussa, Interox and the French producers but also that the EEC market was the subject of a detailed understanding on how business was to divided between the producers. This document, together with the earlier references in 1961 and 1970 provides the necessary

evidence of collusion between the producers on the organization of the European market.

(24) The opportunity for monitoring the maintenance of the agreed market divisions was provided for in Bitop, then in CIPP, and latterly in the *ad hoc* contacts between the producers. These meetings were clearly not concerned only with technical matters or even the export quotas for third markets as is made clear from the withdrawal of Solvay in protest at Degussa's Benelux expansion and the observations made by Laporte on their activities.

The expression 'home market rule' or 'home market principle' was used by the producers themselves in relation to the partitioning of the market and is not the creation of the Commission. Contrary to the argument of Laporte, it does not consider that it should overlook or ignore the implications of the documentation found at the premises of the producers and expressly referring to such a principle.

While it is correct that hydrogen peroxide (but not sodium perborate) requires special care in handling and shipping, such transport problems do not — as the manufacturers claimed — prevent the product from being supplied across national frontiers. Degussa for instance supplies a considerable part of the German market from its Antwerp site, while certain concentrations sold in France by Interox are produced in Belgium. Even the English Channel is not a great obstacle, as is demonstrated by Degussa's expressed readiness to take part of any increased quota in the United Kingdom.

(25) The Commission therefore considers that the evidence shows:

(i) the major part of the EEC market is partitioned on strict national lines with each producer supplying only in those territories where it has production facilities;

(ii) this market division results from and is referable to an understanding or arrangement between the producers;

(iii) the various market-sharing agreements (for Germany, the Benelux and France) are not isolated or fragmented cases but constitute part of a general cartel formed by the producers by which the market is organized.

B. MARKET SHARING AGREEMENT IN FRANCE

Participants: Solvay, Laporte, L'Air Liquide, PCUK (now Atochem)

The 1958 agency agreement

(26) In or about 1958 Solvay constructed a new plant for hydrogen peroxide and sodium perborate at Tavaux in France. At the same time the two French producers formed their joint subsidiary Oxysynthese to produce hydrogen peroxide.

By an agreement in writing made in 1958 (and reproduced in its essential terms by a second agreement in 1967) Solvay appointed the two French producers as agents for the sale and distribution of its peroxygen products in France. The contract provided that at the beginning of each year the parties would determine by mutual agreement the tonnage of each product to be sold on Solvay's behalf.

The producers however admit that at the same time the contract was signed the producers agreed that each producer would cover one-third of the French market in hydrogen peroxide and sodium perborate. The arrangement continued after the setting up of Interox in 1970 and regular meetings were held to review the market situation and supervise the administration of the quotas.

(27) In 1973 the chemical producer Rhône-Poulenc constructed a new hydroquinone plant at St-Fons with an annual requirement of several thousand tonnes of hydrogen peroxide. Solvay (Interox) claimed that the market-sharing agreement entitled it to a one-third share of this new business but the French producers demurred and concluded a total requirements contract with Rhône-Poulanc for this new application. The three producers never reached agreement on the question of the division of the Rhône-Poulenc business. The St-Fons factory takes all its requirement from the French producers (± 5 000 tpa).

At the beginning of the 1970's Solvay was setting up its own sales network in France and becoming less dependent on the agency arrangements. This agreement was terminated by notice to end on 1 January 1975 and from that date Interox made its own arrangements for the sale and marketing of peroxygen products in France.

Continuation of the market-sharing arrangements

(28) While the agency agreement was terminated according to the legal requirements the quota agreement was never formally cancelled and the participants have produced no documentation to show that it was brought to an end.

Solvay claims that the quota arrangements lapsed at the same time as the agency agreement. The evidence obtained however shows that not only did the quota arrangements continue to produce their effects — in the sense that the agreed division of the market into three was maintained — but also that this was referable to a continuing collusion between the three producers.

Maintenance of the agreed market division

(29) The one-third market share allocated to Solvay for France has been maintained since the termination of the agency agreement in 1975. The Rhône-Poulenc requirement had not been contemplated by the parties when the original market share had been agreed and it is apparent from the documentation that it was treated as a new application quite separate from the general hydrogen peroxide market. Solvay appears to have tacitly accepted that Rhône-Poulenc St-Fons should be treated as a special case.

Excluding St-Fons, the average market shares of the three producers in hydrogen peroxide in France between 1975 and 1980 were in the proportion AL 32,3 %; PCUK 33,3 %; Interox 34,4 %. The French hydrogen peroxide market in 1980 (excluding Rhône-Poulenc St-Fons) was some 15 000 tonnes.

In sodium perborate as well the same division into three almost equal parts also remained: over the same five years the average was AL 32 %; PCUK 34 %; Interox 34 %. The market in 1980 was estimated at 83 000 tonnes.

Exchange of information on deliveries

(30) The three producers which supplied the French market continued after 1975 to exchange detailed information on their respective production and sales figures of the same kind as they had done previously. Now however it was effected every month through a body known as the 'Chambre Syndicale de l'Eau Oxygénée et des Persels'. This body collects statistics from each of the producers and issues them with composite figures for the whole French market. The limited number of producers (effectively only two in hydrogen peroxide) means that each producer is automatically informed of the production and sales of the other group and can also check that its own market share remains at approximately one-third of the total.

In fact, besides the monthly statistics issued by the 'Chambre Syndicale' the producers exchanged further and more detailed information on matters not covered by the 'official' exchange. The data available through the Chambre Syndicale do not include details of sales to individual customers, nor can these be discovered by any analysis of the figures. The producers also deny exchanging any information other than via the 'official' association. Nevertheless documentation obtained from Solvay for 1978 to 1981 shows that it was precisely and correctly informed of the sales made by L'Air Liquide, PCUK and Oxysynthese to individual customers.

(31) Thus Solvay knew exactly to the tonne the quantity of hydrogen peroxide supplied in 1978, 1979 and 1980 by the producers to the two major chemical industry customers as well as the exact quantities sold by Oxysynthese to Rhône-Poulenc for the hydroquinone plant at St-Fons. On this basis it was able to check its market share in each of the principal sectors (paper; chemical industry excluding Rhône-Poulenc hydroquinone; textiles). For 1979 and 1980 it was also aware of the precise tonnage supplied by the French producers to each customer in the chemical and the paper sectors, including those which were not its own customers (which indicates that it must have obtained the information from PCUK and/or L'Air Liquide). These documents also confirm that the producers

treat Rhône-Poulenc's St-Fons requirement for hydroquinone as a special case.

(32) Similarly Solvay knew the exact sales of sodium perborate by the French producers to each of the four main detergent producers for 1978, 1979 and 1980, and could check that it had roughly one-third of the business of each; although the breakdown by customers is not apparent from the composite monthly figures from the Chambre Syndicale.

The Commission has under Article 11 of Regulation No 17 checked the sales of each producer to the major individual customers and the figures obtained confirm the accuracy of those recorded by Solvay: they were not therefore simply estimates but constituted correct information which could only have been obtained from the other suppliers.

From 1981, that is, following the investigations made by the Commission in December 1980, the documents no longer showed any information on individual customers.

Arguments of the producers

(33) The producers all deny that the agreement dividing the market into thirds survived the termination of the agency agreement in 1975. They point to the variations from year to year in the relative percentage market shares of the three suppliers and claim that these are inconsistent with a system of fixed quotas. It is also argued that in relation to hydrogen peroxide it is illogical to exclude the supplies to Rhône-Poulenc St-Fons and that if these were included Interox would only have around 25 % of the market.

(34) They also argue that there is no evidence of collusion: the exchange via the 'Chambre Syndicale' was not intended (they say) to provide a check on the maintenance of the three-part market division. Solvay claims that the documents showing detailed knowledge to the last tonne of the quantities supplied to each major customer — which cannot be discovered from the official 'Chambre Syndicale' statistics — are not conclusive proof of any exchange of additional information. While the other producers can provide no explanation of how this information came into Solvay's possession Solvay claims that it could have come from customers who have an interest in communicating their annual requirement to a potential supplier. It provided the Commission with reports of visits to customers which it claimed supported its contention.

Factual conclusions

(35) The Commission considers that the arrangement to divide the French hydrogen peroxide and sodium perborate market equally between the three suppliers was independent of the formal agency agreement which was terminated in 1975 and continued in practice until at least the date of the Commission's investigations in December 1980.

Although it is correct that the shares of the producers relative to one another fluctuated, their average market shares for both products during the six years in which the Commission considers the sharing arrangement to have remained in force was almost exactly one-third each, the division which had originally been agreed. The argument that there is no reason for excluding Rhône-Poulenc St-Fons from the general third-party hydrogen peroxide market for France is disproved by the parties' own documentation: it is apparent that it is treated as a special case. In any event the argument does not apply to the sodium perborate sector where the equal sharing is also apparent.

(36) The exchange of information went far beyond the official 'Chambre Syndicale' scheme which even on its own permits the market behaviour and market share of individual producers to be identified. The detail and accuracy of the total sales made to individual customers by the French producers shown in the Interox documents is such that it could only have been ascertained by contact between the suppliers themselves. The Commission does not accept that such detailed and accurate information on competitors' sales was obtained from consumers. The visit reports supplied by Solvay to support its argument that it may have obtained these details from customers generally do not even relate to the customers of whose consumption it was informed in precise detail and even where they do concern a customer listed in the documents give only general estimates of monthly or annual requirements which do not correspond with the precise figure as set out in the

tables on which the Commission relies. The Commission concludes that the producers systematically exchanged details of their sales to each major customer. By exchanging detailed figures each producer could not only check that its market share was being maintained at one-third but could also ascertain the source of any imbalance or deviation.

C. BENELUX AGREEMENT

Participants: Solvay, Laporte, Degussa

(37) To accommodate the new production capacity of Degussa in Antwerp which was due to come on stream in 1970, an agreement was reached at the end of 1969 between Solvay and Degussa on the division of business and the allocation of major customers in both hydrogen peroxide and sodium perborate.

Degussa's plans had originally been resisted by Solvay which had reacted by boycotting CIPP meetings for 18 months.

In hydrogen peroxide, the Netherlands market was to be divided equally between the two producers. For Belgium, special arrangements were made for the business of the two major customers: UCB was allocated to Solvay and AKZO was to be shared equally between them. As regards the rest of the Belgian market Degussa was to be permitted to build up its share progressively to one-third.

In sodium perborate the Benelux was treated as a single unit to be divided between Solvay and Degussa in the proportion of 80:20, with the exception of Henkel, Degussa's oldest customer, where the proportions of the share were to be reversed (i.e. Degussa was to get 80 %).

(38) These arrangements were summarized in writing in the form of so-called 'gentleman's agreements' which were still in existence and were being referred to in secret internal memoranda as late as April 1979. In spite of repeated requests made to both parties during the investigation and subsequently no copies have ever been provided to the Commission and it has had to rely on the account given in response to requests under Article 11 by Laporte.

After Solvay and Laporte set up the Interox grouping the arrangement was continued. Meetings were held three times each year to review the operation in practice of the agreements and to correct deviations from the quotas. Imbalances would be corrected by the producer whose market share was below quota reducing his selling prices or offering special terms in order to increase his sales in the next quarter. There was also some telephone communication between the producers to ensure the agreement was being kept. Over the years the original agreement was subject to some modification and practices developed which had not been envisaged at the outset. Nevertheless as Solvay admits the parties met regularly until at least the end of 1980 and had reached a consensus on their respective positions in the market.

(39) In 1978 a proposal was made (apparently by Degussa) to 'simplify' the Benelux agreement (and the 'Germany' agreement) and reduce contact to a minimum. There was however no intention on either side of altering the status quo as outlined in the agreements. The essential key to any successful simplification of the agreements was said to be the willingness of individuals 'at the highest level' to exert their influence on the national managements to ensure that quotas were rigorously adhered to, with any deviations to be the subject of criticism. The plan, which was agreed in a meeting between Degussa and Interox on 17 April 1979 for submission to more senior company officials would involve central management informing the national managements (incorrectly) that any detailed arrangements which may have existed between the two groups were being revoked but that 'common sense' would prevail in the future. Contact was to be reduced to a minimum and was to take place only through certain named executives on each side.

Solvay and Laporte claim the proposal to 'simplify' the agreements was never implemented: if that is so, the arrangements must have continued as before.

Solvay, Laporte and Degussa admit their participation in the Benelux agreement until December 1980.

D. GERMANY AGREEMENT

Participants: Solvay, Laporte, Degussa

(40) A related but separate agreement was reached in 1970 between Degussa and representatives

from Solvay and Laporte on the division of the German market. The purpose of this agreement, which was also made in writing, was to maintain the 'status quo' based on the respective average sales of the two groupings in Germany over the preceding three years in both hydrogen peroxide and sodium perborate.

This gave the Interox grouping 38 % of the market in hydrogen peroxide to Degussa's 62 %. For sodium perborate the agreed percentage quotas were 28 to 72 %. The size of the market for these products in Germany in 1980 was respectively 23 000 and 130 000 tonnes. Copies of this agreement were provided to the various national managements but again the parties declined to provide copies.

Meetings took place three or four times each year to supervise the detailed execution of the quota agreement. In one document dating from 1974 and found at Solvay the 'Soll' (or quota) of the two producers is calculated to two decimal places: 38,64 % : 61,36 %. This document also indicates that particular arrangements, not disclosed by the producers, were made in respect of the division of the business of the major customers AKZO, Ciba Geigy and Henkel: the note of the 1979 Degussa-Interox meeting also indicates that special quotas had been set for different customers.

It is not clear in what detail the original agreement covered the fixing of prices. In practice the two groups were in telephone contact several times each week to ensure that their list prices — which were identical — were being respected.

(41) In 1979 the parties were also anxious to simplify the 'Germany' agreement which involved a far closer degree of contact — and hence a greater risk of discovery — than the Benelux agreement. It was agreed in principle that in future there should be less concern to check prices at individual customers provided there was no risk to maintaining the basic price structure. The quota arrangements for different customers or in different sectors were also to be simplified in such a way that the status quo was not disturbed. On price, if either side wished to apply below-list prices for a new application, the initial contact was to be made via Interox-coordination (i.e. Solvay or Laporte head office). These points were to be summarized in a draft annex to be attached to the original Germany agreement. Again it is claimed the proposed amendments were never implemented.

The parties have also admitted their participation in the Germany agreement until December 1980.

The claim however in relation to both the Germany and Benelux agreements that they were intended only to facilitate the maintenance of an 'equilibrium' already existing in fact by reason of the oligopolistic structure of the market.

E. PERSULPHATES AGREEMENT

Participants: Solvay, Laporte, Degussa

(42) In 1979, following anti-trust proceedings in the United States in the persulphates sector, involving among others Solvay and Laporte, the Commission carried out an investigation into the possible extension of the alleged arrangements on the United States market to the EEC. The representatives of Laporte denied categorically that there had ever been any restrictive agreements concerning the European market and the enquiry was closed.

The evidence obtained during investigations in the present case shows however that in or about 1974 the Interox grouping and Degussa agreed to fix their respective sales of persulphates on the world market (including the EEC) in the proportion of 70 : 30 based on their respective sales in the period 1971 to 1973.

Arrangements were also made between Peroxid-Chemie (the Interox company primarily concerned with persulphates) and Degussa to share the new business which arose when the Dutch producer AKZO ceased production in 1977.

Total sales figures were periodically exchanged and steps taken to redress any imbalance in the quotas. The collaboration in the persulphates field also extended to discussions on the coordination of pricing policy.

II. LEGAL ASSESSMENT

A. ARTICLE 85 OF THE EEC TREATY

Article 85 (1)

(43) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) ...

(e) ...

Agreements and concerted practices

The general cartel: home market rule

(44) The Commission does not consider that the strict separation of the EEC market and the confinement by each producer of its activities to certain markets arose from natural market forces or the independent judgment of the producers. The documentation which was found for 1961 made frequent reference to a 'home market rule' which, as Solvay stated, already existed and was distinct from any accessory agreement on third market quotas. The evidence shows that the 'home market rule' was accepted by the producers on the basis of reciprocal cooperation on which the industry was organized. The 'home market principle' was again mentioned in 1970, being said to have 'emerged more or less unscathed' from the period of differences between Solvay and Degussa, which were resolved with the conclusion of status quo and quota agreements in Germany and the Benelux. The 1979 document ('red note') shows that the close collaboration between the producers and a reciprocated community of interest continued at that time with the division of the EEC market forming the basis of a general consensus between all the producers.

(45) It is not necessary, for the establishment of a concerted practice, for the parties to have agreed a precise or detailed plan in advance. (Judgment of the Court of Justice in Re the European Sugar Cartel: Suiker Unie and Others v. Commission, Cases 40-48/73; 50/73; 54-56/73; 111/73; 113-114/73 Judgment of 16 December 1975 [1], paragraphs 173 to 174.) The criteria of coordination and cooperation laid down in the case law of the Court must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, but it does strictly preclude any direct or indirect contact between them, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

The documents show that the decision by each producer of its markets and customers was not the subject of independent commercial judgment. The 'home market rule' is expressly and consistently mentioned as the basis on which they conducted their activities first in 'BITOP' and then in 'CIPP'. The 1979 'red note' of the Degussa-Interox meeting shows that there was close contact, direct and indirect, between all the producers on their future conduct and plans as well as a general consensus on how any new business was to be divided between them on each national market.

(46) In the present case the evidence shows that:

(a) the producers accepted and intended that their commercial conduct in the EEC should be governed by the principle of protection of traditional home markets,

[1] ECR 1975, p. 1663.

the restriction by each producer of sales to those territories where it possessed production facilities, and the division of business in those markets where several producers were present according to specific market sharing agreements;

(b) in accordance with this rule they confined their activities to particular defined markets;

(c) as a result the division of the EEC market on national lines was maintained.

The Commission therefore considers that the factual separation of national markets in the major part of the EEC results from and is referable, if not to an agreement properly so called, at least to a concerted practice between Solvay, Laporte (acting as Interox), Degussa, L'Air Liquide and PCUK (now Atochem).

The Germany, Benelux and Persulphates agreements

(47) The particular arrangements concluded in 1969/70 between Degussa and the Solvay-Laporte Interox grouping setting up market sharing quotas and collusion on pricing for hydrogen peroxide and sodium perborate in Germany and the Benelux, as well as the 1974 'Persulphates' agreement covering the whole world including the EEC, constitute 'agreements' for the purposes of Article 85. The market division and the conduct of the producer groupings formed the subject of precise and detailed agreements between the parties which were reduced to writing and formed the basis for their market behaviour in those sectors.

Market sharing agreement in France

(48) The original division of the French market in hydrogen peroxide and sodium perborate by which each producer took a one-third share constituted an 'agreement' in terms of Article 85.

The Commission considers that, contrary to the submission of the producers, the convergent behaviour of the parties and the maintenance after 1974 of their respective market shares in the proportion originally agreed resulted from their continuing to act in collusion.

The mutual disclosure by the three producers of business details on their deliveries to major customers not only through the 'official' information exchange but also by further contacts must have been intended enable each to check that the agreed market division was maintained. This arrangement indicates that the producers were still united by an express or implied agreement to divide the market. The continuation of the agreed market division was therefore the result of an agreement or at least a concerted practice.

Undertakings

(49) For the purpose of the present proceedings the Commission does not consider the Interox grouping as an undertaking possessing an identity sufficiently distinct from that of its two parent companies so as to absolve Solvay and Laporte themselves (as opposed to Interox) from liability under EEC competition rules. The Interox operation is simply the framework in which the activities of Solvay and Laporte in the peroxygen sector are coordinated and profits shared and all major policy decisions are taken by the parent companies. The Interox companies do not determine their market behaviour autonomously but in essentials follow directives issued by the parent companies.

The Commission in its statement of objections has expressly reserved the right to examine in future proceedings the applicability of Article 85 of the Treaty to the Interox arrangements. Solvay and Laporte contend that Interox is a separate undertaking constituting a merger falling outside Article 85 (1), but for the purpose of these proceedings have accepted that the parent companies are liable for any infringements referable to the Interox operation.

The fact that L'Air Liquide and PCUK operated a joint manufacturing facility for hydrogen peroxide (Oxysynthese) does not affect their separate identity as undertakings.

At all relevant times, the other French supplier besides L'Air Liquide was PCUK, part of the Pechiney-Ugine-Kuhlmann conglomerate. In 1983 the French chemical industry was reorganized and the peroxygen business of PCUK was transferred to Atochem part of the Elf-Aquitaine group. The Commission considers that as the present owner of the business entity which was involved in the infringements, and having taken over the assets and adopted the economic objectives of PCUK in this sector, Atochem must be the addressee of any decision and responsible for the payment of any fines imposed in respect of the infringements committed by PCUK.

This decision is therefore addressed to Solvay, Laporte, Degussa, L'Air Liquide and Atochem.

Restriction upon competition

(50) The overall market division and sharing arrangement, and the individual agreements covering particular geographical areas and products, together regulate almost all trade in the products concerned in a major part of the common market, and involved all the principal producers in the European market for a major industrial sector.

The 'home market' arrangement, enunciated in 1961 and later refined to accommodate Degussa's expansion plans to the Benelux in 1970, delineated the territories in which each producer was to supply and consolidated the established positions of those producers to the detriment of effective freedom of movement in the common market.

As regards the individual agreements (Benelux, Germany, France, 'Persulphates') these were intended to, and did, eliminate all effective competition between the parties on the markets and in the products concerned.

The argument made by the parties that the structure of the market, the position of the producers and the nature of the producers are such that conditions of competition would have been no different if they had not had the agreements, is irrelevant. Article 85 applies just as well to oligopolistic markets as to more fragmented markets. The very fact that the parties considered it necessary to enter into agreements which either maintained the status quo or limited the market penetration of a particular supplier to a given percentage, shows that market conditions might well have been different had the free play of competition been permitted.

Effect upon trade between Member States

(51) The complex of arrangements made on a European (and world) level between the major producers of peroxygen products had the effect of excluding virtually all trade between Member States except through channels subject to control by restrictive agreement. The 'home market' rule involved producers refraining from supplying on the territory of others or confining their activities to particular markets where restrictive market sharing agreements had been made. The only movement of products between Member States thus occurred in the context of the agreed market organization or as coproducer deliveries.

The restrictive arrangements on the different national markets were designed to implement and reinforce the general market division between the producers and cannot be separated therefrom. However, even if they are considered individually, the market sharing arrangements for the Benelux, Germany and France have an appreciable effect upon trade between Member States.

The Benelux agreement covers trade in three Member States. In the case of the other arrangements, the agreements by dividing each national market between two or three producers effectively contribute to the preservation of barriers to trade. Further, both Degussa and the Interox grouping are established in several Member States and product supplied on one national market under the terms of a market sharing arrangement may well have been produced in another Member State: for example, Interox supplies certain products in France from its factory in Belgium.

The persulphates agreement fixed the respectives shares of the two major producers in the whole of the EEC and by its very nature affected trade between Member States.

Conclusion

(52) The Commission therefore considers that:

(a) the agreement or concerted practice between all the producers by which the

EEC market was organized on the basis of the respect of home markets and the confinement by producers of their sales to particular territories;

(b) the agreement dating from 1958 by which the French market in hydrogen peroxide and sodium perborate was to be equally divided between Solvay (later Interox), L'Air Liquide and PCUK;

(c) the 'Benelux' agreement of 1969 by which the respective shares of Solvay (later Interox) and Degussa in Belgium, the Netherlands and Luxembourg for hydrogen peroxide and sodium perborate were fixed according to agreed quotas;

(d) the 'Germany' agreement of 1970 by which the respective shares of Degussa and the Interox grouping in the German hydrogen peroxide and sodium perborate markets were fixed on the basis of the status quo and continuous contact took place to ensure list prices were respected:

(e) the 'Persulphates' agreement of 1974 by which the respective shares of Degussa and Interox in the EEC persulphates market were fixed and their price policy coordinated:

constituted infringements of Article 85 (1) of the EEC Treaty.

Article 85 (3)

(53) Under Article 85 (3) of the EEC Treaty, the Commission may on the fulfilment of certain conditions grant undertakings an exemption from the prohibition of Article 85 (1). In order for the Commission to consider any exemption, however, it is a necessary pre-requisite that the agreements or concerted practices in question be notified in proper form, which was not the case in the present proceedings.

Even if the agreements or concerted practices had been properly notified there would be no possibility of any exemption being granted. Market sharing and price fixing arrangements of the type under consideration in an important industrial sector where there are a limited number of producers, virtually all of which are involved, are fundamentally contrary to the basic objectives of the Treaty. The agreements cannot be said to improve the production or distribution of goods, and their result is to eliminate any possibility of effective competition in respect of the products in question. Any benefit that could be said to result from the agreements (i.e. stability of market shares and high prices) accrue only to the participants.

B. REGULATION No 17

Fines

(54) The Commission may, by Article 15 of Regulation No 17, impose fines of from 1 000 to 1 000 000 ECU, or a sum in excess thereof not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where either intentionally or negligently, they infringe Article 85 (1) of the EEC Treaty. In fixing the fine, regard shall be had to both the gravity and the duration of the infringement.

In the present case the only view the Commission can take of the agreements and concerted practices is that they are of extreme gravity and were of long duration.

The gravity of the infringements lies in the fact that over a long period the producers of hydrogen peroxide, sodium perborate and persulphates effectively eliminated all possibility of effective competition in a market worth several hundred million ECU annually, and would no doubt have continued their secret arrangements indefinitely but for the discovery of the relevant evidence by the Commission.

The division of markets on national lines and the series of market sharing and quota agreements together constituted a cartel which jeopardized inter-State trade in a way which is contrary to one of the fundamental objectives of the EEC Treaty, namely the creation of a single market between the Member States.

The cartel involved deliberate and wide-ranging infringements of EEC competition law and was persisted in even after the Commission had carried out investigations concerning the persulphates sector in 1979 under Article 14 (2).

(55) As regards duration, the 'home market' arrangement dated from almost the very establishment of the common market while in the case of the individual agreements these ran from 1958 for France, from 1969/70 for

the Benelux and Germany, and from 1974 in persulphates.

In so far as the 'home market' arrangement and the French market-sharing agreement were already in effect before Regulation No 17 came into force on 6 February 1962, the Commission will assess fines only in respect of their operation after that date. While the home market agreement was in operation from 1961, the Commission considers that for the purposes of Article 15 of Regulation No 17, its most serious aspects were manifested from about 1970 onwards with the formation of Interox, the concentration of the producers effectively into only three major groupings, and the arrangements made to accommodate Degussa's expansion to the Benelux.

The parties claim that the infringements admitted were terminated immediately after the Commission's investigations in December 1980. Although there is no substantive evidence that this was in fact the case, the Commission will assess any fines on the assumption that the infringements were not continued after this date.

(56) In assessing fines however, some distinction can be drawn between the respective responsibility of Solvay, Laporte and Degussa on the one hand and the French producers on the other. The Solvay-Laporte Interox grouping and Degussa are the major world producers of the products in question and played a dominant role in the conception and operation of the cartel. Degussa is the second largest world producer and was involved in the detailed agreements for the Benelux and Germany: the reason it did not sell in France or the United Kingdom was the 'home market rule' of which it was a major beneficiary, Germany being the largest individual EEC market.

(57) In 1980, the last year in which the cartel was definitely known to have been in operation, the turnover of the Interox grouping in the products concerned in the EEC amounted to some . . . million ECU.

Although after the formation of the Interox grouping Solvay and Laporte as joint owners are both responsible for its activities, the Commission is imposing separate fines. In recognition of the fact that Solvay is the larger of the parent companies of Interox, and the peroxide sector forms a far greater proportion of Laporte's total turnover than of Solvay's, the Commission will make some distinction between them.

It also takes into account that Laporte's responsibility for the French and Benelux agreements dates from 1970 when the Interox grouping was formed, both these agreements having originally been negotiated with the other participants by Solvay.

Degussa's EEC turnover for the products concerned in the year ending 30 September 1980 was . . . million ECU.

The French producers had a somewhat lesser role which reflects their smaller part of the EEC market compared with Interox and Degussa. While they were not participants in the Benelux or Germany agreements, their confinement of their activities to their domestic market however ensured the effectiveness of the restrictive arrangements on other markets between Interox and Degussa, particularly as regards the maintenance of price differentials between the Member States.

In 1980 their EEC sales of hydrogen peroxide and sodium perborate to third parties (excluding co-producers) came to . . . million ECU for L'Air Liquide and . . . million for PCUK.

Termination of infringements

(58) By Article 3 of Regulation No 17, the Commission may, on finding that there is an infringement of Articles 85 or 86 of the EEC Treaty, require the undertakings concerned to terminate the said infringement.

The Commission is not satisfied that the infringements have in fact ever been terminated. Even where Solvay and Laporte have admitted the existence of specific market-sharing agreements they state that these were not considered 'appropriate for formal termination'. Degussa for its part while admitting that employees 'may have participated' in such arrangements, denied that its senior management was aware of the existence of the agreements. The Commission does not consider that the French agreement lapsed at the end of 1974 as claimed by the participants. As a result, it is uncertain whether or not the parties have terminated all the infringements established in this decision. It is therefore necessary, pursuant to Article 3 of Regulation No 17, to require the parties to the agreements and concerted practices to bring them immediately to an end.

The parties must also be prohibited from any agreement or concerted practice having equivalent effect, in particular any exchange of price lists or of information, whether of composite figures or details of sales to particular customers, which will enable them to check that the market shares or allocation of customers as originally agreed are being maintained, or which will provide them, either directly or indirectly, with normally confidential information on such matters as the costs of other producers, their prices, investment and production plans or requests for tendering for capital projects received by them.

Inasmuch as any information exchange system provides the participants with such details, it will have to be modified or abandoned,

HAS ADOPTED THIS DECISION:

Article 1

1. Solvay et Cie, Laporte Industries (Holdings) plc, Degussa AG, L'Air Liquide SA, and Produits Chimiques Ugine Kuhlmann infringed Article 85 of the EEC Treaty by participating until at least 13 December 1980 in an agreement or concerted practice dating from 1961 by which the producers confined their sales of hydrogen peroxide and sodium perborate to their home markets or to certain national markets where restrictive quota agreements were in force.

2. Solvay et Cie, Laporte Industries (Holdings) plc, L'Air Liquide SA, and Produits Chimiques Ugine Kuhlmann infringed Article 85 of the EEC Treaty by participating from 1958 (in the case of Laporte from after the formation of Interox in 1970) in an agreement or concerted practice by which until at least 13 December 1980 the French market for hydrogen peroxide and sodium perborate was shared in three equal parts between Solvay (later the Interox grouping), L'Air Liquide and PCUK.

3. Solvay et Cie, Laporte Industrie (Holdings) plc and Degussa AG infringed Article 85 of the EEC Treaty by participating from 1969 (in the case of Laporte from after the formation of Interox in 1970) in agreements or concerted practices by which until at least 13 December 1980 the market for hydrogen peroxide and sodium perborate in the Benelux was shared between Solvay (later the Interox grouping) and Degussa according to agreed quotas and the business of particular major customers in the Benelux was allocated in agreed proportions.

4. Solvay et Cie, Laporte Industries (Holdings) plc and Degussa AG infringed Article 85 of the EEC Treaty by participating in agreements or concerted practices by which from 1970 until at least 13 December 1980 the market for hydrogen peroxide and sodium perborate in Germany was shared between the Interox grouping and Degussa according to agreed quotas and continuous contact took place to ensure that their price lists (which were identical) were being respected.

5. Solvay et Cie, Laporte Industries (Holdings) plc and Degussa AG infringed Article 85 of the EEC Treaty by participating from 1974 until at least 13 December 1980 in an agreement by which the respective shares of the Interox grouping and Degussa of the EEC persulphates market were agreed and their price policy coordinated.

Article 2

Solvay et Cie, Laporte Industries (Holdings) plc, Degussa AG, L'Air Liquide SA and Atochem (as successor of PCUK) shall forthwith bring to an end the said infringements (if they have not already done so) and shall refrain from any agreement, concerted practice or measure which may have equivalent effect, including any organized exchange of price lists or of commercial information of the kind normally covered by trade secrecy and by which the participants are informed directly or indirectly, of individual data from other individual producers concerning quantities produced or sold, costs selling prices, discounts, tenders, or production or investment plans, or by which they might be able to monitor adherence to any market-sharing or price fixing agreement or arrangement covering the EEC or any national market thereof.

Article 3

The following fines are imposed on the undertakings named herein in respect of the infringements found in Article 1 in so far as they were applied after the coming into force of Regulation No 17:

(a) Solvay et Cie, Brussels, a fine of 3 000 000 ECU, that is Bfrs 134 775 300;

(b) Laporte Industries (Holdings) plc, London, a fine of 2 000 000 ECU, that is £ 1 206 254;

(c) Degussa AG, Frankfurt, a fine of 3 000 000 ECU, that is DM 6 687 120;

(d) L'Air Liquide SA, Paris, a fine of 500 000 ECU, that is FF 3 418 005;

(e) Atochem, Paris, (as successor of PCUK), a fine of 500 000 ECU, that is FF 3 418 005.

Article 4

The fines imposed under Article 3 shall be paid to the following bank accounts of the Commission within three months following the date of notification of this Decision:

(a) Solvay: Banque Bruxelles-Lambert, Brussels, No 310.0231000-32;

(b) Laporte: Lloyds Bank plc, London, No 108.63.41;

(c) Degussa: Sal. Oppenheim & Cie, Cologne, No 260/00/64910;

(d) and (e) L'Air Liquide and Atochem: Société Générale, Paris, No 5.770.006.5.

Article 5

This Decision is **addressed to**:

— Solvay et Cie,
33 Rue du Prince Albert,
1050 Brussels,

— Laporte Industries (Holdings) plc,
14 Hanover Square,
London W1R OBE,

— Degussa AG,
Weißfrauenstraße 9,
6000 Frankfurt-am-Main 11,

— L'Air Liquide SA,
75 Quai d'Orsay,
75131 Paris,

— Atochem,
La Défense 5,
92091 Paris-La Défense.

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

Done at Brussels, 23 November 1984.

For the Commission

Frans ANDRIESSEN

Member of the Commission