II

*(Acts whose publication is not obligatory)*

# COMMISSION

## COMMISSION DECISION

**of 10 July 1987**

**relating to a proceeding under Article 85 of the EEC Treaty**
**(IV-31.192 — Tipp-Ex)**
**(IV/31.507 — Tipp-Ex (standard form contract))**

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

(87/406/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 Spain and Portugal, and in particular Articles 3 (1) and 15 (2) thereof,

Having regard to the complaints lodged by ISA France Sarl., Bar-le-Duc, France, on 30 March 1984 and M. Visser's Industrie & Handelsonderneming — VIHO BV, Eijsden, Netherlands, on 24 July 1984 against Tipp-Ex Vertrieb GmbH & Co KG, Frankfurt, Federal Republic of Germany,

Having regard to the notification and application for negative clearance submitted by Tipp-Ex on 7 March 1985 pursuant to Articles 2 and 4 of Regulation No 17 relating to the standard form 'authorized dealer contract',

Having regard to the Commission Decision of 10 April 1986 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 read in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article No 19 (1) and (2) of Regulation No 17 [2],

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

Whereas:

### I. THE FACTS

(1) These proceedings concern agreements and concerted practices between Tipp-Ex and its exclusive distributors in several EEC countries aimed at preventing parallel imports or exports of Tipp-Ex products within the common market. The proceedings began with a complaint lodged by ISA France on 30 March 1984. The standard form authorized dealer contract notified on 7 March 1985 was included in the proceedings because of the close correlation.

#### A. The undertakings

##### (a) *Tipp-Ex*

(2) Tipp-Ex Vertrieb GmbH & Co KG, Frankfurt, is engaged primarily in the marketing of correction

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

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

products. It buys the products marketed under the 'Tipp-Ex' trade mark from Stadler GmbH & Co KG, Frankfurt. Since the shareholders and managers of both undertakings are the same, the Commission considers that Tipp-Ex and Stadler are associated companies.

In 1984 Tipp-Ex recorded total sales of (. . .) [1]. Domestic sales accounted for (. . .), and sales in the whole of the EEC for (. . .).

(b) *Beiersdorf*

(3) Beiersdorf AG manufactures a large number of pharmaceutical, cosmetic and chemical products, including those of the 'tesa' range. Consolidated group sales of Beiersdorf AG and its domestic subsidiaries amounted in 1984 to (. . .). The Beiersdorf group's sales worldwide in 1984 came to (. . .).

Beiersdorf took over the exclusive distribution of Tipp-Ex products in France on 4 January 1982 following the termination of the contractual relationship between Tipp-Ex and (. . .) [2].

(4) BDF tesa SA, Le Plessis Robinson, is one of three Beiersdorf subsidiaries in France. It markets, among other things, 'tesa' and Tipp-Ex products in France.

(c) *The remaining exclusive distributors concerned*

(5) — Burotex SA, Brussels, Belgium,

— (. . .) (up to 31 December 1981),

— Esveha-Rijam (formerly Rijam Jade), Alphen aan de Rijn, Netherlands,

— Tipp-Ex (Leslie McLean) Ltd, Camberley, Surrey, United Kingdom.

(d) *ISA France*

(6) ISA France Sarl, Bar-le-Duc, is a major importer and exporter of office supplies. Its markets are France, the Netherlands, the Federal Republic of Germany, and Africa. In 1984 it achieved total sales worth (. . .). Of this figure, Tipp-Ex products accounted for (. . .).

(e) *VIHO*

(7) M. Visser's Industrie & Handelsonderneming-VIHO BV, Eijsden, Netherlands, is an importer and exporter of office supplies, especially within the EEC. In 1984 its annual turnover came to (. . .), of which (. . .) was accounted for by Tipp-Ex products.

## B. The product and the market in correction products

(8) These proceedings concern correction products for documents. These take the form mainly of correction paper, correction fluids and correction tapes.

(9) The Commission notes that Tipp-Ex has a strong position in the correction products market without, however, occupying a dominant position. Although Tipp-Ex is by far the biggest supplier of correction paper and fluids in the Community, this is not the case with correction tapes, the fastest-growing market segment. The leading suppliers there are the established manufacturers of typewriters and typewriter ribbons. Tipp-Ex is only one of eight smaller suppliers who together have a market share of approximately 30 %.

In determining Tipp-Ex's market position, regard must also be had to the fact that, as a medium-sized undertaking, it has to compete with large firms and that there are no fundamental barriers to access to the correction products market.

## C. The Tipp-Ex distribution system

(10) Tipp-Ex markets its products throughout the EEC and in a large number of non-Community countries. In the Federal Republic of Germany, it sells to specialist traders (wholesalers and retailers), department stores and two 'authorized dealers'.

In the other Member States, Tipp-Ex markets its goods through the abovementioned exclusive distributors (cf. points 3 to 5 above), who resell them to specialist traders.

(11) The collaboration between Tipp-Ex and these exclusive distributors is, with two exceptions, based on oral agreements. Under the terms of these agreements, Tipp-Ex has undertaken *vis-à-vis* each of these distributors to supply to him alone certain goods for resale within a defined area of the common market. For his part, each distributor has

[1] Certain figures have been omitted in the published version of the Decision pursuant to Article 21 of Regulation No 17 concerning the protection of business secrets.

[2] The name of this undertaking is not stated in the published version of this Decision but is shown as '. . .', neither the Decision nor the Statement of Objections being addressed to it.

undertaken *vis-à-vis* Tipp-Ex to perform the usual sales promotion obligations of an exclusive distributor.

(12) Written 'authorized dealer contracts' have been concluded only with Tipp-Ex (Leslie McLean) and Beiersdorf. The contract with Tipp-Ex (Leslie McLean) was concluded on 1 October 1983 and entered into force immediately. The contract with Beiersdorf was concluded in December 1983 with retroactive effect from 4 January 1982. Previous to that, the contractual relation between Tipp-Ex and these two undertakings were, like those with the other exclusive distributors, governed by oral agreements. On 7 March 1985, that is to say after the investigation was completed, Tipp-Ex submitted an application for negative clearance under Article 2 of Regulation No 17 in respect of a standard form contract corresponding to the authorized dealer contracts, and notified that standard form contract 'as a precautionary measure' in accordance with Articles 4 and 5 of that Regulation.

(13) The standard form contract contains *inter alia* the following clauses of importance in this context:

'...

*Article 14 — Sales outside the contract territory*

(1) The Authorized Dealer undertakes not to sell the contract goods to customers having their place of business outside the contract territory with the exception of EEC Member States. Enquiries by customers from such countries shall be forwarded by the Authorized Dealer to the Supplier. The Authorized Dealer furthermore undertakes not to sell the contract goods to customers who to his knowledge intend to resell them in areas outside the contract territory.

(2) With regard to EEC Member States not included in the contract territory, the Authorized Dealer undertakes not to engage in active sales efforts. That is to say he must not canvass customers, open branch offices, maintain supply depots or advertise the contract goods in those countries.

...'

'...

*Article 20 — Territorial protection*

(14) (1) The Supplier shall not supply the contract goods to distributors who to his knowledge intend to resell them in the contract territory. He shall examine with the diligence of a prudent businessman whether there is any danger of distributors reselling in the contract territory.

(2) The Supplier undertakes to impose on the parties to his other Authorized Dealer Contracts the same obligations as the Authorized Dealer assumed under Chapter II Art. 14 of this contract.

...'

## D. The prevention of parallel imports and exports by Tipp-Ex

(15) According to the Commission's findings, Tipp-Ex took, at least between 1979 and 1982, active measures to prevent parallel imports or exports within the Community. It also exerted pressure on its exclusive distributors in order to obtain their agreement and support.

The oral agreements between Tipp-Ex and (...), Burotex, Esveha-Rijam and Tipp-Ex (Leslie McLean) were also aimed at preventing parallel imports and exports. This is clear from the parties' conduct as established by the investigation.

### (a) *Conduct towards ISA France*

(16) In early 1979 ISA France obtained goods direct from Tipp-Ex for the first and last time. As these goods were not sold in a third country in breach of the agreement between the two firms and as some of them ultimately appeared on the German market, Tipp-Ex made further deliveries to ISA France dependent on that firm's giving detailed information on destinations and recipients.

(17) On 11 April 1979 Tipp-Ex sent ISA France a telex accusing the latter of selling Tipp-Ex products in the Federal Republic and even of telling its customers where and at what prices it bought them; it went without saying, it continued, that this terminated their business relationship. Tipp-Ex did, in fact, cease supplying ISA France.

(18) Likewise in 1979, ISA France bought Tipp-Ex goods on a number of occasions from (...) and sold them in the Federal Republic of Gemany. When Tipp-Ex found out about this, it sent several telexes not only to (...), but also to Burotex, Esveha-Rijam and Tipp-Ex (Leslie McLean) in order to prevail upon the exclusive distributors to endorse the business policy pursued by Tipp-Ex, which was not to supply parallel importers in order thus to achieve absolute protection of the contract territories allotted. The Commission's findings in this respect are set out in points 19 to 24 below.

(19) On 29 August 1979 Tipp-Ex complained by telex to its exclusive distributors in Belgium, France, the

United Kingdom and the Netherlands about reimports by German customers at prices far lower than those charged locally, and stressed that this would have direct consequences for the dealer concerned. Tipp-Ex also stated in the telex that, for its part, it would supply no exporter in the Federal Republic who could not prove with the help of forwarding documents that the goods had actually been sent to the third county concerned, and that, because of parallel imports, it had decided to affix a special country code to every consignment.

(20) On 31 August 1979 Tipp-Ex requested (. . .) to trace the source from which ISA France obtained Tipp-Ex products. The telex ends with the sentence: 'We hope that you are able to help us to cut out the parallel market.'

(21) On 5 October 1979 Tipp-Ex informed the exclusive distributors that (. . .) had supplied Tipp-Ex goods to ISA France and that the latter firm, which was known for its price-cutting activities, had resold the goods to a German dealer. The telex asks whether it makes sense for an exclusive distributor thus to place his distributorship in jeopardy, and states that action will be taken.

(22) In a postscript to the abovementioned telex addressed to (. . .), Tipp-Ex gave notice of termination of supplies. On 12 October 1979 Tipp-Ex temporarily suspended the notice but withdrew (. . .)'s entitlement to a rebate in kind it had so far enjoyed equal to 10 % of the selling price. (. . .) reacted to the measures taken by Tipp-Ex by increasing its price quotations to ISA France by 10 — 20 %.

(23) This led to arguments between (. . .) and ISA France because the latter saw in the price rise a concerted attempt by (. . .) and Tipp-Ex to prevent ISA France from continuing its parallel importing. In the period that followed there was a lengthy interruption of relations between ISA France and (. . .) which lasted, according to the information in the Commission's possession, throughout 1980. In the course of that year, ISA France was able to obtain Tipp-Ex goods from a German wholesaler who, for fear of reprisals by Tipp-Ex, exported the consignments in a disguised form.

(24) It was not until the beginning of 1981 that negotiations resumed between (. . .) and ISA France. (. . .) refused to supply ISA France itself direct, but said it had no objections to ISA France obtaining large quantities of Tipp-Ex goods from one of its customers. No deal was concluded, however, as ISA France considered the prices quoted to be too high.

(25) On 20 November 1981 Tipp-Ex finally withdrew (. . .)'s sole selling right for France with effect from 31 December 1981 and transferred it with effect from 4 January 1982 to Beiersdorf. According to ISA France, one of the main reasons for this was the supplying of ISA France by (. . .). Tipp-Ex states, however, that the termination was due to the fact that (. . .) did not satisfactorily fulfil its sales promotion obligations, and in particular achieved too low a turnover with French wholesalers. That (. . .)'s inadequate sales performance did constitute one of the grounds for termination is apparent from the file on a civil action brought by Tipp-Ex against (. . .) in 1982.

(26) From the above conduct on the part of (. . .), the Commission draws the conclusion that, under strong pressure from Tipp-Ex in October 1979, the firm was obliged to join, at least in part, in the measures demanded by Tipp-Ex against ISA France.

In October 1979 (. . .) greatly increased the prices it quoted to ISA France and for a time, particularly in 1980, suspended supplies to ISA France. (. . .)'s declared readiness in early 1981 to tolerate the purchase by ISA France of large quantities from third dealers proves, moreover, that (. . .) continued to obey Tipp-Ex's demand that it should not itself supply firms known to be parallel importers. Buying through third dealers is not comparable to buying direct from an exclusive distributor because a further profit margin then results. Nor, lastly, does the ending of the contractual relationship by Tipp-Ex at the end of 1981 invalidate the proposition that (. . .) for a time, and at all events from October 1979 to the beginning of 1981, supported a business policy pursued by Tipp-Ex aimed at partitioning the market.

(27) From 1982 until February 1984, ISA France bought Tipp-Ex products from BDF tesa. The complainant maintains that BDF tesa practised price discrimination against it and that since 2 March 1984 it has been unable to obtain any further Tipp-Ex products from BDF tesa.

(28) The investigation has shown, however, that BDF tesa did not break off business relations with ISA France but by letter dated 2 March 1984 temporarily discontinued them. This happened after ISA France had threatened action by 'a European body' because BDF tesa had not informed it of a particularly favourable special offer. In fact, in response to subsequent enquiries by ISA France mainly in April and June 1984, BDF tesa made offers on terms which it proposed only to the most efficient wholesalers. For all that, ISA France did not avail itself of these offers.

(29) Nor has it been established that BDF tesa practised price discrimination against ISA France compared with other wholesalers. When BDF tesa took over the Tipp-Ex distributorship with effect from 4 January 1982, it proved to be heavily dependent on ISA France. As a result, BDF tesa, like (...) before it, first of all granted ISA France particularly favourable price terms (including a functional discount of 25 % for specialist wholesalers, despite the fact that ISA France does not perform the usual wholesale services), which led to ISA France being placed in a better position than comparable wholesalers. Moreover, out of a total of 65 articles in the Tipp-Ex product range, ISA France bought only three, all fast-moving merchandise.

(30) This situation, which became apparent during the first months of 1982, made it desirable for Beiersdorf in the medium term to reduce the competitive advantage of ISA France over other wholesalers, that is to say to bring the special terms granted to ISA France into line with the normal terms granted to specialist wholesalers. After BDF tesa had reduced the one-sided dependence on ISA France by widening its distribution base, the terms granted to ISA France were brought into line with those of other wholesalers during late 1982/early 1983.

(31) However, the Commission's investigation has shown that the measures taken by BDF tesa — at least during the second half of 1982 — were also intended to prevent reimports by ISA France into the Federal Republic of Germany.

(32) This is clear from the following documents emanating from Beiersdorf itself.

A telex dated 13 May 1982 from Beiersdorf to BDF tesa states: 'Since your deliveries to ISA now jeopardize cooperation and contact with Tipp-Ex, a solution must be found immediately. Although it is impossible on legal grounds to stop supplies, special prices should no longer be applied . . . '

In a letter to BDF tesa dated 15 June 1982, Beiersdorf observed that its subsidiary had yet to adjust its prices, and strongly insisted on an immediate price increase, since collaboration with Tipp-Ex would be jeopardized if ISA France continued to be able to export as a result of BDF tesa's pricing.

Finally, on 2 August 1982 Beiersdorf gave its subsidiary strict instructions to stop supplying ISA France on special terms as the latter had not adhered to its undertaking not to export Tipp-Ex goods. Special terms should be granted only to big customers who were known not to export.

(33) From the documents referred to above, the conclusion can be drawn that Tipp-Ex made repeated representations to Beiersdorf with a view to preventing parallel imports by ISA France. It is also apparent that Beiersdorf expressed readiness to support Tipp-Ex in this endeavour. This understanding can be inferred *inter alia* from the fact that Beiersdorf sent a copy of the abovementioned letter to BDF tesa of 2 August 1982 to the owner of Tipp-Ex.

(34) In January 1984 ISA France asked the Belgian exclusive distributor, Burotex, to quote a price for certain Tipp-Ex articles. It made similar enquiries of the British exclusive distributor Tipp-Ex (Leslie McLean). Burotex referred ISA France to BDF tesa. The British company, for its part, did not reply.

The Commission has been unable to establish that Tipp-Ex took action at that time to induce the exclusive distributors to adopt such an attitude.

(35) In May 1984 ISA France addressed an enquiry to Tipp-Ex asking for a quotation for a considerable quantity of Tipp-Ex articles 'ex-works Frankfurt'. Tipp-Ex declined to execute the order, referring to its exclusive distribution agreement with Beiersdorf.

(b) *Conduct towards VIHO*

(36) On 24 July 1984 VIHO became a joint complainant with ISA France and declared that it, too, had had difficulty in obtaining supplies of Tipp-Ex products and had been cut off from all sources of supply outside its own country.

(37) This claim is inconsistent inasmuch as, in its answer to the Commission's request for information dated 11 December 1984, the complainant conceded that, since 1982, it hat obtained Tipp-Ex goods from a subsidiary of Tipp-Ex's Dutch exclusive distributor, Esveha-Rijam, and from Dutch, Belgian, German, French and British dealers who are not Tipp-Ex exclusive distributors.

(38) Esveha-Rijam did, it is true, stop supplying VIHO in 1984. The Commission has been unable, however, to establish with sufficient certainty that in this connection and at that time there was any concerted action between Tipp-Ex and Esveha-Rijam.

(39) In May 1984 VIHO asked Tipp-Ex to quote a price ex-works for a large quantity of goods. Tipp-Ex first

of all referred VIHO to the Dutch exclusive distributor. In the ensuing exchange of correspondence VIHO took the view that the manufacturer was obliged to supply goods to it pursuant to Commission Regulation (EEC) No 1983/83 [1], in conjunction with the Commission press release of 12 January 1984 in the 'La Maison des Bibliothèques' case. In November 1984 Tipp-Ex finally made VIHO an offer, informing it of the prices at which it supplied customers not bound by existing authorized dealer contracts. VIHO did not take up the offer as it considered the prices to be excessive.

(40) VIHO received negative replies from various Tipp-Ex exclusive distributors in response to a number of requests for supplies made between May and October 1984. Burotex referred VIHO to the Dutch exclusive distributor. Tipp-Ex (Leslie McLean) did not reply and BDF tesa stated that it was Tipp-Ex representative for France alone and did not export.

With regard to the behaviour of these exclusive distributors, the Commission has not found sufficient grounds for concluding that Tipp-Ex took action in connection with VIHO's enquiries to induce the exclusive distributors not to give any quotations.

## E. The main submissions of the parties concerned

### (a) *Tipp-Ex*

(41) According to Tipp-Ex, prior to 1982 it had no knowledge of Article 85 of the Treaty, Commission Regulation No 67/67/EEC [2] or the Decisions published by the Commission and the Court of Justice. Its knowledge of the law was limited to what it understood to be its civil law obligation towards the exclusive distributors to protect the exclusive distribution system.

(42) In 1982, to prepare the ground for the relationship with Beiersdorf, Tipp-Ex instructed a lawyer to draw up a standard form contract with a view to placing its relations with its exclusive distributors on a 'legally sound basis'. It is from what he said and from the correspondence with Beiersdorf on the subject that Tipp-Ex first learned of the competition law issues.

(43) Tipp-Ex was then, up to the time of the 'Commission notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements' [3], of the opinion that the standard form contract in question fell under Regulation No 67/67/EEC, which was still in force in 1982. However, doubt set in after it learnt of the notice, and it decided to submit the authorized dealer contract to the Commission, but put off doing so in view of the impending investigation by the Commission.

(44) Tipp-Ex has further submitted that it was not at fault as it relied on the opinion of a lawyer who spent a considerable amount of time dealing with the legal questions involved and commanded commensurately high fees. Tipp-Ex was convinced that in every respect it acted lawfully and with due regard to legitimate interests. The lawyer also advised Tipp-Ex during the drafting of the exclusive distribution agreement and during the negotiations with BDF tesa, assuring it that the contested Articles 14 and 20 of the standard contract were unobjectionable.

### (b) *Beiersdorf*

(45) Beiersdorf has contended that the present version of the authorized dealer contract, which contains an express restriction in relation to supplies to EEC countries only in the first sentence of Article 14 (1) and not in the third sentence of that provision or in Article 20, is a drafting error which was first noticed in the course of these proceedings. It has pointed out that its legal department made identically worded additions to the third sentence of Article 14 (1) and to Article 20 (1) of the draft contracts submitted by Tipp-Ex on 5 November 1982 and 8 February 1983. In the final draft contract then sent by Tipp-Ex to Beiersdorf on 20 July 1983, the amendments to Articles 14 and 20 proposed by Beiersdorf were omitted. This was not noticed, however, by any of Beiersdorf's employees. This explanation, which Beiersdorf gave in its answer to the Statement of Objections of 2 June 1986 and in the hearing on 18 September 1986, does not convince the Commission. It is clear from the record of the hearing that the persons acting for Beiersdorf at the signature of the final text knew which text they were signing and what its content was.

[1] OJ No L 173, 30. 6. 1983, p. 1.
[2] OJ No 57, 25. 3. 1967, p. 849/67.
[3] OJ No C 101, 13. 4. 1984 p. 2.

(46) Finally, at the hearing on 18 September 1986 Beiersdorf submitted the addendum to the authorized dealer contract which had been adopted in the meantime, and by which the contested provisions of Articles 14 and 20 were amended. On 11 September 1986 Tipp-Ex made known its intention of reapplying for negative clearance.

(c) *The other parties concerned*

(47) Burotex, Esveha-Rijam and Tipp-Ex (Leslie McLean) have contended in essence that, where they did not react to enquiries by ISA France or VIHO regarding supplies, they had passed on these enquiries to Tipp-Ex. They had entered into no obligations *vis-à-vis* Tipp-Ex regarding these customers and in future they would comply fully with the EEC competition rules.

## II. LEGAL ASSESSMENT

### A. Article 85 (1)

*The agreements*

(48) Tipp-Ex and its exclusive distributors and dealers in the Community ([. . .], Beiersdorf, Burotex, Esveha-Rijam and Tipp-Ex [Leslie McLean]) are undertakings within the meaning of Article 85. The partly oral, partly written agreements between Tipp-Ex and these exclusive distributors and dealers, including the 'authorized dealer contracts', are agreements within the meaning of that Article. The written agreements were entered into with the content set out in Articles 14 and 20. The signatories were aware of the content of the agreement and were willing to commit themselves accordingly. The measures which Tipp-Ex has taken at least since 1979 in the exercise and on the basis of its contractual relations with its exclusive distributors and dealers in order to prevent parallel imports into the Member States of the Community are to be considered an integral part of those agreements.

(49) As the Court of Justice has held in several judgments (cf., in particular, judgment of 25 October 1983 in Case 107/82 *AEG-Telefunken* [1], and Judgment of 17 September 1985 in Joined Cases 25 and 26/84 *Ford-Werke* [2], the conduct of an undertaking does not constitute a unilateral act outside the scope of Article 85 where it forms part of the contractual relations between the undertaking and its dealers. An agreement was entered into between Tipp-Ex and its authorized dealers. All authorized dealers adopted Tipp-Ex's ideas regarding the mutual protection of territories and hence these became an integral part of the agreement. It is immaterial whether or not that business policy coincides with the dealers' own interests.

(50) This conduct on the part of Tipp-Ex and its dealers amounts at least to a concerted practice within the meaning of Article 85 (1).

*The restrictions of competition*

(51) The agreements and concerted practices restrict competition as they are designed to prevent customers from exporting. This is clear, in the case of the written agreements, from the very wording of Articles 14 and 20 of the authorized dealer contracts and, in the case of the oral agreements, from the manner in which they have been implemented at least since 1979.

(52) Tipp-Ex has made the supplying of its dealers in the Federal Republic of Germany, and of its exclusive distributors in France, Belgium, the Netherlands and the United Kingdom, dependent on their supplying no customers who are known or who are believed, in the light of the surrounding circumstances, to resell the goods in other Community Member States. Tipp-Ex has repeatedly given expression to this policy aimed at affording exclusive distributors absolute territorial protection. Moreover, Tipp-Ex has exerted strong pressure on individual dealers and in particular on (. . .), threatening them with, and even imposing, sanctions in order to prevent them from supplying the complainant, ISA France, who was known to be a parallel importer. (. . .) yielded at least partly to this pressure. Pressure was also brought to bear indirectly on the other exclusive distributors via an information campaign. They were meant to interpret Tipp-Ex's communications concerning the (. . .)/ISA France cases as a serious warning not to sell to parallel importing or exporting dealers. The continuation of contractual relations between Tipp-Ex and the exlcusive distributors Burotex, Esveha-Rijam and Tipp-Ex (Leslie McLean) is proof that these undertakings were prepared to accede to Tipp-Ex's wishes.

(53) Since it took over the exclusive distributorship in France on 4 January 1982, Beiersdorf also supported, at least for a while, the market-partitioning measures taken by Tipp-Ex. This was especially the case during the second half of 1982.

(54) The Commission does not doubt that the withdrawal of the special terms for ISA France was

(1) (1983) ECR 3 151.
(2) Not yet reported.

based among other things on distribution policy considerations. Beiersdorf intended to bring the particularly favourable terms granted to ISA France into line with those granted to comparable wholesalers so as not to place the latter at a disadvantage and in order to make distribution in France more broad-based. ISA Fance had and has no right under Community law, by reason of its involvement in trade between Member States, to be treated more favourably than other dealers with a comparable sales performance.

(55) According to Beiersdorf, however, this adjustment was to be brought about gradually, as at the beginning of 1982 ISA France was a major purchaser of Tipp-Ex products in France. Beiersdorf was therefore prepared initially to continue supplying ISA France on the same particularly favourable terms in return for an undertaking that it would not export to the Federal Republic of Germany or to the contract territories of other exclusive distributors. Only after ISA France had manifestly failed to observe this restriction did Beiersdorf force its French subsidiary to withdraw the special terms in their entirety and with immediate effect (cf. point 32 above).

(56) Beiersdorf stated at the hearing that the withdrawal of the special terms was based solely on distribution policy considerations. The Commission does not agree. Following various measures by the firm's owner, Beiersdorf was aware of the importance Tipp-Ex attached to preventing the 'market disturbances' caused by ISA France. As Beiersdorf set great store by good relations with its new contracting partner, there was an understanding between the parties that ISA France should no longer have the opportunity of exporting to other EEC Member States. That there was such an understanding in clear *inter alia* from the fact that Beiersdorf sent a copy of the internal instructions to BDF tesa to the owner of Tipp-Ex (cf. point 33 above).

(57) Although the withdrawal of the special terms was based on an obviously rational distribution strategy in the medium term, the measures taken from May 1982 until early 1983 were also the subject of an agreement or a concerted practice between Beiersdorf and Tipp-Ex. It was thus not a purely subjective secondary aim of the distribution measures taken, but rather an aim relevant from the point of view of competition about which there was an understanding between the parties and which is significant in its own right irrespective of any sales considerations.

(58) A further means used by Tipp-Ex to bring about absolute territorial protection was to require detailed proof of the identity of the final recipients of goods supplied and of the carrying out of the post-delivery checks requested by Tipp-Ex. Tipp-Ex clearly made the point to its exclusive distributors (see point 19).

(59) The Commission's findings as to the obstacles actually raised permit the conclusion to be drawn that the agreements and concerted practices had not only as their object but also as their effect an appreciable restriction of competition within the common market.

*The authorized dealer contracts in particular*

(60) Pursuant to Article 20 (1) of the authorized dealer contracts concluded with Beiersdorf and Tipp-Ex (Leslie McLean), Tipp-Ex is obliged to refrain from supplying goods covered by the contract to independent distributors who are known or who can be assumed in the light of the surrounding circumstances to want to resell the goods in the territory allotted to an exclusive distributor. This amounts in effect to an obligation on the part of Tipp-Ex to prohibit independent distributors from exporting the goods supplied to them. Under paragraph 2 of that Article, Tipp-Ex undertakes to impose on its exclusive distributors in general the obligations laid down in Article 14 of the standard form contract.

(61) Article 14 provides that exclusive distributors are obliged 'not to sell the contract goods to customers having their place of business outside the contract territory with the exception of EEC Member States' (paragraph 1). With regard to EEC Member States not included in the territory allotted, both companies undertake not to engage in active sales efforts in those countries (paragraph 2). The third sentence of paragraph 1 provides, moreover, that: 'the Authorized Dealer furthermore undertakes not to sell the contract goods to customers who to his knowledge intend to resell them in areas outside the contract territory.' According to its literal meaning, but also in the light of the structure of Article 14 (1), this additional obligation relates quite clearly both to third countries and to EEC Member States. It, too, amounts in effect to an obligation on the part of the exclusive distributor to prohibit his customers from exporting the goods supplied to them.

(62) The provisions of Articles 20 and 14 of the standard form contract are obviously aimed at conferring absolute territorial protection on Tipp-Ex in the Federal Republic of Germany and on exclusive distributors in their allotted territories. They are designed to prevent dealers, such as the complainants, who are known to wish to resell the contract goods in other territories, from obtaining supplies. Lastly, they are intended to prevent parallel importers from obtaining their requirements directly from the exclusive distributors in other territories or

from the trade in the Federal Republic of Germany.

*Effect on trade between Member States*

(63) The agreements and concerted practices between Tipp-Ex and its exclusive distributors in the Community and the authorized dealer contracts concluded in 1983 were and are capable of affecting trade between Member States by limiting parallel imports and exports.

(64) Article 85 (1) therefore applies both to the agreements and concerted practices between Tipp-Ex and its exclusive distributors in the form in which they have existed at least since 1979, and to the authorized dealer contracts dating from 1983.

B. **Regulation No 67/67/EEC**

(65) Article 1 (1) of Regulation No 67/67/EEC provides that exclusive distribution agreements are in principle exempted from the prohibition in Article 85 (1) where they satisfy the conditions laid down in that Regulation. Regulation No 67/67/EEC expired on 1 July 1983; Article 7 of Regulation (EEC) No 1983/83 provides, however, that the rules contained therein continue to apply until 31 December 1986 to agreements which were concluded before 1 January 1984.

(66) In the form in which they have been applied at least since 1979, the exclusive distribution agreements do not qualify for exemption under Regulation No 67/67/EEC as they impose on the parties obligations restrictive of competition which go beyond the restrictions that are permissible under Article 1 (1) and Article 2 (1) of that Regulation.

Furthermore, the agreements are likely to limit the opportunities for intermediaries and final consumers to obtain Tipp-Ex products from other intermediaries in the common market. According to Article 3 (b) of the Regulation, this renders the Regulation inapplicable.

(67) Nor do the authorized dealer contracts dating from 1983 satisfy the conditions laid down in Regulation No 67/67/EEC. Article 20 (1) and (2) and the third sentence of Article 14 (1) seek to confer on the contracting parties an extensive territorial protection which is not provided for in Regulation 67/67/EEC. Whilst, pursuant to Article 1 (1) (a) of the Regulation, the obligation on the manufacturer to supply goods only to the exclusive distributor within the latter's allotted territory is exempted, the same is not true of the obligation contained in the authorized dealer contract to protect the exclusive distributor and the manufacturer also from indirect competition from parallel importing traders.

(68) On the other hand — contrary to the view taken by the complainants — nothing in the above points to there being a general right to be supplied by the manufacturer. Where the manufacturer, for business reasons, decides not to supply a dealer established in the territory of an exclusive distributor ex-works, this is unobjectionable provided other sources of supply are available to the dealer in the common market (cf. also Article 3 (b) of Regulation No 67/67).

C. **Article 85 (3)**

(69) It was not until 7 March 1985, i.e. after the Commission had completed its investigation, that Tipp-Ex submitted an application for negative clearance under Article 2 of Regulation No 17 and notified the standard form authorized dealer contract as a precaution under Article 4 of that Regulation. According to Article 6 of the Regulation, a decision granting exemption may not cover the period prior to notification.

(70) The standard form contract notified on 7 March 1985 does not fulfil the conditions for exemption under Article 85 (3). In particular, it is not apparent that restricting the opportunities for parallel importing or exporting traders to compete (cf. points 60 to 62 above) is indispensable to the attainment of the objective of improving the distribution of goods.

D. **Article 3 of Regulation No 17**

(71) Article 3 (1) of Regulation No 17 provides that, where the Commission finds that there is infringement of Article 85, it may by decision require the undertakings concerned to bring such infringement to an end.

(72) It appears to be necessary to require Tipp-Ex and its exclusive distributors in France, Belgium, the United Kingdom and the Netherlands to bring the infringements established to an end and to undertake not to take any measures which have the same object or effect. The requirement that the infringements be

brought to an end does not apply to the agreements and concerted practices between Tipp-Ex and (. . .), as these were terminated with the elimination of (. . .) on 31 December 1981. This Decision has not, therefore, been addressed to (. . .).

### E. Article 15 (2) of Regulation No 17

(73) Article 15 (2) of Regulation No 17 provides that the Commission may by decision impose on undertakings fines of from 1 000 to one million ECU, or a sum in excess thereof but 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 Treaty. In fixing the amount of the fine, regard must be had both to the gravity and to the duration of the infringement.

(74) The Commission takes the view that the imposition of a fine on Tipp-Ex is justified in the present case. The infringement of Article 85 (1) was intentional. Tipp-Ex knew that the agreements and concerted practices were designed to prevent parallel imports or exports and to ensure absolute territorial protection. It was therefore in no doubt as to whether the requirements of the prohibitory provision were met, especially since the Commission and the Court of Justice have established the illegality of such agreements in a long line of decisions.

(75) In determining the fine to be imposed on Tipp-Ex, the Commission has taken account, in particular, of the following factors:

(a) The acts forming the subject-matter of this Decision constitute a serious infringement of the competition rules of the EEC Treaty as they substantially impede the integration of the markets in the Community;

(b) The infringement consisting in active steps to partition markets lasted at least from 1979 until 1982;

(c) Tipp-Ex is a medium-sized firm which went to great trouble and expense to penetrate the European markets;

(d) Tipp-Ex tried in 1982 to place its relations with its exclusive distributors on a legally sound basis by entrusting to a legal adviser the task of drawing up an authorized dealer contract, which was concluded for the first time in late 1983.

On the other hand, Tipp-Ex disregarded the amendments repeatedly made by Beiersdorf concerning the additional restrictions in the third sentence of Article 14 (1) and Article 20 (1) relating to EEC Member States;

(e) Tipp-Ex expressed its readiness during the investigation to discontinue any practices which were found to be incompatible with the competition rules of the EEC Treaty and to amend, if necessary, the relevant provisions of its authorized dealer contracts.

(76) A fine should also be imposed on Beiersdorf AG. The latter took part actively during the second half of 1982 in Tipp-Ex's market-partitioning measures. The persons responsible were manifestly aware that the measures taken were incompatible with Article 85 and were in any case designed to prevent parallel imports and exports by ISA France. The position is not altered by the fact that it was much in Beiersdorf's own interest gradually to increase selling prices to ISA France (cf. points 29 and 30 above), which must have led indirectly to ISA France ultimately having less latitude for engaging in parallel exporting. It is clear from its own records that Beiersdorf took the measures that were in fact taken in response to a request from Tipp-Ex and in agreement with the latter, and that those measures were also aimed indirectly at preventing ISA France from engaging in parallel exporting.

(77) Nor is the position altered by the fact that, during the negotiations over the authorized dealer contract, Beiersdorf proposed that it be amended to bring it into line with Regulation No 67/67/EEC. For one thing, the authorized dealer contract was not concluded until December 1983, and for another the parties acted, not on the basis of the distribution agreement that was to be concluded, but on a basis of actual collaboration between the owner of Tipp-Ex and the managerial staff of Beiersdorf's tesa product division.

(78) Moreover, the Commission is well aware that Beiersdorf's responsibility for the carrying out of the restrictions on competition is considerably mitigated by the fact of Beiersdorf's having given way under pressure from Tipp-Ex.

The Commission has taken account of this subordinate role and considers that a much lower fine should be imposed on Beiersdorf than on Tipp-Ex.

(79) It is not proposed to fine the other exclusive distributors. These are small firms which followed the policy pursued by Tipp-Ex only partially and with reluctance and only under considerable pressure. In view of the energy with which Tipp-Ex combatted the parallel trade, they must have feared that if they did not fall into line Tipp-Ex would

withdraw their sole selling rights, as did in fact happen in the case of (. . .). Moreover, beyond the general agreement with Tipp-Ex's policy, it has not been established that these exclusive distributors actually collaborated with Tipp-Ex in withholding supplies from the two complainants,

HAS ADOPTED THIS DECISION:

*Article 1*

The agreements and concerted practices between Tipp-Ex on the one hand and the exclusive distributors Beiersdorf, Burotex, (. . .), Esveha-Rijam and Tipp-Ex (Leslie McLean) on the other, concerning the discontinuance of sales to customers who resell the contract goods in other Member States, constitute infringements of Article 85 (1) of the EEC Treaty.

*Article 2*

The undertakings concerned shall forthwith bring the infringements referred to in Article 1 to an end in so far as they still exist, and shall refrain from taking any measures which may have the same object or effect.

*Article 3*

An exemption under Article 85 (3) of the EEC Treaty for the standard form authorized dealer contract notified on 7 March 1985 is hereby refused.

*Article 4*

The following fines are hereby imposed on the undertakings named below:

— Tipp-Ex Vertrieb GmbH & Co KG, a fine of 400 000 ECU,

— Beiersdorf AG, a fine of 10 000 ECU.

The above fines shall be paid within three months of the date of notification of this Decision into one of the following accounts of the Commission of the European Communities:

(a) Account
No 262.00.64910
Sal. Oppenheim & Cie
Untersachsenhausen 4
D-5000 Köln;
Commission of the European Communities, Brussels — ECU (for payments in ECU);

(b) Account
No 260.00.64910
Sal. Oppenheim & Cie
Untersachsenhausen 4
D-5000 Köln
(for payments in DM).

After three months, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, that is 10 %.

Should payment be made in the national currency of the abovementioned undertakings, the exchange rate applicable shall be that prevailing on the day preceding payment.

*Article 5*

This Decision is addressed to:

1. Tipp-Ex Vertrieb GmbH & Co KG,
Eschborner Landstraße 135,
D-6000 Frankfurt/M. 94;

2. Beiersdorf AG,
Unnastraße 48,
D-2000 Hamburg 20;

3. Burotex SA,
Tollaan/Av. du Péage 65,
B-1940 St. Stevens-Woluwe;

4. Esveha-Rijam BV,
NL-2400 AE Alphen a/d Rijn;

5. Tipp-Ex (Leslie McLean) Limited,
5, Crawley Hill,
GB-Camberley-Surrey GU 15 2DD.

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

Done at Brussels, 10 July 1987

*For the Commission*

Peter SUTHERLAND

*Member of the Commission*