II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 December 1987

relating to a proceeding under Article 85 of the EEC Treaty

(IV/31.503 — Konica)

(Only the English and German texts are authentic)

(88/172/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 (1) and 15 (2) thereof,

Having regard to the Commission Decision of 5 December 1986 to initiate proceedings *ex officio* in this case,

Having given the undertakings concerned, Konica UK Ltd, Konica Europe GmbH and Konishiroku Photo Industry Co., the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and to Commission Regulation (EEC) No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Regulation No 17 [2],

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

Whereas :

I. FACTS

(1) This Decision concerns practices of Konica UK Ltd and Konica Europe GmbH, both subsidiaries of Konishiroku Photo Industry Co. Ltd., Tokyo, Japan, aimed at preventing the export of Konica colour films from the United Kingdom to other EC Member States and the resale of parallel imported Konica colour film on the German market.

A. The companies

(2) Konishiroku Photo Industry Co. Ltd, Tokyo (Konishiroku), is a major manufacturer of photographic goods and equipment. It also manufactures video tapes and video cameras and office equipment. The firm has many overseas subsidiaries, including some in the EC.

(3) Konica UK Ltd, Feltham, Middlesex, United Kingdom (Konica UK), is a wholly-owned subsidiary of Konishiroku. The business of Konica UK is the import and sale of photographic goods and equipment, video tapes and video cameras manufactured by the parent company.

Konica UK has only been a legally independent company since 1 February 1985. Before that it was a branch — albeit enjoying management autonomy — of Konishiroku Photo Industry (Europe) GmbH, Hamburg (now Konica Europe GmbH).

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

Konica UK has stated that it does not receive directives from the Japanese parent company, although the parent company suggests some guidelines for its sales policy and it keeps the parent company regularly informed about its sales, profits and general market situation.

(4) Konica Europe GmbH, Hohenbrunn, Federal Republic of Germany (Konica Europe) is a majority (92 %) owned subsidiary of Konishiroku. The business of Konica Europe is importing and distributing photographic goods and equipment, video tapes and video cameras manufactured by the parent company. The present company is a product of the merger of Konishiroku Photo Industry (Europe) GmbH, Hamburg, with Konica Europe GmbH (formerly Sakura Film Leo Hirschberg GmbH), Höhenkirchen/Siegertsbrunn, which is early 1984 was completely taken over by Konishiroku Photo Industry (Europe) which changed its name to Konica Europe GmbH.

The merger between Konishiroku Photo Industry (Europe) and Konica Europe GmbH, originally planned for 30 June 1984, did not take legal effect until 1 February 1985, but according to Konica Europe for practical purposes the two companies were merged from 1 July 1984.

Konica Europe has stated that it does not receive instructions on the day-to-day running of the business from Konishiroku; the parent company limits its intervention in the subsidiary's affairs to the exercise of its rights as shareholder. Otherwise Konica Europe's rerlationship to its parent company is a purely commercial one of customer and supplier. There is no interference in its marketing policy. Nor is the parent company kept informed of sales and prices decisions.

(5) The turnover of the parent company Konishiroku in the financial year to 20 April 1984/85 was the equivalent of (. . .) (1).

The turnover of Konica UK in the financial year to 31 January 1986, its first year as a legally independent company, was (. . .). Sales of colour film in the financial year 1984/85 amounted to (. . .); in the period from 1 February to 30 June 1985, they came to (. . .).

In the first 10 months after the merger with Konishiroku Photo Industry (Europe) GmbH (February to November 1985) Konica Europe GmbH's turnover was (. . .). Sales of Konica colour film between 1 October 1984 and 31 January 1985 totalled (. . .); between 1 February and 30 June 1985 they came to (. . .).

B. The product

(6) This Decision is concerned with Konica brand colour negative film. Colour film made by Konishiroku has only been sold on the European market under the Konica trade mark since 1983. Before that it was known mainly under the Sakura brand. Konica colour film was introduced on the United Kingdom market in November 1983 and on the German market in October 1984.

C. The distribution of Konica film in the EEC (as constituted on 31 December 1985) and neighbouring non-EEC countries

(7) Konishiroku has three subsidiaries in the EC which import and distribute Konica film, namely Konica Europe in the Federal Republic of Germany, Konica UK in the United Kingdoms and Konica France in France.

(8) Konica Europe markets Konica film in the Federal Republic of Germany. In the Netherlands Konica film is distributed by a subsidiary of the Federal Republic of Konica Europe, Konica Netherlands BV. For Belgium/Luxembourg, Denmark, Greece and Italy, Konica Europe has appointed sole distributors, with the same one covering Belgium and Luxembourg. An Austrian subsidiary of Konica Europe handles distribution of Konica film in Austria.

(9) Konica UK markets Konica film in the United Kingdom. In Ireland and the Channel Islands the film is distributed by a local wholesaler in each case who is under contract to Konica UK.

(10) Konica France markets Konica films in France.

(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.

D. The marketing policy for Konica film in Germany and the United Kingdom

(11) As a new entrant to the German market, Konica Europe tried to gain a foothold by establishing its film as a brand and therefore decided to sell it exclusively through specialist photographic dealers. Competition with other brands is based mainly on promoting the film's quality image.

It announced this policy of marketing Konica film in the Federal Republic of Germany solely through specialist dealers when launching the film at the Photokina exhibition in October 1984 and made the point that Konica that Konica film was only available from good photo dealers a focus of its advertising.

Konica Europe has its own sales force in the Federal Republic of Germany with which photo dealers place their orders for Konica film and other products. As a rule, any photo dealer is supplied. A written 'bonus contract' is signed with each dealer which sets out his entitlement to an annual rebate on a sliding scale related to his total net sales of Konica amateur products over the year. The rebate is credited to the dealer at the end of the year and deducted from the following year's invoices. No other dealership agreement is signed with dealers.

(12) In the United Kingdom, Konica film is supplied not only to specialist dealers but to other customers as well. Competition with other brands is based mainly on price. Films are supplied to retailers (photo dealers, chemists and processing laboratories) both directly by Konica UK and through to supply retailers as far as possible direct and to keep down the member of wholesalers. Retailers and wholesalers are here given an immediate discount off the basic prices on the price list varying with the quantity ordered. There are no written dealership agreements; however, Konica UK's terms and conditions of sale are printed on the back of its price lists.

Konica UK also supplies wholesalers for export to certain third world countries.

E. Markets shares of Konica colour film in the Federal Republic of Germany and the United Kingdom

(13) The market share of Konica colour film in the Federal Republic of Germany in 1985 is estimated by Konica Europe to have been around (...). In comparison, the market shares of major competitors are : Kodak about (...), Agfa about (...), Porst about (...), Revue about (...), and minor brands and private labels about 13 %. In the United Kingdom its 1985 market share is put by Konica UK at around (...), in comparison the market shares of major competitors are : Kodak about (...), Fuji about (...), Ilford about (...), Agfa about (...) and private labels 30 %.

F. The price differential between the Federal Republic of Germany and the United Kingdom

(14) From October 1984 to mid-February 1985 the basic prices for Konica colour film to dealers in the Federal Republic of Germany were on average about 20 % higher than to dealers in the United Kingdom. The price differential was smaller or larger than this average for different types or presentations of film and also varied somewhat with fluctuations in the DM/£ exchange rate.

(15) Konica Europe grants dealers end-of-year rebates of from 7 to 15 % off basic prices. To obtain the maximum rebate of 15 %, however, the dealer must have annual net sales of Konica amateur products of at least DM 80 000. In the United Kingdom, by contrast, dealers receive an immediate discount of 15 % for order of a mix of at least 1 000 films. Large customers are given discounts of from (...) off the basic prices.

(16) On 16 February 1985 Konica UK raised its basic prices to dealers by approximately 10 %. Konica Europe's basic prices to dealers in the Federal Republic of Germany remained unchanged. With the pound at first continuing to fall against the mark, there remained quite considerable differences between the German and United Kingdom basic prices. Between April and July 1985, while basic prices moved back broadly into line due to a strong recovery of the pound, the different discount terms in the two countries could still lead to substantial variation in the final prices paid by dealers, especially for large orders.

(17) Thus, especially in late 1984 and early 1985, the price differential between the Federal Republic of Germany and the United Kingdom was large enough to provide a strong incentive for parallel exports to the Federal Republic of Germany, even if the goods had to be shipped via a third country.

(18) Konica's explanation for the price differential is the difference between market structures and marketing methods in the Federal Republic of Germany and the United Kingdom. Owing to consumer habits in the Federal Republic of Germany, competition in the field of amateur films is based mainly on quality, price being a minor consideration. Konica Europe has, moreover, spent substantial sums on advertising to create a brand image for Konica film suggestive of quality in which cheapness plays no role; this advertising expenditure is reflected at least partly in the prices paid by dealers.

In the United Kingdom, on the other hand, consumer habits are such that competition on the amateur film market is pure price competition, British consumers having no particular brand loyalty. The successful introduction of a new brand depends entirely on the price being correctly situated in relation to the two clear market leaders.

G. The evidence of restriction of competition in the distribution of Konica colour film

(19) The documents found in the course of the Commission's investigations provide evidence that Konica Europe and Konica UK pursued a policy aimed at (a) isolating the German market from competition from parallel imports of Konica colour film from other EEC and neighbouring non-EEC countries and (b) preventing dealers in the United Kingdom, Ireland and the Channel Islands from exporting Konica colour film to other EEC and non-EEC European countries.

(20) In December 1984, when Konica films had been on the German market no more than two months and according to Konica Europe's declared marketing policy were sold to final consumers only by photo dealers, Konica colour negative film appeared on the shelves of Metro cash-and-carry stores at prices far (some 30 %) below the basic prices Konica Europe was charging German photo dealers.

(21) On 14 December 1984 Konica Europe sent a telex to Konica UK informing it that Metro had begun offering Konica colour film at its 32 cash-and-carry stores in the Federal Republic of Germany. The emulsion number of the film showed that it had been exported from Japan only to the United Kingdom and Canada. The telex went on, 'our tel-lines are almost occupied by calls from Konica dealers cancelling bonus-contracts for 1985 and/or informing of the return of films purchased. We are now exerting all our efforts to buy those films up without having confidence of success, but believing that you can take those films again.'

(22) On 5, 14 and 29 November 1984 Konica Europe had already bought several consignments of Konica colour film from a German wholesaler, (...) [1]. On 3 January 1985 it bought another consignment. Altogether these consignments were worth over (...). A certain amount of this film, which had originally been exported from Japan to the United Kingdom, although this was not known until the film was actually delivered to Konica Europe, was in fact bought back by Konica UK for a total of approximately (...), some being sent back to Konica Europe in February 1985.

(23) Between December 1984 and July 1985 Konic Europe regularly bought up Konica film that was on sale in the Federal Republic of Germany from non-specialist outlets, and particularly at Metro cash-and-carry stores, or had various persons do so, with the advertising agence GGK accounting for a large volume of these purchases.

Konica Europe's explanation for this is that the purchases from Metro cash-and-carry stores, where shortly after its introduction Konica film was on the shelves in large quantities and at give-away prices, were necessary in order to protect the marketing strategy for Konica film in the Federal Republic of Germany and so as not to have to write off the advertising.

Altogether over (...) worth of film was bought up from Metro stores. The emulsion numbers of the film showed that it had originally been exported from Japan to the United Kingdom, France and Austria.

(24) A major part of the film bought up in the Federal Republic of Germany probably came from the United Kingdom. This is shown by the following evidence:

[1] The names of some undertakings are not stated in the published version of this Decision but are shown as (...), neither the Decision nor the statement of objections being addressed to them.

— a telex from Konica Europe to Konica France dated 11 December 1984 urged: 'I strongly ask you to consider price increase by at least 15 pct. both for films and paper. ... For your information Konica UK will increase film price by 10 pct. from next February on and expect another increase by about 15 pct. from August. It means that their price level will be soon higher than yours and your films are supposed to be re-exported to the Federal Republic of Germany instead of UK films,'

— a telex sent by Konica Europe to Konica UK in March 1985 said '... while we had clear evidence of grey imports from UK ...',

— Konica Europe's sales manager stated in an interview reported in 'markt intern' on 8 May 1985: 'We do not supply Metro or any comparable outlets. ... The origin of the film is not known for certain, but I suspect it is from neighbouring countries, especially England.',

— on an invoice from a firm of accountants dated 28 June 1985, Konica Europe was invoiced for, among other items, 'day-to-day advice and reporting services in connection with settlement of repurchased grey imports from England.'

(25) Konica Europe made the buying-up operations in the Federal Republic of Germany public. On 1 February 1985 it placed an advertisement in the trade journals *Foto-Contact Foto-Wirtschaft* and *Inpho des Fotomarktes* with the headline 'Sometimes we buy more of our film than we sell.' The text explained: 'The simple reason is that we have promised you that Konica film will only be sold through good photo dealers. We have also promised that any of our customers can buy up Konica film that appears in cut-price shops and will be reimbursed by us.

And that is exactly what happened in December 1984. A cash-and-carry chain had managed to get hold of our film through grey channels. Konica and its customers reacted swiftly. We bought the stocks out of circulation. Now Konica film is once again only on sale where it belongs — at good photo dealers. For we know that the successful long-term establishment of the brand and, with it, market success are only possible in partnership with the specialist photographic trade. For Konica that means taking a long-term view and marketing exclusively through the specialist trade. It means resisting pressure for volume in our sales to the trade and its resale to the public. And naturally it means an appropriate bonus scheme. Only then will photo dealers be left with an above-average margin.'

After being reprimanded for the advertisements by the Fair Trading Association (Verein zur Wahrung des lauteren Wettbewerbs eV), Konica Europe gave an undertaking to stop referring to the buying-up policy in its advertising, though it did not promise to abandon the buying-up policy as such.

(26) Konica UK on 1 February 1985 sent the following circular, headed 'Grey exports of Konica film', to 12 dealers in the United Kingdom, Ireland and the Channel Islands who it thought might be involved in such operations: 'In the past six months we have been experiencing a high level of grey exports of Konica film to Europe.

We have therefore been told by Konica Japan, that all United Kingdom shipments will be individually coded so that any exports from the United Kingdom can be traced by batch number without any difficulty. In addition, all shipments of film to individual dealers will from now onwards be monitored by a new invisible marking system in order to stop this unnecessary business practice.

I would therefore ask you to cooperate with us as much as possible in order that we are not forced to increase our United Kingdom prices and therefore affect our growing market position within the United Kingdom.'

Konica UK has said, however, that the statement to the effect that products were coded was written as a 'bluff', that film was not marked in any way to identify either consignments to individual dealers or shipments to different countries and that there had been no instructions from the parent company in Japan to engage in such practices. Film only bore an emulsion number, and this was so that quality control inspectors could tell which emulsion had been used. Several countries could be supplied simultaneously with the same emulsion.

(27) An internal memorandum of the same date by Konica UK's marketing and sales manager stated with reference to this circular: '... we know that there is a United Kingdom source who is collecting film parcels together in quantities of 5 to 10 000 rolls from each dealer and transhipping these, mainly to the Federal Republic of Germany. ... If you are aware, or suspect, any dealer with grey exporting, please do not sell any goods, for the simple reason that each time we are caught out we have to buy back the film from the country of export and pay delivery cost and perhaps a compensation element. As you can imagine, it costs a small fortune and is easily traced because each country in Europe has a separate film code on the box which indicates the original importing

country.'

(28) A telex sent to Konica Europe on 15 March 1985, in which Konica UK names suspected 'grey exporters', ended with the sentence : 'Let me assure you that we will do our utmost to prevent sales into Europe but you should investigate these other grey importers/exporters.' Konica Europe's reply to this telex began, 'Thank you very much for your information and I appreciate your efforts in preventing grey exports, and went on, 'We in fact suspected Jersey. That was because you were so confident that none of your wholesalers, including Jersey, had been involved in grey business, while we had clear evidence of grey imports from the United Kingdom. ... If Jersey is not, then someone else among those who insist that they have never grey exported must be the one. Anway, ... is a quite new name for us. We will start investigations !'

(29) A number of wholesalers in the UK were asked by Konica UK even after 1 February 1985 not to engage in grey exporting. A letter dated 26 February 1985 to a British wholesaler (...), who was not one of the addresses of the circular of 1 February, concluded with the sentence : 'May I also take this opportunity of asking you not to deal with customers who specialize in "grey exporting" our products to overseas markets as this is the cause of disorderly marketing and, in the long run, there is no benefit to you from this.'

A letter dated 17 May 1985 to another wholesaler (...), who had received the 1 February circular and who had complained to the Commission at the beginning of 1985 about Konica UK's refusal to supply him, finally contained an offer to supply Konica film but closed with the words : 'May I remind you of our grey export policy which we discussed at the meeting and state that all film sales to your company will be monitored and should we find that product supplied to your company has been grey exported then any business relationship will have to be terminated.'

Another British wholesaler (...), who was also one of the addresses of the 1 February circular, was unable to get any more Konica film supplies from Konica UK after December 1984. He claimed that Konica UK refused to supply film for export and had telephoned him to say that they would do their utmost to stop the flow of film from the United Kingdom to the continent of Europe.

(30) Several dealers to whom the circular of 1 February 1985 about 'grey exports' was sent, however, carried on their previous business relationship with Konica UK and continued purchasing Konica film from the company, without explicity reacting to the circular ; after receiving the circular they did not export Konica film to other EEC countries.

(31) Konica UK maintains that, of the dealers circularized, two had no business relationship with it (one of them was, however, the abovementioned dealer who had tried in vain to obtain supplies), another ordered Konica film for the first time in May 1985, two others ceased ordering Konica film in June 1984 and yet another dealt in Konica products other than films ; moreover, three of the dealers who still bought Konica film on a regular basis were not involved in exporting. Konica UK also denies having refused to supply the dealer referred to above after December 1984 with film for export or having received any inquiries on the subject over the telephone.

Furthermore Konica states that the circular, which contained an empty threat which dealers could easily see through, was the over-hasty reaction of an employee.

(32) Konica UK's contention that the number of circularized dealers who might have been interested in exporting Konica film to the EC during the period in question was very small is not at variance with the Commission's findings. Konica UK itself clearly did not think that many dealers were involved in such export business as a written request to refrain from exporting was afer all sent to only 13 out of some 2 500 dealers.

Moreover, if they had supplied, as Konica UK suspected, a 'collector' in the United Kingdom (see point 27 above), the British dealers circularized by Konica UK were not wrong in telling the Commission that they had not exported before they received Konica UK's letter.

(33) As far as the attitude of the parent company is concerned, the Commission takes the view that, under the circumstances, it can be assumed that Konishiroku was informed in general terms about the measures taken by Konica UK and Konica Europe. However, there is no firm evidence that Konishiroku knew about or even instigated the measures taken by its subsidiaries in the United Kingdom and the Federal Republic of Germany.

II. LEGAL ASSESSMENT

A. Article 85 (1)

Agreements and concerted practices between undertakings

(34) Konica UK, Konica Europe and the dealers supplied by them in the United Kingdom, Ireland, the Channel Islands and the Federal Republic of Germany are undertakings within the meaning of Article 85 (1).

(35) In its circular of 1 February 1985 to wholesalers in the United Kingdom , Ireland and the Channel Islands whom it believed to be involved in re-exporting film to Europe and in subsequent letters to individual wholesalers, Konica UK asked the wholesalers to cooperate with it by not engaging directly or indirectly in such export business. Should they fail to cooperate, Konica UK threatened to stop supplying them or to raise its prices, which would have reduced their possible sales in the United Kingdom.

(36) In the Commission's opinion, this circular, to which only one dealer expressly reacted, was not, as Konica UK maintains, a unilateral measure by Konica UK, but the offer of an agreement which was accepted by several dealers.

The Commission considers that it would be unusual in business for a dealer to expressly react to such a letter from a manufacturer. As a rule he will take such a letter, especially where it gives voice to the business policy pursued by the supplier, as establishing the supplier's conditions for doing business with him, namely in the present case that the goods supplied are not for export. If the dealer does not contradict such a letter, it can by implication be taken as an essential term of his contract with the supplier. This can be said to be the case especially where the dealer continues to order the goods from the supplier and only sells them on his home market, but it is also the case where the dealer stops reselling the goods to a 'collector' who in turn exports them.

The circumstances point, in the Commission's opinion, at least to a concerted practice between Konica UK and the dealers falling within Article 85 (1).

(37) Konica Europe distributes Konica colour film in the Federal Republic of Germany only through specialist photo dealers, with whom it has so-called bonus contracts. It has promised its German dealers, and has publicly repeated this promise on numerous occasions, that it will not supply supermarkets or similar outlets. It does not, however, require its dealers to undertake only to sell the goods to final consumers or other specialist dealers.

(38) The public delcaration of Konica Europe in its advertisement of 1 February 1985 (see point 25 above), that it would buy up as far as possible any Konica film that a cash-and-carry chain managed to obtain through 'grey channels', in order to protect the German market against competition from parallel imported Konica film and to prevent erosion of photo dealers' prices and margin was made and carried out — amid considerable publicity — at the wish and in the interests of the specialist photo dealers. This is clear from the fact that the advertisement invited them to buy up any Konica film they noticed in cut-price outlets and pass it on to Konica Europe, which would refund them whatever they had paid for it. In the event, two specialist photo dealers bought up Konica film in this way, even if the quantities were not very large. The fact that the buying-up operation was aimed at stopping parallel imports can be seen from the telex in which Konica Europe thanks Konica UK for its efforts in preventing 'grey exports' and at the same time announces that it will start investigations to trace the 'grey exporter' (see point 28 above), and from the buying-back by Konica UK of a certain amount of the film bought up by Konica Europe (see point 22 above). The purpose of the buying-up operation was therefore to put a stop to the parallel trade. In the Commission's opinion, this policy of Konica Europe is to be regarded, at least from 1 February 1985, as a term of its supply contracts with German dealers whereby Konica Europe undertakes to protect its German dealers against competition from parallel imported Konica film by buying it up. This commitment is an agreement within the meaning of Article 85 (1).

The circumstances point at least to a concerted practice between Konica Europe and its dealers.

(39) Konica Europe has argued that the buying-up operation was not aimed at preventing parallel imports but that it was necessary to counter a deliberate attempt to interfere with its marketing methods.

The advertisement placed in photo trade journals on 1 February 1985 had been a publicity stunt and could not be regarded as an undertaking by Konica Europe to supply only specialist photo dealers and to counter the marketing of parallel imported goods so as to uphold that marketing method. Konica Europe would have had nothing to gain from entering into a unilateral commitment towards the specialist photo trade as, in the event of failure of the specialist dealer method, it would have made a speedy change-over to other forms of marketing more difficult if not impossible. On no account could it be said that specialist photo dealers had tacitly accepted an exclusivity of the specialist trade as a term of their supply contracts. The specialist photo trade likewise had nothing to gain from preventing the marketing of parallel imported Konica film as it might itself have been interested in obtaining Konica film more cheaply from abroad. The buying-up operation and Konica Europe's advertisement had been a unilateral measure which had not formed the subject matter of any agreement whatsoever or of any concerted practice.

(40) A restrictive agreement pursuant to Article 85 (1) does not, however, in the Commission's opinion, require the written assent of the other party but can consist in the continuing business relationship between the parties, which in the present case takes the form of the actions and public declarations of Konica Europe and the at least, tacit acceptance thereof by its customers. Moreover, as Konica Europe itself admits, two dealers in fact participated actively in the buying-up operation. It is immaterial that the quantities bought up by these dealers were not very large.

Restriction of competition

(41) The export ban imposed on a number of dealers by Konica UK had the object and effect of restricting competition within the common market. Its aim was to restrain dealers in the United Kingdom, Ireland and the Channel Islands from selling to customers in other Member States, so that these would not compete with dealers under contract to Konica Europe. Such a ban leads to artificial divisions in the common market and impedes the establishment of a single market between the Member States, which is a basic objective of the EEC Treaty.

(42) The buying-up undertaking given by Konica Europe to prevent the resale of parallel imported Konica film in the Federal Republic of Germany had the same aim, namely to protect the dealers supplied by Konica Europe against competition from parallel imported Konica film so that their margins were not eroded.

(43) The intention of Konica UK and Konica Europe to restrict competition within the common market is clear from their joint efforts to identify the dealers who were 'grey' exporting or importing Konica film.

(44) Konica UK's export ban had the intended effect of restricting competition. Konica UK made it perfectly clear to its dealers that parallel exporting would place their business relations with Konica UK in jeopardy, or even be an absolute bar to such relations. Several dealers can be assumed to have refrained from exporting Konica film as a result.

(45) As far as Konica Europe's buying-up undertaking is concerned, this largely eliminated intra-brand competition and its impact on the prices of Konica film in the Federal Republic of Germany which would have benefited the German consumer. The buying-up commitment was also inextricably linked to the action taken by Konica UK ; it was part of a deliberate policy in the Konica group to isolate national markets from one another.

Effect on trade between Member States

(46) An export ban is inherently likely to affect trade between Member States. The purpose of such an arrangement is to prevent trade between Member States or to keep it within channels determined by the firm imposing the ban. In the present case, the arrangements impeded trade between the United Kingdom and other Member States, particularly the Federal Republic of Germany, created or at least encouraged artificial divisions in the common market, and operated to prevent the establishment of a single market between the Member States.

(47) Through its export ban Konica UK prevented trade, particularly between the United Kingdom and the Federal Republic of Germany, from developing in the way it would probably otherwise have done in view of the scope that existed for such trade. Wholesale prices in the United Kingdom were below those in the Federal Republic of Germany throughout the period October 1984 to March 1985 and in certain cases thereafter, so that exporting and importing Konica film between the two countries was worthwhile even if some of the goods had to be shipped via the Channel Islands. The particular status of these islands as regards the European Community does not exclude the application of Article 85 (1) to practices of Konica UK aimed at preventing parallel trade between Member States.

(48) Konica Europe's buying-up commitment related to imported goods and was likely to influence the volume of imports. It was also likely to contribute to artificial divisions in the market.

B. Article 85 (3)

(49) The agreements or concerted practices cannot be considered for exemption under Article 85 (3) as they were not notified to the Commission and are not among those exempt from notification under Article 4 (2) of Regulation No 17. In any case, they do not fulfil the conditions for exemption laid down in Article 85 (3). Export bans within the common market do not contribute to improving

the distribution of goods; nor are the other conditions for application of Article 85 (3) satisfied. The same goes for the buying-up commitment.

C. Article 3 of Regulation No 17

(50) Konica has assured the Commission that the infringements established have been terminated. Parallel imports into the Federal Republic of Germany from other Member States take place and are tolerated. Konica UK will in future take care that its sales personnel do not oblige or try to oblige customers, either orally or in writing, to refrain from exporting or reselling to exporters. An order pursuant to Article 3 (1) of Regulation No 17 that the infringements be brought to an end does not therefore seem necessary.

D. Article 15 (2) of Regulation No 17

(51) This Decision is addressed only to Konica UK and Konica Europe, as these firms are alone responsible for the infringement of Article 85 (1). Although the measures complained of, namely the export ban and the prevention of the resale of parallel imported Konica film, cannot be regarded as unilateral acts of the two firms, these measures were prepared and carried out primarily in their interest. The customers of Konica UK and Konica Europe are therefore not being held responsible for the infringements.

(52) The Commission has reason to believe that Konica UK deliberately contravened Article 85 (1) when it banned wholesalers in the United Kingdom, Ireland and the Channel Islands from exporting. Those responsible knew that an export ban constituted a serious violation of the Treaty. This is confirmed by evidence found during the investigation at Konica UK in the form of a letter which Konica UK had sent to the British Photographic Importers' Association in 1980 warning it that refusal to carry out guarantee work on parallel imported cameras might be against the EEC competition rules; the letter was captioned 'EEC Anti-trust Law and "Grey Imports"'.

(53) The Commission also has reason to believe that Konica Europe deliberately contravened Article 85 (1) when it undertook to prevent the resale in the Federal Republic of Germany of parallel imported Konica film from other EEC and neighbouring non-EEC countries by buying up such film. The behaviour of Konica Europe was consciously directed at a measure intended to ensure the dividing-up of the common market in order to prevent intra-brand competition on the German market and avoid the impact such competition would have on prices. Moreover, Konica Europe specifically asked the British Konica sales subsidiary to help prevent exports to the Federal Republic of Germany. A similar call was incidentally made to Konica France (see point 24 above).

(54) The commitments in restraint of competition entered into or brought about by Konica Europe and Konica UK are only explicable as part of a common policy on the part of the Konica group in Europe aimed at maintaining separate national markets with different prices. It is clear from the above exposition that Konica Europe turned to Konica UK in the hope of preventing or at least limiting imports from the United Kingdom and that Konica UK actively acceded to that request.

(55) In view of this, the Commission considers it appropriate to impose fines of the same amount on Konica Europe and Konica UK.

(56) The Commission regards conduct that deliberately obstructs the objective of establishing a genuine common market as a very serious infringement.

(57) As to the duration of the infringements, there is evidence that these lasted from 1 February until the beginning of July 1985.

(58) In deciding the size of the fines, the Commission has had regard in this case on the one hand to the clear infringement of Community law that preventing the creation of a common market constitutes. On the other hand, it has taken into account the fact that, according to the evidence, the infringement lasted only about five months and that the actual economic impact on trade between Member States was not particularly great, as well as the fact that at the time of the infringement Konica film was still being introduced in the Federal Republic of Germany where it had a very small market share,

HAS ADOPTED THIS DECISION:

Article 1

Konica UK Ltd has infringed Article 85 (1) of the EEC Treaty by banning its dealers in the United Kingdom, Ireland and the Channel Islands from exporting Konica film to Member States of the Community.

Article 2

Konica Europe GmbH has infringed Article 85 (1) of the EEC Treaty by entering into a commitment towards German specialist photographic dealers to prevent the resale of parallel imported Konica film in the Federal Republic of Germany by buying up such film, and by in fact doing so.

Article 3

A fine of 75 000 ECU is hereby imposed on Konica UK Ltd. This fine shall be paid into account No 59 000 204 of the Commission of the European Communities, Brussels — ECU at Lloyds Bank Ltd, the Manager Payments Section, Overseas Centre Birmingham, PO Box 63, 38a Paradise Street, Birmingham B1 2AB, United Kingdom, within three months of the date of notification of this Decision.

A fine of 75 000 ECU is hereby imposed on Konica Europe GmbH. This fine shall be paid into account No 262 00 64910 of the Commission of the European Communities, Brussels — ECU at Sal. Oppenheim Jr & Cie, Unter Sachsenhausen 4, D-5000 Cologne, within three months of the date of notification of this Decision.

On expiry of that period 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, i.e. 10,25 %. Should payment be made in the national currency of the addressees, the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 4

This Decision is addressed to:

— Konica UK Ltd,
Plane Tree Crescent,
Feltham,
UK-Middlesex TW13 7HD,

— Konica Europe GmbH,
Industriecenter X11,
D-8011 Hohenbrunn.

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

Done at Brussels, 18 December 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission