COMMISSION

COMMISSION DECISION

of 13 December 1989

relating to a proceeding under Article 85 of the EEC Treaty

(IV/32.026 — Bayo-n-ox)

(Only the German text is authentic)

(90/38/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 Article 3 (1) thereof,

Having regard to the Commission's decision of 22 November 1988 to initiate proceedings upon its own initiative,

Having given the parties the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19 (1) of Regulation No 17 in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Articles 19 (1) and (2) of Council Regulation No 17 (2),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

1. The subject of the proceeding

(1) This proceeding relates to agreements that were in force from 10 July 1986 to 13 November 1989 between Bayer AG, Leverkusen, and its customers specified in the Annex in respect of the product 'Bayo-n-ox Premix 10 %', under which these customers were required to use the product only to cover their own requirements in their own works.

2. The undertakings

(2) Bayer AG is a chemicals undertaking with a worldwide group turnover of DM 40,5 billion (1988) and holdings in a large numer of undertakings.

(3) The customers of Bayer AG which purchase from it the product 'Bayo-n-ox Premix 10 %', are undertakings operating in the feedingstuffs industry which as a rule process the product with other active substances or additives into either premixes or finished feeds.

3. The product

(4) The product 'Bayo-n-ox Premix 10 %' (hereinafter referred to as 'Bayo-n-ox') consists in particular of the active substance 'Olaquindox' (10 %), with limestone grit (calcium carbonate) as the carrier. It was introduced on to the market in 1976 under the protected trade mark 'Bayo-n-ox'.

(5) Bayo-n-ox is a growth promoter. The active substance contained in it, when used as an additive in feedingstuffs, leads to an improvement in feed conversion and in daily weight gain. Within the European Community, the ingredient may be used for pigs up to four months old.

(6) Feedingstuff additives with the active substance 'Carbodox' (manufactured by the firm Pfizer), which like 'Olaquindox' belongs to the 'Quinoxaline' group, and feedingstuff antibiotics produced by a fermentation process are other growth promoters used for pigs.

(7) In several Member States, Bayo-n-ox was and is protected by industrial property rights. The patents relate to the active substance, the manufacturing process and/or the final product. In 1985, patent protection expired in respect of a non-dust-free formulation in Germany and Denmark. In France, the Netherlands and Belgium, patent protection continued to apply up to 1988.

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

(8) The active substance contained in Bayo-n-ox is manufactured by Bayer AG. Processing into the final product is carried out within the Community in Germany, Spain and Italy (where a mixture with a 1 % active substance content is used exclusively for medical purposes) by undertakings belonging to the Bayer group and in Greece.

4. The distribution system

(9) Apart from Greece, the United Kingdom and Ireland, where Bayo-n-ox is distributed by undertakings linked to Bayer AG by licensing agreements, distribution of the product within the Community is carried out by undertakings belonging to the Bayer group. These distribution companies sell Bayo-n-ox only direct to approved undertakings in the feedingstuffs industry (premix and feedingstuff manufacturers). The product is not sold to dealers.

5. The market

(a) *Federal Republic of Germany*

(10) Bayer AG estimates that the total German market (Quinoxalines and feedingstuff antibiotics produced by a fermentation process) for growth promoters in 1985 was 230 tonnes of active substance. This would mean that Bayer AG had market share of [...] % (1) in that year.

(11) The prices (before discount, free at domicile, excluding VAT) charged by Bayer AG to its (German) customers amounted:

in 1982 to between DM [...] and DM [...] (ECU [...] — [...])

in 1983 to between DM [...] and DM [...] (ECU [...] — [...])

in 1984 to between DM [...] and DM [...] (ECU [...] — [...])

in 1985 to between DM [...] and DM [...] (ECU [...] — [...])

in 1986 (January to September) to between DM [...] and DM [...] (ECU [...] — [...] (2).

Bayer AG's gross revenue in the Federal Republic of Germany amounted to DM [...] in 1986, DM [...] in 1987 and DM [...] in 1988.

(b) *France*

(12) The market share of Bayo-n-ox on the French market for growth promoters, including feedingstuff antibiotics manufactured by a fermentation process, amounted in 1985 to some [...] %.

(13) Bayer Pharma SA, an undertaking belonging to the Bayer group, which is responsible for the distribution of Bayo-n-ox in France, charged the following average prices per kilogram for Bayo-n-ox:

1982 FF [...] (ECU [...])
1983 FF [...] (ECU [...])
1984 FF [...] (ECU [...])
1985 FF [...] (ECU [...])
1986 FF [...] (ECU [...]).

(14) A comparison of the average monthly gross prices in Germany and France expressed in German marks shows the following:

	Germany	France
1/1986	[...]	[...]
2/1986	[...]	[...]
3/1986	[...]	[...]
4/1986	[...]	[...]
5/1986	[...]	[...]
6/1986	[...]	[...]
7/1986	[...]	[...]
8/1986	[...]	[...]
9/1986	[...]	[...]
10/1986	[...]	[...]
11/1986	[...]	[...]
12/1986	[...]	[...]
1/1987	[...]	[...]
2/1987	[...]	[...]
3/1987	[...]	[...]
4/1987	[...]	[...]
5/1987	[...]	[...]
6/1987	[...]	[...]
7/1987	[...]	[...]
8/1987	[...]	[...]
9/1987	[...]	[...]
10/1987	[...]	[...]
11/1987	[...]	[...]
12/1987	[...]	[...]
1/1988	[...]	[...]
2/1988	[...]	[...]
3/1988	[...]	[...]
4/1988	[...]	[...]
5/1988	[...]	[...]
6/1988	[...]	[...]
7/1988	[...]	[...]
8/1988	[...]	[...]
9/1988	[...]	[...]
10/1988	[...]	[...]
11/1988	[...]	[...]
12/1988	[...]	[...]
1/1989	[...]	[...]
2/1989	[...]	[...]
3/1989	[...]	[...]
4/1989	[...]	[...]
5/1989	[...]	[...]
6/1989	[...]	[...]

(1) In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

(2) On the basis of annual average exchange rates. (*Source:* Eurostat).

(c) *Other Member States*

(15) The market shares for Bayo-n-ox estimated by Bayer AG for 1985 amounted to between [...] % in Belgium and Luxembourg; [...] % in Italy, Spain and Greece, and [...] % in the Netherlands).

(16) In Belgium/Luxembourg and the Netherlands at least, the trend in the sales prices charged for Bayo-n-ox by the Bayer distribution companies was comparable to the 1986/87 price trend in France. Gross revenue for Bayo-n-ox was as follows:

(in DM)

	Belgium/ Luxembourg	Netherland	France
1986	[...]	[...]	[...]
1987	[...]	[...]	[...]
1988	[...]	[...]	[...]

6. The agreements

(17) On 12 June 1986, Bayer AG issued instructions to its sales department to make the following statement to Bayo-n-ox customers:

> 'Because of the current market situation, we are obliged to sell Bayo-n-ox at cut-rate prices not reflecting normal cost structures. In order to ensure the continued provision of a balanced service and in order to meet your quantitative requirements, we are prepared to grant long-term customers special prices (including a refund of DM [...] payable quarterly) to cover their *own requirements.* This cut-rate offer applies to quantities needed for customers' own requirements. The selling price for merchandise held for resale is DM [...] per kilogram.'

(18) This 'own requirements' more was followed up by the following circular which Bayer AG sent to all its German Bayo-n-ox customers on 10 and 11 July 1986:

> 'Bayo-n-ox
>
> Dear Sir,
>
> We wish to confirm to you the agreements applying between us in respect of Bayo-n-ox in the following terms:
>
> The amounts of Bayo-n-ox supplied to you are used exclusively to cover your own requirements in your own works.
>
> For such purchase for your own use, we charge you the special price of DM [...] per kilogram of premix 10 %.
>
> Please confirm your agreement on the attached duplicate of this letter and return it to us.
>
> Thank you for your cooperation.
>
> Yours faithfully.'

(19) The 'special prices' referred to in the circular vary from customer to customer, ranging from DM [...] to DM [...] per kilogram. All Bayer AG's customers purchased Bayo-n-ox at these 'special prices' as from 11 July 1986. The prices specified in the circulars were intended, Bayer AG explained to the Commission, to constitute an incentive to customers to process in their own works the Bayo-n-ox purchased from Bayer AG. The prices specified were virtually identical to the prices for generic products, with the result that there was no longer any incentive to use cheaper generic products while at the same time making 'improper' (as Bayer AG claimed) use of Bayo-n-ox. The purpose of the price applying to merchandise held for resale was to prevent such resale through the unrealistic price level set.

(20) The undertaking listed in the Annex under heading A [...] confirmed their agreement in writing to Bayer AG. The undertakings listed in the Annex, [...] under heading B gave an amended confirmation, though without excluding the principle of own use. One undertaking expressly rejected Bayer AG's letter. All of Bayer AG's other Bayo-n-ox customers did not state their position in writing (listed in the Annex [...] under heading C). Bayer AG states that it did not impose any sanctions either against undertakings which did not confirm the circular of 10 and 11 July 1986 nor against undertakings which confirmed the letter, but marketed Bayo-n-ox despite the commitment given.

(21) Bayer AG claims that, before 10 and 11 July 1986, Bayo-n-ox was in a series of instances mixed with other, lower quality Olaquindox preparations. It alleges that Bayo-n-ox was also distributed direct to animal owners and used by them improperly outside the approved range of application or in higher doses for therapeutic purposes in animals suffering from diarrhoea. So as to prevent this in future, it claims, it required its customers to purchase Bayo-n-ox only for use in their own works. In this way, it claims, its intention was to prevent cross supplies of Bayo-n-ox from one feedingstuffs undertaking to another (direct or via a dealer) and to reduce the risk of a deterioration in quality through mixture with inferior Olaquindox

preparations. Furthermore, Bayer AG argues, providing cross supplies to feedingstuff undertakings infringes Article 21 of the German Feedingstuffs Order. Any feedingstuffs undertaking supplied by it would be committing an offence if it resupplied Bayo-n-ox to a non-approved undertaking. However, those responsible in Bayer AG would also be committing an offence if, in the knowledge of such infringements, they were to supply a dealer with Bayo-n-ox. The purpose of the measures taken, it is argued, is 'to prevent uncontrolled trade in Bayo-n-ox through distribution channels that are not legally authorized, so as to prevent any misuse of Bayo-n-ox that might endanger the health of man and beast, to prevent loss of marketability and involvement in offences against German feedingstuffs law that are liable to incur fines, to prevent product liability claims and, lastly, to prevent any adverse effect on the good name and reputation of Bayo-n-ox'. Bayer AG argues that counselling by its trained staff and sale of the growth promoter, which requires correct application, form a whole and are inseparable.

(22) In a memo from Bayer AG's legal department, the background to the circular is explained as being the expiry of the Bayo-n-ox patent in Germany, while protection continued to exist in other Community countries. This had led to a price differential between Germany and such other Community countries, resulting in transactions between individual German feedingstuffs manufacturers and importers from other Community countries that were contrary to German law on feedingstuffs.

7. Trade outside the distribution system

(a) *Before the end of patent protection in Germany*

(23) Already in 1981, the average price for Bayo-n-ox in France had to be reduced from FF [...] to FF [...] as a result of imports from Belgium.

(24) As from 1982, imports from Italy and Spain between a constant problem for the French Bayer distribution undertaking, which was as a result compelled continually to revise its selling prices downwards. In the short term, it was possible to maintain the selling prices by granting rebates in kind.

(25) As a result of wide-ranging measures in which all the Bayer distribution undertakings concerned were involved, an attempt was made, with at least some success, to determine the sources of the import.

(26) When in 1983 a French Bayo-n-ox customer was identified as the source of exports to Switzerland, the customer's supplies were quantitatively limited by the French Bayer distribution undertaking.

(b) *After the end of patent protection in Germany*

(27) When, at the beginning of October 1985, the patent protection of 'Olaquindox' expired for Bayer AG and the active substance then became available on the German market from other manufacturers as well, the prices for Bayo-n-ox in Germany were DM [...] per kilogram. Already on 25 October 1985, because of the immediate onset of parallel imports, the French Bayer distribution undertaking was compelled to reduce its prices from FF [...] to FF [...]. Despite the extensive grant of rebates in kind, prices subsequently had to be further cut on a continuous basis.

(28) In January 1986, Bayer AG realized that not only the trade was involved in the parallel imports, but that large feedingstuffs manufacturers, which in any case exchanged raw materials if and when required in Benelux and in France, were also involved in the transactions.

(29) The Belgian Bayer distribution undertaking thought the flow of goods took place as follows : a Bayer AG customer buys Bayo-n-ox at DM [...] per kilogram, but then uses another Olaquindox product at DM 6,50 per kilogram. The Bayo-n-ox is then resold in countries with Bayo-n-ox patent protection. Bayer AG confirmed this assumption during the course of this proceeding. It stated that 'because of the expiry of patent protection on the one hand and the availability of generic products onthe other ... Bayo-n-ox customers began to purchase Bayo-n-ox, but then to mix generic products into the feedingstuffs in their works and to resell the Bayo-n-ox which they had not themselves used in an uncontrolled manner that was contrary to the prohibition'.

(30) In April 1986, a repurchase scheme started in January 1986 was called to a halt. A careful analysis was supposed to allow identification of the German source from which the Bayo-n-ox found in the other Member States originated.

(31) A certain quantity of Bayo-n-ox, which had been purchased in the Netherlands, originated from a 21 March 1986 delivery to the firm [...], although the latter had given an undertaking to Bayer AG that it would purchase goods only for its own requirements (according to [...], the goods had been stolen).

8. The proceeding

(32) As part of its enquiries, the Commission sent requests for information to a number of bayer AG's German Bayo-n-ox customers pursuant to Article 11 of Regulation No 17. Bayer AG learned of this and, on 15 December 1987, sent a letter to its customers (1), setting out the background to the measures it had taken and containing the following wording:

'Dear Sir or Madam,

It has come to our attention that the Commission of the European Communities has sent requests for information to a number of our German Bayo-n-ox customers, possibly including you. ... We recommend that you answer the Commission's questions along the following lines:

Upon your confirmation of our letter of 10 and 11 July 1986, you were paid the bonus as agreed. You purchased Bayo-n-ox for processing in your own works. You did not engage in trade in Bayo-n-ox either before or after July 1986. You assume that Bayer wanted, for quality protection reasons, to prevent as far as possible legally unauthorized practices in the use of Bayo-n-ox. The only business documents in this connection are the abovementioned Bayer letter of 10 and 11 July 1986 and your confirmation of 16 July 1986'.

(33) On 29 August 1989, Bayer AG notified the Commission of a planned addition to its terms and conditions of sale. This was changed on . ... The subject of this notification is significantly different to that of the present proceedings, and shall therefore, be considered in the framework of a subsequent procedure.

In a circular dated 13 November 1989, Bayer AG expressly withrew its previous circulars dated 10 and 11 July 1986.

9. The current situation regarding Community rules

(34) A number of provisions concerning additives in feedingstuffs laid down in the Member States by law and regulations were harmonized by Council Directive 70/524/EEC (2), as last amended by Commission Directive 88/483/EEC (3), Olaquindox is an additive listed in Annex I to the Directive and may therefore be used for an indefinite period as an additive in feedingstuffs (4). Manufacturers of growth promoters and of premixes and compound feedingstuffs manufactured with it and intermediaries must comply with the requirements set out in Annex III to the Directive. Each Member State must publish a list of manufacturers annually. At the final marketing stage, growth promoters may be sold only to manufacturers of premixes and, in the form of premixes, only to manufacturers of compound feedingstuffs who meet the minimum requirements laid down in Annex III.

Olaquindox was first included in Annex II pursuant to Commission Directive 76/933/EEC (5). The products listed in Annex II are additives whose effect on the health of human beings and animals cannot yet be conclusively assessed. Authorization for Member States to approve Olaquindox as an additive in feedingstuffs was extended on several occasions. Pursuant to Commission Directive 85/520/EEC (6), 3 December 1986 was set as the final date.

Bayer AG claims that, in this phase which is of such importance for the future marketing of the product, maintenance of the marketability of the product was the primary factor. It had had to take all possible steps to prevent any negative public discussion of the product. A particular danger had been posed by the uncontrolled trade in Bayo-n-ox contrary to the prohibition laid down.

In the interests of maintaining marketability, therefore, Bayer had been obliged to do everything possible to prohibit such uncontrolled trade in Bayo-n-ox in a situation in which the further authorization of the product was in any case extremely doubtful.

II. LEGAL ASSESSMENT

1. Article 85 (1) of the Treaty

(35) The agreements which were in force from 10 July 1986 to 13 November 1989 between Bayer AG and its customers listed in the Annex, under which such customers were required to use Bayo-n-ox exclusively to cover their own requirements in their own works, are incompatible with the common market and prohibited under Article 85 (1) of the Treatyx.

(a) *Agreements between undertakings*

(36) Bayer AG's circular of 10 and 11 July 1986 confirms 'existing ageements'. At the same time, the recipients are asked to state that they agree that supplies at the specified special prices are provided to cover their own requirements.

(1) The content of the letter to customers which did not confirm in writing the circular of 10 and 11 July 1986 is adapted accordingly.
(2) OJ No L 270, 14. 12. 1970, p. 1.
(3) OJ No L 237, 27. 8. 1988, p. 39.
(4) Council Directive 87/317/EEC (OJ No L 160, 20. 6. 1987, p. 34); see also Order of the President of the Court of Justice of the European Communities of 8 April 1987 in Case 65/87-R Pfizer, not yet reported.
(5) OJ No L 364, 31. 12. 1976, p. 18.
(6) OJ No L 323, 4. 12. 1985, p. 12.

(37) The question of whether and with which customers agreements containing such terms already existed before the circular was sent — the events in connection with the theft from the firm [...] (see paragraph 31), the explanatory instructions for the sales department (see paragraph 17) and the written confirmations provided by the undertakings listed in the Annex under headings A and B suggest that they did exist — may be left open.

(38) Bayer AG evidently supplied Bayo-n-ox to each customer as from 10 and 11 July 1986 at the relevant special prices only subject to the condition that the goods were used for the customer's own requirements. Even if they did not expressly state their agreement, all the Bayer AG customers listed in the Annex became parties to agreements within the meaning of Article 85 (1) containing this stipulation by the fact of their purchase of bayo-n-ox at such special prices. In view of the fact that, in addition to the special prices for own requirements, Bayer AG offered a price for Bayo-n-ox which was not linked to any restriction on disposal (see paragraph 17), the decision to purchase the product at the special prices objectively involves tacit agreement to use the product for own requirements, unless this condition was expressly rejected, as one Bayer AG customer did.

(b) *Restriction of competition*

(39) The own-use requirement applying to the undertakings listed in theAnnex has as its object and effect prevention of the resale of the product by such undertakings and hence also its export by them to other Member States. The very wording of the agreement makes it clear that such undertakings are to be ruled out as possible sources of supply for Bayo-n-ox. The position of the other actual or potential suppliers is thus artifically reinforced and competition on the supply side restricted.

(40) However, a restriction of competition within the meaning of Article 85 (1) would not exist, if Bayer AG customers were prohibited by law from trading in Bayo-n-ox.

(41) The agreements concluded with its customers were primarily intended, according to Bayer AG, to prevent trade in Bayo-n-ox through distribution channels not allowed by law. In this context, however, Bayer AG itself concedes that its customers would be acting improperly on the basis of the rules governing feedingstuffs only if they 'passed Bayo-n-ox on to a non-approved firm'.

(42) However, the own-use requirement applying to German purchasers of Bayo-n-ox on the basis of the agreement concluded with Bayer AG excludes any trade, i.e. it also excludes trade with authorized firms in the Federal Republic of Germany and trade in other Member States. There are no legal provisions preventing an authorized undertaking operating in the feedingstuffs industry from also performing trading functions. However, the undertaking must comply with the provisions applying to each of such functions. Even if certain German Bayo-n-ox customers did in certain commercial transactins infringe the provisions relating to them as dealers, an agreement which in principle rules out any trading activity still has the effect of restricting competition.

(43) Lastly, Bayer AG invokes the principles of selective distribution, according to which a contractual restriction of the group of resellers does not constitute a restriction of competition provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and h suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion (1).

However, if it is to be unobjectionable from a competition policy point of view, selective distibution must in particular include freedom to trade within the network of authorized firms. Such freedom is not allowed in the case in point.

(c) *Object and effect of restricting competition*

(44) Article 85 (1) presupposes that the agreements in question have as their object or effect the restriction of competition.

(45) The term 'object' has an objective meaning in this context. It does not matter what the intention subjectively pursued by the parties was.

(46) The ban on trading in Bayo-n-ox is directly evident from the wording of the agreements. As far as examination of the applicability of Article 85 (1) is concerned, therefore, Bayer AG's contention that it did not pursue any anti-competitive object in requiring its customers to purchase only for their own requirements (see paragraph 21) is irrelevant. Furthermore, the ban also has the effect of restricting competition, since the scoppe of choice for third parties was affected by the conclusion of the agreements.

(d) *Appreciability of the restriction of competition*

(47) The question of whether there is an appreciable restriction of competition must be decided on the basis of the legal and economic context within which the agreements restraint of competition were concluded.

(1) Case 26/76, Metro [1977] ECR, p. 1875.

(48) Because of the immediate competition which Bayo-n-ox had to face in the Federal Republic of Germany after the expiry of patent protection for Olaquindox and because of the resulting collapse in prices, each of Bayer AG's German customers became an economically attractive source of supply for Bayo-n-ox purchasers, at least in the adjoining Member States. The contractual elimination of almost all of these sources of supply restricts competition appreciably between the latter and the relevant Bayer distribution companies in particular.

(e) *Effect on trade between Member States*

(49) The contractual ban on resale means that goods belonging to an undertaking cannot participate in trade between Member States. However, it remains to be examined whether the effect here is appreciable.

(50) Although Bayer AG has organized its distribution system in such a way that only undertakings operating in the feedingstuffs industry are supplied, it is economically advantageous for such undertakings in circumstances such as the presente to exercise trading activities (see paragraph 29).

(51) Because of Bayer AG's 'own-requirements' measures, a number of undertakings are barred from trading activities which account for more than one [...] % of the German market for growth promoters used with pigs. Since, apart from transport costs, there are no other substantial barriers to access to other markets, it would be possible for Bayo-n-ox purchasers, at least in adjacent markets, to make their purchases from Bayer AG customers, a practice which did indeed actually take place on a considerable scale (see paragraphs 23 *et seq.*).

(52) The agreements existing between Bayer AG and its customers thus partition a large proportion of the German market for growth promoters used with pigs from other Comniunity markets and may therefore significantly affect trade between Member States.

(53) The fact that, even after 10 and 11 July 1986, sales of Bayo-n-ox of German origin took place in the adjoining Member States and caused a further decline in prices there does not detract from the liability of the agreements to affect trade. The actual effects of an agreement which by its nature may affect trade have to be determined precisely in only a very small numer of cases. Article 85 (1) does not require that an agreement in restraint of competition must be successful in achieving its desired effect (1).

(1) Established case law of the Court of Justice of the European Communities; Case 19/77, Miller International Schallplatten GmbH, [1978] ECR p. 131.

2. **Article 85 (3) of the Treaty**

(54) The agreements which existed between Bayer AG and the undertakings listed in the Annex were not notified to the Commission in accordance with Article 4 (1) of Regulation No 17. Nor are they exempt from notification pursuant to Article 4 (1) of that Regulation, since in particular they relate to 'exports between Member States' within the meaning of Article 4 (2) (1) of the Regulation.

(55) Even if the agreements had been notified or were exempt from notification, the provisions of Article 85 (1) could not be declared inapplicable to the agreements pursuant to Article 85 (3).

(56) The agreements do not improve the production or distribution of goods or contribute to technical or economic progress within the Community. On the contrary, they are liable to compartmentalize a large proportion of an aggregate, cross-frontier market and are therefore *prima facie* incompatible with the principles of the EEC. In particular, Bayer AG's contention that councelling and sales form an inseparable whole that prevents resale of Bayo-n-ox by Bayer AG's customers does not stand up to examination. Any distribution system that is to be compatible with the common market presupposes that all customers who have acquired the product lawfully within the European Community will be provided with counselling and other necessary services throughout the European Community. Furthermore, the restrictions imposed on the German purchasers of Bayo-n-ox are not induspensable to the achievement of the objectives cited by Bayer AG (see paragrph 21). If Bayer AG's in fact been to prevent unlawful trade, the content of the agreement should have been restricted to this. For the rest, the question of whether restrictions of competitions arising from the assumption by undertakings of funtions belonging to the regulatory authorities are exempt from the scope of Article 85 may in this context be left open.

3. **Encroachment on the validity of patent rights**

(57) Bayer AG objects that a ban on the agreements would undermine its existing industrial property rights for Laquindox in other Member States. Although it could in such countries continue to defend itself against competition in Olaquindox products manufactured by other producers, the distribution of German Bayo-n-ox, whose marketing terms are already geared to competitive pressure from other Olaquindox products, would in such countries lead to the same result.

(58) This objection does not stand up to scrutiny. The legal status of the Bayo-n-ox industrial property rights in other Member States will clearly not be affected by a ban on the agreements. Nor is the exercise of such rights affected to an extent which would wholly undermine their validity and thus infringe the common constitutional principles of the Member States which guarantee property rights in the community legal order.

(59) The substance of a patent right or of an equivalent property right essentially consists in granting the inventor the exclusive right to bring the product on to the market before anyone else. If the inventor decides to sell the product in a Member State in which legal patent protection does not exist or no longer exists for the product, he must accept the consequences of such a decision in so far as trade within the common market is concerned (1). The right to defend oneself in all the Member States of the Community in which patent protection still exists agaisnt products of other manufacturers that infringe patent law continues to apply without any restriction.

(60) It is part of the Court's established case law that 'the proprietor of an industrial or commercial property right protected by the law of a Member State cannot rely on that law to prevent the importation of a product which has been lawfully marketed in another Member States by the proprietor himself or with his consent' (2).

(61) This principle applying to the legal content of the property right under the Community legal order may not be undermined by agreements falling within the scope of Article 85 (1) (3).

4. Termination of the infringement

(62) Bayer AG, by distributing a new circular on 13 November 1989 effectively terminated its infringement of Article 85 (1) on that date.

(63) It is not appropriate to limit the finding of the present infringement pursuant to Article 3 of Regulation 17 to that part of the agreement which goes beyond the legal restraints on the ability of purchasers freely to dispose of the goods acquired. There are no indications that Bayer AG and its customers wished such a limited agreement at all; the false legal interpretation adopted by Bayer AG of Article 21 of the German Feedstuffs Order (see paragraph 21) clearly refutes such a wish.

(1) Case 187/80 Merck v. Stephar [1981] ECR, p. 2063.
(2) *Loc. cit.*, 2082 and the case law cited there.
(3) Case 258/78 Nungesser [1982] ECR, p. 2082.

5. Fine

(64) A fine is imposed pursuant to Article 15 (2) of Regulation No 17 only on Bayer AG, since the agreements were concluded on the initiative and in the interests of Bayer AG.

(65) Bayer AG intentionally infringed Article 85 from 10 July 1986 until 13 November 1989.

(66) Bayer AG has not submitted business records clearly showing a direct link between the 'own-requirements' measures and the alleged intention (paragraph 21), nor does the Commission have in its possession any such records from another source. On the other hand, such intention cannot be disproved.

(67) Nevertheless, the instructions to the sales department (paragraph 17) and the memo from the legal department described in paragrpah 22 indicate that the competitive position in Germany and its impact on market conditions in other Member States were an important factor behind the initiation of the 'own-requirements' measures.

(68) The infringement being assessed here is, morevoer, particularly serious. In 1983, the Commission pointed out that export bans and market partitioning were particularly serous offences (13th Report on Competition Policy, point 62 *et seq.*). A further factor in this case is that, if the distribution system applied by the Bayer group is absued, it could jeopardize the attainment of the common market. This is because of the vertical integration of the distribution function into the Bayer group and because of the chosen distribution policy of supplying only undertakings in manufacturing industry. If supplies are then quantitatively restricted to the own requirements of the relevant purchaser, the partitioning of market is complete.

(69) A further factor to be taken into account against Bayer AG is the fact that it obstructed the Commission's enquiries in this proceeding. As a result of the letter it sent to its Bayo-n-ox customers on 15 December 1987, the information provided by the undertakings concerned is of reduced value, since it cannot be determined to what extent such information was influenced by the relevant measure taken by Bayer AG.

(70) The amount of the fine must take account of the turnover of Bayer AG and of the undertakings associated with it in Bayo-n-ox in the relevant geographical market (Federal Republic of Germany, France, Netherlands and Belgium/Luxembourg) as well as the economic importance of Bayer which is reflected by its total turnover,

HAS ADOPTED THIS DECISION:

Article 1

The agreements which were in force from 10 July 1986 to 13 November 1989 between Bayer AG and its customers, under which such customers were required to use 'Bayo-n-ox Premix 10 %' solely to cover their own requirements in their own works, constitute infringements of Article 85 of the EEC Treaty.

Article 2

A fine of ECU 500 000 is imposed on Bayer AG in respect of the infringement referred to in Article 1.

Article 3

The fine imposed in Article 2 shall be paid within three months of notification of this Decision to the following bank account:

No 310-0933000-43,
Banque Bruxelles-Lambert,
Agence européenne,
5 Rond Point Schuman,
B — 1040 Brussels.

After the expiry of that period, interest shall be automatically payable at the rate charged by the European Monetary Cooperation Fund for transactions in ecus on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, e.e. 14,25 %.

Article 4

This Decision is addressed to Bayer Aktiengesellschaft, D — 5090 Leverkusen.

Done at Brussels, 13 December 1989.

For the Commission

Leon BRITTAN

Vice-President