COMMISSION DECISION

of 21 December 1994

relating to a proceeding pursuant to Article 85 of the EC Treaty

(IV/32.948 — IV/34.590: Tretorn and others)

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

(Text with EEA relevance)

(94/987/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European 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 and 15 (2) thereof,

Having regard to the Commission decision of 14 May 1993 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, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

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

Whereas:

A. THE FACTS

I. THE PARTIES

(1) Tretorn AB, (hereinafter referred to as 'Tretorn AB'), is a Swedish industrial company. It operates within the Community in the market in tennis balls, through its subsidiary Tretorn Sport Ltd, Ireland. For the year 1992, Tretorn AB's turnover was of about ECU 16,5 million.

(2) Tretorn Sport Ltd, (hereinafter 'Tretorn'), is a subsidiary of Tretorn AB, manufacturing tennis balls. For the year 1992, Tretorn had a turnover of about ECU [. . .] [3].

(3) Formula Sport International Ltd (hereinafter 'Formula') was Tretorn's exclusive distributor in the United Kingdom until 1989.

(4) Fabra SPA, (hereinafter 'Fabra'), was Tretorn's exclusive distributor in Italy until mid-1993.

(5) Tenimport SA (hereinafter 'Tenimport'), was Tretorn's exclusive distributor in Belgium.

(6) Zürcher AG, (hereinafter 'Zürcher'), is Tretorn's exclusive distributor in Switzerland.

(7) Van Megen Tennis BV, (hereinafter 'Van Megen'), is Tretorn's exclusive distributor in the Netherlands.

II. THE MARKET FOR TENNIS BALLS

(8) The market is oligopolistic. Four producers share most (about 80 %) of the Community market for first-grade balls:

— Dunlop Slazenger International: 39 % (Dunlop 28 %, Slazenger 11 %),

— Dunlop France: 19 %,

— Penn: 16 %,

— Tretorn: 11 %.

These figures are estimated by Dunlop Slazenger International (1986): see Commission Decision 92/261/EEC, Newitt Dunlop Slazenger International and others [4]. The Commission has no reason to suppose that any significant change

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

[3] In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 (2) of Regulation No 17 concerning non-disclosure of business secrets.
[4] OJ No L 131, 16. 5. 1992, p. 32.

has taken place since. Tretorn sales are mainly orientated on Europe.

(9) According to the producers, there are no major technological barriers to entry. Barriers are of an economic nature and include the production volumes necessary for profitability and the presence on the market of a small number of well-established enterprises with brand-name loyalty, the latter supported by sponsorship of major events and the system of national associations granting 'official ball' status to certain brands.

(10) Although 'first-grade balls' are technically fully substitutable, brand loyalty leads to a much lower level of substitution than would be expected. Also, the cross-elasticity of demand is low.

III. TRETORN'S DISTRIBUTION SYSTEM

(11) Tretorn AB uses its own subsidiaries to distribute in Germany and Denmark, and in other Member States Tretorn AB or its subsidiary Tretorn set up a network of exclusive distributorships.

IV. THE BASIS OF THE OBJECTION

(12) On the basis of the information available, the Commission carried out investigations at the premises of various tennis ball companies, including those of Tretorn. This investigation uncovered documents and correspondence which show that Tretorn actively erected barriers against parallel imports of its products within the Community.

V. GENERAL EXPORT BAN AND BARRIERS ERECTED BY TRETORN AGAINST PARALLEL IMPORTS

(13) Since 1987 at least, Tretorn has, in concertation with its exclusive distributors within and outside the Community, introduced an export ban in its exclusive distribution system and has set up a series of mechanisms aimed at implementing and reinforcing that ban.

(14) Those mechanisms consisted of: systematic reporting and investigation of instances of parallel imports; marking of products to identify the origin of parallel imports; and suspension of supplies to specific markets to prevent actual or potential parallel imports.

(15) Generally, Tretorn's intention to implement all the above measures is evidenced by a fax, from Tretorn AB to Zürcher, its Swiss distributor, dated 6 June 1989. In that fax Tretorn AB stated:

> '... our policy is to protect each and every distributor from grey market imports. We have also ... implemented many controls, designed new packages, refused several orders, etc., in order to keep this grey market business at a minimum.
>
> ... we are always prepared to listen to new ideas and proposals re how to stop this business.'

1. Export ban

(16) It appears from various documents that there was an agreement or a concerted practice between Tretorn and its distributor in the United Kingdom to prevent supply to dealers likely to engage in parallel exports.

(17) In a telex dated 13 February 1987 to Formula, Tretorn specifically warned Formula against supplying to Newitt Ltd (hereinafter 'Newitt') of York. Tretorn also informed Formula that Dunlop Slazenger International Ltd (hereinafter 'DSI') had already stopped dealing with Newitt and had curtailed supplies to JJB (another, but smaller, possible parallel exporter).

(18) Newitt was again singled out, along with JJB, at a meeting between Tretorn and Formula at Wellebourne on 18 February 1987. Tretorn stated that the relationship between Formula and Tretorn would be in jeopardy if balls supplied to Formula turned up as parallel imports in other European countries. Formula gave an assurance that it would not ship to any customer who would export.

(19) In a fax of 17 April 1987, Tretorn informed Formula that cheap balls had appeared as parallels in certain retail outlets in Switzerland. According to the date codes they had all been shipped to Formula. By letter of 6 May 1987, Formula assured Tretorn that supply via Newitt would not be an issue again.

(20) The fact that the general export ban was the result of an agreement between Tretorn and its distributors and not the result of unilateral action by Tretorn is evidenced in part by the following correspondence:

A letter of 7 November 1986 from Formula to Newitt; a telex of 20 January 1987 from Formula to Newitt again; letters of 6 and 11 May 1987 from Formula to Tretorn.

In the letter of 7 November 1986, Formula informed Newitt that its 'immediate concern is to penetrate the United Kingdom market and not actively canvass export business, as this may well disturb Tretorn's existing network'.

In the telex of 20 January 1987, Formula informed Newitt that its distribution agreement with Tretorn AB prohibits exports to 'certain European countries' and suggests that Newitt 'clarify any potential export business'. In those cases, Formula will 'ship direct, where necessary, into those countries which do not conflict with Tretorn's established distribution network'.

In the letter of 11 May 1987, Formula informed Tretorn that an order from Newitt had been accepted on the basis that the balls were to be re-sold only on the United Kingdom market. The Formula invoice was marked 'For re-sale in United Kingdom-territory only'. In the same letter Formula promised not to supply Newitt any more.

(21) Even with those assurances from Formula, which clearly show its participation in the agreement on the export ban, Tretorn was not confident that Formula would not sell to Newitt and took steps to change to another United Kingdom distributor (Tretorn's international note of 11 May 1987).

2. **Reporting and investigating parallel imports**

(22) Tretorn itself or Tretorn's distribution network reported parallel importers wherever there was evidence of such imports.

(23) Reference is made to the faxes of 6 June 1989 and 17 April 1987 respectively, quoted at paragraphs 15 and 19.

(24) In July 1987, Van Megen informed Tretorn that Tretorn balls were 'again turning up' in Holland. Tretorn asked Van Megen to forward the code number to it to allow it to find out 'which country has shipped' (fax from Tretorn to Tretorn AB dated 16 July 1987).

(25) In an internal Tretorn note dated 20 June 1988, Van Megen was said to have parallels from two different sources. He hoped to obtain date codes.

(26) In a fax dated 15 November 1988, Fabra informed Tretorn that they had identified a parallel importer in Italy, Fabra having obtained an invoice from a customer who bought a carton of balls from the parallel importer. They asked Tretorn to comment. Tretorn answered by fax dated 21 November 1988, asking for information about the type of packaging and the original shipment. By telex dated 24 November 1988, Fabra answered those questions.

(27) In a telex dated 5 December 1988, Fabra informed Tretorn of the name of another Italian parallel importer.

(28) In a fax dated 10 January 1989, Tretorn AB's German subsidiary reported a 'German exporter' who had tried to purchase Tretorn balls. Tretorn Germany refused to sell the balls. The exporter expressed its intention to buy Tretorn balls direct from the USA. Tretorn Germany informed Tretorn AB, asking it to inform Tretorn and Tretorn USA so as to prevent any sales to this presumed parallel exporter.

(29) The minutes of 22 February 1989 of a meeting between Fabra and Tretorn expressed Fabra's concern about cancelled orders due to parallel imports. It was decided that Fabra should inform Tretorn immediately of any deterioration in the situation.

(30) In a fax dated 27 February 1989, Tenimport informed Tretorn that parallel exports were on their way to Italy via Belgium and expressed its concern about the significantly lower prices offered by Tretorn to other distributors.

(31) Following Tenimport's fax dated 27 February 1989 Tretorn asked Fabra, in a telex dated 28 February 1989, for information concerning the parallel importer. The telex stated that Tretorn was monitoring the situation in order to ensure that the parallal importer did not receive any parallel-imported balls. In a fax from Fabra to Tretorn of the same day, Fabra replied that they had not been able to trace the parallel importer, and Fabra therefore asked for more information.

(32) In a fax dated 21 March 1989, Fabra identified and gave the address in France of a so-called 'parallel' and requested an investigation.

(33) The minutes of a meeting held on 5 April 1989 state that 'both parties (are) concerned about parallel ...' and Tretorn agreed with Fabra to share the costs of an investigation as to which of its customers in France was exporting to Italy.

(34) In a fax dated 6 June 1989, Tretorn AB complained to its German subsidiary that balls

intended for the United States Army in Germany had ended up in Switzerland, thereby causing Tretorn and its Swiss distributor 'great problems'. While informing Tretorn Germany that Tretorn AB's marketing contribution for these balls was cancelled, Mr Alven asked him to investigate to find out 'how this could have happened' and to see what steps should be taken.

3. **Marking of products**

(35) The evidence in the Commission's possession indicates that Tretorn marked their tennis balls with date codes which would allow the origin of parallel imports to be traced. Numerous references to these codes and their use are found in Tretorn's correspondence. Moreover, Tretorn admits having used different packaging with a view to making parallel exports less attractive.

(36) In a letter dated 13 April 1987, Zürcher informed Tretorn of parallel imports to Switzerland, and gave specific date codes, requesting Tretorn to take action.

(37) In a fax dated 17 April 1987, Tretorn pointed out to Formula that date codes on balls which had been parallel-imported into Switzerland showed that the balls came from a shipment to Formula.

(38) In a fax dated 15 May 1987 Tretorn informed Formula that date codes clearly show that balls shipped to Formula ended up in Switzerland as parallel imports, concluding that Formula was guilty for having sold to Newitt.

(39) The minutes of a meeting between Tretorn and Fabra on 6 October 1988 show that Tretorn agreed to prepare a sticker to put on ball packs to show that Fabra was the Tretorn distributor. The minutes state that this device would allow the Fabra salesmen to identify parallel imports with the retailers.

(40) In a letter dated 17 March 1989, Fabra gave Tretorn details of codes on packs of balls sold by parallel importers, clearly intending this as a means of identifying the origin of the balls.

(41) In an internal Tretorn memorandum of 17 April 1989, it is stated that the colour of the packaging of Tretorn balls meant for the American market was changed so that it differed from the colour of the packaging of balls for the European market. Tretorn however did not believe that this would 'alleviate the problem' of the re-exports of balls from the USA to Europe which had increased at an 'unprecedented rate despite all the efforts to control/stop this by our American colleagues'.

(42) The fax of 6 June 1989 quoted at paragraph 15 also makes reference to designing new packages as a measure to prevent parallel imports.

(43) Likewise, in an undated market overview (presumably conducted in early 1988), Tretorn has stated that one of the ball types will be sold in tubes in Italy in order to combat parallels from France.

In an internal memorandum dated 23 August 1988, Tretorn also contemplated changing the names of the balls exported to the USA in order to make their reexportation to Europe more difficult. It considered however that 'judging from past experience in Switzerland this would not solve the problem'.

4. **Suspension of supplies to prevent parallel imports**

(44) As stated by Tretorn in the fax of 6 June 1989 quoted at paragraph 15, it appears that Tretorn or its distributors suspended supplies to different markets in order to prevent parallel imports.

(45) Reference is made to the letters of 6 and 11 May 1987 quoted at paragraphs 19 and 20, and to the fax of 10 January 1989 cited at paragraph 28.

(46) In an internal Tretorn memorandum dated 23 August 1988, it is recommended to stop supplies to the United States market because Tretorn USA were unable to prevent re-exportation. Balls shipped to the United States were turning up as parallel imports in the Netherlands and Switherland. The United States balls bads were sold at half the price of the balls marketed in Switzerland by the Tretorn distributor, Zürcher.

(47) In an internal memo of 2 November 1988, it is stated that Tretorn USA promised once again to do all they could to prevent parallel exports from the USA. They informed Tretorn that they had stopped a shipment in San Diego the week before.

(48) In the same memo of 2 November 1988, Tretorn stated that a decision had been taken to stop

shipments to the United States market if there were 'major problems' with parallel imports in the spring of 1989.

(49) In a fax dated 6 February 1989 from Tretorn to Fabra giving the minutes of a meeting between those two parties, it is stated that Fabra had some problems with 'grey imports' from France and that Tretorn would do everything possible to stop these imports. Tretorn's memorandum to Fabra of 22 February 1989 makes it clear that shipments to France were actually suspended for February and March 1989 while investigations into parallel imports were carried out. Tretorn stated that the suspension ensured that there would be no more parallel trade.

(50) In an internal memorandum of 17 April 1989 Tretorn suggested the immediate cessation of supplies to all mail order companies and certain large chain stores in the USA in order to try to prevent parallel imports into Europe.

B. LEGAL ASSESSMENT

I. ARTICLE 85 (1)

(51) The general export ban and the barriers erected to parallel imports, as described above, should not be regarded as the result of unilateral action by Tretorn [1] but as an integral, although unwritten, parts of its distribution or sales agreements, or at least as the result of concerted action by Tretorn and its distributors.

The general export ban and the barriers had the direct object and effect of restricting competition, affecting trade between Member States and partitioning the common market. This, in fact, constitutes an obstruction of the achievement of a fundamental objective of the Treaty, the integration of the common market. It also allows Tretorn and its distributors to apply a differentiated price policy.

A. Agreements and/or concerted practices: restrictions of competition

1. *General Ban on Exports (paragraphs 15 and 16 to 21)*

(52) The fax dated 6 June 1989 from Tretorn to Zürcher, and the correspondence between Tretorn and Formula, in particular, show that Tretorn, in combination with its exclusive distributor for the United Kingdom, set up a distribution system providing for total territorial protection and therefore aimed at excluding all parallel trade.

This shows:

— that Tretorn's exclusive distribution arrangements include an unwritten undertaking by Tretorn to provide its distributors with absolute territorial protection,

— that sales agreements between Tretorn and its retailers and distributors include an unwritten condition of sale prohibiting them from exporting or supplying to any company likely to export.

(53) The fax mentioned in paragraph 52 indicates that the agreement or concerted practice applies 'to protect each and every distributor from imports'. As was stated above, there is a Tretorn exclusive distributor in all Community countries, except Germany and Denmark, where Tretorn used its own subsidiaries as distributors.

(54) Tretorn's determination to implement this agreement or concerted practice is evidenced by the minutes of a meeting between Tretorn and Formula Sport on 18 February 1987 (see paragraph 18).

(55) Clearly the agreement or concerted practice was implemented not just by Tretorn, but also in particular by the United Kingdom distributor (see paragraph 20).

(56) Those agreements or concerted practices between Tretorn and its exclusive distributors to prevent parallel trade and to monitor the implementation thereof, are specifically prohibited by Article 85 (1).

2. *Reporting and investigating parallel imports (paragraphs 15 and 22 to 34)*

(57) Tretorn's policy of preventing parallel imports was further implemented by its distributors by reporting to Tretorn instances of parallel imports.

(58) This system of reporting and investigation in order to identify parallel importers and cut off supplies to them is clearly the result of an agreement or concerted practice between Tretorn and its distributors and reinforces the ban on parallel exports in breach of Article 85 (1).

[1] 'Tretorn' must be understood in this part of the Decision as designating either Tretorn Sport Ltd or Tretorn AB.

3. *Marking of products (paragraphs 15 and 35 to 43)*

(59) The marking of products played an integral part in the implementation of Tretorn's policy to prevent parallel imports. Balls were marked with date codes and/or exclusive distributor stickers for the specific purpose of identifying the origins of parallel imports.

(60) Clearly, Tretorn's distributors made use of this marking system when reporting on parallel importers.

(61) This system of product-marking is also in agreement or concerted practice aimed at implementing and reinforcing the ban on parallel trade, thereby protecting Tretorn's distributors, contrary to Article 85 (1).

4. *Suspension of supplies (paragraphs 15 and 44 to 50)*

(62) As shown in paragraphs 44 to 50 Tretorn clearly suspended supplies to different markets in order to prevent parallel imports.

(63) It is clear that the suspension of supplies was made in coordination with Tretorn's distributors, who asked Tretorn to take action when parallel imports turned up on their markets. These actions, which reinforced and implemented the ban on parallel trade, are clear examples of concerted practices contrary to Article 85 (1).

B. **Effect on trade between Member States**

(64) The ban on exports contained in the Tretorn distribution agreements has the direct object of hampering trade between Member States. The ban is a general one, and affects trade throughout the Community, since Tretorn has distributors or subsidiaries in almost all Community countries. This results in a partitioning of the common market.

(65) Tretorn's prevention of parallel exports from the Community and into Switzerland meant that only Tretorn could deliver its products to the Swiss market through its distributor Zürcher while others in the Community were excluded from any such exports. The impediment of parallel exports from the Community and into Switzerland affected trade between Member States since it prevented Swiss dealers from buying from one Member State and re-exporting to a second Member State.

Tretorn maintains in its replies that the situation is highly unlikely since the same opportunity for re-exportation does not arise, because the price of tennis balls in Switzerland is estimated to be 15 to 20 % higher than in the Community.

Such an allegation is rejected on the grounds that it is likely that Swiss dealers would, in the absence of the restrictive practices, buy tennis balls at the lowest Community prices and resell them, even without physically shipping them to Switzerland, in Member States where the prices are higher.

The effect of the restrictive practices is therefore to maintain price differentials between Member States.

(66) Tretorn's prevention of parallel exports from the USA and into Switzerland also had an appreciable effect on trade between Member States, since the price structure in Europe and in the USA made re-exportation into the Community highly probable.

C. **Main elements of Tretorn's and its distributors' position**

(67) Only Tretorn, Tenimport and Van Megen replied to the statement of objections. Formula became insolvent, whilst Zürcher considered that the Treaty did not apply. A hearing was held on 16 November 1993.

(68) In the written and oral replies to the statement of objections, Tretorn generally denies that it had the intention of preventing parallel import or export, or that it had taken any measures having such an effect. Tretorn argues that even if some of the documents may suggest that Tretorn prevented parallel trade, the documents were formulated to pay 'lip service' to the distributors and that no actual measure has ever been taken.

Further, Tretorn maintains that it is the distributors who have taken the initiative leading to the contested actions.

This argument cannot be accepted.

Firstly, the documents referred to in paragraphs 13 to 50 demonstrate that Tretorn and its distributors have initiated a number of measures to create barriers to avoid parallel import or export and that Tretorn even penalized one of its own distributors for having sold to a parallel exporter.

As to Tretorn's intention, the wording of the correspondence to Tretorn's distributors and of internal Tretorn documents does not support the conclusion that Tretorn took measures merely to fall into line with the demands of the distributors.

Even assuming that Tretorn had not taken measures with a view to preventing parallel import or export, the system of distribution organized with its distributors resulted in a partitioning of the common market for Tretorn's tennis balls and the barriers set up resulted in encouraging the distributors to prevent parallel trade. This is acknowledged by Tretorn itself in its reply.

Tretorn also claims that, as far as Formula is concerned, the reason for preventing it from selling to parallel exporters was its bad performance in the United Kingdom territory. Even if this were true, it cannot constitute a justification. Besides, it is not the Commissions's place to evaluate the performance of Tretorn's distributors. The correspondence between Tretorn and Formula (see paragraphs 16 to 21) shows clearly that the aim of preventing parallel exports was to avoid the disruption of Tretorn's closed distribution system in other countries.

Finally, Tretorn also claims that it has itself delivered direct to dealers which Tretorn knew to be parallel importers. Even if this were the case, it does not alter the fact that the other hindrances to parallel exports or imports exercised by Tretorn constitute an infringement.

Tenimport

(69) Tenimport points out that the fax which is referred to by the Commission (see paragraph 30) must be understood in its context. Tenimport considers that Tretorn charged it the highest prices and that the object of the quoted fax was not to prevent parallel imports but to ask Tretorn to explain how some dealers could benefit from much lower prices.

Even if this interpretation of the text of the quoted fax were correct, the fact remains that the information given by Tenimport has resulted in measures taken by Tretorn and Fabra with a view to suppressing that source of parallel imports (see paragraph 31). Since the behaviour of Tenimport had the effect, even if it was not intended, of restricting competition and partitioning the common market, it constituted an infringement of Article 85 (1).

Van Megen

(70) Van Megen explained that its object in reporting date codes to Tretorn was not to prevent parallel imports but to check whether Tretorn did not supply direct in its territory. It declares that it itself supplies companies that it knows to be parallel exporters.

Even if the interpretation given by Van Megen were correct, the fact remains that the information was given in the context of a ban on parallel exports of which Van Megen was well aware and it actively participated in identifying the source of the parallel imports with a view to suppressing it (see paragraphs 24 and 25).

II. REGULATION (EEC) No 1983/83

(71) Article 1 of Commission Regulation (EEC) No 1983/83 [1] provides that exclusive distribution agreements are in general exempt from the prohibition in Article 85 (1) if they fulfil the conditions set out in that Regulation.

The exclusive distribution system operated by Tretorn does not however qualify for block exemption as it includes an unwritten undertaking giving absolute territorial protection to Tretorn's distributors, and implementation of the system involved — as was stated above — agreement or concerted practices to prevent parallel imports. For that reason the system falls within Article 3 (d) of Regulation (EEC) No 1983/83.

III. ARTICLE 85 (3)

(72) The Tretorn distribution agreements were not notified to the Commission and do not therefore qualify for an individual exemption. The agreements would not have qualified for exemption even if they had been notified, because of the export bans involved in the agreements, which are not indispensable to the effectiveness of Tretorn's distribution system.

IV. ARTICLE 3 OF REGULATION NO 17

(73) Pursuant to Article 3 (1) of Regulation No 17 the Commission may, if it finds that there has been an infringement of Article 85, require by decision that the undertakings concerned bring such infringements to an end.

(74) Tretorn should be required, in so far as it has not already done so, to terminate the export bans contained in its sales agreements and the absolute territorial protection involved in its distribution system. Tretorn and those of its abovementioned exclusive distributors which are still active, namely Tenimport, Zürcher and Van Megen should also be required to end the agreements or concerted practices described in paragraphs 13 to 50.

[1] OJ No L 173, 30. 6. 1983, p. 1.

V. ARTICLE 15 (2) OF REGULATION No 17

(75) Pursuant to Article 15 (2) (a) of Regulation No 17 the Commission may, by decision, impose fines of from ECU 1 000 to 1 000 000 or a sum in excess thereof but not exceeding 10 % of the turnover in the previous business year on undertakings which, either intentionally or negligently, infringe Article 85. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

(76) Tretorn could not have been unaware that the export ban in its distribution system and conditions of sale infringed Article 85 (1) and that it has always been the policy of the Commission and the Court of Justice, in their decisions, to regard such bans as particularly serious infringements. Tretorn and its relevant distributors could not also have been unaware that the same applies to the various concerted practices aimed at preventing parallel imports. Consequently, a fine is to be imposed on Tretorn and its relevant distributors (with the exception of Tenimport). The documents in the Commission's possession prove that the infringement was concerted between Tretorn and its subsidiary companies, Tretorn Sport in particular, and it is therefore appropriate to fine Tretorn AB and Tretorn Sport jointly and severally.

(77) The infringement committed by Tretorn and its distributors go back at least to 1987 (see paragraphs 13 to 50). There is no reason to believe that the practices are terminated. However, for the purpose of the fine only the years 1987 to 1989 will be considered.

It should finally be mentioned that, during the course of the procedure, Tenimport collaborated with the Commission, confirming the existence of an unwritten but actual prohibition on exports. It considered that the recent cancellation of its distribution agreement with Tretorn could only be understood as meaning that Tenimport had not complied with that prohibition.

(78) In determining whether to impose fines and at what level the Commission has taken into account the fact that some of Tretorn's distributors have taken a particularly active part in preventing parallel imports; but also that such participation was in other cases of a limited nature and has to be set in the context of Tretorn's general policy of prohibiting any export of its products. Moreover, the part played by Tenimport was of a less substantial nature and it is therefore justified in refraining from imposing a fine on that untertaking,

HAS ADOPTED THIS DECISION:

Article 1

Tretorn Sport Ltd and Tretorn AB have infringed Article 85 (1) of the EC Treaty by applying a general export ban to their distributors of tennis balls, implemented through monitoring measures and sanctions, through the reporting and investigation of parallel imports of tennis balls, the marking of tennis balls, and the suspension of supplies in order to prevent parallel imports and exports of tennis balls.

Formula Sport International Ltd has infringed Article 85 (1) by participating in the implementation in the United Kingdom of the export ban and suspension of supplies in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

Fabra SPA has infringed Article 85 (1) by participating in the implementation in Italy of the export ban and suspension of supplies through the reporting and investigation of parallel imports of tennis balls, the marking of tennis balls and the suspension of supplies in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

Tenimport SA has infringed Article 85 (1) by participating in the export ban and the suspension of supplies, through the reporting of parallel imports to Tretorn with the effect that Tretorn and its Italian exclusive distributor took measures with a view to eliminating those imports.

Zürcher AG has infringed Article 85 (1) by participating in the implementation in Switzerland of the export ban and suspension of supplies, through the reporting and investigation of parallel imports of tennis balls and the marking of tennis balls in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

Van Megen Tennis BV has infringed Article 85 (1) by participating in the implementation in the Netherlands of the reporting and investigation of parallel imports in order to enforce Tretorn Sport Ltd's policy of preventing parallel imports and exports of tennis balls.

Article 2

A fine of ECU 600 000 is hereby imposed on Tretorn Sport Limited and Tretorn AB jointly and severally and fines of ECU 10 000 each on Formula Sport International Ltd; on Fabra SPA; on Zürcher AG; and on Van Megen Tennis BV, in respect of the infringements referred to in Article 1.

The fines shall be paid, in ecus, to the Commission of the European Communities, account No 310-0933000-43, Banque Bruxelles Lambert, Agence Européenne, Rond Point Schuman 5, B-1040 Brussels, within three months of notification of this Decision.

After the expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Institute on its ecu operations on the first working day of the month in which this Decision is adopted, plus three and a half percentage points.

Article 3

Tretorn Sport Ltd, Tretorn AB, Fabra SPA, Tenimport SA, Zürcher AG and Van Megen Tennis BV shall, in so far as they have not already done so, terminate the infringements referred to in Article 1. They shall refrain from adopting any other measures having equivalent effect.

Article 4

This Decision is adressed to:

Tretorn Sport Ltd
Industrial Estate
Portlaoise
IRL-County Laois

Tretorn AB
Rönowsweg 10 Box 931
S-25100 Helsingborg

Formula Sport International Limited
c/o Arthur Andersen
PO Box 55
1 Surrey Street
UK-London WC2R 2NT

Fabra SPA
Via Sansovino 243/60
I-10151 Torino

Tenimport SA
Rue des Cottages 73
B-1180 Bruxelles

Zürcher AG
Gewerbestrasse 18
CH-8800 Thalwil

Van Megen Tennis BV
Parmentierweg 5
NL-5657 EH-Eindhoven

This Decision shall be enforceable pursuant to Article 192 of the EC Treaty.

Done at Brussels, 21 December 1994.

For the Commission
Karel VAN MIERT
Member of the Commission