II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 4 December 1996

relating to a proceeding pursuant to Article 85 of the Treaty establishing the European Community and Article 53 of the EEA Agreement

(IV/35.679 — Novalliance/Systemform)

(Only the German text is authentic)

(Text with EEA relevance)

(97/123/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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 Austria, Finland and Sweden, and in particular Article 15 (2) thereof,

Having regard to the Commission decision of 16 August 1996 to initiate proceedings in this case,

Having regard to the complaint made pursuant to Article 3 of Regulation No 17,

Having given the undertaking concerned the opportunity of being heard on the matters to which the Commission has objected, 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 Article 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

A. Introduction and background

(1) On 4 August 1995 the Commission received a complaint from a French company, Novalliance, concerning the behaviour of a German company, Systemform GmbH. Requests for information were sent to both Novalliance and Systemform GmbH. Both of these were answered, and Systemform has also commented on the complaint and provided information which it believed to be relevant to the Commission's consideration of the issues raised by the complaint. The last such communication was received from Systemform GmbH on 12 April 1996. On 12 August 1996 a Statement of Objections was sent to Systemform. Systemform replied on 2 October 1996, making certain comments and observations and waiving the right to an oral hearing.

(2) The complaint alleged that certain clauses in contracts entered into between Systemform and its distributors and actions taken by Systemform to enforce these clauses with respect to Novapost, a Greek company that supplied Novalliance with Systemform products, were in breach of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement. The complaint also alleged other actions by Systemform GmbH with respect to other

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

distributors and claimed that certain behaviour of Systemform could be regarded as an abuse of a dominant position within the meaning of Article 86 of the EC Treaty and Article 54 of the EEA Agreement.

(3) Following consideration of the complaint and the information received subsequently the Commission has decided to proceed against Systemform GmbH for breaches of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement in its contracts with distributors. This Decision therefore relates to breaches of those Articles in the distribution agreements between Systemform and its distributors.

(4) The Commission is not proceeding against Systemform with respect to the allegation that it acted illegally to enforce an export ban on its distributor, Novapost. Novalliance and Novapost form a single entity, being under the common majority control of Eurinvest, and Novapost has appointed Novalliance as a distributor. Accordingly, any attempt by Systemform to prevent its exclusive distributor from selling goods actively outside the contract territory through another company of the same group or through appointing distributors is justifiable.

B. The parties

Novalliance

(5) Novalliance, the complainant, is a French dealer in office equipment specializing in computer printing and post-handling systems. According to its 'Présentation et programme' ([1]), this company was formed on 17 June 1994 and commenced operations in September 1994. According to this document, 68,44 % of its share capital is owned by a company called Eurinvest. Eurinvest's representative on the board of directors of Novalliance is one Mr Bruno Vitali. Mr Vitali is also president of Novalliance. According to information received from Eurinvest ([2]), its shareholding in Novalliance is now 76 %.

Systemform

(6) Systemform GmbH is a German company active in the fields of printing standard forms and manufacturing equipment for processing computer printouts and running lotteries. According to the complaint, it employs approximately 400 people and was part of the PWA group of companies. According to information received from Systemform GmbH ([3]), the company was sold to ECV Edition Cantor Verlag in September 1995.

In its reply to the Commission's Statement of Objections, Systemform stated that its beneficial owner is now a sole trader, Mr René Enderle. According to its accounts for 1994 ([4]), its total sales were [...] DM ([5]). Of this figure [...] DM was accounted for by the 'Data-Technik' division, with which this case is concerned.

Novapost

(7) Novapost is a Greek company which has entered into a distribution contract with Systemform. According to information provided by Eurinvest ([6]), 99 % of the shares in Novapost are owned by Eurinvest. The same letter states that Eurinvest's share of the voting rights in Novapost is 50 %. According to a 'business information report' obtained by Systemform and supplied to the Commission ([7]), the only other shareholder in Novapost is one Ms Noëlle Gaigne. According to Eurinvest's letter of 5 February 1996 Ms Noëlle Gaigne is the sole managing director of Eurinvest. According to the complaint, Novapost has appointed Novalliance as its distributor in France and a copy of a contract between them is attached to the complaint ([8]).

C. The relevant markets

Product market

(8) The products with which this complaint is concerned are devices for handling and processing large computer printouts. Large computer printouts, such as a set of payroll forms or a detailed management report, are often printed on continuous computer stationery, which is to say that the printout is on one long piece of paper, which is perforated at intervals to allow it to be split into manageable sheets. This continuous stationery often consists of several superimposed layers of self-carbonating paper to allow the automatic production of several copies of a report. Continuous stationery also has a line of perforations running down both sides to allow it to be rapidly fed through a bulk printer. The devices being considered here automatically convert such output into conveniently usable form. They perform some or all of the following functions: splitting the con-

([1]) Annex 14 to letter of 30 November 1995 from Cleary, Gottlieb, Steen & Hamilton on behalf of Systemform GmbH.
([2]) Letter from Eurinvest to the Commission dated 5 February 1996.
([3]) Letter from Cleary, Gottlieb, Steen & Hamilton to the Commission on behalf of Systemform GmbH of 3 October 1995.
([4]) Annex 4 to letter from Cleary, Gottlieb, Steen & Hamilton to the Commission on behalf of Systemform GmbH of 30 November 1995.
([5]) 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.
([6]) Letter from Eurinvest to the Commission of 5 February 1996.
([7]) Annex 1 to letter from Cleary, Gottlieb, Steen & Hamilton to the Commission on behalf of Systemform of 10 April 1996.
([8]) Annex 6 to complaint.

tinuous roll of printed paper into separate sheets, removing the perforated strips from the side of the paper and separating and collating the carbon copies produced by the printer.

(9) The needs of users of this type of equipment varies greatly. A large concern such as an electricity utility might have to handle extremely large volumes of printout, for example to produce pay slips for all its employees on a regular basis. Other users might handle much smaller volumes of printout, might not require that the margins be removed or might produce a single copy of a printout and so not require a separating or collating facility. Such users can use relatively simple, low-volume, single-function devices. Systemform markets a range of equipment between these two extremes. Their 'V' range (V4000, V5000, V8000 and V9000) consists of portable combination machines that margin-trim, burst, decollate and sort printouts and can process between 2 500 and 8 200 12 inch (30 cm) documents per hour.

(10) The machines sold by Systemform are not substitutes for the type of large-scale equipment used for high-volume applications, and so fall into a separate product market from such machines [1]. Even for low to medium-volume applications, combination machines of the type sold by Systemform do not compete with the simpler, single-purpose machines and so form a separate market. The simpler, single-function machines are useful for firms who do not require all the functions of a combination machine, for example because they only produce a single copy of their printouts or do not require that margins be removed. The manufacturers of these new low to medium-volume combination machines have defined a new market for themselves as these new machines are the only practical choice for a low to medium-volume user who requires all the possible operations to be performed on printouts.

Geographic market

(11) Systemform manufactures this machinery in Germany and sells it in Germany through a network of dealers. As is set out in more detail below, it sells outside Germany through exclusive distributors appointed in various Member States. Certain aspects of the marketing and distribution of these goods appear to take place on a national basis. However the events leading to this complaint show that price comparison and trade sometimes take place across national boundaries in the EEA. The geographical market for this machinery could therefore be EEA wide. However this question can be left open, as the assessment of the restrictions is not affected by whether this is considered as a Europe-wide market or as a set of national markets.

Market structure

(12) According to Systemform, no independent studies of this market are available. However, Systemform has provided the Commission with its own estimates of market sizes and shares.

(13) Systemform provided the Commission with an estimate of the total European sales of machinery for handling computer printouts. They estimated that [...] worth of such machinery was sold in Europe. As noted above, the Commission finds that the relevant product market is the market for machinery capable of handling low to medium volumes of printout and which performs several operations on the printouts. The complainant provided estimates of the proportion which such machines represented, relative to total sales of machinery for handling printouts. Applying these proportions to the information provided by Systemform, the Commission estimated that Systemform had a market share of over [...] in the relevant product market. This estimate was set out in the Commission Statement of Objections and was not contested by Systemform.

D. **The distribution contracts**

Introduction

(14) Within Germany, before the beginning of 1994 Systemform employed its own sales force to promote the machines. From 1986 to 1993 it also had OEM-type agreements with Digital-Kienzle, Mannesmann and Siemens-Nixdorf for the sale of the machines in Germany. Since the beginning of 1994, six of the former sales people have been self-employed as dealers in Systemform machinery, with a dealer contract between them and Systemform. Outside Germany, Systemform has a network of exclusive distributors with whom it has a formal, written distribution contract or resellers with whom it has an oral agreement. In response to a request from the Commission, Systemform has provided copies of all agreements in force, or which have been in force between it and independent distributors. The following restrictions, in addition to the exclusivity mentioned above, have been identified in those contracts.

[1] The fact that high and low-volume equipment form separate markets was alleged in the original complaint, and agreed by Systemform in their letter to the Commission of 30 November 1995. Remaining analysis is based on product information from both Novalliance and Systemform.

Territorial restrictions

(15) The following territorial restrictions are imposed on the exclusive distributors currently operating outside Germany:

(16) (a) Secap France (contract signed on 4 April 1984)

Paragraph 4: 'All enquiries, offers or orders coming from a client situated outside the contractual territory, or from clients who are known to intend reselling the goods to customers outside Secap's contractual territory, must be transmitted immediately to Systemform, who will deal with them as they see fit. In any event, and unless such an obligation is prohibited by any national or supranational law applicable in the contractual territory, Secap will not directly or indirectly respond positively to such enquiries, offers or orders without the express, prior authorization of Systemform in writing.'

(17) (b) NV Geha SA, Luxembourg (contract signed on 28 January 1987): identical to (a).

(18) (c) Kondator AB, Sweden (contract signed on 29 December 1989)

Paragraph 3: '... The distributor will not sell the contract products mentioned in paragraph 1 to customers whose head office is located outside the contractual territory. Requests coming from companies located outside of the contractual territory will be passed on to Systemform by the distributor. Moreover, he will not sell the products in question to customers who have the known intention to deliver these products to areas outside the contractual territory. In justified exceptional cases, he must have Systemform's approval.'

(19) (d) Scani A/S, Denmark (contract signed before 31 December 1991): identical to (c).

(20) (e) Linetex SA, Spain (contract signed before 31 December 1991): identical to (c).

(21) (f) Moore Gesellschaft mbH, Austria (contract signed on 29 April 1991)

Paragraph 3: '... The distributor shall only sell the products covered by this agreement to customers whose head office is in the contractual territory. Orders coming from clients situated outside the contractual territory shall be transmitted to Systemform by the distributor. In addition, when the distributor knows that one of its customers intends to deliver products ordered from it outside the contractual territory, it shall specify that guarantee and maintenance services are not to be provided by the distributor itself, nor by Systemform, nor by any firm working for the latter.'

(22) (g) Novapost, Greece (contract signed on 22 June 1994)

Paragraph 3: '... The distributor will not sell the contract products mentioned in paragraph 1 to customers whose head office is located outside the contractual territory. Requests coming from companies located outside the contractual territory will be passed on to Systemform by the distributor.'

(23) (h) Speciaaldrukkerij Lijnco Groningen BV, The Netherlands (contract signed on 16 January 1995)

Paragraph 3: '... The distributor shall not sell the products mentioned in the first clause of this agreement to clients whose head office is outside the contractual territory. Orders coming from clients outside the contractual territory shall be transmitted to Systemform by the distributor.'

(24) The six dealers operating in Germany all have an exclusive relationship with Systemform and are bound by the following clause: 'The dealers shall only sell the contract products to clients whose head office is in the contractual territory. Orders coming from German clients whose head office is outside the contractual territory shall be transmitted by the dealer in question to the competent dealer. Orders coming from foreign dealers shall be transmitted to Systemform.'

(25) Systemform also inserted territorial restrictions in other exclusive distribution contracts which are no longer in force. These were as follows:

(26) (i) Computermail, UK (contract signed on 2 April 1984)

Paragraph 3: '... The dealer undertakes not to sell the products described in paragraph 1 of this agreement to clients whose head office is outside the contractual territory. Orders coming from potential clients situated outside the contractual territory shall be transmitted by the dealer to Systemform. The dealer also undertakes not to sell the relevant products to clients whom he knows intend to deliver the products outside the contractual territory. In certain exceptional cases which justify such a derogation, the dealer may be released from this rule by obtaining the consent of Systemform.'

(27) (j) Schleicher & Co., UK (contract signed before 31 December 1991): identical to (c).

(28) (k) Børge Andersen, Denmark (contract signed on 15 June 1984): identical to (i).

(29) (l) Berthom Groep BV, The Netherlands (contract signed on 9 November 1993): identical to (h).

Pricing restrictions

(30) The following clauses relating to prices are included in the contracts with exclusive distributors currently operating outside Germany:

(31) (a) Kondator AB, Sweden (contract signed on 29 December 1989)

Paragraph 14: 'Prices are established on the basis of current price costs. The prices are understood to be fob Prien am Chiemsee plant, packing not included. Price changes will be sent to the distributor within three months .... The sales prices for the contractual territory are established by Systemform and the distributor, taking into account the market conditions. The distributor must ensure that these established prices are competitive. It is expected that the distributor will pass on delivery time and warranty conditions offered by Systemform to his customers.' The prices referred to are set out in German Marks denominated price lists applied by Systemform to sales to all distributors. The 'sales prices' are the distributors' resale prices.

(32) (b) Scani A/S, Denmark (contract signed before 31 December 1991): identical to (a).

(33) (c) Linetex SA, Spain (contract signed before 31 December 1991): identical to (a).

(34) (d) Moore Gesellschaft mbH, Austria (contract signed on 29 April 1991)

Paragraph 14: '... Sales prices in force in the contractual territory shall be fixed by Systemform and the distributor in the light of conditions prevailing in the market. The distributor shall ensure that the prices so fixed will be competitive.'

(35) (e) Novapost, Greece (contract signed on 22 June 1994)

Paragraph 15: '... The sales price in the contract territory will be fixed by the distributor considering competitor's situation. If requested the distributor will inform Systemform about the fixed prices/ discounts.'

(36) (f) Speciaaldrukkerij Lijnco Groningen BV, The Netherlands (contract signed on 16 January 1995): identical to (d).

(37) The six dealers operating in Germany are all bound by the following clause: Paragraph 12: '... The non-compulsory base price applied to end-user customers shall be calculated with the dealer. This price will provide a margin of 35 % for the dealer. (All exceptions shall be decided in common). The installation of the machines shall be free.'

(38) Systemform also inserted pricing restrictions in other exclusive distribution contracts which are no longer in force. These were as follows:

(39) (g) Computermail, UK (contract signed on 2 April 1984)

Paragraph 14: '... Sales prices in force in the contractual territory shall be fixed by Systemform and the distributor in the light of conditions prevailing in the market. The distributor shall ensure that the prices so fixed will be competitive. It is agreed that the distributor shall apply the same delivery times and guarantee condition to its clients as Systemform.'

(40) (h) Schleicher & Co., UK (contract signed before 31 December 1991): identical to (a).

(41) (i) Børge Andersen, Denmark (contract signed on 15 June 1984): identical to (g).

(42) (j) Berthom Groep BV, The Netherlands (contract signed on 9 November 1993): identical to (d).

(43) In their reply to the Commission's Statement of Objection, Systemform's lawyers have stated that these clauses were not enforced and that their intention was to ensure that Systemform was informed about market conditions in different countries.

E. The Novalliance complaint

(44) On 22 June 1994, after six months of communications by fax and one meeting, Novapost was appointed an exclusive dealer of Systemform. The correspondence between Systemform and Novapost indicated that as Novapost had not yet provided a satisfactory bank guarantee it would have to pay in advance for any goods ordered, and that it was expected to send personnel to attend commercial and technical training in the Systemform products.

(45) On 19 May 1995 Novalliance, the complainant in this case, contacted Systemform for the first time. The company identified itself as a 'distributor' of Novapost's in France. It complained that the delays in Systemform's supplying goods to Novapost meant that it was not being supplied with those goods by Novapost. It described this as Systemform's imposing a ban on exports on Novapost and accused Systemform of being in breach of Community competition law.

(46) On 11 July 1995 a meeting, organized by Novalliance, took place in Paris between Novalliance, Systemform and Eurinvest. Novalliance presented Systemform with a draft of their complaint to the Commission. They stated the opinion that Systemform would be fined 10 % of their turnover [...] DM if the complaint was made.

(47) On 20 July 1995 Systemform sent a circular to all of its distributors, including Novapost. The letter stated that a company, Novalliance, had brought it to its attention that their distribution contracts contained 'clauses which could be interpreted as export prohibitions'. Systemform then stated that it had never sought to enforce such a prohibition, and that such a prohibition would be in breach of Community law. It concluded by saying that they expected that all their distributors would deal on normal terms with any orders received from outside their territory, and that this would include any orders from Novalliance.

(48) On 4 August 1995 Novalliance made its complaint to the Commission. Its complaint identified Novalliance as a distributor of Novapost's and enclosed a distribution contract between Novalliance and Novapost.

(49) Subsequent to this complaint Systemform has revised the standard contract it uses for appointing distributors. It has entered into a contract on the revised terms with a Portuguese distributor. The new contract falls within the block exemption for exclusive distribution pursuant to Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements [1]. In addition, on 2 April 1996 it wrote to its distributors stating that as a result of a Commission investigation it was amending its existing contracts. The amendment signed by Systemform and attached to those letters replaced the restrictions with one falling under the exclusive distribution block-exemption.

(50) On 28 June 1996 the Commission wrote to Novalliance indicating that the Commission was studying Systemform's contracts with its distributors, and expressing the preliminary view that although there were illicit clauses in the contracts Novalliance had no grounds to complain that these clauses had been applied against it. This view was based on the preliminary findings that:

(i) No clear-cut refusal to supply by Systemform, or any other action to enforce the ban on Novapost making export sales, had taken place.

(ii) There was a distribution contract in force between Novapost and Novalliance, so that any sales from Novapost to Novalliance had to be considered as active sales outside an assigned territory.

(iii) Novalliance's complaint was based on the claim that it had ordered goods from Novapost, Systemform's exclusive distributor for Greece, without Novapost taking the initiative. It is well established that although Systemform could prevent Novapost from actively selling Systemform products outside its assigned territory, Novapost must be allowed to meet unsolicited orders coming from outside its territory. However, Novapost and Novalliance appeared to be under the common control of a third company, Eurinvest. Such a group of companies forms a single economic entity, and any attempt by this economic entity, through any of its component parts, to put goods on sale outside its assigned territory would be an active attempt to export. If Systemform had refused to supply Novapost, it would merely have been preventing the entity, of which Novapost is a part, from actively exporting the goods outside the entity's assigned territory. Any sale by Novalliance in France would be an active sale outside its assigned territory by this group of companies.

II. LEGAL ASSESSMENT

A. Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement

(51) Pursuant to Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States or Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the common market or the territory covered by the EEA Agreement shall be prohibited.

(52) Systemform and its dealers and distributors are undertakings within the meaning of the Articles referred to above, and the distribution contracts between them are agreements within the meaning of these Articles. As explained below, these agreements have the object and the effect of restricting competition to an appreciable extent and of affecting trade between Member States or Contracting Parties and therefore infringe Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement.

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

(53) Systemform does not earn more than 33 % of its EEA turnover in the EFTA Member States. Therefore, pursuant to Article 56 of the EEA Agreement, any decision on the distribution agreements entered into between Systemform and its distributors and dealers falls within the field of responsibility of the Commission.

Existence of restrictions in the agreements entered into by Systemform

(a) Exclusivity

(54) Systemform's contracts with Secap, NV Geha SA, Kondator AB, Scani A/S, Linetex SA, Moore Gesellschaft mbH, Novapost and Speciaaldrukkerij Groningen BV are all exclusive contracts. The distributor is granted a territory within which further distributors will not be appointed and within which Systemform will not make sales itself. In return, the distributor will only purchase the products in question, or products substitutable for them, from Systemform. While such restrictions can often be automatically exempted pursuant to Regulation (EEC) No 1983/83 the presence of other restrictions in those contracts as described below removes them from the scope of this block exemption.

(55) The distribution contracts no longer in force, namely those between Systemform and Computermail Ltd, Schleicher & Co., Børge Andersen and Berthom Groep BV, were also exclusive in nature.

(b) Export bans

(56) The contracts currently in force between Systemform and Kondator AB, Scani A/S, Linetex SA, Moore Gesellschaft mbH, Novapost and Speciaaldrukkerij Groningen BV all originally contained a restriction in the following, or similar terms: 'The distributor will not sell the contract products mentioned in paragraph 1 to customers whose head office is located outside the contractual territory. Requests coming from companies located outside the contractual territory will be passed on to Systemform by the distributor.' (example taken from the Novapost contract) and most of them also contain a ban on selling to customers in the territory who intend to export the products. These restrictions remained in force at least until Systemform's amendments in April 1996.

(57) The contracts with Secap and NV Geha SA originally contained similar bans, with the qualification that the obligation did not apply where it was prohibited by law. For example, the Secap contract states: 'In any event, and unless such an obligation is prohibited by any national or supranational law applicable in the contractual territory, Secap shall not directly or indirectly respond positively to such enquiries, offers or orders without the express, prior authorization of Systemform in writing'. This apparent qualification does not change the intention or effect of the restrictive clause since it merely states the legal situation resulting from Article 85 (2) of the Treaty and Article 53 (2) of the Agreement, that restrictions of the type considered here are void. The inclusion of this wording clearly has the intention of preventing exports; it forms part of a pattern of behaviour seen in the other contracts, and if the intention was not present the contract should simply not have referred to any restriction of exports or any qualification of such a restriction. In addition this 'qualification' of the restriction is unlikely to change the effect the restriction would have on the distributor unless the distributor was unusually familiar with Community and EEA law for a small distributor of office equipment. Again, those restrictions were in force at least until April 1996.

(58) The exclusive-dealer contracts which were in force in the past but which are no longer in place, namely those with Computermail Ltd, Schleicher & Co., Børge Andersen and Berthom Groep BV, also contained a ban on selling to customers outside the allocated territory and most of them contained the further obligation not to supply customers known to be intending to export.

(59) The contracts with German dealers also contain a ban on selling to customers outside Germany or to customers with a known intention to export outside Germany.

(60) All of the contracts described above contain restrictions on the freedom of Systemform distributors to deal with customers of their choice. Distributors may only deal with customers within their assigned territory who they believe are not going to export the goods from the territory. The prohibition on selling to companies outside the territory prohibits both active export sales, where the distributor might actively sell Systemform products outside its assigned territory, and passive sales, where the distributor might want to meet an unsolicited order from outside its assigned territory. These clauses clearly have the object of restricting competition in the sale of Systemform products. In addition, whether or not Systemform has enforced these clauses, they will have had the effect of restricting

such competition. Individual distributors, having entered into these contracts will have been reluctant to make sales in breach of the contract, regardless of whether Systemform actively supervises their compliance with the clause.

(c) Restriction on the freedom of distributors to set their own resale prices

(61) The exclusive distribution contracts in force between Systemform and its European distributors all to a greater or lesser extent restrict the freedom of distributors to set their own resale prices. The contracts between Systemform and Kondator AB, Scani A/S, Linetex SA, Moore Gesellschaft mbH and Speciaaldrukkerij Lijnco Groningen BV all provide that the resale prices in the contract territory shall be set jointly by Systemform and the distributor concerned. The contract with Novapost requires that Novapost shall, on request, inform Systemform of its prices and discount rates. All of the old contracts contained provisions requiring the joint setting of prices. In addition, no matter how little action Systemform took to enforce the clauses, they may have had an effect on the behaviour of its distributors. For example, even if Systemform exerted no control in the 'joint' setting of prices and never requested pricing information, the presence of these clauses in contracts may have put pressure on Systemform's distributors to align their pricing policy with the perceived wishes of Systemform.

(d) Alleged actions by Systemform to enforce these export bans

(62) The complaint from Novalliance giving rise to this case alleges that Systemform has enforced these restrictions on exporting with respect to its distributor Novapost, thereby depriving Novalliance of its source of supply of Systemform products. The facts do not indicate that Systemform's actions with respect to Novalliance and Novapost are in breach of competition law. The relationship between Novalliance and Novapost is such that Novalliance does not enjoy the rights it claims and in any case there has been no clear-cut refusal to supply.

Effect on trade between Member States and/or Contracting Parties

(63) In view of the nature of the restrictions identified (partitioning of the EEA market and influence over resale prices), the market share of Systemform and the presence of the restrictions in several contracts covering much of the EEA, the restrictions are appreciable in nature.

(64) The agreements are and were likely to affect trade between Member States and/or Contracting Parties to an appreciable extent, given the market share held by Systemform and the fact that the goods are traded throughout the EEA.

(65) It appears from the number of these distribution agreements that Systemform products are sold throughout the EEA. Since Systemform has been granting a series of exclusive territories in the EEA, the majority of potential customers in the EEA for these machines will purchase them from distributors appointed under these agreements. In addition, the terms of the agreements expressly limit the ability of the distributors to sell the goods concerned outside their assigned territories.

B. Commission Regulations or EEA Acts on block-exemption

(66) These distribution agreements are not covered by Regulation (EEC) No 1983/83 nor by EEA Act No 383 R 1983, as they contain restrictions which are expressly not exempted by that Regulation or that Act.

(67) Article 2 of the Regulation and Act contain an exhaustive list of restrictions which are exempted under those block exemptions. The list does not include any restriction on the freedom of a distributor to meet unsolicited orders from outside its assigned territory, or orders from inside its territory where the goods may subsequently be sold outside the assigned territory, nor does it include any control or supervision by the manufacturer of the contract goods of the resale prices set by the distributor. However, this type of control is found in the contracts described above.

C. Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement

(68) The agreements in question were not notified and do not fall within the exceptions envisaged in Article 4 (2) of Regulation No 17 and Article 4 (2) of Protocol 21 of the EEA Agreement. Pursuant to Article 4 (1) of Regulation No 17 and Article 4 (1) of Protocol 21 of the EEA Agreement, a notification is a precondition for an exemption decision in application of Article 85 (3) and Article 53 (3).

(69) Moreover even if those contracts were notified, they could not be exempted from the application of Article 85 (1) and Article 53 (1), since not all of the conditions set out in those Articles for the grant of an exemption are met.

Possible benefits of the exclusive distribution agreements

(70) It is generally accepted that exclusive distribution agreements can contribute to technical and economic progress by improving the distribution of goods. For example recital 5 of the preamble to the block-exemption Regulation for such agreements states that: '... exclusive distribution agreements lead, in general, to an improvement in distribution because the undertaking is able to concentrate its sales activities, does not need to maintain numerous business relations with a larger number of dealers and is able, by dealing with only one dealer, to overcome more easily distribution difficulties in international trade resulting from linguistic, legal and other differences ...'. It is likely that the distribution contracts being considered here do have the benefits, associated with the exclusive distribution agreements exempted by Regulation (EEC) No 1983/83, however they contain extra restrictions that have the effect of distorting competition and partitioning the EEA market. In addition, as discussed below, the other conditions for exemption are not met.

The agreements allow a fair share of their possible benefits to customers

(71) Given the market share enjoyed by Systemform and the competition it faces any efficiencies or other benefits realized by a distribution agreement would be passed on to consumers through the operation of competitive pressure.

Indispensability of the restrictions

(72) However the restrictions mentioned above: the absolute ban on sales outside their assigned territory by the exclusive distributors and the German dealers, the bans on selling to customers with the known intention of exporting the goods and the controls on the prices set by distributors are not indispensable to the realization of the benefits described above.

(a) Export ban

(73) Many of the benefits described above are secured when a manufacturer appoints a distributor for its products who is located in a different area of the EEA to the manufacturer. The incentive for the distributor to invest in promoting and distributing the product in its area of the EEA is increased if the distributor is granted exclusive rights in this territory by the manufacturer. The effectiveness of this protection is increased by preventing other appointed distributors from undermining the exclusive territory by actively marketing the manufacturer's products in territories not assigned to them.

(74) However it is well established that extending this protection of exclusive territories by completely prohibiting distributors from making any sales outside the territories assigned to them or even from selling to customers with the known intention of exporting is not indispensable to realizing the potential benefits of an exclusive distribution system. The extra control does not lead to extra benefits from the distribution agreement and has the effect of partitioning the EEA market for the goods in question, so harming consumers. This has been established in a long line of cases, starting with Consten and Grundig v. Commission [1]. This thinking is also reflected in the block exemption legislation for exclusive distribution contracts where such restrictions are excluded from exemption.

(b) Pricing controls

(75) Control over the prices charged by a distributor is not related in any way to the possible benefits of an exclusive distribution contract, so the question of these restrictions being in any way indispensable does not arise.

No elimination of competition in the sector

(76) Given the market share of Systemform there does not seem to be any possibility that these contracts could have the effect of eliminating competition in this industry.

D. Article 3 (1) of Regulation No 17

(77) Article 3 (1) of Regulation No 17 provides that, where the Commission finds that there is infringement of Article 85 of the Treaty, it may by decision require the undertakings concerned to bring such infringement to an end. According to the information available to the Commission Systemform has now taken certain steps towards bringing its infringement of Article 85 to an end.

(78) As mentioned in paragraph 48 above, on 2 April 1996 Systemform took steps to amend the territorial restrictions in its distribution contracts.

[1] [1966] ECR 299.

(79) With respect to the pricing restrictions Systemform, in its response to the Commission's Statement of Objections, has indicated its willingness to bring this infringement to an end.

E. **Fines**

(80) Within the meaning of Article 15 (2) of Regulation No 17 and Article 3 (3) of Protocol 21 to the EEA Agreement, the Commission may impose fines from ECU 1 000 to 1 000 000 or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding year of the undertakings participating in the infringement, where, either intentionally or negligently they infringe Article 85 (1) of the EC Treaty or Article 53 (1) of the EEA Agreement. In fixing the amount of the fine, regard must be had to both the gravity and the duration of the infringement.

(81) The Commission considers that a fine should be imposed on Systemform for the following reasons:

1. The territorial restrictions have the clear object and effect of partitioning the EEA market.

2. The territorial and pricing restrictions are of types which have been clearly condemned by the Commission on numerous occasions in the past, starting with the Consten-Grundig case referred to above.

3. At least some of the restrictions in question have been found in all distribution contracts entered into by Systemform, indicating that these have been part of a consistent policy pursued since Systemform started to appoint distributors.

4. The breaches of Articles 85 and 53 have persisted over a long period of time. The earliest contract in question was signed in November 1983 (that with Berthom Groep BV) and contracts containing the restrictions in question were entered into with all new distributors until Systemform used a revised form of contract in November 1995 (when appointing Copidata-Ind. Grafica e Equipamentos, SA as its distributor in Portugal). The agreements with distributors in Sweden and Austria became subject to Article 85 or 53 on 1 January 1994. The territorial restriction remained in force until 2 April 1996 as described in paragraph 48. The pricing restrictions have remained in force, although in their response to the Commission's Statement of Objections, Systemform indicated their willingness to amend them in accordance with Community law.

5. Although Systemform has represented to the Commission that the contracts in question were drafted in ignorance of the relevant Community law, and that the extent to which they breach Community law therefore represents negligence rather than a deliberate attempt to restrict competition, the intention to partition the EEA market and at least to monitor resale prices was clear.

(82) In determining the amount of the fine the Commission has also taken into account that:

1. The only alleged enforcement of a ban on export sales was one applied to sales from Novapost to Novalliance. This was not established, and even if it had taken place would have been an incident where a manufacturer acted to prevent active export sales. A contract containing such a ban on active exports can benefit from the exclusive distribution block-exemption.

2. Systemform have not disputed the Commission's findings in this case. In particular in their response to the Commission's Statement of Objections they acknowledged that breaches of Community competition law had taken place.

3. The territorial restrictions in the contracts have now been amended and are now of the type that can be exempted under the exclusive distribution block-exemption. In particular Systemform started to amend their contracts before a Statement of Objections was issued to them.

4. Following receipt of the Commission's Statement of Objections, Systemform indicated willingness to amend the pricing restrictions in their contracts. Indeed, the Commission did not find any evidence that any action had been taken by Systemform to enforce these clauses, or to impose any other control over the resale prices of their distributors.

5. Systemform's turnover for the year to 31 December 1994 was [...] DM. Sales of machinery for processing computer printouts amounted to [...] DM for the same period,

HAS ADOPTED THIS DECISION:

Article 1

Systemform GmbH has infringed Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement by including an export ban and restrictions on resale prices in its contracts with distributors.

Article 2

A fine of ECU 100 000 is hereby imposed on Systemform GmbH, in respect of the infringement referred to in Article 1.

The fine shall be paid, in ecus, to the European Commission, 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

Systemform GmbH shall, in so far as it has not already done so, terminate the infringements referred to in Article 1.

Article 4

This Decision is addressed to:

Systemform GmbH
Geithstraße 18
D-83209 PRIEN

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

Done at Brussels, 4 December 1996.

For the Commission
Karel VAN MIERT
Member of the Commission