

COMMISSION DECISION

of 20 July 1978

relating to a proceeding under Article 85 of the EEC Treaty (IV/26.186 — Central Stikstof Verkoopkantoor)

(Only the Dutch text is authentic)

(78/732/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

I. THE FACTS

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Regulation No 17 of 6 February 1962 ⁽¹⁾, and in particular Article 3 thereof,

Having regard to the proceeding initiated by the Commission on 13 March 1967 against Centraal Stikstof Verkoopkantoor NV (currently BV), The Hague, Netherlands, and its shareholders — NV Nederlandse Staatsmijnen, Heerlen, the Netherlands, NV Maatschappij tot exploitatie van Kooksoevengassen (Mekog), IJmuiden, the Netherlands (these two companies subsequently merged their straight nitrogenous fertilizer business in Unie van Kunstmestfabrieken BV (UKF), Utrecht, the Netherlands, and NV Nederlandse Stikstofmaatschappij (NSM), Brussels, Belgium,

Having regard to the application for negative clearance filed by those companies pursuant to Article 2 of Regulation No 17 on 27 June 1969 and to the notification made by them on 27 March 1975,

Having heard the undertakings concerned in accordance with Article 19 (1) of Regulation No 17 and with Regulation No 99/63/EEC of 25 July 1963 ⁽²⁾,

Having regard to the opinion delivered on 23 May 1978 by the Advisory Committee on Restrictive Practices and Dominant Positions in accordance with Article 10 of Regulation No 17,

Whereas:

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

A. Subject

1. The proceeding concerns cooperation in the marketing of straight nitrogenous fertilizers between two Dutch fertilizer manufacturers, Unie van Kunstmestfabrieken BV (UKF) and Nederlandse Stikstof Maatschappij (NSM) operating through the joint sales agency Centraal Stikstof Verkoopkantoor BV (CSV), founded in 1948.

B. The relevant products

2. Of the various fertilizers containing nitrogen, by far the most important are synthetic nitrogenous fertilizers obtained from ammonia. Ammonia, which consists of nitrogen and hydrogen, is itself obtained from atmospheric nitrogen (N) and hydrogen derived from naphtha and natural gas. Ammonia production in the Netherlands is based on natural gas, as it is in the United Kingdom.

Ammonia is used in the manufacture of nitrogenous fertilizers but also in the manufactures of man-made fibres, explosives and amines. It can be sold as it is (82 % N) or processed by the manufacturer himself for various uses.

In fertilizer manufacture the ammonia is first processed into nitric acid or — by the addition of sulphuric acid — into ammonium sulphate.

Together with ammonia, nitric acid is the basic material for ammonium nitrate and is used — especially in the form of the AN (ammonium nitrate) solution — for the manufacture of:

- ammonium nitrate at 33.5 % N,
- calcium ammonium nitrate at 26 % N (the most widely used nitrogenous fertilizer in Europe),
- magnesammon (22 % N, 8 % Mg),
- urea at 46 % N,
- compound fertilizers.

3. Urea is used primarily in the warmer countries. In Europe it is used among other things for the manufacture of compound fertilizers and also, to a considerable extent, for technical uses such as the manufacture of feedstuffs. Urean is a mixture of urea and ammonium nitrate, while ureak is a mixture of urea and ammonia.

In Europe ammonium sulphate has been superseded as a straight fertilizer and is used more commonly in the manufacture of compound fertilizers. It is also obtained as a by-product of coke-oven gas or of caprolactam (an intermediate product in the manufacture of man-made fibres).

Aqua ammonia and anhydrous ammonia are also intermediate products used in the manufacture of compound fertilizers.

C. Production of nitrogenous fertilizers

4. World production and consumption of the relevant products quadrupled between 1960 and 1975, rising from 10.97 to 43.8 million tonnes of nitrogen.

In the market-economy countries, production has slowed down and in some places is even declining. EEC production currently accounts for between 15 and 17 % of world production, the United States being the world's largest producer country with 21 %. In the EEC the largest producer country is France, with 1.3 million tonnes of N in 1975/76, followed by Germany with 1.2 million, the Netherlands with 1.1 million, Italy and the United Kingdom with one million and Belgium with 0.6 million. Whereas the home-produced volume broadly corresponds to consumption in Germany and the United Kingdom, there is a substantial surplus in the Netherlands, Italy and Belgium. The Netherlands is by far the largest Community exporter.

5. The percentage of sales accounted for by nitrogen in compound fertilizers as compared with that in straight nitrogenous fertilizers varies from one country to another. In the Community, the country with the largest percentage is the United Kingdom (70 %), followed by Denmark (50 %), France (40 %), Belgium (30 %) and Italy and Germany (25 %); the Netherlands consumes only a little more than 15 %. The consumption of compound fertilizers generally is declining everywhere because their price per unit of nutrient value is higher than that of straight fertilizers.

6. There are only a few manufacturers of straight nitrogenous fertilizers in the Member States, the most important being:

(a) in Germany: BASF, Ruhrstickstoff AG (which originally acted as a sales agency for several manufac-

turers and has since become a subsidiary of Veba, a State-owned enterprise) and Hoechst;

(b) in France: the Gesa-Sopag/Gardinier group (a joint subsidiary of Rhône-Poulenc and Pechiney-Ugine Kuhlmann), Entreprise minière et chimique (EMC), Cie française de l'azote (Cofaz) and CDF-Chimie (a subsidiary of Charbonnages de France).

These four firms were combined in the Comptoir français de l'azote (CFA), which was wound up in 1968. For purposes of exporting to non-Community countries they are currently combined in the Syndicat professionnel de l'industrie des engrais azotés (Spiea);

(c) in Italy: Montedison and Anic (which belongs to the State-owned ENI). The sales agency Seifa which used to sell products for several firms that are currently all owned by Montedison, has been wound up;

(d) in the United Kingdom: ICI, Fisons and Albright and Wilson;

(e) in Belgium: Société carbochimique (incorporating Société chimique de Prayon), Société belge de l'azote, and UCB/Fison.

The sales agency Cobelaz has since 1968 handled only joint exports to non-Community countries;

(f) in Denmark and Ireland, no producer of importance;

(g) in the Netherlands: UKF and NSM (which use the services of the sales agency CSV, see below), Esso-Chemie and Zuidchemie.

7. The three German manufacturers, Spiea, Montedison, Cobelaz and CSV are represented with other European manufacturers in two Swiss companies, Nitrex and Complex, which handle exports to certain non-member countries of straight and compound nitrogenous fertilizers respectively.

8. UKF's production accounts for 8.7 % of Community production of nitrogen for agricultural use (approximately 10 % of the production of its British subsidiary is included); NSM's production accounts for 6.4 %. Their major competitors, BASF, Ruhrstickstoff AG, Gesa, ICI, Montedison and the Belgian group Carbochimique, each account for between 7 and 8 % of total Community production.

D. Structure of nitrogenous fertilizer supply in the Netherlands

9. Unie van Kunstmestfabrieken BV (UKF) combines the fertilizer interests of NV Nederlandse Staatsmijnen (Dutch State Mines-DSM) following the merger in 1972 of DSM and Verenigde Kunstmestfabrieken (VKF), itself the result of a merger between NV Maatschappij tot

exploitatie van Kooksoevengassen Mekog and the phosphate fertilizer manufacturer Albatros. UKF is the largest nitrogenous fertilizer manufacturer in the European Economic Community. Its Dutch production facilities are in the Netherlands at Geleen, IJmuiden, Pernis and Amsterdam. Through DSM it is entitled to half the output of Ammoniak Unie NV, a joint subsidiary of DSM and BASF at Pernis.

Outside the Netherlands, UKF has production facilities at Ince Marsh in the United Kingdom with UKF Fertilizers UK Ltd (formerly Shellstar). In Ireland UKF sells through CFD Albatros, in France through its subsidiary Lecoester SA, in Belgium through Moreels Guano, in Germany through UKF Deutschland and in the United States through the local DSM subsidiary, Nypro Inc., and Columbian Nitrogen Corporation. In 1976 the DSM Group's total sales were Fl 9 934 million, of which 1 683 million were accounted for by fertilizers.

10. Nederlandse Stikstof Maatschappij (NSM) is a company in which 69 % of the shares are held by Montedison and 25 % by ICI. It is a very important manufacturer of ammonia, nitric acid, ammonium nitrate and above all urea, of which it may be regarded as the world's largest manufacturer. Its production facilities are at Sluiskil. NSM began producing ammonium nitrate at 33.5 % N in 1975, specifically for the French and British markets, and it is planning to enter production of a comparable product based on magnesammon.

NSM manufactures no compound fertilizers, but supplies on the basis of a long term agreement Zuid-Chemie, a Gesa subsidiary manufacturing compound fertilizers in the Netherlands, with ammonium nitrate solution, an intermediate product used in their manufacture.

In 1976 NSM's sales were Fl 1 100 million.

11. UKF and NSM manufacture the following straight nitrogenous fertilizers:

	UKF	NSM
Ammonia	x	x
Nitric acid	x	x
Calcium ammonium nitrate	x	x
Ammonium nitrate at 33.5 %		x
Magnesammon	x	x
Lime nitrate	x	
Ammonium sulphate	x	
Urea	x	x

	UKF	NSM
Urean	x	x
Ureak		x
AN solution	x	x
NP solution		x
Aqua ammonia	x	
Anhydrous ammonia		x

12. In addition to the two manufacturers (UKF and NSM) belonging to CSV, there is also another Dutch straight nitrogenous fertilizer manufacturer, Esso Chemie, an Esso subsidiary. This company entered the market in 1968 as an importer and in 1969 as an ammonia producer. It also produces straight nitrogenous fertilizers which it sells exclusively through a division of Windmill Holland BV, Europoort, which sells them on the Dutch market alongside its own compound fertilizers. It has gained a Dutch market share of between 20 and 25 %. It manufactures ammonia, nitric acid, urea and calcium ammonium nitrate at 26 % N.

E. Background to the agreements

13. Centraal Stikstof Verkoopkantoor NV (CSV) was formed at the Hague on 27 August 1948 as a limited liability company under Dutch Law with the object of engaging in all business activities relating to the sale of chemical fertilizers.

Its founders were:

- NV Nederlandse Staatsmijnen,
- NV Maatschappij tot exploitatie van Kooksoevengassen (Mekog), and
- NV Nederlandse Stikstofmaatschappij.

At the time, these three firms accounted for virtually all the straight nitrogenous fertilizer production capacity in the Netherlands, and they formed this company to handle joint sales of their straight nitrogenous fertilizers in the Netherlands and for export. Original shareholdings were 50, 25 and 25 % respectively.

14. On 11 April 1963 the CSV shareholders entered into an 'agreement between manufacturers of straight nitrogenous fertilizers' as a sequel to a similar agreement entered into on 4 April 1955, which had expired on 30 June 1962: 'to ensure supplies to agriculture and horticulture on the best economic terms by expanding

the consumption of nitrogenous fertilizers as far as possible' the firms agreed to reinforce their future cooperation as regards the marketing of nitrogenous fertilizers manufactured by them.

The agreement was amended and provisionally renewed on 23 June 1969. The preamble to the current version of the agreement, which dates from 1976, defines its object in the following terms: 'the manufacturers wish to strengthen their future cooperation while maintaining the same objectives, by pooling the sale and marketing of their straight nitrogenous fertilizers on the Dutch market and on markets outside the European Economic Community and by engaging in joint advertising on those markets'.

15. 'By an agreement entered into on the same day by the manufacturers and CSV, entitled 'CSV agreement', CSV's shareholders entrusted CSV with the task of 'marketing all straight nitrogenous fertilizers manufactured by them in the Netherlands and on export markets outside the common market'.

16. Following the merger between NV Nederlandse Staatsmijnen and NV Maatschappij tot exploitatie van Kooksoevengassen (Mekog) in Unie van Kunstmestfabrieken BV, the parties to the manufacturers' agreement are currently UKF and NSM. Their shareholdings in CSV are now 75 and 25 % respectively.

17. Without changing their agreement the parties agreed in 1975 to abandon joint sales in the United States.

F. Content of the agreements as they currently apply

18. *The manufacturers' agreement*

(a) Article 1 of the agreement defines the products to which it relates.

'(1) The item "nitrogenous fertilizers" is taken to mean all products manufactured from synthetic ammonia, with the exception of nitric acid, containing more than 1 % nitrogen — including those containing other nutrients — provided they are available to a manufacturer on Dutch territory and are intended to be used as fertilizers. It also includes ammonia and aqua ammonia for agricultural use in the Netherlands, and ammonia, nitric acid and ammonium nitrate supplied by the two manufacturers to Dutch manufacturers of compound fertilizers.

(2) The item "straight nitrogenous fertilizers" is taken to mean nitrogenous fertilizers, particularly nitric acid and ammonia, containing less than 5 % phosphorus (P_2O_5) or potassium (K_2O) as plant nutrients.'

(b) The manufacturers undertake (Article 2) to make all their sales in the Netherlands and in non-EEC countries jointly through CSV. This does not extend to sales by the manufacturers to CSV, between manufacturers, sales to other manufacturers for processing under contract, sales to persons employed by the firms or sales of waste.

All exports to EEC Member States are to be handled individually by the manufacturers themselves.

CSV's sales on the Dutch market are to be made in accordance with terms of business determined by CSV and approved by the manufacturers. For exports outside the EEC, the manufacturers lay down general guidelines for CSV and in individual cases may give special instructions.

(c) The manufacturers are free (Article 3) to determine their production capacities and to abandon production of existing lines for others. Should they decide to set up new plant they will inform CSV so that it can make the necessary arrangements to increase joint sales potential.

Each of them freely and independently determines the amount of each type of nitrogenous fertilizer it will manufacture. Before the beginning of each year CSV informs the manufacturers of the quantities of each type of straight nitrogenous fertilizer it believes it can sell in each of the next few months both on the Dutch market and on export markets outside the EEC. This information is updated monthly.

(d) Article 4 of the agreement allots to each manufacturer a proportional share of supplies to the Dutch market relating firstly to total CSV Dutch sales and secondly to sales of ammonia for agricultural use in the Netherlands and of nitrogenous fertilizers for processing into compound fertilizers in the Netherlands.

For the first part, the proportions are 75 % for UKF and 25 % for NSM up to 300 000 tonnes of pure nitrogen, 60 % for UKF and 40 % for NSM between 300 000 and 450 000 tonnes, and 70 % for UKF and 30 % for NSM above that. The second part is to be allocated in such a fashion that UKF accounts for 75 % of aggregate supplies and NSM for 25 %.

- (e) The manufacturers undertake to agree before the beginning of each year on their percentage share of supplies of each type of product and on the distribution of their sales outside the EEC. The agreement also contains detailed arrangements (Article 5) for dealing with surpluses and shortfalls in terms both of quantities and of revenue.

In particular, should it be found at the end of the year that the tonnage of nitrogen supplied by one of the manufacturers does not correspond to the quota allotted to it, CSV is to equalize supplies by upward or downward adjustments so that the manufacturer who has remained below his sales quota is authorized to sell to another who has exceeded it, at the average gross price, in the form of a product to be agreed, the quantity of nitrogen required to make up the difference between the quota and the quantity actually supplied. But this equalization will not take place if it is found that the manufacturer who has not made full use of his supplies quota has not supplied CSV in good time with the quantities requested.

It is also provided (Article 6) that in the event of surplus production, the quota for exports outside the EEC will be allotted in such a fashion that the share of each manufacturer in total sales for the relevant year corresponds for each product to that manufacturer's sales in the two preceding years.

- (f) Article 7 requires CSV to pay each manufacturer a uniform average price per tonne supplied, calculated separately for each type of fertilizer; this average price varies depending on whether the product was supplied to the home market or exported outside the common market.
- (g) It is further provided (Article 11) that the Board (Raad van Commissarissen) of CSV is to consist of four members, three appointed by UKF and one by NSM. A Steering Group (Stuurgroep) consisting of representatives of each manufacturer is set up (Article 12) to handle monthly liaison with CSV and issue instructions to it; these instructions are to be binding provided representatives of both manufacturers agree to them in the presence of CSV's management.

19. *The CSV agreement*

- (a) The CSV agreement, which was entered into and renewed at the same time as the manufacturers' agreement, confers upon CSV the task of determin-

ing, with the agreement of the manufacturers, the terms of business applicable in the Netherlands and for exports outside the common market (Article 2).

It provides that the relevant products are to be sold in CSV's name on behalf of the manufacturers, who retain the right to put their trade marks on packagings (Article 3).

CSV undertakes to pay the amounts accruing to each manufacturer under the manufacturers' agreement, notably under the clauses concerning supply quotas (Articles 5 and 7).

- (b) Consultations between CSV's management and the Steering Group on the manner in which CSV is to perform the tasks conferred on it by the manufacturers are as a rule to be held monthly. CSV's management is required to comply with instructions given by the Steering Group. Should it disagree with these instructions it must say so during the course of the same meeting; the final decision is then suspended until the Board of CSV has settled the question (Article 1 (4)). The Steering Group is also to verify annually CSV's budget (Article 8).

Apart from a number of technical provisions, the agreement expresses the general acceptance by CSV of all the arrangements made for performance of the manufacturers' agreement.

20. *CSV's terms of business*

- (a) CSV's Dutch sales of nitrogenous fertilizers for direct consumption in agriculture and horticulture are made through CSV's Dutch representatives, with whom orders must be placed, namely:
- Cebeco (Nationale Coöperatieve Aan- en Verkoopvereniging voor Land- en Tuinbouw GA Cebeco-Handelsraad), Rotterdam,
 - Cocon, Rotterdam, acting for Cehave NV, Veghel, and Coöperatieve Centrale Vereniging 'Landbouwbelaang' GA, Roermond,
 - ANK (BV Algemene Nederlandse Kunstmesthandelmaatschappij), Rotterdam, hereinafter referred to as 'the representatives'.

Orders for CSV must be placed by one of these three representatives (Article 1).

- (b) CSV may refuse to meet all or part of an order, specifying reasons (Article 2).

Where it is unable to meet demand for one or more specific varieties of product, CSV, after consulting all interested buyers so as to distribute the available quantities of the varieties requested as fairly as possible, may supply an equivalent quantity of pure nitrogen in the form of a fertilizer of an available variety (Article 6).

- (c) Sales prices are determined at the beginning of each agricultural marketing year; they are uniform within each category of fertilizer regardless of the origin of the product (Article 8).

Buyers may qualify for staggered rebates (*staffelkorting*) varying according to the month of delivery. The value of the rebate declines monthly from the beginning of the marketing year, i.e. October (Article 11).

- (d) Orders which have been sent to CSV by the dates specified in the terms of business and which have been accepted and confirmed by CSV will be delivered in specified instalments per month or per period in accordance with a table given in the terms of business. Deliveries are to be made at the prices laid down in Article 8 minus the staggered rebates provided for in Article 11 (Article 20). These Articles further contain a table which, for the most important products, determines the supply schedules which the wholesaler must comply with in order to qualify for these rebates.
- (e) Where CSV lowers its prices in the course of a marketing year, it reimburses the difference between the agreed price and the reduced price (Article 7) to buyers who have fully complied with the terms of business, as regards stocks of products whose price has been reduced and which can still be identified as having been definitely delivered by CSV. To qualify for this arrangement buyers have since 1970 had to keep full accounts and at all times give CSV's inspectors every facility for investigations.

Deliveries are after loading ex-works, either at the warehouse or on board barge (Article 12).

Lastly, for deliveries by barge and by rail, CSV has since 1970 given higher rebates to buyers placing orders of a determined quantity or proving that they are grouping their orders. Failure to comply with the delivery schedule renders the buyer liable to an additional carriage charge. Deliveries by rail are made free at all Dutch stations where the quantity is 25 tonnes or more (Article 15).

G. The operation of the CSV agreement in practice

21. Before the beginning of each marketing year the CSV members prepare and notify to CSV their production and sales forecasts ('productieraming' and 'afzetraming') for the whole of the coming year. For each product (calcium ammonium nitrate, magnesammon, lime nitrate, urea, nitric acid, urean, ureak) they specify month by month:

- (a) how much they plan to produce;
- (b) how much they plan to sell themselves by way of straight fertilizers:
- for technical use in the Netherlands,
 - for technical use in the EEC (with no distinctions according to Member State),
 - for agricultural use in the EEC and the USA (where their sales are no longer pooled);
- (c) stocks in hand and quantities remaining available for sale through CSV.

22. This information is discussed by the Planning Committee. It is collected in a single paper that is passed on to both of them. Each month the manufacturers adjust their figures, send them to CSV and receive in return a paper setting out, product by product and manufacturer by manufacturer, the volumes produced and sold on the various markets in the previous month and the corrected forecasts for the remaining months of the year.

The Planning Committee meets monthly to discuss stocks, production and sales by the two manufacturers in order to verify whether they are in line with the forecasts. CSV informs the manufacturers of any sales problems it meets, or of any scope for expansion, so that this can be taken account of in future production.

23. One of the results of this system is that there is practically no chance of exports within the EEC, which are included in the end-of-year allocation to manufacturers, exceeding the level set for them at the beginning of the year, as additional quantities not allocated by the forecasts to a given market are automatically made available to CSV in order, according to CSV, 'to avert the risk of their being sold twice' and the quantities needed to meet orders from the other Member States during the year cannot be diverted from or added to production programmes, especially when production facilities are operating to capacity as in 1973/74.

With the same object of preventing quantities from being sold twice, the Nitrex Supervisory Committee — whose services are used both by CSV and by other European manufacturers of straight nitrogenous fertilizers for sales in countries with centrally planned economies — can declare CSV's allocation to Nitrex of quantities of fertilizers for markets outside the Community irrevocable.

24. The manufacturers also investigate both at home and within Nitrex, the possibility of planned exchanges of products between manufacturers (*productenruil*) and purchases from or sales to other manufacturers or importers. As regards deliveries from manufacturer to manufacturer, these take place both between CSV members themselves, notably as regards products which they both manufacture but of which they are in short supply, or in order to economise on transport costs, and between CSV members and manufacturers to whom they are linked through joint subsidiaries (UKF and BASF through *Ammoniak Unie*) or by interlocking shareholdings (NSM-Montedison/ICI).

25. Every two months the Steering Group meets to discuss all technical and economic questions arising: sales in the Netherlands, carriage, prices, rebates, terms of business, comparison between quantities available and sales effected or about to be effected, deliveries to competitors, manufacturers of compound fertilizers such as Zuid Chemie etc., imports, exports within and outside Nitrex, use of liquid fertilizers, safety at production plant, market exploration and so on.

26. From the minutes of these various committee meetings it can be seen that CSV, on the basis of its sales forecasts, from time to time makes recommendations to manufacturers on stocks, production and ranges. At times of shortfall as in 1973/74 it has even been found that CSV does not hesitate to put pressure on manufacturers to give precise figures for their sales in the EEC and either to reduce their sales or to sell at a higher price or to refrain from entering into new EEC export contracts without consulting it and the other manufacturer, or again to replace the products due to be exported by products of another quality. Moreover, at these meetings, when CSV has confronted the manufacturers with its requirements to meet the sales forecasts, the manufacturers have on occasion acted in concert in reserving a specified quantity of the relevant product for export to EEC countries and have then allocated this quantity between themselves.

27. CSV produces estimated production and sales accounts (*poolafrekening*) from time to time during the marketing year, and final accounts at the end of the year. Sales in the Netherlands are organized by CSV so that UKF and NSM supply exactly the quotas given to them by the manufacturers' agreement. The application of those quotas is possible principally because, throughout the marketing year, CSV and the manufacturers have periodically brought up to date the details of sales and deliveries already made by both manufacturers and compared them with the quotas, so that each manufacturer's production can be tailored to the fulfilment of its quota.

28. When the accounts are drawn up, an average gross price is also calculated per tonne per product for the home market, for exports to non-Community countries and for intermediate products. This price is paid to each manufacturer according to its product supply quotas for the above markets. Packaging costs (*opzakkosten*), distribution costs (*overslagkosten*) and carriage costs are shared out between UKF and NSM. Deliveries of nitric acid from Hoogovens (one of UKF's parent companies) are also within the '*poolafrekening*' but are calculated separately.

29. Application of the quotas laid down in the accounts is ensured by a sale at the average gross price by any manufacturer which has not achieved its quota to one which has exceeded it of a corresponding quantity of nitrogen in an agreed form of fertilizer (those sales are entered in the accounts under the heading '*switch agreements*'), so as to liquidate, over two marketing years if necessary, any positive or negative balance arising from the difference between on the one hand the quantity of straight nitrogenous fertilizers which the manufacturers had on hand at the beginning of the year (i.e. their production, less any corrections arising from the previous year) and on the other the sum of their sales (*afzet*) — including sales in other EEC Member States — and their year-end stocks (*eindvoorraad*).

30. These stocks are made up of the qualities of fertilizer which CSV has been unable to dispose of. They are allocated in the final accounts to each manufacturer according to the quantities of each type of fertilizer which he has sold during the year either through CSV or independently.

31. In the case of UKF, the sales taken into consideration (afzet) extend also to sales of compound fertilizers in proportion to their nitrogen content, though CSV itself is not directly involved in these sales. For both UKF and NSM, deliveries of intermediate products (halffabrikaten) to other firms in the fertilizer industry, such as Zuid Chemie, are taken into account. Although sales of nitrogen for technical uses are theoretically conducted separately — a technical coordination committee called the 'Technische Ureum Commissie', meeting every month, is responsible for market information and the coordination of prices among the manufacturers — they (including, since 1974, export sales outside the EEC) are included in the accounts.

H. Distribution and carriage of fertilizers in the Netherlands

32. The structure of the distribution of straight nitrogenous fertilizers in the Netherlands can be described by saying that there are both cooperatives' combines in Cocon and Cebeco and highly integrated wholesalers' combines in ANK.

Under CSV's terms of business, Cebeco, Cocon and ANK act, as has already been stated in 20 (a), as representatives for purchases of fertilizers by their members from CSV. Depending on whether they are themselves cooperatives or wholesalers, these members resell the products to local cooperatives or to retailers, which then resell them to the ultimate user.

33. At the beginning of each marketing year, in October, CSV enters into annual sales contracts with the cooperatives and wholesalers. As has already been seen above these contracts provide for staggered month-by-month delivery of fertilizers during the farming year.

34. CSV arranges for the actual performance of the deliveries according to the types and quantities of fertilizer available at each plant and the location of the buyer. It also arranges for the means of transport (barge, railway wagon or lorry) required to carry the fertilizers from the manufacturer's plant to the storage depots of the wholesalers or central cooperatives, which then store the fertilizers until the time comes to allocate them to the various regional and local cooperatives and retailers, or deliver them direct to the user.

35. CSV gives credit only to the eight wholesalers or central cooperatives with which it deals, leaving them to

pass the credit on to the 2 000 or so regional and local retailers and cooperatives.

36. CSV sales in the Netherlands are nearly always made in accordance with the delivered price system. But there are exceptions for deliveries of urea and anhydrous ammonia sold in small quantities and for isolated purchases (not made under an annual contract), which are generally made by buyers located close to a manufacturer's plant.

Carriage costs vary widely depending on the volume to be delivered and the mode of transport, be it by waterway (the cheapest and most widely used mode), by rail or by road. According to CSV's report for April to June 1976, 80 % of deliveries were by waterway (NSM delivers exclusively by waterway), 14.7 % by rail and only 4 % by road (the remainder being sold direct ex-works).

I. Pricing

37. As regards price levels, despite the inevitable difficulties of producing a valid comparison, the prices charged in the Netherlands by CSV do seem generally to lie below the prices charged in Germany but above those charged in France and Belgium.

38. With a few exceptions, confined to only a few months in certain years, Belgian prices are some 7 % below Dutch prices, but in France the difference reached 16 %. On the other hand, German prices are generally 6 % or so above Dutch prices. Here it should be borne in mind that the wholesaler's margin is generally 2.5 %, so that exporting to a country where prices are higher is definitely profitable. Prices for exports outside the EEC tend to be a lot lower, as can be seen from the end-of-year accounts prepared by the firms concerned. The only exception was the farming year 1974/75. Following the energy crisis prices for exports outside the EEC rose sharply enough to exceed the prices charged on EEC markets, but they have now fallen below them again.

39. As regards Dutch prices, Windmill Holland BV, which resells nitrogenous fertilizers manufactured by Esso Chemie, generally aligns on CSV's prices and, for exports (to Belgium, Germany and France and outside the EEC), aligns 2 or 3 % below the prices charged by foreign manufacturers.

40. In the case of sales to other Member States the manufacturers do not charge domestic prices (carriage free) but the prices prevailing in the country of destination, give or take 2 %. Deliveries are either carriage free or free at frontier, in which case the buyer has to pay carriage costs from the frontier.

41. Similarly, there is very little advantage, in comparison with the Dutch prices, to the final consumer in buying goods imported from non-member countries.

42. The uniform application of the delivered pricing system by all manufacturers inevitably means that all buyers, irrespective of distance from the production plant and amount paid in carriage costs by the manufacturer, all pay the same price. This has a direct effect on intra-Community trade; take for example the case of a Dutch buyer located near a foreign manufacturer's plant, who has to pay the delivered price ruling abroad as well as carriage costs from the frontier. This amounts in fact to an artificial reduction of price differentials between the various countries to the advantage of the manufacturers.

43. The uniform application of the delivered pricing system also produces price standardization within each Member State. However, price differences do arise as a result of the granting of secret rebates. This is true not only of the manufacturers' prices but also of the consumer prices, as these are fixed by the manufacturers; they do grant wholesale rebates, which are to a certain extent passed on down the line to the retailer. Despite the fact that consumer prices are not imposed vertically, they are more or less uniform (except of course where secret rebates are granted).

44. Two problems arise as a result of staggered rebates and prices.

45. First, the staggered price has to be calculated in such a way that monthly deliveries reflect the production pattern despite the fact that consumption is concentrated within a period of only a few months. As it is very difficult to get the two to tally, the manufacturers

get round the problem by fixing in the contract monthly delivery quotas for the entire period between the conclusion of the contract and the end of the farming year.

46. Secondly, it is in the manufacturer's interest that the sliding price scale is observed. Not only does it provide final buyers with an incentive to place their orders as early as possible, it is also a way of financing storage, a viable proposition only if, when the time comes for the fertilizers to be used, they can then be resold at a higher price in order to cover storage costs or if buyers who did not place their orders early in the year have also to pay the higher price. Changes by manufacturers to the sliding price scale in the course of the farming year are tantamount to a retroactive drop in price. The only reason for manufacturers to adjust the sliding scale is where they are confronted with numbers of competitors — not just the odd one — flooding the market with fertilizers at much lower prices. Supplies from non-member countries have not in the past made any lasting impact on Community prices, even when these were undercut, as they were not sufficiently regular to be of interest to buyers. Unless they are convinced that the favourable trade terms will continue, buyers are reluctant to sacrifice a secure source of domestic supply even if the prices asked are higher.

As for manufacturers in the other Member States, if they wish to avoid possible reprisals they have to make sure that the prices charged by them on the Dutch market do not fall too far below the prices applied by the Dutch manufacturers.

47. It is clear from the above that the application of delivered prices and the practice of staggering prices give rise to a situation where prices tend to be uniform and highly rigid.

J. Distribution of nitrogenous fertilizers

48. The share of the Dutch market held by members of CSV from 1971 to 1977 was as follows:

	Dutch consumption (1 000 tonnes N)	CSV sales (1 000 tonnes)	UKF (NPK) sales (1 000 tonnes)	Market share (%)
1971/72	370	237.5	26	71.2
1972/73	395	253.4	28	71.2
1973/74	415.7	298.3	27	78.2
1974/75	432	286.4	22.7	71.5
1975/76	434	268.2	26.7	67.9
1976/77	430	255.8	30	66.5

In the 1971/72 marketing year sales of straight nitrogenous fertilizers through CSV together with UKF sales of compound fertilizers containing nitrogen accounted for 71.2 % of Dutch consumption. In 1976/77 this market share dropped to 66.5 %. These figures do not include sales of nitrogenous fertilizers for use as an intermediate product in the manufacture of compound fertilizers (by Zuid Chemie in particular), which amount to between 20 000 and 30 000 tonnes of nitrogen per year, or 7 % of consumption.

49. The remainder of sales on the Dutch market is accounted for by Esso Chemie (between 20 and 25 %), other manufacturers of compound fertilizers (Zuid Chemie, Windmill) (7 %) and imports (5 % maximum). (In 1973/74 imports reached an all-time low, never rising above 1 %.)

In the early sixties Dutch imports of straight nitrogenous fertilizers were just as low as everywhere else in the Community. They have since increased although the picture is still fairly uncertain, as import statistics also include:

- sales between competing manufacturers (buffer sales or product exchanges),
- imports by manufacturers (for processing or resale),
- imports of re-exports (especially goods imported by sea for unloading in a port and re-export to other Member States).

This explains why only a very small percentage of the 60 000 tonnes and 81 000 tonnes of nitrogen appearing in the Dutch import statistics for 1975/76 and 1976/77 respectively was sold direct to Dutch consumers. According to reports from the parties concerned, the

impact of these imports was purely regional and also very irregular. Even in 1976/77 they did not account for more than 5 % of Dutch consumption.

50. In the other Member States where straight nitrogenous fertilizers are manufactured the market share taken up by imports is considerably higher, not only in Belgium (approximately one quarter of national consumption) but also in France and Germany.

51. The low volume of Dutch imports cannot be explained away in terms of technical or commercial obstacles. With the exception of urea, which is used primarily in warmer countries, i.e. countries outside the Community, all straight nitrogenous fertilizers are interchangeable from one Member State to another. Admittedly, technical specifications may vary from one country to another, but it is equally true that a product like calcium nitrate, for example, manufactured for use in France with a higher nitrogen content than in the other Member States (33.5 %) as against (26 %) is also manufactured for export with a nitrogen content of 26 %. Conversely, it is manufactured by certain manufacturers in other Member States (NSM for one) for export to France with a nitrogen content of 33.5 %. Given the price differential between the various countries, carriage costs, especially by waterway, are far from prohibitive. By way of an example, carriage costs in the Netherlands represent between 3 and 4 % of the selling price, and the cost of moving goods by water is approximately one third less than by rail. Even if longer distances were involved, the higher carriage costs would still not cancel out the differences in price from one Member State to another such as to make the operation unprofitable.

52. CSV's Dutch sales of straight nitrogenous fertilizers manufactured by its shareholders have hitherto been on the basis of 75 % from UKF and 25 % from NSM. The same is true of sales of intermediate products. However, these figures do not reflect the relative strength of the two firms. Production figures show a ratio of 58 : 42, and together they account for approximately 80 % (UKF 46 % and NSM 34 %) of Dutch production and 16 % of total Community production.

53. At the Commission's request joint sales arrangements for UKF and NSM exports to other Member States have now been terminated; sales are now carried out independently by the manufacturers themselves. These individual exports have increased considerably since the late sixties when they were still insignificant. In 1974 they accounted for 21.7 % of total UKF sales and 11 % of NSM sales. By 1977 these figures had risen to 23 and 15.3 % respectively.

54: CSV no longer acts — or has never acted — as joint sales agency for the following sales, which are carried out direct by UKF and NSM:

(a) Individual sales by UKF (%):	1974	1977
— sales on the home market ⁽¹⁾ (intermediate products)	3.1	3.6
— sales on the home market ⁽¹⁾ (compound fertilizers)	4.4	4.8
— urea for technical uses ⁽¹⁾	6.2	2.4
— EEC sales	21.7	23.0
— USA sales	—	15.6
	<hr/>	<hr/>
	35.4	49.4

(b) Individual sales by NSM (%):	1974	1977
— sales on the home market ⁽¹⁾ (intermediate products)	1.6	1.6
— urea for technical uses ⁽¹⁾	3.0	1.8
— EEC sales	11.0	15.3
— USA sales	—	45.6
	<hr/>	<hr/>
	15.6	64.3

(c) Total individual sales by UKF and NSM, which in 1974 amounted to 24.8 % of their overall sales, increased in 1977 to 53.8 %. During the same period the percentage of sales made through CSV dropped from 32.1 to 25.8 % in the case of the home market and 43.1 to 20.4 % in the case of

non-member countries; in other words the percentage of aggregate sales made through CSV dropped from 75.2 to 46.2 %.

K. Summary of the proceeding and proposals by CSV and its members for changes to their agreements

55. The manufacturers' agreement between CSV members and the agreements for its operation were not notified to the Commission, but in response to several complaints from Dutch and Belgian wholesalers the Commission initiated an own-initiative proceeding in 1967, sending to CSV and to its shareholders a statement of objections very similar to that earlier addressed to other straight nitrogenous fertilizer selling agencies in the EEC which had notified — Cobelaz/Synthèse and Cobelaz/Cokeries of Belgium, Seifa of Italy and CFA of France. A meeting took place, after which CSV and its shareholders applied to the Commission for negative clearance and commenced discussions with Commission staff on the changes that would have to be made to their agreements if they were to qualify for negative clearance similar to that which had been given to the other agencies ⁽²⁾. In those decisions the Commission stated that, on the facts in its possession at the time, it could find no direct effect on the EEC market of the joint selling arrangements, which, following changes to the notified agreements, applied only to the home market and to exports outside the EEC.

56. However, when it realized that the Dutch market was being partitioned off from the rest of the common market, the Commission decided, before taking a decision on the CSV application, to wait for the results of its broad survey of the practical effects of this liberalization in the common market. The survey led to the conclusion that the changes which the three selling agencies had been asked to make did not go far enough to stop them adversely affecting trade between Member States. But since the four agencies had changed their business function and internal structure in the meantime, the Commission saw no need for formal withdrawal of the negative clearance already given. However, as CSV was the only agency still operating according to the system described in the negative clearance and complaints were still being received against it, a statement of objections was issued on 23 December 1974 concluding that the joint selling arrangements had adverse effects on exports between EEC Member States and were accordingly within the prohibition in Article 85 ⁽¹⁾.

⁽¹⁾ Despite the fact that these sales are made individually they are none the less entered in CSV's end-of-year accounts.

⁽²⁾ Commission Decisions of 6 November 1968 (OJ No 276, 14. 11. 1968) and 30 June 1969 (OJ No L 173, 15. 7. 1969).

57. CSV and its shareholders responded to the statement of objections by notifying their agreements on 27 March 1975, but they still maintained that the agreements did not appreciably restrict competition and did not affect trade between Member States, so that they were entitled to a negative clearance from the Commission or alternatively, should Article 85 (1) be found applicable, to exemption from it. Even so, to render their agreements safe from objections by the Commission, they proposed at the hearing held on 29 August 1975 to open discussions on the obligation for CSV customers to place orders through the 'representatives' and the question of delivered pricing.

58. Having considered these proposals in the light of the general manner in which CSV operated ⁽¹⁾, the Commission, by supplementary statement of objections dated 7 November 1977, informed those concerned that the proposed changes were to be welcomed as a means of improving the conditions of competition on the Dutch market but did not go far enough to settle all the objections made against CSV as a joint selling agency; accordingly, while reserving the right to return in greater detail to the restrictions of competition which subsisted in distribution, it informed them that it maintained its earlier views in full. Earlier the Commission had asked CSV and its shareholders to terminate the joint selling arrangement with CSV for straight nitrogenous fertilizers manufactured by UKF and NSM and to terminate CSV's commercial coordination activities. In answer to this letter CSV and the shareholders put six proposals to the Commission on 22 December 1977, adding further details at the third hearing on 16 February 1978.

59. On 16 May 1978 these proposals were spelled out in greater detail, and CSV and the shareholders notified the Commission:

(1) that they had dissolved the following bodies:

- the Stuurgroep,
- the Planning Commissie,
- the Producentenvergadering,
- the Werkgroep/Verkoopvoorwaarden,
- the Financiële Werkgroep;

(2) that they intended to discontinue the practice whereby all orders placed with CSV had to pass through the 'representatives' and to authorize buyers undertaking to purchase upwards of 10'000 tonnes per year to deal direct with CSV; on 22 December 1977 they had also agreed to use such

influence as they had on the market to prevent the continued existence at subsequent distribution levels of selling systems which fix market shares once and for all;

- (3) that they intended to terminate the manufacturers' agreement and the CSV agreement, replacing them by a system whereby once a year shareholders would specify the quantities of fertilizer being supplied to CSV, these figures to be reviewed at quarterly information meetings; at the hearing on 16 February 1978 the CSV representatives had also talked in terms of supply schedules to cover periods of several years;
- (4) that they intended to let purchasers choose between delivered prices and ex-works prices.

On 22 May 1978 the firms concerned transmitted these proposals to the Commission by means of a notification form.

II. APPLICABILITY OF ARTICLE 85 (1)

Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

A. Agreements or concerted practices

60. The cooperation between UKF and NSM is based on agreements within the meaning of Article 85 (1), namely the manufacturers' agreement (producentenovereenkomst) and the CSV agreement (CSV-overeenkomst), to which effect is given through the uniform terms of business determined by CSV and by concerted practices. CSV merely provides the framework for this cooperation. As shareholders in CSV, UKF and NSM determine CSV's business policy. The shareholders have the right of veto, which effectively prevents CSV from taking any business decisions without the agreement of both of them. If necessary they can issue instructions via the Steering Group to CSV's management. If CSV's management wishes to influence the business policy of one or other of the shareholders on its own account, i.e. if it issues 'instructions' or 'recommendations' or exerts 'pressure', it is merely acting in accordance with the cooperation between UKF and NSM applied via CSV pursuant to the agreements between them, whose practical execution is left to CSV.

⁽¹⁾ Commission Decision of 25 June 1976 (OJ No L 192, 16. 7. 1976).

B. Restriction of competition within the common market

61. These agreements have as their object and effect an appreciable restriction of competition within the common market. The two manufacturers, UKF and NSM, act in concert in the production and sale of straight nitrogenous fertilizers not only on the Dutch market and the other markets allocated to CSV, but also on markets in the other Member States.

62. In the first place, the agreements have as their object and effect the joint sale of products manufactured by the two undertakings on their home market and outside the EEC. The consequence is that buyers in the relevant markets can no longer approach two independent suppliers, but must deal exclusively with CSV, which charges uniform prices and applies the same terms of business for deliveries of UKF and NSM products. Customers can no longer choose between competing offers. UKF and NSM products are, admittedly, still separately identifiable to some extent and customers may voice a preference for one or the other when placing an order with CSV. But this has no appreciable effect on competition because the same prices and conditions apply to the products of both firms and, moreover, both are guaranteed a fixed share of the Dutch market by means of the exchange system and the quota arrangement.

63. If such cooperation did not exist, UKF and NSM would be capable of doing business on the relevant markets independently, and thus of competing with one another. UKF is the largest manufacturer of nitrogenous fertilizers in the Community, and NSM is not far behind. UKF operates its own production plants through subsidiaries in Belgium, France and the United Kingdom. NSM has ties with ICI and Montedison, the largest fertilizer manufacturers in the United Kingdom and Italy respectively.

UKF and NSM have a sufficiently broad range of products (NSM has recently extended its range (see point 10)). In the Netherlands they account for 46 and 34 % of production respectively, and have a market share of 50 and 17 % respectively. In the Community as a whole UKF has a 10 % market share (including that of its UK plant) and NSM a 6.4 % share. Other domestic and foreign manufacturers, including smaller firms and others, like Esso Chemie, which have a narrower range of products, are capable of marketing their products throughout the Community without assistance, either via their own marketing network or via the normal trade outlets and cooperatives.

64. The cooperation by joint sales between UKF and NSM affects their entire production and distribution policy. The prices that can be charged vary considerably from one market to another; a lower return in non-member countries can generally be balanced by a higher one in the Community (barring a few exceptions of limited duration). Prices subject to government approval within the Community are not fixed prices; they may accordingly be undercut. Improved use of production capacity and imports from other member or non-member countries can be used to boost supplies; there are no technical barriers to trade or excessive transport costs to hinder imports, especially when they come by sea or inland waterway. When the situation arises that supply constantly exceeds demand and local manufacturers' prices are appreciably undercut, then these local manufacturers lose sales and revenue.

65. This being so, UKF's and NSM's objective is to match their supplies as closely as possible to demand. The basic reason behind the cooperation between UKF and NSM is therefore to establish and exchange sales estimates (correct to the nearest kilogram), broken down by type of fertilizer, use, destination and delivery date. CSV's shareholders act on the sales estimates relayed to them by CSV and make arrangements for the appropriate quantities to be produced and placed at CSV's disposal according to the agreed schedule. The two shareholders' total production consists of these quantities, plus the quantities they market independently without CSV's intervention as a sales agent.

The detailed information thus exchanged with regard to UKF's and NSM's production and sales plans is further supplemented by an exchange of production and sales figures and details of stocks. All these figures are constantly updated to give an accurate picture of actual or expected developments on the market, regularly discussed and then corrected again.

66. The quantities placed at CSV's disposal are irrevocable or may be declared so, either by CSV itself or, where non-member countries are concerned, by Nitrex. There is, however, no sales guarantee given to the shareholders. If one of them produces more than it can sell, either independently or via CSV, it must stock up the surplus or cut down its production. If CSV's domestic sales do not come up to expectations the excess quantity is automatically earmarked for export to non-member countries. If they still fail to find a market, the quota arrangement of Article 6 of the manufac-

turers' agreement comes into effect. The fact that Article 6 has never been applied even during a period of substantial surplus in production capacity suggests that a purpose of the coordination system is to prevent such a situation.

67. In effect, this means that when the manufacturers draw up their first production and sales forecasts for the coming agricultural year they are free to decide at their own discretion on the quantities they will sell independently and the quantities they will offer CSV. These plans are, however, coordinated at or before the time they are exchanged and harmonized with those of CSV. Any corrections in the course of a farm year are equally carefully harmonized. It is not easy for an individual manufacturer — if only for technical reasons, above all when he is working at full capacity as during the 1973/74 crisis — to decide unilaterally to increase production in order to push up his own export figures in the short term.

In addition, the production and sales accounts refer to total production, including sales made independently by UKF and NSM. The quantities produced by both firms and made available to CSV and those remaining unsold are lumped together in the accounts under the heading 'end of year stocks' (eindvoorraden) and made available to CSV in the following year. However, these quantities are not considered as made available to CSV by the producers in proportion to the unsold stock held by each of them, nor in terms of the quantities made available to CSV or sold through its agency during the previous year, but in proportion to their total sales including their individual sales for that year. This puts at a disadvantage a producer who proportionally has made the largest individual sales, particularly to other Member States. Since the amount held in stock may not correspond to the amount supposed to have been made available to CSV, the situation is clarified by completion of 'switch agreements', i.e. delivery agreements between the producers or by including the amounts in question in agreements of this type.

68. The proceeds from sales in the Netherlands and in non-member countries (46 % of total sales) are distributed as evenly as storage, transport and packing costs. This pooling of proceeds also covers products — such as intermediate products and urea for industrial uses (5 % of total sales) — marketed without recourse to CSV's services as sales agency.

If UKF and NSM calculate to the last kilogram and cent in these matters, and if the total production and sales of both manufacturers are taken into account in their joint planning to the extent described, then they must inevitably refrain from competing with one another on markets not included in their pooling arrangements in order to safeguard the joint sales policy they pursue through CSV. When deciding on their sales policy for markets not covered by CSV they must take their CSV sales policy into account just as much as they take their quantities and pricing policies for their individual exports into account when they decide on their CSV sales policy.

69. It can be seen from the results of their cooperation — particularly in 1973/74 — that UKF's and NSM's sales policy in other Community markets was specifically discussed during their meetings, leading to decisions of a clearly practical nature. CSV caused its shareholders to provide it with precise figures for their sales in the EEC and persuaded them to reduce their sales, to sell at a higher price, to refrain from entering into further similar agreements without first consulting it and the other manufacturer, or to supply the EEC markets with products of a poorer quality. The records of these meetings show CSV's requests as taking the form of 'instructions', 'pressure' or 'recommendations'.

The parties have asserted that 1973/74 was not a typical year, characterized as it was by the shortage induced by the crisis, the danger of supplies draining off to non-member countries (where, for a limited period, they fetched higher prices) and the attendant risk of a shortfall in supply on the domestic market. They maintain that the words 'instructions', 'pressure' and 'recommendations' are not to be taken literally; the manufacturers were still free to determine their own sales policy, even in these difficult years.

70. The events of 1973/74 demonstrate that decisions concerning the quantity or prices of products sold in one Member State can have repercussions not only in that Member State but in others too. Despite the parties' assertions it seems quite predictable that, faced with an unstable market, they should use their information exchange scheme to improve the coordination of their sales policies on other EEC markets. There is, on the other hand, no need for UKF and NSM specifically to coordinate their individual export deals when market conditions are normal. It is sufficient to have a coordination system which will allow them to concert the general orientation of their sales policy.

71. The cooperation between UKF and NSM makes the two firms interdependent, gives them influence over each other and leads them to coordinate their sales policy even on markets which they do not supply jointly through CSV.

As the Court of Justice of the European Communities held in its judgment of 16 December 1975, ground of judgement 174 ⁽¹⁾, the 'requirement of independence ... does ... strictly preclude any direct or indirect contact ... the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market'.

72. The joint sale by CSV of straight nitrogenous fertilizers manufactured by UKF and NSM, combined with an information agreement that is inextricably bound to it, thus has the effect of depriving the manufacturers of much of their freedom to determine independently how much to produce and for which markets. Even if the manufacturers did not invariably follow in practice the lines laid down in CSV, this does not alter the fact that UKF and NSM substituted for the inherent risks of competition a form of practical cooperation which created conditions of competition that differed from the normal conditions of the market.

C. Capacity to affect trade between Member States

73. The cooperation between UKF and NSM effected through CSV is capable of affecting trade between Member States. This is clear from an overall assessment of the various aspects of this cooperation, all of which are inextricably interdependent: joint domestic sales, joint sales to non-member countries (except the USA) and the coordination by UKF and NSM of their entire business policy as regards straight nitrogenous fertilizers, including production, storage and sales.

74. There is no need to decide whether cooperation has an appreciable affect on competition in the common market and on trade between Member States if it consists simply and solely of making specified quantities of products available to a distribution agency for sales in non-member countries.

In the case at issue, however, the agreements cover more than just sales in non-member countries: that aspect is an integral part of a more extensive form of cooperation involving joint domestic sales and coordination and effectively covering UKF's and NSM's entire straight nitrogenous fertilizer business.

75. The sales policy of the parties cannot be considered on the basis of each market individually. They needed to coordinate their joint domestic sales and joint sales in non-member countries (with the exception of the USA) for the reason that since their proceeds from sales on the domestic market were — except over one specific period — and still are substantially higher than those from sales in non-member countries, UKF and NSM cannot possibly be indifferent about how much of the quantities they make available to CSV is sold domestically and how much is sold in non-member countries. The parties solved this problem by dividing up their domestic sales into fixed quotas; the remainder of the quantities made available to CSV by UKF and NSM were automatically earmarked for export to non-member countries. These non-Community sales have brought in lower proceeds, and consequently do not need to be regulated by a permanent quota system: provision is simply made for such sales to be effected in the event of surplus production, i.e. if one or both of the parties produces, and makes available to CSV, more than CSV can manage to market.

76. The events of 1973/74 show (see point 69) that the sales policy determined within CSV can influence the decisions taken by UKF or NSM with regard to sales on non-CSV markets in the Community. The amounts CSV or one of its shareholders supplies to the Dutch or any other Community market may affect the prices on that market and the other party's income and also have repercussions on other markets. An increase in supply to these markets which are an obvious area for expansion because they fetch higher prices than exports to non-member countries, and in the case of Germany higher even than in the Netherlands, is extremely likely to result in exports to other Member States by those purchasing from CSV and its members.

Cooperation is consequently not confined to just one Member State and non-member countries, it affects the whole production and sales policy followed by UKF and NSM, including trade between Member States. The nature and the accuracy of the year-end production and sales accounts, which include figures for quantities exported to other Member States, along with the prior exchange and discussion of all important production and sales factors, demonstrate that UKF and NSM were not free to determine independently their production

⁽¹⁾ [1975] ECR 1663, 1942 (Suiker Unie v. Commission of the European Communities (40/73)).

policy or their policy on exports to other Member States.

77. The parties fail in their submission that inter-State trade is subject to technical barriers and cannot therefore be appreciably influenced by private arrangements. If nitrogenous fertilizers with a higher or lower nitrogen content are used in a given Member State, there is nothing to prevent manufacturers in other Member States from including such fertilizers in their production programmes and exporting them.

78. The parties also fail in their argument that inter-State trade has increased and has not therefore been affected.

The volume of UKF's and NSM's export business within the common market has admittedly increased and has even led those companies to establish production and sales facilities in several countries. But, as the Court of Justice emphasized in its judgment of 13 July 1966 ⁽¹⁾, the fact that an agreement encourages an increase, even a large one, in the volume of trade between Member States is not sufficient to exclude the possibility that the agreement may affect such trade by constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States.

79. The cooperation between UKF and NSM does not merely jeopardize their freedom to determine independently their sales policy on non-CSV markets, but also has a restrictive effect on imports.

The concentration of supplies from two manufacturers of this size and importance on a Community market constitutes an economic unit which discourages foreign manufacturers from pursuing a more active export policy, effectively preventing them altogether from doing so. This danger increases in proportion to the power and solidarity of manufacturers in the country of destination.

Between them, UKF and NSM have something in the region of a 16 % share in Community production; their most important competitors — BASF, Ruhrstickstoff AG, Gesa, ICI, Montedison and the Carbochimique Group — each have a substantially smaller share of between 7 and 8 %. The two firms have well-sited factories with large production capacities, not all of which is used. With a 67 % share of Dutch production, UKF and NSM hold a very strong position on their home market. The concentration of supplies by UKF and NSM and the annual agreements with CSV fixing quantities for the greater part of their purchases effectively reduce the alternatives open to Dutch purchasers when they wish to place subsequent orders in the course of the year.

⁽¹⁾ [1966] ECR 299, 341 (Grundig/Consten (56/64)).

The Netherlands imports less of the relevant products than the other Member States, and such imports as there are have had no appreciable influence on the high prices prevailing there. These high prices have been successfully maintained for years, in spite of lower prices in other Member States and considerably lower prices in non-member countries. The cooperation in question resulted in the continuous coordination of market policies and is a force to be reckoned with for foreign manufacturers proposing to import into the Netherlands larger quantities at appreciably lower prices.

80. The cooperation between UKF and NSM through CSV thus has appreciable effects on the structure of competition in the common market and is capable of affecting trade between Member States. This finding, which is based on close and lengthy observation of the market and of the operation of the CSV cooperation arrangements, differs from the conclusions reached by the Commission in its comparable Decisions concerning Cobelaz/Kokerie, Cobelaz/Synthèse, CFA and Seifa, where the Commission made it clear that its sympathetic attitude was strictly a result of the circumstances then pertaining. There is therefore no inconsistency in the finding that inter-State trade is affected in the present case.

D. CSV's proposals

81. The proposal by CSV and its shareholders to go as far as possible in terminating the exchange of information between the two shareholders, and the fact that they have accordingly discontinued the various planning and management committees in which they currently meet together with CSV, are not enough to take the altered arrangements out of the scope of Article 85 (1).

82. Regardless of the amount of information exchanged between the two shareholders, as long as CSV continues handling joint sales of its shareholders' products, it will have to formulate and carry out its sales programmes according to its shareholders' stocks and supply potential, and will have to adjust both these variables as closely as possible to demand from buyers.

The present arrangements, whereby information is exchanged between the manufacturers and CSV at the beginning of the agricultural year and then periodically during the course of the year for the purpose of drawing

up CSV's sales forecasts, the individual production and sales forecasts for each manufacturer and consequently the volume of goods and the types of fertilizer to be made available for sale by CSV, cannot be terminated if the two manufacturers continue to use a joint agency for selling their products.

83. If a system of separate consultations between CSV and each of its two members were to be set up it would not differ fundamentally from the present arrangements, since, apart from the fact that CSV is a body consisting entirely of representatives of the two manufacturers on which each manufacturer has the right of supervision and veto, it would still be obliged to take account of the manufacturers' individual production and sales forecasts and the quantities placed at its disposal by each shareholder when making its own sales forecasts at the beginning of the year and when conferring thereafter with each manufacturer (every three months, under the proposed system) on the quantities which, judging from current trends, it would require the manufacturer either to place at its disposal or to take back and attempt to sell on its own account. In either case the manufacturer's ability to export to other EEC countries would be directly affected.

84. CSV would then have to act as a kind of umpire and allocate orders and deliveries — a function currently performed by the various committees.

This umpire function would entail a degree of close cooperation, in the form of an agreement or a concerted practice, exercised within CSV or elsewhere, between the two shareholders, which would in any event be all the more necessary as the parties would wish to continue with the system of annual contracts, the quota system would officially be dismantled and the parties would wish to prepare their own production and delivery plans for several years ahead (*meerjarenplannen*). These long-term plans would in turn entail a more or less overt return to a system similar to the present quota system, the surpluses and the shortfalls being made up at the end of the year by 'switch agreements'. This would be similar to the present accounts system, for the purposes of which CSV and its shareholders must take account of all the latter's production, including quantities produced for independent sales.

85. It is difficult to see how else CSV, including as it does the two manufacturers' representatives, could fix independently the proportion of the quantities they make available to it that should be set aside for dom-

estic orders (thereby fetching considerably higher prices than exports) and the proportion that should go to export markets.

86. It would, moreover, seem quite impossible for the two shareholders genuinely to hand over to CSV the task of deciding on their sales forecasts and actual sales on the markets allocated to it (a) because of the proportion of their total represented by these sales (50 % for UKF, 35 % for NSM), (b) because these sales concern not just isolated products but the bulk of their production, and (c) above all because they include all their sales on the home market, so that UKF and NSM cannot leave them to the discretion of a third party. Even if they hand over the right to decide on their respective sales on these markets, the fact remains that if CSV satisfies this or that order by supplying products from one manufacturer and not the other this will inevitably affect the opportunities of each of the two to export to markets where they do business independently, particularly in the other EEC Member States.

87. Lastly, CSV's plans for altering the system of distribution for UKF and NSM products in the Netherlands have no impact on the essence of the restriction of competition found in this decision, i.e. the fact that the products of these two undertakings are marketed in the Netherlands as a single option. The proposed alterations are therefore insufficient to prevent the restriction from being caught by Article 85 (1).

III. APPLICABILITY OF ARTICLE 85 (3)

Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable to any agreement or concerted practice between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford those undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

A. Specialization between UKF and NSM

88. The notifying companies fail in their submission that production is improved by a specialization arrangement between UKF and NSM which enables the two companies in combination to supply a full range of straight nitrogenous fertilizers. For one thing, the agreements have had no effect on the range of products offered by UKF which, before the agreements were made, was identical to CSV's current range. For another, NSM's range, which was very narrow for several years, being confined to calcium ammonium nitrate, urea and urea solutions (ammonium sulphate production was stopped in 1968), has since been extended by the addition of 33.5 % N ammonium nitrate for the French and British markets and of DAS (dolomite ammonium saltpeter), a product competitive with magnesammon.

Accordingly, subject to a few minor differences, the product ranges offered by the two CSV shareholders broadly coincide. There is no evidence therefore to suggest that either UKF or NSM has abandoned production of this or that product in favour of the other.

Moreover, since the exchanges of products between them relate to products manufactured by both, there is no evidence of any specialization in their respective manufacturing activities.

89. In any event such a specialization arrangement would not make it necessary to exchange information and operate a joint selling scheme; the example of Esso Chemie, which markets an even narrower range of straight nitrogenous fertilizers in the Netherlands (KAS, urea, nitric acid) and a range of compound fertilizers that is comparable to UKF's, goes to show that it is quite possible for a firm to survive on this market with only a limited product range.

B. Reduction in cost prices

90. The firms also fail in their submission that the specialization and exchanges between manufacturers made it possible to reduce cost prices, notably by reason of economies of scale, for UKF and NSM are still producing separately two virtually identical ranges and exchanging products manufactured by both.

In any event Dutch retailers and users do not benefit from the alleged improvement, since the prices charged on the Dutch market are still the second highest in the Community, exceeded only by German prices.

91. The statement by CSV and its shareholders that Dutch manufacturers are not always willing or able to follow prices charged by their competitors is difficult to accept, for this competition is on the home market, where they have a preponderant position (roughly two thirds of sales) in relation to the other firms, which are smaller and act separately with higher raw material costs (particularly for natural gas) and higher carriage costs.

C. Improved opportunities for planning by manufacturers

92. An improvement in the opportunities for production and distribution planning by the manufacturers does not automatically improve production and distribution themselves, especially where the manufacturers' freedom of action is reduced. Such an improvement must not be assessed only in subjective terms, taking account only of the manufacturers' wishes and not of any unfavourable effects on competition which may result.

UKF and NSM continuously plan and adjust their production solely because they are selling their products jointly and coordinating their business policies.

93. The perfection of market knowledge that the information agreement gives the manufacturers is of benefit to them and to them alone, for buyers are less favourably placed than they would be in the absence of the agreements as the number of firms actually competing on the market is reduced.

D. Improvement in distribution

94. Nor is it possible to accept the submission that the agreements improve the distribution of the relevant goods in the Netherlands by providing for continuity of deliveries, smooth distribution in terms of both time and space and the assurance that demand can be met at a time of slack production.

95. These benefits, like the further benefits in terms of storage and carriage that the firms plead, do not flow from CSV's existence but from the manner in which wholesalers and cooperatives organize their supplies and the distribution of their products.

96. The contracts that CSV enters into with wholesalers and cooperatives in the Netherlands at the

beginning of each year — subject to revision or modification throughout the year — could easily be entered into by the manufacturers themselves, for they have sales departments to market their straight nitrogenous fertilizers in the EEC and the USA and intermediate products on the home market.

Moreover the products are stored initially by the manufacturer and later by the wholesalers and cooperatives, but never by CSV itself. The only role that CSV actually seems to play is to organize means of transport from the manufacturer's plant to the storage depots at cooperatives and wholesalers, subsequent carriage from these depots to the ultimate consumer being handled by the cooperatives and wholesalers themselves.

97. Furthermore, the very grouping of orders which, according to CSV, is the reason why continuity of supplies to consumers can be guaranteed, is in fact carried out by wholesalers, cooperatives, and more rarely, retailers. Indeed the role of the wholesalers, cooperatives and retailers is to seek supplies of the volumes they need on the best possible terms from all manufacturers of straight nitrogenous fertilizers, whether or not they are members of CSV, and whether or not they are established in the Netherlands or elsewhere in the EEC, and to handle the physical arrangements for delivery.

The manufacturers' argument that the joint sale of their products through CSV is necessary to the smooth, continuous supply of Dutch agriculture accordingly fails.

98. As regards their deliveries to the Dutch market during the 1973/74 crisis, it has already been seen that CSV did not hesitate to impose quantitative restrictions on its Dutch buyers when it was still exporting outside the EEC, where it could charge more profitable prices.

99. UKF and NSM fail in their submission that joint sales are necessary to the smooth disposal of their output. This is in fact achieved because CSV grants staggered rebates varying according to whether the time for use is near at hand or still well away, so as to induce cooperatives and wholesalers to buy the products when they are cheapest and then store them. Such a system of rebates could easily be operated in independent sales organizations.

E. The importance of cooperatives and wholesalers on the Dutch market

100. The notifying companies fail in their argument that, because there are groupings of wholesalers and

cooperatives on the Dutch market, they must have a single sales agency acting for them because, apart from the fact that neither Esso Chemie nor foreign manufacturers feel the need for a single agency to handle their Dutch sales, they are large enough to be safe from any attempt by wholesalers and cooperatives to act against them where, for reasons which the companies have not specified and of which it is difficult to conceive, the latter might seek to persuade them to sell their products jointly, at the same price and on the same terms.

They consequently fail in their argument that if they were to take over CSV's activities themselves this would push up prices for, as has already been seen, they already have their own sales departments, which market more than 54 % of their output.

Moreover CSV, as has already been stated, plays virtually no role in the storage and delivery of the relevant products, and is not involved in financing deliveries either, this being left to the cooperatives and wholesalers.

F. The need to equalize carriage costs

101. Furthermore, the equalization of carriage costs by CSV can scarcely be regarded as sufficient reason for standardizing the choice of products on the Dutch market.

As Esso Chemie has demonstrated, any firm can do this simply by introducing a delivered price system; it is not sufficient reason to justify the joint sale by UKF and NSM of their products, nor the coordination of business policy and production set up by the two companies. It appears that, without prejudice to the compatibility with Articles 85 and 86 of delivered price systems, the joint application of such a system by a number of firms is in fact merely a logical consequence of the joint sale of their products.

G. Economies in staffing and management

102. The notifying companies fail again in their argument that by working through CSV they have been able to achieve economies in staffing and management, for any benefit that may have resulted from cooperation between their respective sales departments — and this cooperation extends only to straight nitrogenous fertilizers and in any case does not cover sales in other Community countries — cannot be regarded as constituting an appreciable improvement in distribution.

Not only is there no evidence to suggest that CSV, which has a staff more than 100 strong, has lower operating costs than would be incurred by UKF and NSM if their sales departments — which are already handling the sale of straight nitrogenous fertilizers — were to take over this work also, even if they had to be given additional staff to do so. In addition, and above all, users do not receive a fair share of the benefit from the alleged economies, as was seen earlier when the prices charged on the Dutch market were considered.

103. The effects claimed for the agreements by the notifying companies would therefore not seem capable of being regarded as an improvement in distribution, while their benefits are apparently felt by the manufacturers alone, who shield themselves from any competition while at the same time leaving their retailers to handle storage, their customers' delivery and credit.

H. Advantages for the consumer

104. Dutch consumers are not allowed a fair share of the benefit of this system, which has nothing but disadvantages for them, in terms of both quantities and prices, because of the inelasticity and uniformity of supply on the Dutch market.

Contrary to what the notifying companies allege, these effects on Dutch consumers are not to be attributed to the existence of imposed prices (which in reality are merely maximum prices which in no way impede competition between the various manufacturers), nor to the existence of an oligopoly, but to the enormous influence on business in this market of the pooled sale of UKF and NSM output and of the consequent alignment of prices by Esso Chemie and importing companies on those of CSV.

I. Indispensability of the restrictions

105. Furthermore, even if the first two tests of Article 85 (3) were regarded as being satisfied, exemption could not be given to the notified agreements, as the numerous restrictions which flow from them are by no means proved to be indispensable to the attainment of the benefits of the agreement.

106. In particular, Esso Chemie, with only a little more than a quarter of aggregate Dutch sales, can continue to sell in the Netherlands and for export without pooling its sales and without being placed at a competitive disadvantage. And UKF and NSM stopped using

CSV's services for exports to other Community countries and the United States without, as they themselves admit, any adverse effect on their market penetration. Indeed, the two companies state that their exports to those countries are developing quite favourably, with good prospects for future expansion.

107. Consequently, it cannot reasonably be held, in view of their respective sizes — UKF is the largest, and NSM one of the largest manufacturers of nitrogenous fertilizers in the EEC — that it is essential for them to set up an information system concerning their production and to entrust their Dutch and non-Community export sales to a joint selling agency.

108. Since none of the first three tests of Article 85 (3) is satisfied, there is no need to consider the fourth.

109. CSV's proposals for internal reorganization are not capable of altering this assessment of the applicability of Article 85 (3) to the cooperation between UKF and NSM since they would make no substantial changes to the aim of that cooperation, the way it is operated or its effects on the consumer.

IV. APPLICABILITY OF ARTICLE 3 OF REGULATION No 17

110. The cooperation between UKF and NSM based on the agreements of 11 April 1963, as amended on 23 June 1969 and 2 January 1974, constitutes an infringement of Article 85 (1) by conferring on CSV, of which UKF and NSM are the shareholders, a joint sales agency for marketing the two companies' straight nitrogenous fertilizers in the Netherlands and by their exchange and joint discussion of detailed information concerning production, storage and sales forecasts and figures for each product and destination, including deliveries to other Member States.

111. The parties have recently decided to discontinue the various planning and management committees operating within CSV, but their disappearance affects merely the administrative machinery behind the cooperation, which itself remains intact. The parties have announced that the agreements that have hitherto governed the cooperation arrangements will, by the beginning of the next fertilizer year, be replaced by bilateral agreements between UKF and CSV and between NSM and CSV taking into account solely market conditions but, as the Commission has explained in points 81 to 87, there is no apparent reason to believe

that the new arrangements will achieve anything more radical than a relaxation of the existing sales system. The parties themselves remain convinced that their present cooperation is compatible with Article 85. The parties should therefore be apprised of the limits which Article 85 imposes on their cooperation and should be required, in accordance with Article 3 of Regulation No 17, to bring their infringement to an end,

HAS ADOPTED THIS DECISION:

Article 1

The cooperation between Unie van Kunstmestfabrieken BV and Nederlandse Stikstof Maatschappij NV under the agreements of 11 April 1963, as amended on 23 June 1969 and 2 January 1974, constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community in that it confers on Centraal Stikstof Verkoopkantoor BV, of which UKF and NSM are the sole shareholders, a joint sales agency for marketing the two companies' straight nitrogenous fertilizers in the Netherlands and provides for the exchange and joint discussion of detailed information concerning production, storage and sales forecasts and figures for each product and destination, including deliveries to other Member States.

Article 2

The application for exemption under Article 85 (3) of the said Treaty made by Unie van Kunstmestfabrieken

BV, Nederlandse Stikstof Maatschappij NV and Centraal Stikstof Verkoopkantoor BV is dismissed.

Article 3

Unie van Kunstmestfabrieken BV, Nederlandse Stikstof Maatschappij NV and Centraal Stikstof Verkoopkantoor BV are ordered to terminate the infringement described in Article 1.

Article 4

This Decision is addressed to:

- Unie van Kunstmestfabrieken BV, Maliebaan 81, Utrecht, Netherlands,
- Nederlandse Stikstof Maatschappij NV, Louizalaan 149, B-1050 Brussels, Belgium,
- Centraal Stikstof Verkoopkantoor BV, Thorbeckelaan 360, NL-2564 BZ The Hague, Netherlands.

Done at Brussels, 20 July 1978.

For the Commission

Raymond VOUEL

Member of the Commission

ANNEX

PRODUCTION AND CONSUMPTION OF NITROGENOUS FERTILIZERS

(amount of N in straight and compound fertilizers)

(in 1 000 tonnes N)

	Production					Consumption				
	1972/73	1973/74	1974/75	1975/76	1976/77	1972/73	1973/74	1974/75	1975/76	1976/77
World	37 825	40 447	42 433	43 801	45 884	35 677	38 721	38 577	43 238	45 088
Countries with central planning organization	12 800	14 263	15 548	16 887	18 071	12 788	14 070	14 721	16 337	16 297
Developing countries	3 858	3 902	4 488	5 150	5 720	6 424	6 799	6 779	7 682	8 792
Developed countries	21 167	22 282	22 398	21 763	22 093	16 466	17 851	17 077	19 219	19 999
USA	8 433	9 158	8 474	9 591	9 790	7 512	8 297	7 809	9 445	9 654
	5 134	5 901	5 597	6 255	nd	5 830	6 613	6 212	nd	nd
Japan	2 199	2 138	2 341	1 557	1 149	733	821	691	653	736
	329	327	343	260	nd	311	337	294	270	nd
Europe (including Soviet bloc)	13 101	13 720	14 581	14 303	15 012	10 663	11 202	11 237	12 242	12 455
EEC	6 762	7 022	7 549	6 619	6 913	5 274	5 565	5 408	5 830	6 056
Belgium/Luxembourg (659) ⁽²⁾	640	654	641	610	652	180	179	185	182	190
	175	178	182	140	...	54	52	65	59	nd
Denmark (32)	77	63	81	80	109	329	365	300	339	349
	44	43	52	52	86	148	187	160	165	177
France (2 559)	1 476	1 642	1 694	1 361	1 462	1 588	1 833	1 555	1 708	1 815
	658	717	(780)	(750)	nd	642	761	562	nd	nd
Germany (2 388)	1 471	1 473	1 574	1 259	1 290	1 189	1 100	1 201	1 223	1 323
	440	444	453	304	375	321	318	367	314	358
Ireland (38)	85	94	97	100	91	131	130	133	153	168
	...	...	...	...	...	52	60	53	(53)	nd
Italy (1 761)	1 045	1 129	1 131	1 000	985	692	672	672	724	671
	219	241	246	218	219	217	205	193	251	190
Netherlands (2 115)	1 217	1 212	1 334	1 154	1 253	376	412	435	451	430
	159	178	173	123	nd	63	57	55	49	nd
United Kingdom (1 801)	751	755	997	1 055	1 071	789	874	927	1 045	1 110
	(348)	(346)	nd	nd	nd	593	nd	nd	nd	nd

Source: FAO annual report (fertilizers) 1976 and 1977 (provisional); OSCE.

⁽¹⁾ Of which N is included in compound fertilizers.⁽²⁾ Ammonia production capacity for 1975 in brackets.