

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 January 1996

relating to a proceeding under Article 85 of the EC Treaty

(Case IV/34.279/F3 — ADALAT)

(Only the German text is authentic)

(96/478/EC)

CONTENTS OF THE DECISION

CHAPTER I THE FACTS

Section I The product

1. *Nature of the product*
2. *Markets on which ADALAT is sold*
 - 2.1. Coronary heart disease
 - 2.2. Hypertension
 - 2.3. Congestive heart failure
3. *Importance of the product*
 - 3.1. A major product for Bayer
 - a. For the group
 - b. A major product in the sales strategies of Bayer subsidiaries in the various Member States
 - 3.2. Market shares
 - a. In France
 - b. In Spain
 - c. In the United Kingdom
 - d. In the Community of Twelve
 - e. Conclusion

- 3.3. Parallel imports of ADALAT
 - a. Wide price differences between Member States: an incentive for parallel imports
 - b. Extent of parallel imports
 - c. Cost of parallel imports
- 3.4. Outlook: ADALAT will in future remain a major product for Bayer

Section II **Bayer**

Section III **Pharmaceutical wholesalers**

- 1. *General*
- 2. *The situation in France*
 - 2.1. The wholesalers operating on the market (1990)
 - 2.2. Legislation applicable to distributing wholesalers
- 3. *The situation in Spain*
 - 3.1. The wholesalers operating on the market (1990)
 - 3.2. Legislation applicable to wholesalers

Section IV **Bayer France and Bayer Spain's continuous commercial relations with their wholesale customers**

- 1. *In France*
 - 1.1. Start of commercial relations
 - 1.2. Normal commercial relations
 - 1.3. Invoices
 - 1.4. Procedures in the event of supply problems
- 2. *In Spain*

Section V **Obstacles to parallel exports of ADALAT to the United Kingdom**

I. INTRA-GROUP CONDUCT WITHIN BAYER

- 1. *Parallel exports: an ongoing problem for Bayer*
 - 1.1. A general concern for the past number of years
 - 1.2. Studies and research into the problem of parallel exports
- 2. *Full information system on parallel imports within Bayer*
 - 2.1. Continuous exchanges of information on parallel imports between the various Bayer companies
 - 2.2. Centralization of information at Leverkusen
 - 2.3. Other means of obtaining information on parallel imports
- 3. *Formal decisions within the group intended to reduce parallel exports to the United Kingdom*

II. PRACTICAL IMPLEMENTATION OF THE INTRA-GROUP STRATEGY IN FRANCE AND IN SPAIN

- 1. *France*
 - 1.1. Bayer France's identification of exporting customers
 - 1.2. Halting of supplies to customers who have been detected
 - 1.3. Bayer France's official argument: depletion of stocks
 - 1.4. Wholesalers' reaction to Bayer France's conduct

1.5. Results

2. *Spain*

2.1. Bayer Spain's identification of exporting customers

2.2. Halting of supplies to customers who have been detected

2.3. Wholesalers' reaction to Bayer Spain's obstructive behaviour

2.4. Results

3. *United Kingdom: identification of the source of parallel imports to the United Kingdom*4. *Results*

4.1. Complaints from wholesalers not receiving supplies

4.2. Results achieved by Bayer

CHAPTER II **LEGAL ASSESSMENT**Section I **Definition of the market**1. *Geographic market*2. *Product market*3. *Relevant market*Section II **Article 85 (1)**1. *Agreement*

1.1. Export ban

(a) System for detecting exporting wholesalers

(b) Successive reductions in the amounts supplied by Bayer France and Bayer Spain where wholesalers export all or some of the products

(c) Conclusions

1.2. The export ban has been incorporated into the continuous relations between Bayer France and Bayer Spain and their respective wholesalers

(a) The precedent of the Sandoz case

(b) Continuous commercial relations

(c) Incorporation of the export ban into these continuous commercial relations

1.3. General conclusion

2. *Restriction of competition*

2.1. Object and effect of restricting competition

2.2. Appreciable restriction of competition

3. *Appreciable effect on trade between Member States*4. *Conclusions*Section III **Bayer's counter-arguments**1. *The argument that stocks were depleted*2. *The argument that legislative provisions impose certain obligations regarding the supply of the domestic market*3. *The argument regarding the existence of a patent for ADALAT-Retard*

Section IV	Article 85 (3)
Section V	Duration of the infringement
	1. <i>Spain</i>
	2. <i>France</i>
Section VI	Article 3 of Regulation No 17
Section VII	Party to which this Decision is addressed
Section VIII	Article 15 of Regulation No 17

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Articles 3, 15 (2) and 16 (1) thereof,

Having regard to the decision taken by the Commission on 26 September 1994 to initiate proceedings in this case,

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

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

Whereas:

CHAPTER I

THE FACTS ⁽³⁾

SECTION I

The product

1. Nature of the product

- (1) ADALAT (known in France as ADALATE) is the brand name of a range of medicinal products whose active principle is nifedipine. This substance has remarkable pharmacological properties.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

⁽³⁾ 1. The documents in support of the charges are quoted in their original version at the end of this Decision in the Annex 'Original documents in support of charges'. These are marked by ordinary numbering. The Annex fully forms part of this Decision.
2. The names ADALAT and ADALATE are printed in capitals in this Decision for the purposes of clarity.

(2) The ADALAT product range is available in the following forms:

- capsules (5 mg, 10 mg, 20 mg)
- tablets (20 mg)
- modified-release tablets (10 mg, 20 mg, 5+15 mg)
- one-per-day tablets (30 mg, 60 mg).

(3) The products are marketed as follows in Germany, France, Spain and the United Kingdom:

	Germany	United Kingdom	France	Spain
Capsule 5 mg	Adalat 5	Adalat 5		
Capsule 10 mg	Adalat	Adalat	Adalate	Adalat
Capsule 20 mg	Adalat 20			Adalat 20
Tablet 10 mg	Adalat T10			
Mod. Rel. Tab. 10 mg		Adalat Retard 10		
Mod. Rel. Tab. 20 mg	Adalat retard	Adalat Retard	Adalat 20mg LP	Adalat Retard
Mod. Rel. Tab. 5+15 mg	Adalat SL			Adalat Bifasico
One/day Tab. 30 mg		Adalat LA 30		Adalat Oros 30 (*)
One/day Tab. 60 mg		Adalat LA 60		Adalat Oros 60 (*)
(...)	(...)	(...)	(...)	(...)

(*) from 1. 3. 1993¹

(4) ADALAT products also exist in the form of an injectable solution, for hospital use only. These products are not covered by this Decision, which will be confined to the ADALAT products marketed in the following three countries: France, Spain and the United Kingdom. Therefore, this Decision covers only the following two products in the ADALAT range: the 10 mg capsule (marketed in the United Kingdom and Spain under the name ADALAT and in France under the name ADALATE) and the 20 mg modified-release tablet (marketed in the United Kingdom and Spain under the name ADALAT-Retard and in France under the name ADALATE 20 mg LP). As may be seen from the facts set out below, the main export restrictions apply essentially to ADALAT-Retard. It is this product which, for medical reasons, is in greatest demand. In this Decision, the term 'ADALAT' designates the two products.

(5) In France, ADALATE 10 mg was licensed in May 1979 and ADALATE 20 mg LP in 1985. The two products are manufactured, packaged and marketed by Bayer Pharma SA (France) ⁽⁴⁾.

(6) In Spain, ADALAT and ADALAT-Retard were licensed in January 1986. The two products are manufactured, packaged and marketed by Química Farmacéutica Bayer SA (Spain) ⁽⁵⁾.

(7) Bayer states that, in the United Kingdom, it applied for a patent in the early 1980s for the ADALAT-Retard 20mg Tablets and that this patent was definitively awarded at the beginning of 1995.

⁽⁴⁾ Bayer Pharma SA (France) will be referred to in this Decision as 'Bayer France'.

⁽⁵⁾ Química Farmacéutica Bayer SA (Spain) will be referred to in this Decision as 'Bayer Spain'.

2. Markets on which ADALAT is sold

- (8) ADALAT belongs to a category of medicinal products known as 'calcium antagonists' and is used to treat cardiovascular diseases, which are subdivided into three categories: coronary heart disease, arterial hypertension and congestive heart failure. However, congestive heart failure seems to represent a minor market for Bayer ⁽⁶⁾:

'On comparing the 2 markets important to Bayer at the moment, ie Coronary Heart Disease (CHD) and Hypertension it is clear that the hypertension market holds by far the greatest potential. There has been a significant growth in the hypertension market in the last few years and this is expected to continue. (...) In contrast there is little growth expected in the CHD market.'²

2.1. Coronary heart disease

- (9) Coronary heart disease is characterized by violent constrictive pains in the precordial region. Three types of treatment are used: calcium antagonists, nitrates and beta blockers.

'Leading product classes by revenue are Ca-antagonists. They maintained their leading position since 1985 with a market share of 40 % in 1989 (34 % in 1985). (...)

(In Europe), leading product classes are Ca-antagonists (34 %) (...):

	1985	1989
Ca-antagonists	35 %	34 %
Nitrates	29 %	33 %
Beta-blockers	8 %	6 %

From 1988 to 1989, ADALAT is slightly losing ground in all 5 European countries (France, Great Britain, Germany, Italy, Spain) mainly due to the generic competition of Nifedipine and Diltiazem.'³

2.2. Hypertension

- (10) Hypertension is a heart disease in which increased tension in the arteries brings about an increase in blood pressure.

'The (world) Hypertension Market is the largest pharmaceutical market and has experienced a very healthy growth rate of approximately 10 % per annum over the last five years, growing from DM 10.9 bn in 1985 to DM 14.5 bn in 1989.'⁴

- (11) Four types of treatment are used: ACE (angiotensin converting enzyme) inhibitors, beta blockers, calcium antagonists and diuretics.

'ACE-Inhibitors are, in revenue terms, dominant market leaders in Europe as a whole. This dominance is especially marked in the Mediterranean countries such as Italy and Spain, whereas in Great Britain and Germany Calcium Antagonists and Beta-Blockers are relatively much stronger as illustrated below:

1989 European Revenue Market Share by Product Class

	Europe	Italy	Spain	Germany	GB
ACE-Inhibitors (%)	35.1	54.8	43.6	19.9	21.1
Calcium Antagonists (%)	16.3	14.7	17.8	16.7	18.7
Beta Blockers (%)	22.7	11.3	15.5	34.1	43.3
Diuretics (%)	11.4	7.9	17.9	9.6	11.2
Others (%)	14.5	11.3	5.2	19.7	5.7
Total Market (DM billion)	5.42	0.91	0.27	0.95	0.65

Source: IMS'⁵

⁽⁶⁾ The Bayer group will be referred to in this Decision as 'Bayer'. Bayer AG (Germany) will be referred to as 'Bayer AG'. Bayer plc (UK) will be referred to as 'Bayer UK'.

Europe and the United States represent more than 70 % of the world market.

2.3. Congestive heart failure

- (12) Congestive heart failure is cardiovascular insufficiency and the circulatory problems which this causes.

'The world market in CHF (Congestive Heart Failure) in 1989 was valued at DM 3.2 billion (. . .):

ACE-inhibitors	23 %
Diuretics	19 %
Glycosides	19 %
Ca-antagonists	16 %
Others	23 % ' 6

Europe accounted for 40 % of the world market for this type of medicament (Japan: 14 %, North America: 33 %, other countries: 13 %).

3. Importance of the product

- (13) ADALAT ranked ninth in the world's top 40 pharmaceutical products in 1992, with world sales of US\$ [. . .] ⁽⁷⁾ million (about ECU [. . .] million).

3.1. A major product for Bayer

(a) For the group

- (14) Bayer's annual report for 1990 states that:

'The very effective calcium antagonists are among the most important therapeutic principles for the treatment of coronary heart disease and hypertension. Our product ADALATE (nifedipine), proven for many years, is now available in more than one hundred countries (. . .).' ⁷

- (15) The report goes on to confirm that ADALAT is Bayer's major product:

'In a short time, Ciprobay (. . .) has become our most important pharmaceutical specialty after ADALATE.' ⁸

- (16) An internal Bayer report confirms that ADALAT is Bayer's major product:

'Bayer's current image in the CV-business is closely linked to the market success of ADALAT which currently represents one of the leading products in HT and CHD and the standard reference for investigators all over the world.' ⁹

- (17) Another report states that ADALAT is Bayer's leading product in terms of turnover (DM [. . .] million in 1991, i.e. about ECU [. . .] million, up 7 % on 1990).

- (18) In 1990, ADALAT accounted for [. . .] of the group's turnover in prescription medicines and [. . .] of its turnover in the cardiovascular disease sector.

⁽⁷⁾ In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 (2) of Regulation No 17 concerning non-disclosure of business secrets.

- (19) Numerous documents detail the qualities which make ADALAT 'a leading product with a strong identity'¹⁰. These qualities are as follows:
- Reference (product) as a calcium inhibitor
 - guaranteed effective
 - can be used in cases of associated pathologies
 - easy to use
 - tolerance
 - Bayer product.'¹¹
- (b) A major product in the sales strategies of Bayer subsidiaries in the various Member States
- (20) In Spain, ADALAT is the leading product in the sales of Bayer Spain. In 1992, Bayer Spain's turnover in ADALAT (all products) accounted for [...] of its total turnover and [...] of its turnover in the cardiovascular disease sector.
- (21) In France, in 1992, ADALATE accounted for [...] of Bayer France's total turnover and [...] of its turnover in the cardiovascular disease sector.
- (22) In the United Kingdom, ADALAT was by far Bayer UK's leading product in terms of turnover in 1992. In that year ADALAT accounted for [...] of Bayer UK's total turnover and virtually [...] of its turnover in the cardiovascular disease sector.

3.2. Market shares

- (23) Only the market shares of the countries that are pertinent to this Decision are given here, since markets in the pharmaceutical sector are national (see paragraphs 150—152). For the purposes of this Decision, market shares are indicated by reference to the major therapeutic uses of the product (coronary heart disease and hypertension).

(a) In France

- (24) Bayer has specified the following market shares, calculated in value terms:
- on the coronary heart disease market, ADALATE (capsules + Retard) has 5,1 %,
 - on the hypertension market, ADALATE has 4,1 %,

(b) In Spain

- (25) Bayer has specified the following market shares, calculated in value terms:
- on the coronary heart disease market, ADALAT has 7,4 %,
 - on the hypertension market, ADALAT has 8,7 % of the market.

(c) In the United Kingdom

- (26) Bayer has specified the following market shares, calculated in value terms:
- on the coronary heart disease market, ADALAT has 19,6 %,
 - on the hypertension market, ADALAT has 16,6 %.

(d) In the Community of Twelve

(27) Bayer has specified the following market shares, calculated in value terms:

- on the coronary heart disease market, ADALAT has 7,6 %,
- on the hypertension market, ADALAT has 5,8 % of the market.

(e) Conclusion

(28) It should be noted that, in the medicinal products sector, doctors and patients are often very attached to a particular brand, particularly in the case of chronic diseases. This is the case with ADALAT, which has the backing of Bayer's name and is recognized as one of the major products worldwide for the treatment of the relevant diseases. It must therefore be borne in mind that, where ADALAT is expressly prescribed by the doctor, it is often difficult to substitute another, competing product, for example a generic, for it, both for psychological reasons (reluctance on the part of the patient to accept another product) and for statutory reasons (statutory rule in some countries prohibiting pharmacists from substituting a product having equivalent therapeutic properties for the product specifically prescribed by the doctor). This aspect helps to give the market shares held by Bayer through its product ADALAT special significance, these market shares being in themselves already relatively substantial, particularly in the United Kingdom.

3.3. *Parallel imports of ADALAT*

(a) Wide price differences between Member States: an incentive for parallel imports

(29) A very large number of documents found on the premises of the various Bayer companies investigated give the prices for ADALAT products in the various countries. For example, one document compares prices between the various countries as at 14 October 1991:

'Price comparison ADALAT RETARD 20mg Tablet (DM per tablet)

	UK	B	GR	NL	P	SP	FR	IT	GER	DK
Wholesale price	0.49	0.51	0.43	0.63	0.47	0.32	0.37	0.37	0.42	0.84
Price excl. tax	0.84	0.85	0.55	0.85	0.68	0.52	0.55	0.55	0.78	1.20
Price incl. tax	0.97	0.90	0.60	0.90	0.68	0.55	0.56	0.60	0.90	1.47

Price comparison ADALAT 10mg capsules (DM per capsule)

	UK	B	GR	NL	P	SP	FR	IT	GER	DK
Wholesale price	0.31	0.20	0.26	0.41	0.21	0.16	0.17	0.23	0.27	0.50
Price excl. tax	0.53	0.34	0.36	0.59	0.30	0.26	0.24	0.35	0.44	0.74
Price incl. tax	0.61	0.36	0.39	0.62	0.30	0.28	0.24	0.38	0.50	0.90 ¹²

(30) Numerous documents take these figures as a basis in calculating the difference in prices between certain countries. Handwritten annotations highlight the differences between the low-price countries and the United Kingdom.

(31) The most recent document (18 March 1992) gives the following price comparisons:

Price comparison/by region

ADALAT RETARD 20 mg tablet **per tablet**

Country	(...)	No Pack	(...)	Wholesale price DM per **	(...)
(...)					
Belgium		30		0,51	
Denmark		100		0,82	
(...)					
France		30		0,37	
Greece		30		0,42	
Ireland		100		0,49	
Italy		50		0,36	
Netherlands		50		0,70	
Netherlands		100		0,70	
(...)					
Portugal		20		0,55	
Portugal		50		0,47	
(...)					
Spain		40		0,32	
Spain		60		0,32	
Spain		500		0,26	
United Kingdom		100		0,49	

ADALAT 10 mg capsule **Per capsule**

Country	(...)	No Pack	(...)	Wholesale price DM per **	(...)
(...)					
Belgium		96		0,21	
Belgium		100		0,20	
Belgium		50		0,26	
Denmark		100		0,48	
Denmark		250		0,45	
(...)					
France		90		0,17	
France		30		0,19	
Greece		50		0,26	
Ireland		100		0,31	
Italy		50		0,23	
Netherlands		50		0,46	
Netherlands		100		0,42	
(...)					
Portugal		50		0,21	
(...)					
Spain		50		0,16	
Spain		500		0,14	
United Kingdom		100		0,31	

It may be noted here in particular that, in the case of ADALAT-Retard 20 mg tablets, the price in Spain is, depending on the type of packaging, from 35 to 47 % below the price in the United Kingdom and that the price in France is 24 % lower. In the case of ADALAT in 10 mg capsule form, depending on the type of packaging, the price in Spain is from 48 to 55 % below the price charged in the United Kingdom. The price in France is from 39 to 45 % below the United Kingdom price.

(b) Extent of parallel imports

(i) Origin of parallel imports

- (32) A very large number of statistical documents found on the premises of Bayer's various companies that were investigated record parallel imports regularly, with monthly updatings, indicating their level and countries of origin.
- (33) The following table gives the figures for the countries of origin of parallel imports in 1990 and 1991. It recapitulates the figures available in those two years regarding the origin of parallel imports.

	ADALAT 10 mg capsule		ADALAT RETARD 20 mg	
	1990	1991	1990	1991
Belgium	28.1 %	27.0 %	5.1 %	5.6 %
Germany	6.1 %	15.7 %	3.8 %	9.5 %
France	14.9 %	11.8 %	17.1 %	24.9 %
Greece	3.1 %	5.1 %	40.5 %	30.1 %
Netherlands	0.8 %	1.0 %	0.1 %	0.7 %
Italy	18.2 %	9.9 %	12.0 %	10.6 %
Spain	20.8 %	22.6 %	13.4 %	12.6 %
Other	1.4 %	0.3 %	0.6 %	0.5 %
Not classified	11.0 %	9.9 %	12.1 %	13.0 %
(...) ¹⁴				

(ii) Market shares of parallel imports

- (34) The market shares (in Europe) of parallel imports are as follows:

‘ADALAT and imitations
Shares of turnover — growth 1984-1991

	ADALAT	PI (Value in %)	Generics
1984	95.0	5.0	
1985	75.9	9.0	15.1
1986	61.2	6.8	32.0
1987	55.4	4.9	37.7
1988	47.4	5.9	46.7
1989	38.6	4.5	56.8
1990	30.6	1.9	67.5
1991	31.4	2.2	66.4 ¹⁵

(c) Cost of parallel imports

- (35) A very large number of documents identify parallel imports as ‘weak points’ or ‘threats’ for ADALAT.

For price reasons, as stated above, the United Kingdom is one of the main targets of parallel imports. In 1989, a report by the ABPI (Association of the British Pharmaceutical Industry) concluded:

'The overall effects of parallel imports on the UK economy are harmful (...) our direct estimate of the value of domestic sales lost to parallel imports by UK manufacturers in 1987/8 was £ 350 m. representing 0,1 % of gross National Product in 1987.'¹⁶

In 1992, a report drawn up by Bayer UK concluded:

'Estimated loss to the UK market through PI would be £ 1.4 billion if total free trade and unlimited supply in low cost countries'.¹⁷

3.4. *Outlook: ADALAT will in future remain a major product for Bayer*

- (36) The following document highlights Bayer's objectives for ADALAT:

'The objective of Bayer cardiovascular is to make ADALAT the number [...] product in cash and scrips in both (coronary and hypertension) indications by [...].'¹⁸

The Bayer group's annual report for 1992 confirms the group's success with ADALAT:

'We have consistently developed our leading product in terms of turnover, the heart/circulatory drug ADALAT (...). This has enabled us to strengthen our position as world leaders in the heart/circulatory drug sector.'¹⁹

SECTION II

Bayer

- (37) Bayer is a highly diversified international chemicals group. It operates in some 180 countries in six sectors: polymers, organic chemicals, industrial products, health, agriculture and information technology. The Bayer group's turnover amounted to DM 41 195 million in 1992 (some ECU 22 029 million). Its turnover in the health sector amounted to DM 7 198 million (some ECU 3 849 million) in 1992.

In 1991 to 1992, the Bayer group was eighth in the pharmaceuticals sector at world level with sales of US\$ 4 309,1 million (some ECU 3 264 million).

SECTION III

Pharmaceutical wholesalers

1. General

- (38) Pharmaceutical distribution in Europe uses three distinct channels: hospitals, pharmacies and drugstores, and wholesalers.

Hospitals generally obtain their supplies direct from the laboratories or through purchasing consortia. Hospitals obtain supplies from wholesalers only in exceptional cases. There are approximately 6 000 hospitals in the Community of Twelve. Hospitals account for 11 % of demand in France, 12 % in Spain and 5 % in the United Kingdom.

Pharmacies and drugstores obtain few of their supplies direct from laboratories. There are at present 103 500 pharmacies and 14 650 drugstores in the Community of Twelve. Direct sales of pharmaceutical specialities to pharmacies represent 7 % of distribution in France, 3 % in Spain and 19 % in the United Kingdom.

Pharmaceutical wholesalers are thus the main intermediaries between laboratories and retailers in the Community of Twelve. European wholesalers thus distribute 90 % of medicinal products. There are about 500 wholesalers. Pharmaceutical specialities account for 75 to 95 % of their turnover, and their profit margin ranges between 9,7 and 16,5 %.

2. The situation in France

2.1. *The wholesalers operating on the market (1990)*

(39)	'OCP	38.8 %
	IFP Santé	15.2 %
	Erpi	11.6 %
	CERP Rouen	12.4 %
	CERP Rhin-Rhône-Méditer.	6.1 %
	Bourelly	4.1 %
	CERP Lorraine	3.2 %
	GRP (Repha-Vendée)	
	(Schulze, RFA)	2.1 %
	CERP Bretagne Nord	1.5 %
	Chafer (Schulze)	0.85 %
	Martin	0.8 %
	Bialais	0.15 % ²⁰

2.2. *Legislation applicable to distributing wholesalers*

- (40) French legislation ⁽⁸⁾ applicable to distributing wholesalers is based on the following provisions:
- legislative articles L.596, L.596—1, L.598, L.599, and L.600 of the Code de la santé publique ⁽⁹⁾,
 - the regulatory articles relating to establishments preparing and dealing wholesale in pharmaceutical products, Articles R.5105 to R.5516 of the 'Code de la santé publique',
 - the Order of 3 October 1962 ⁽¹⁰⁾ laying down the requirements incumbent on distributing wholesalers as regards the supply of medicinal products to pharmacies.

French legislation lays down the following rules:

- there must be a pharmacist authorized to take decisions (Article L.596),
- a pharmaceutical establishment (capable of wholesale distribution of medicinal products) may not be opened until administrative authorization has been obtained (Article L.598),
- the conditions under which pharmaceutical establishments operate must be such as fully to safeguard public health (specially fitted-out premises, availability of the necessary equipment, resources and staff) (Article R.5115—6),
- distributing wholesalers must keep a sufficient stock of medicinal products to be able to supply the relevant pharmacies (third paragraph of Article R.5115—6),
- This latter article is spelt out in greater detail by the Order of 3 October 1962, which provides that:

'Any wholesale distributor of pharmaceutical products (. . .) and its branches must permanently keep a stock of pharmaceutical specialities to enable it to supply the monthly consumption of their regular pharmacy customers in the area which they serve.

⁽⁸⁾ Public Health Code (Code de la santé publique, JORF, 11. 12. 1992).

⁽⁹⁾ These articles were amended at the end of 1992 ('Loi n° 92.1279 modifiant le Livre V du Code de la santé publique', JORF, 11. 12. 1992), but essentially maintained all of the provisions applicable to distributing wholesalers. It is the pre-1992 version which has been referred to here since the main effects of the conduct described in this Decision took place between October 1991 and September 1992.

⁽¹⁰⁾ JORF, 12. 10. 1962.

This stock of medicinal products must be similar in nature to a "collection" of specialties and must include at least two thirds of the number of special pharmaceutical forms actually used and, in terms of value, must correspond to the average value of the monthly turnover of the preceding year (Article 1).

Any wholesale distributor of pharmaceutical products and its branches must be able to supply any specialty used by any pharmacy which is a regular customer and which lies within their distribution area within twenty-four hours of receiving an order for any specialty forming part of their "collection".

They must monitor their supplies of specialties in order to avoid running out of stock (Article 2).

The area referred to in Article 2 is constituted by the geographical area in which the pharmacist responsible for the wholesale distributor of pharmaceutical products or the branch of a wholesale distributor of pharmaceutical products has stated that he carries on his activity (Article 3).²¹

- (41) French legislation does not prohibit exports. No implicit impediment to exports may be inferred from the legislation. It is therefore clear that, under the terms of the legislation, exports are authorized.

These are the interpretation and practice which have always been followed. The recent Law of 1992 and the decrees implementing it elucidate the matter further along these lines and spell out explicitly what the law already provided implicitly: French law grants distributing wholesalers a monopoly for the distribution of medicinal products to pharmacies. In return for this monopoly, it imposes a number of public-service requirements. The territory of the Community is treated by the law on a par with the French national territory, and distributing wholesalers are free to export to other countries of the Community once their public-service obligations have been fulfilled.

- (42) Producers are not subject to any statutory requirement as regards supplies to wholesalers or the supplying of the national market.

3. The situation in Spain

3.1. *The wholesalers operating on the market (1990)*

- | | | |
|------|---|---------------------|
| (43) | 'COFARES | 20.6 % |
| | Federación Farmacéutica | 11.0 % |
| | Safa (incl. Galenica) | 6.3 % |
| | Hermandad FCA Del Mediterráneo (HEFAME) | 6.1 % |
| | CECOFAR | 5.3 % |
| | HUFASA (CERP Rouen) | 3.9 % |
| | Centro Farmacéutico | 3.9 % ²² |

3.2. *Legislation applicable to wholesalers*

- (44) Spanish legislation applicable to pharmaceutical wholesalers is based on the Ministerial Decision of 7 April 1964⁽¹¹⁾ as supplemented by the Ministerial Decision of 5 May 1965⁽¹²⁾. In 1990, a Law on medicinal products was also adopted, spelling out the earlier provisions without amending them⁽¹³⁾.

This legislation lays down rules which are similar to those provided for under French legislation:

— there must be a pharmacist authorized to take decisions (Chapter IV, Article 14 *et seq.* of the Ministerial Decision of 1964),

⁽¹¹⁾ Orden de 7 de abril de 1964, del Ministerio de la Gobernación, Especialidades Farmacéuticas Almacenas, reglamentación (B. gaceta nº 101 de 27 de abril de 1964).

⁽¹²⁾ Orden de 5 de mayo de 1965, del Ministerio de la Gobernación. Farmacéuticos-Farmacia. Existencias Mínimas en farmacias y almacenes farmacéuticos (B.O.E. 'Gaceta de Madrid' nº 127, de 28 de mayo de 1965).

⁽¹³⁾ Law No 25 of 20 December (Ley del Medicamento).

- a pharmaceutical establishment may not be opened until administrative authorization has been obtained (Chapter I, Article 1 *et seq.* of the Ministerial Decision of 1964),
 - the conditions under which pharmaceutical establishments operate must be such as fully to safeguard public health (Chapter II, Article 9 *et seq.* of the Ministerial Decision of 1964),
 - wholesalers must, at all times, keep sufficient stocks for the region in which they operate (Chapter III, Article 12 of the Ministerial Decision of 1964). In 1964, the term 'region' meant the provinces. Nowadays, it refers to the autonomous communities. The term 'sufficient stocks' was defined by means of a list published in the Ministerial Decision of 1965. The list has not been updated since 1965.
- (45) Spanish law does not provide for any obligation to supply pharmacies.
- With regard to exports, Article 82 of the Law of 1990, confirming previous practice, provides explicitly for the right of pharmaceutical wholesalers to export.
- (46) Producers are not subject to any statutory requirement regarding supplies to wholesalers or the supplying of the national market.

SECTION IV

Bayer France and Bayer Spain's continuous commercial relations with their wholesale customers

1. In France

- (47) Bayer France has a continuous commercial relationship with the wholesalers, who regularly order ADALATE and other medicinal products from it in order to meet the demand emanating from the pharmacists which they have to supply. Direct supplies from the producer to pharmacies are rare and are not part of Bayer France's general marketing policy.

Pharmaceutical product wholesalers are therefore the natural customers of Bayer France, which, as a general rule, supplies them on request, except in specific cases.

Similar procedures apply for each of the three major wholesalers in France, OCP, CERP Rouen and CERP Lorraine (these three wholesalers accounting for at least 80 % of the market):

1.1. *Start of commercial relations*

- (48) — Commercial relations between OCP and Bayer France date from the beginning of the century. Commercial relations were established as soon as the two companies were set up and have continued uninterrupted ever since. The distributing wholesaler is the natural prime customer of any producer of pharmaceutical products wishing to distribute them in France.
- CERP Rouen has provided similar information: commercial relations date back to the setting-up of CERP Rouen, in 1919. Since then, CERP Rouen has always been supplied by Bayer France.
 - CERP Lorraine has provided similar information: commercial relations started when CERP Lorraine was set up in 1935, and they have continued uninterrupted ever since CERP Lorraine and Bayer France have existed in France.

1.2. *Normal commercial relations*

- (49) — In the case of OCP, orders are normally placed by telephone. Bayer France sends the invoice after delivery. Settlement normally takes place within 90 days.

- In the case of CERP Rouen, orders are placed more or less weekly by electronic mail. The order is delivered by Bayer France generally within a few days, and delivery rarely takes more than a week. CERP Rouen draws up a receipt list on delivery, and this enables it to check the delivery. Bayer France sends the invoice after delivery.
- In the case of CERP Lorraine, the way in which orders are normally placed depends on their destination: orders for France are generated automatically by the 'chain of supply', with the computer automatically placing orders in response to the level of stocks. Orders for export (Community and third countries) are irregular in pattern, since they depend on foreign customer demand, and CERP Lorraine cannot always assess foreign customers' requirements precisely in advance. Those orders are therefore placed separately from the orders for France. All normal orders are placed by fax or telephone, and in some cases by ordinary letter. Bayer France sends the invoice after delivery.

1.3. Invoices

- (50) The invoices sent by Bayer France to its wholesale customers include clauses specifying the general conditions of sale. The bottom left-hand corner of the French invoice refers the customer clearly, in capital letters, to the notice on the reverse side of the invoice:

'See over for our general conditions of sale' ²³

The general conditions of sale are neutral: they are the usual clauses included in a contract for the supply of goods.

1.4. Procedures in the event of supply problems

- (51) Normal supply problems are generally settled by telephone. With regard to the particular problems involved in this case, all the wholesalers have made telephone calls of complaint, have (in rare cases) sent letters of complaint and, in certain cases, have actually placed their orders by registered letter in a (vain) attempt to get Bayer France to supply them. These aspects will be dealt with below in the detailed description of the disruptions in supply and the reasons for them, which are the subject of this Decision.

2. In Spain

- (52) The situation is similar to that in France.

With regard to continuous commercial relations, contacts between pharmaceutical product wholesalers and Bayer Spain are regular and frequent. Orders are normally placed by telephone or electronic mail, and the invoices are sent after delivery.

On the Spanish invoice, the clause 'conditions of sale' ²⁴ states that:

'Acceptance of the goods implies compliance with the following conditions of sale.' ²⁵

There then follow the usual clauses contained in a contract for the supply of goods.

SECTION V

Obstacles to parallel exports of ADALAT to the United Kingdom

I. INTRA-GROUP CONDUCT WITHIN BAYER

1. Parallel exports: an ongoing problem for Bayer

1.1. A general concern for the past number of years

- (53) A very large number of documents reflect the ongoing concern caused by parallel imports of ADALAT, particularly in the United Kingdom.

- (54) For example, in 1988, an internal Bayer UK memorandum states:

'Parallel import brainstorm meeting.'

'The purpose of this PI brainstorming meeting was to explore ideas to combat the potential increase in the demand for foreign ADALAT (. . .).' ²⁶

(55) In 1989, the same concern is apparent:

'Without doubt the main cause of the overall decline in sales for the period is the significant increase in the level of parallel imports of the ADALAT product range, in particular the 20 mg presentation of ADALAT RETARD. Parallel imports of ADALAT RETARD 20 mg now account for some 25 % of that product's sales in the UK.'²⁷

At the end of 1989, the ABPI (Association of the British Pharmaceutical Industry) decided to carry out a study to identify the level of parallel imports. The project was supported by all the major producers, and Bayer UK stated:

'We are trying to establish the true size of Parallel Imports (PIs) which "official" sources put at between £ 70—£ 300m. ADALAT is quite badly affected and it is in our interest to support the project.'²⁸

(56) In 1990, the Bayer UK reports identify the source of the problems:

'PH (PHARMA) (¹⁴) in spite of the continued erosion of ADALAT sales due to parallel imports performed very well (. . .).'²⁹

'(. . .) PH still losing sales of ADALAT against parallel imports (. . .).'³⁰

(57) In 1991, subsequent reports indicate continuing parallel imports:

'(. . .) progress of ADALAT RETARD 20 mg in spite of parallel imports!'³¹

(58) In 1992, the problem continued to be referred to in documents:

'The launch of ADALAT LA continues to do well and is rising every week (. . .) However there is considerable concern over the continued increase in parallel imports which is affecting our business badly.'³²

1.2. *Studies and research into the problem of parallel exports*

(59) Bayer set up bodies and structures to examine the problem and find solutions.

(60) In 1988, a 'PI Brainstorm Meeting'³³ was organized by Bayer UK. At the meeting, different ideas were put forward to combat the potential increase in the demand for 'foreign' ADALAT.

'The purpose of this PI brainstorming meeting was to explore ideas to combat the potential increase in the demand for foreign ADALAT. The ideas put forward at the meeting fell into four groups.

Promotional

Action which could be taken immediately to offer defence in the short term.

Supply PI company with UK stock

Cut UK price

Attend trade shows for local promotions

Request free AG stock to fund promotion

Adjust credit/invoice procedure to aid wholesalers

Provide free UK stock to hospitals

Increase direct dealing

Employ telesales techniques

Target problem areas and conduct intensive sell-ins

Increase discount to wholesalers by 0.34 % to eliminate the clawback rationale.

(¹⁴) PH (= Pharma): Pharmaceutical division of the company.

Marketing Orientated Activity

Medium-Term Defence

Run a cardiovascular awareness programme
Increase efforts to educate GPs
Promote product lines which are UK specific
Provide patient compliance packs
Vary UK pack sizes
Obtain unique batch numbers for the UK
Release a medical information deterrent
Stop promoting capsules
Delete ADALAT RETARD 20 mg for a period
Print Bayer UK on capsules
Run a national newspaper awareness campaign
Employ a speaker for wholesaler meetings
Become more involved with the Royal Pharmaceutical Society.

Legal Actions

Back retail chemist to challenge clawback
Prosecute all unlicensed users
Supply information to VAT, inland revenue, customs, etc., on customer accounts
Highlight illegal PIs

Corporate Action

Long-Term Defence

Hold discussion with DHSS
Restrict foreign supply
Bayer AG to allocate ADALAT stock against strict market forecasts
Cooperate with other manufacturers
Purchase a wholesaler
Do nothing.

Some of these ideas are obviously extreme but the purpose of the meeting was to explore as many different angles as possible.' ³⁴

- (61) In 1989, the 'EC 92' group met. The record of the meeting states:

'In general, all representatives of low-price countries referred to the risk of parallel imports from their countries.' ³⁵

At that meeting, study groups placed under the responsibility of Bayer executives were set up. One of them was the group on 'Transfer prices, parallel imports and re-imports' ³⁶.

- (62) In 1990, the 'EC 92' study group met on numerous occasions:

'How can we gain control of "Euro-purchases" by wholesalers/hospitals?'

(. . .) 'the group made the following recommendations: (. . .) 3. Identify possible European wholesalers.' ³⁷

- (63) In 1991, the same group continued to put forward proposals:

'(. . .) For the time being, PH production will remain in Spain (. . .).

In addition, however, the future distribution strategy should be discussed, in particular with regard to possible cooperation with UK wholesalers.' ³⁸

- (64) In 1992, a 'wholesaler working group' met and reported that parallel imports were increasing and that measures such as the following should be envisaged:

'phased plan:

1. Make wholesale trade aware of direct supply as a reaction to imports (threat)
2. Regional** direct supply of pharmacies by wholesalers with fast-moving products
3. Stakes in national wholesalers ***
(> 75 %), in order to be present in substitution competition (poss. further development of wholesalers to carry partial product range)
 - *) No bonus for import returns
 - *) possible Awareness campaign for parties with similar interests on price level (e.g. ABDA, wholesale trade)
 - **) poss. alternative Cooperation with regional wholesalers, less than ideal because of danger of dependency
 - ***) poss. alternative Set up new MPS wholesaler, but would take longer than purchase (2 years) and cost advantage questionable' ³⁹

2. Full information system on parallel imports within the Bayer group

2.1. Continuous exchanges of information on parallel imports between the various Bayer companies

- (65) Following the *Hauptländertreffen* in Travemünde (22 September 1991) at which major decisions were taken (see paragraph 76), Bayer UK sent all the low-price countries a circular:

'Dear Dr Acebillo,

ADALAT/Parallel Imports

I refer to our recent discussions at the "Top Country Meeting" and would like to send you updated figures regarding the quantities of parallel imported ADALAT to the UK. Please find enclosed.

1. Quantities of the different forms and packages sold in the UK in the twelve months to September 1991.
2. Countries of origin.

The source of these data is IMS (British Pharmaceutical Index) and Taylor Nelson Healthcare (Parallel Imports Monitor). However, both research companies provide us only with quantities and the respective package size. We associate the packs with the country of origin as follows:

1. ADALAT capsules 5 mg
 - 16 190 packs — Belgium
 - 4 282 packs — France
2. ADALAT capsules 10 mg
 - 66 238 packs — Germany
 - 55 691 packs — France
 - 147 665 packs — Belgium/France
3. ADALAT RETARD 20 mg tablets
 - 249 945 packs — Italy
 - 1 005 042 packs — Greece/Spain
 - 257 838 packs — Spain

I think we all agreed to discuss this matter in an objective way and to try our best to find and talk about facts instead of just assumptions. . . All parties concerned should cooperate closely in the fact finding. However, please advise your staff to work together rather than merely to defend their positions!

Thanking you for your co-operation.

Yours sincerely,

Klaus Behrend

cc Dr Kley — Region 2
David St George
Roger Cuff

Also sent to:

Dr G Pecci — Italy
Mr F Schönig — France
Dr K Bohle — Belgium
Mr A Zumbaum — Leverkusen'⁴⁰

All the persons receiving this letter are either general directors of the company or specialists in market studies and parallel imports. The handling of parallel imports is thus dealt with at the highest decision-making and responsibility level.

(66) The answers obtained and included in the file are the following:

The reply from Bayer Hellas states:

'(. . .) Contrary to your information on export volumes in Greece and Spain, we must inform you that in our opinion the quantities quoted are incorrect.
For your information, we plan to sell 1 220 000 packs in 1991. We assume that 850 000 of these packs will be used in Greece.'⁴¹

This letter was copied to Bayer AG, Leverkusen (¹⁵).

The reply from Bayer Belgium states:

'We understand your questions.
However, the facts in Belgium are as follows:

(1) ADALAT capsules 5 mg:

Alleged exports to UK: 16 190 packs.

Alleged exports to Cyprus: some 30 000 packs, i.e. a total of some 46 000 packs.

This year (Jan—Nov), Bayer Belgium has sold 19 349 packs in Belgium.

Comment: to our knowledge, practically nothing has been exported.

(2) ADALAT capsules 10 mg:

147 665 Belgium/France?

We are at a loss to understand what Belgium/France means.

This year (Jan—Nov), Bayer Belgium has sold 760 817 packs.

Comment: exports of ADALAT capsules 10 mg in these quantities to UK are extremely unlikely.

Perhaps the goods involved are counterfeit? (. . .)'⁴²

This letter was copied to Leverkusen.

For France, the copy of the letter from Bayer UK is included in the file with the following handwritten annotations: 'Impossible'⁴³ (opposite the figure attributed to France for the 5 mg capsules) and 'Which one?'⁴⁴ (opposite the figure attributed to France/Belgium for the 10 mg capsules).

(67) Other documents show that Bayer UK made frequent enquiries to other subsidiaries. For example, in Ireland and Denmark:

'Please could you let me know the current situation re the nifedipine (Elan) as Germany have made another enquiry concerning this.'⁴⁵

A handwritten note states that the text was sent by telex to Leverkusen.

(¹⁵) Bayer AG is situated at Leverkusen. The department responsible for pharmaceutical products is called 'Region 2'.

- (68) 'Bayer Denmark inform us that they are keeping a very close eye on the possibility of any parallel imports. As it is such a small country with such a small turnover, it will become rapidly obvious.'⁴⁶

2.2. *Centralization of information at Leverkusen*

- (69) The documents set out in paragraphs 65 to 68 show that all the information gathered between subsidiaries was invariably forwarded to Leverkusen.

For example, a memo sent by Bayer France to Leverkusen states:

'Subject: UK

Thank you for the statistics on parallel imports to the UK. The data are instructive.

It must be assumed that imports from France rose rapidly from the fourth quarter of 1989.

The situation highlighted by yourselves requires great caution with all customers.'⁴⁷

A memo sent by Bayer Netherlands to Leverkusen similarly states:

'Herewith we send you the information concerning sales and country of origin of the ADALAT parallel imports in the Netherlands.'⁴⁸

Similarly, the following memorandum sent to Leverkusen states:

'Report on visit by Bayer Italy on 18—19 March 1991.

(1) ADALAT (. . .)

1.3 Parallel imports of capsules appear to be continuing. Estimate of 100 000 to 150 000 packs in 1990.'⁴⁹

There are numerous documents through which the statistics on parallel imports were transmitted regularly to Leverkusen.

2.3. *Other means of obtaining information on parallel imports*

(a) *Instruments external to Bayer*

- (70) Bayer also drew on external instruments measuring parallel imports to enhance its knowledge of the market, as is indicated by this report drawn up by an external consultant commissioned by Bayer to carry out a study on parallel imports:

'Project Outline

There has been concern over the reliability of a range of industry data sources to measure certain parameters. This project is concerned with the comparison of data relating to parallel imports and generics available from a range of those industry sources, namely:

British Pharmaceutical Index (B.P.I.) — I.M.S. ⁽¹⁶⁾

Medical Data Index (M.D.I.) — I.M.S.

Scriptcount — Taylor Nelson

Parallel Import Monitor — Taylor Nelson

D.H.S.S. data

The comparison has been carried out through the examination of data for five products, namely (. . .), ADALAT, (. . .).

Table: Comparison of parallel import data from Parallel Import Monitor and B.P.I. (. . .)' ⁵⁰

⁽¹⁶⁾ IMS = Intercontinental Medical Statistics.

- (71) Bayer UK regularly receives the updated documents of the Parallel Import Monitor (Taylor Nelson). These give details of all the information available on certain products, including ADALAT, broken down by month, by product (every product in the ADALAT range), by country, distribution network (pharmacies, hospitals) and importer.

Bayer AG and all its subsidiaries subscribe to IMS, either direct or to one of its national branches, or else to a national group providing the same type of data.

Comparison of all the external data together with the information provided by the subsidiaries allows Bayer AG's 'market research' department to be fully and continuously informed of parallel imports.

(b) Computerized preparation of the annual Bayer budget

- (72) An internal Bayer AG document indicates that, for the purposes of the group's annual budget exercise, all the subsidiaries are linked to a centralized computerized system for drawing up the annual budget in the health sector. The document sets out the instructions for providing the data on diskette. The system is divided into 'GARTs' (type of operation) as follows:

[...] ⁵¹

This data breakdown makes it possible rapidly to identify sales on the domestic market and other sales. It is in general use, notably in the documents of Bayer France (and not only in the budget documents).

- (73) The 'Important planning advice' ⁵² includes the following instruction:

[...] ⁵³

ADALAT and a few other major Bayer products are thus entered in the system under a special code. The figures are not aggregated as in the case of the figures included in the GARTs. Under the specific code, they are broken down for each product in the ADALAT range.

The instructions state that Leverkusen must be informed immediately in the event of any discrepancy between the figures deriving from different internal computerized instruments used for planning purposes.

The system also comprises a specific entry 'Commentary on planning' ⁵⁴, which itself comprises a separate chapter for [...] products [...] ⁵⁵.

The computerized system enabling Bayer to draw up its budget thus includes the necessary entries for covering the needs of each national market in respect of each strategic product.

However, Bayer did not confine itself to keeping itself informed of the trend of national requirements and the level of parallel imports by endowing itself with the appropriate instruments for this purpose. It also established an actual strategy for preventing or at least curbing them and took formal decisions for this purpose.

3. Formal decisions within the group intended to reduce parallel exports to the United Kingdom

- (74) The senior managers of all the subsidiaries meet at regular intervals at *Hauptländertreffen* or 'Top Country Meetings'. At the meetings, the managers have informal discussions. Written documents on the results of these important meetings are rarely available.
- (75) Records in the form of summary tables setting out the comments made and results obtained are drawn up after the meetings. These documents are neutral, particularly that on the Travemünde meeting.

- (76) However, one of the senior managers of Bayer Spain drew up a report on the Travemünde meeting for his own purposes, a report in which he notes the various decisions taken during the meeting. Point 19 of this record, entitled 'Comments on the "Hauptländertreffen" in Travemünde (23/9/1991)' ⁵⁶ states:

'Activities to reduce parallel imports to the UK as much as possible will continue. The situation in Spain is stable, despite the fact that it is the country with the lowest price for ADALAT RETARD and ADALAT capsules.' ⁵⁷

- (77) In 1992, the record of the *Hauptländertreffen* at San Felice, which took place from 27 to 29 April 1992, included the following comments:

'Political aspects and parallel imports are important for strategy in Europe. However, the availability of ADALAT CC makes it possible to introduce the one-per-day formula for ADALAT into all European countries, which means we can protect high-price markets at the same time.' ⁵⁸

II. PRACTICAL IMPLEMENTATION OF THE INTRA-GROUP STRATEGY IN FRANCE AND IN SPAIN

1. France

1.1. *Bayer France's identification of exporting customers*

- (78) The Director of the Sens production centre regularly sends by mail to the Director of Bayer France lists setting out the names of customers and the amount of their orders from Bayer France. On many documents, large orders of ADALATE are highlighted by marker pen.
- (79) One document surveys six customers in 1990 and 1991, indicating for each month the quantities ordered and the increase (highlighted) in their amount compared to the GERS ⁽¹⁷⁾ statistics for the same period.
- (80) These data are supplemented by the information circulating within the group, which are intended to 'facilitate monitoring', as the following document (1 October 1990) states:

'Subject: UK

Thank you for the statistics on parallel imports to the UK. The data are instructive.

It must be assumed that imports from France rose rapidly from the fourth quarter of 1989.

The situation highlighted by yourselves requires great caution with all customers.

On the other hand we can assure you that we have not deliberately encouraged this and have never tried to conduct our business to the detriment of another market: that would be completely unacceptable for us.

(...) We would ask you to keep us informed of further developments in parallel imports to the UK, providing details of lot numbers etc. so as to facilitate monitoring.

We enclose several graphs summarizing our sales.' ⁵⁹

- (81) A record of the Bayer France management committee meeting held on 5 February 1992 reports the following instruction:

'Given the increasing importance of parallel exports in our Gart 1 turnover (France), and in order better to define our sales potential, Invoicing will notify Control every month of the quantities likely to be exported by our main customers.' ⁶⁰

The instruction is given by the management committee — that is, at the highest decision-making and responsibility level within Bayer France.

⁽¹⁷⁾ 'GERS: Groupement pour l'élaboration et la réalisation de statistiques', an economic interest grouping providing its members (laboratories and wholesalers) with statistics on their sales, at national, regional and sectoral level.

- (82) A memo from the Director of the Sens centre to the Director of Bayer France states:

'As agreed, I enclose the table of sales for ADALATE 20 mg LP, which summarizes sales whose final destination is probably not metropolitan France.'⁶¹

1.2. *Halting of supplies to customers who have been detected*

- (83) A number of documents in the file show that Bayer France discontinues supplies to identified wholesalers. On 20 October 1991, the Director of the Sens centre stated in an internal memo to the Director-General of Bayer France:

'Supplies of ADALATE 20 mg LP to CERP Rouen.

(...) Since the end of September we have not been supplying CERP Boulogne, and we owe them 40 000 packs.

(...) At present we have blocked a total of 11 orders (7 wholesalers), or 137 000 packs.'⁶²

- (84) Some documents refer to 'quota restrictions' imposed on ADALATE, witness the following document (17 February 1992):

Letter from CERP Rouen (Boulogne agency) to Bayer France:

'(...) Boulogne has not received its order for 3 200 packs dated 10 February.

The reply given by your purchasing department was that the product (ADALATE LP) should not exceed a quota of 2 000 packs per month and any additional order should be addressed in writing direct to you.'⁶³

Bayer France's reply:

'(...) We can supply some 5 000 — 6 000 packs of ADALATE 20 mg LP every month for our exceptional orders without necessarily disturbing our supplies to pharmacists through distributing wholesalers.

(...) Of course, the quantity of 5 000 — 6 000 packs in question concerns all exceptional orders. If we supply Boulogne, we do not supply St Etienne du Rouvray and vice-versa.'⁶⁴

- (85) Handwritten notes found in the files of the Director of the Sens centre indicate the sales situation, regularly listing customers and their orders. The notes include the following comments:

'I have blocked 2 000/3 000 packs to CERP Hérouville'

'I have blocked 2 000/4 400 packs to CERP St Lô'

'do not deliver'

'blocked'.⁶⁵

1.3. *Bayer France's official argument: depletion of stocks*

- (86) The Commission has in its possession documents claiming that the reason for the supply difficulties was that Bayer was out of stock. In the case of CERP Lorraine, Bayer France was able, from June to September 1991, to supply on average 67 300 packets of ADALATE 20 mg a month. The previous year, in 1990, Bayer France had supplied only 8 900 packets in July and 2 800 packets in August, in line with the orders placed at that time by CERP Lorraine. If Bayer France really based its production forecasts on the orders supplied the previous year, it would not have been able to keep pace with such a considerable increase in demand over a period of four months in 1991.

- (87) From October 1991, CERP Lorraine continued to order the same quantities as in previous months, but Bayer France's supplies began to fall very sharply, as the following table shows:

'Table of orders for ADALATE LP 20 mg B/30CP

Month	Ordered	Supplied
June 91	67 000	67 000
July 91	69 000	69 000
Aug. 91	66 000	66 000
Sep. 91	74 000	35 000
Oct. 91	71 000	15 000
Nov. 91	56 000	15 000
Dec. 91	34 000	15 000
Jan. 92	75 000	10 000
Feb. 92	105 000	7 500 ⁶⁶

It may be noted that the drastic decrease in supplies corresponds to the date of the decision taken at the *Hauptländertreffen* at Travemünde.

In February 1992, CERP Lorraine began to place its orders by registered letter. Bayer France replied as follows:

'(. . .) You point out that we supplied you with 75 000 packs/month from June to September 1991 and you seem to be saying that we are now going to supply you with only 5 000 packs.

We never said that. At our meeting in Sens on 17 January 1992, we said that, in order to avoid running out of stock on the French market, we would give priority to orders for hospitals and pharmacies.

On the other hand, other orders would be supplied if we were able. To our knowledge we have abided by that rule.'⁶⁷

The letter goes on to cite the purchases made each month by CERP Lorraine the previous year so as to demonstrate that CERP Lorraine's monthly requirements (on average) were 9 000 packets a month. It was for this reason, Bayer France claims, that it was not able to keep pace with increased demand the following year.

The Commission would point out that, for four months, Bayer France was able to keep up with demand without any apparent problem, then was suddenly no longer able to do so. Its production structures were evidently able to adapt very rapidly during this four-month period. Despite the rapid increase in orders, the delivery period remained two weeks.

As from February 1992, Bayer France's supplies were cut to 5 000 packets a month to cover CERP's first order placed in February (50 000 packets), and to 2 500 packets a month to cover CERP's second order placed in February (50 000 packets).

Lastly, it may be noted that the very wording of the letter makes it clear that Bayer France wished to supply the product to the French market alone.

- (88) The other two French wholesalers, OCP and CERP Rouen found themselves in the same situation as CERP Lorraine. They confirmed this point during the investigations carried out on their premises in their oral replies to questions put by the Commission inspectors.

1.4. Wholesalers' reaction to Bayer France's conduct

- (89) Prior to Bayer France's change in conduct, the wholesalers, in placing their orders, used to state expressly that they were intended for export. Bayer France was thus perfectly aware of the final destination of the products supplied.

The final destination was often specified on the actual order itself. This was simpler for the wholesalers, for whom French demand is fairly steady and can be managed more or less automatically on the basis of the level of the wholesaler's available stocks, whereas foreign demand is more irregular.

When Bayer France cut its supplies claiming that it had production problems and inadequate stocks, the wholesalers reacted in two stages, as described below.

(a) Planning arrangements proposed to Bayer France

- (90) After having attempted in vain to obtain supplies and to complain by telephone, this being the usual commercial practice in the sector, the wholesalers had the idea of proposing to Bayer France forecasts of their future requirements so as to enable it to make arrangements to produce sufficient quantities. On 20 November 1991, CERP Rouen sent the director of the Sens production centre the following letter:

‘(. . .) I enclose a monthly schedule for orders of ADALATE LP 20 mg.

Since there is still no slippage in supplies to France, and since ADALATE is one of the best-sellers in Europe, we are absolutely convinced that you will have no trouble in supplying the quantities ordered.

In addition to our purchasing schedule, we request 45 000 ADALATE LP 20 mg per month to be supplied to our agency in Boulogne sur Mer (this does not include 15 000 packs ordered by Boulogne on 11 October 1991, which have still not arrived).

With a schedule, the argument concerning difficulties in supply will be difficult to justify much longer.’⁶⁸

The amount ordered in this letter is, given its level, intended for export. Domestic orders are at very much lower levels. Furthermore, within CERP Rouen’s internal organization, the Boulogne agency specializes in exports to the United Kingdom. By requesting that the order be supplied direct to the Boulogne agency, CERP Rouen explicitly and deliberately made clear the destination of the product ordered.

Bayer France did not respond in any way to this letter. The orders were not supplied, as may be seen from Bayer France’s subsequent invoices and the CERP Rouen documents intended to confirm that the invoices matched the products received. On these invoices, the quantity ordered by CERP Rouen is given under the heading ‘quantity invoiced’⁶⁹. This shows the large amounts of ADALATE 20 mg ordered by the wholesaler and intended for export. Under the heading ‘unit price invoiced’⁷⁰ Bayer France entered the comment ‘resubmit order’⁷¹. This means that in practice CERP Rouen was not supplied. Very quickly, CERP Rouen abandoned this method, which did not enable it to meet demand from its British customers.

- (91) OCP reacted in the same manner at the beginning of 1992 by announcing its projected order of 50 000 packets for March, April and May 1992. Here again, Bayer France did not respond to these planned orders. Supplies continued well below the wholesaler’s request, as may be seen from the following telex sent by OCP to Bayer France on 6 May 1992:

‘To date we have had no further supplies of ADALATE LP CP BT 30 for our export orders for monthly dispatch.

Your last deliveries were:

15 000 ADALATE CP BT 30, invoice No 701893 dated 10. 2. 1992.

5 000 ADALATE CP BT 30, invoice No 701993 dated 4. 3. 1992.

We have had no product for two months. Our customers are complaining. Our quotation committed us to price and quantity. At present there is an increase in demand. We must increase our schedule to 80 000 packs/month. (. . .)’⁷²

Bayer France did not respond to this request. It should be noted that OCP explicitly states that the order is for export. Bayer France was therefore fully aware of the destination and of the amounts requested for export.

- (92) CERP Lorraine did not use the planning method. It resorted to placing orders by registered letter, which marks a sharp break with the normal, very flexible practice of ordering by telephone or ordinary letter.
- (93) Very rapidly, within a few weeks, at the end of 1991, the three French wholesalers realized that their efforts to obtain supplies for export under normal conditions were in vain. They then decided to take appropriate action.

(b) Wholesalers' realization of Bayer France's real objective

- (94) All the wholesalers asked Bayer France for explanations. This is reflected in internal documents drawn up by Bayer France, such as this memo sent by the Director of the Sens centre to the Director-General of Bayer France on 20 October 1991:

'VERY IMPORTANT

Confidential

I had a telephone conversation with (...) CERP Rouen concerning deliveries of ADALATE 20 mg LP.

CERP Rouen is our third largest customer with turnover of FF (...) million at 30 September 1991.

(...) Since the end of September we have not been supplying CERP Boulogne, and we owe them 40 000 packs.

CERP Boulogne thinks that it is deliberate Bayer policy to prevent the growth of parallel imports because it has noticed that Bayer has the same attitude in Belgium and Spain.

The Belgian and Spanish markets are small markets but the French market is sizeable. (...) I explained (...) that we had very low stocks and that our main concern was to supply the French market. CERP Boulogne asked whether I took them for fools, etc. (...)'⁷³

- (95) On 17 January 1992, the Export Director of CERP Lorraine went to see the Director of the Sens centre. During the investigation carried out at CERP Lorraine, he gave the following account of the meeting:

'I met Mr Giraldi in Sens on 17 January 1992 to discuss problems obtaining ADALATE LP 20 mg. I asked him why, after supplying us with an average of 65 000 packs per month between April and September 1991, it was now impossible to obtain these quantities. He replied that he had received strict instructions from Bayer general management to stop parallel exports, that the instructions would never be in writing and that officially they would blame it on problems in obtaining raw materials.'⁷⁴

(c) Action taken by the wholesalers in an attempt to obtain supplies

(i) General description

- (96) The three wholesalers adopted the same method: they stopped placing orders for export and made arrangements to increase the orders which were officially intended for the French market.

Bayer France accepts as normal an increase or decrease of 10 % in domestic requirements. The wholesalers have a number of local agencies situated throughout France which normally provide supplies at local level.

The domestic orders placed by each of the agencies increased, with no indication being given to Bayer France of their destination. The aim was to induce Bayer France to believe that domestic demand had increased, by spreading it over the different agencies. The amounts which were in fact intended for export were then rechannelled within each wholesaler's organization so that they could be exported.

(ii) CERP Rouen

- (97) The first document illustrating this approach was the following letter sent by the CERP Rouen central purchasing department to the agency directors on 18 October 1991:

'ADALATE LP

Following our telephone conversation today, we have noted that you were sending the following quantities to Boulogne:

ST ETIENNE ROUVRAY	1 000
LAIGNEVILLE	1 000
ST QUENTIN	400
MARCQ EN BAROEUIL	400
LIEVIN	400
HEROUVILLE	1 600
ST LÔ	400

We have asked Boulogne to send you an order form.

Thank you for your cooperation.' ⁷⁵

Boulogne is the CERP Rouen agency specializing in exports to the United Kingdom. The purchasing department was thus asking the other agencies to send it a part of the orders (intended for the French market) which they had received so that Boulogne could meet British demand.

- (98) Subsequent documents become increasingly explicit.

A letter sent by the CERP Rouen central purchasing department to the agency directors on 25 October 1991 makes the following request:

'URGENT

To help the Boulogne agency meet 20 000 ADALATE LP 20 mg, code PHON:TE 360, please issue the following order:

ST ETIENNE ROUVRAY	6 000
LAIGNEVILLE	4 000
LILLE	4 000
HEROUVILLE	6 000
TOTAL	<u>20 000</u>

As soon as the order is received, please forward to Boulogne.

Thank you for your cooperation and your discretion.' ⁷⁶

- (99) On 27 November 1991, the central purchasing department sent the same type of letter to the agencies.

But the system did not work for long: the order for 20 000 packs divided up among the agencies and placed by the letter of 27 November was not supplied by Bayer France. The wholesaler was then no longer able simply to increase its agency orders, dividing them up in such a way as to meet actual demand: it had to place orders intended for the French market alone, orders which Bayer France could plausibly believe were for the French market alone.

The following type of document then appeared in the letters sent by the CERP Rouen central purchasing department to the agencies:

'ADALATE LP

The order for ADALATE LP that we asked you to place (see memo dated 27 November 1991) has not been received by any agency. We believe that you will not receive it. Bayer is very reluctant to supply exceptional orders.

Accordingly, for the next three orders:

M 17 December 1991
R 24 December 1991
C 2 January 1992

Include one third of the quantity ordered with each of your weekly orders (consistent with size). As soon as the order is received, please forward the product to Boulogne.

Thank you — absolutely no telephone orders' ⁷⁷

This request not to place any orders by telephone shows that the situation is abnormal. The usual practice (see paragraph 49) is for orders to be placed simply by telephone. This aspect may also be compared with the letter cited below (paragraph 115) regarding the approach adopted by Comercial Genové in Spain ('I am trying to present a watertight case against the labs' ⁷⁸).

CERP Rouen was supplied with 7 000 packets (one third of the 20 000 required).

(100) CERP Rouen accordingly regularly sent this type of letter to its agencies.

The following CERP Rouen document of 27 January 1992 explains the arrangement:

'Central purchasing department Agency directors

ADALATE LP — code TE 360 —

We need 50 000 ADALATE LP for the Boulogne agency for February 1992.

With the next orders:

C 3 February
H 10 February
M 17 February

You should add one third of the quantity shown below to each of your weekly orders (consistent with size). As soon as the order is received, please forward the goods to Boulogne.

Thank you for your cooperation.

Central purchasing department

ST ETIENNE ROUVRAY	7 000
LAIGNEVILLE	5 000
COIGNIERES	3 000
ST QUENTIN	3 000
LILLE	5 000
HEROUVILLE	6 000
ST LÔ	5 000
ABBEVILLE	3 000
MEAUX	4 000
VERNEUIL	4 000
TOTAL	45 000
BOULOGNE	+ 5 000
	= 50 000 ⁷⁹

NB: none of these orders
should be made
by telephone

(101) The following letter similarly illustrates this approach:

'ADALATE LP — code TE 360

The Boulogne agency needs to build a stock of 8 000 to 9 000 ADALATE LP per week.

Please try to build this stock by adding the quantities set out below to your requirements.

However, in view of the monthly quotas allocated by Bayer to prevent us (illegally) from exporting, send to Boulogne only if your monthly requirements are met.

(...)' ⁸⁰

CERP Rouen sent the same type of letter to its agencies throughout 1992.

(iii) CERP Lorraine

- (102) CERP Lorraine made use of the same tactic, as its managers explained orally during the investigation carried out on its premises. This is confirmed by the following extract from an internal CERP Lorraine report:

‘(. . .) Although I do not see a favourable solution in the short term concerning supplies from Bayer (we have managed to obtain minimal quantities of product through the agencies), I think that the budget should be attainable at the end of the financial year.’⁸¹

(iv) OCP

- (103) OCP used the same system, as its managers explained orally during the investigation.

1.5. Results

- (104) The wholesalers managed to obtain small quantities of supplies which did not cover their requirements. The method of dividing the orders up between local agencies did not allow real demand to be met. In addition, it entailed additional costs by way of handling, management and transport. The wholesalers' customers finally became disheartened, and demand from the United Kingdom dried up.

- (105) The following document, headed ‘Export situation on 30. 6. 1992’, shows, by way of example, the losses suffered by CERP Lorraine because of Bayer France's obstructive conduct:

‘Half-way through the financial year, the export situation in terms of turnover is behind the draft budget as it stands.

budgeted turnover . . .

actual turnover . . ., i.e. . . . (-5.06 %)

This difference is explained principally (not to say exclusively) by the difficulties in obtaining supplies experienced since the start of January with Bayer laboratories, which are blocking supplies of ADALATE LP 20 mg (see my January memo following my interview with Mr Giraldi at Bayer in Sens).

Our minimum monthly requirements are . . . packs, i.e. . . . packs over the last six months, but we were supplied with 10 000 packs in January and 7 500 packs/month since February, a total of 55 000, representing a difference of . . . packs. These . . . packs account for a loss of . . . (unmet orders).

This also means that, despite these difficulties, we have succeeded in offsetting part of this difference since we are only FF . . . million behind target and not FF . . . million. Thus, although I do not see a favourable solution in the short term concerning supplies from Bayer (we have managed to obtain minimal quantities of product through the agencies), I think that the budget should be attainable at the end of the financial year.’⁸²

- (106) CERP Rouen's demand amounted to up to 50 000 packets a month at the beginning of 1992. CERP Rouen was able to supply only 7 000 packets to meet this demand, by increasing its orders for France (see paragraph 99).

- (107) OCP's demand went as high as 80 000 packets a month. OCP received minimal supplies. The fax cited in paragraph 91 shows that OCP was supplied with 15 000 packets in February 1992 (to meet demand of 50 000 packets) and 5 000 packets in March (to meet demand of 50 000 packets). The following document provides an example of the losses suffered by OCP:

‘(. . .) We would remind you that we are losing monthly turnover of FF . . . million and potential customers. . . .’⁸³

- (108) The situation was similar in Spain. The following documents, while describing what happened in Spain, also throw useful light on the situation in France.

2. Spain

2.1. Bayer Spain's identification of exporting customers

(109) The Commission found, on Bayer France's premises, a Bayer Spain document containing a full description of the system used by Bayer Spain to identify those of its customers who were exporting. The document reports that a Bayer Spain manager came to Bayer France to give an information talk on the subject: 'Distribution Control System (Spain).' ⁸⁴

The transparencies used during the presentation begin by outlining the problem:

- 'The Problem
- ADALAT order volume grows in a few weeks up to 300 %
 - out of stocks
 - uniform distribution all over the country is not guaranteed
 - dissatisfaction of wholesalers/internal and external sales organization: pharmacists
 - disturbed production rhythm due to urgencies in ADALAT.' ⁸⁵

This is followed by an outline of the way in which Bayer Spain intends to resolve the problem:

BG Pharma	Distribution control system	Spain
The way to proceed — Analyses of product distribution by territories (ABC client-list not falsified by export, if available) — Identification of different potentials by wholesalers — Take into account target of our own sales organization — Identification of possible exporters — Mope basis for incentive calculation from own sales data to IMS data ⇓ Establish a limit for each wholesaler		

Certain aspects of the system are identified as being particularly important:

- 'Very Important
- Discuss (no written information) assigned limits with concerned wholesalers → avoid legal problems
 - Weekly shipment in order to avoid accumulation of product at wholesalers warehouse → export for small quantities not interesting
 - Distribution Dept. (at low level) gives always the same information → out of stocks due to strong increase of sales
 - Inform own sales organization
 - Determine responsible person for direct contact (calls and visits) from wholesalers

Wholesalers, reps, reg, and sales managers and also pharmacies will call continuously for reviewing established limits.' ⁸⁷

The transparencies show how the system works in practice:

BG Pharma	Distribution control system	Spain
-----------	-----------------------------	-------

The solution of the problem

Implementation of a control system which assigns a limit to all customers

In case of higher quantity than assigned the system stops the order automatically and allows a

||

210 wholesalers

Manual review

700 orders per months

(2 minutes daily)

Advantages:

* Knowledge of
"suspicious"

wholesalers

* Place the person over
the machine

↓

authorize

↓

reduce quantity better
than cancel order

» 88

At the end of the presentation, examples were given to show specifically how customers' orders were assessed and treated:

'The Result

code No	denomination	No del. note	actual delivery quantity note	total order quantity month	limit month	total ordered quantity YTD	limit YTD
1) Fit monthly and annual limit:							
2143	Federación Fca.	53 620	100	200	324	2 200	2 400
2) Fit monthly limit, over annual limit:							
6742	Centro Coop. Fco.	53 621	800	2 400	2 596	30 000	28 800
3) Over monthly limit, fit annual limit:							
6157	Huelva Fca.	53 622	400	600	592	7 000	7 200
4) Over monthly limit and annual limit:							
62612	Fca. Aragonesa	53 623	4 000	5 000	1 000	13 500	12 000

Relation of Spanish Wholesalers with External Capital Participation

- Hermandad Fca. del Mediterráneo (HEFAME) — Poland [sic]
- HUFASA — Sevilla (CERP)
- Genové — Barcelona (CERP)
- Centro Europeo de Reparto — Palma Mallorca (CERP)
- Centro Europeo de Reparto — Barcelona (CERP)
- Sisenz Gurb-Vic (CERP)
- Unión Fca. Guipuzcoana — San Sebastián (OCP)
- Centro Fco. Del Norte — Santander (OCP)
- Centro Fco. Asturiano — Oviedo (OCP)

Other Exporters

- Coop. Fca. Española (COFARES) — Madrid
- SAFA — Zaragoza
- Galenica — Barcelona
- Grupo J.J. (Farmacén, Olmeda y Vinuesa, Sefarma, Dimafar y S. Ortiz)
- Hermandad Fca. Del Mediterráneo — Murcia
- Centro Coop. Farmacéutica — Valencia
- Compañía Fca. Madrileña — Madrid
- Centro Fco. Nacional, S.A. — Madrid⁸⁹

2.2. *Halting of supplies to customers who have been detected*

- (110) The following document (4 April 1989) shows that Bayer Spain has for a long time been stopping supplies to exporting wholesalers identified as such:

‘PARALLEL EXPORTS OF ADALAT 50 AND ADALAT RETARD

- It was agreed to restrict as far as possible sales to the four exporting wholesalers identified so far.
- The programme of sales in P3 will rise to:
200 000/month for ADALAT 50 capsules
130 000/month for ADALAT RETARD 60
- It was agreed to create a special stock (for accounting purposes the Felguera warehouse) of 50 000 units of both specialties, maintaining the usual theoretical stock at four and six weeks respectively.
The special stock will be updated monthly by order to the factory (P3).
- Distribution will report any anomaly that may arise with regard to amounts ordered.’⁹⁰

This letter was signed by the manager who gave the information talk in France on the system of controlling distribution in Spain (see paragraph 109 above). It was transmitted to Leverkusen.

- (111) A memorandum (also signed by the same manager) stated in 1991:

‘Amendment to CLI 208 print-out

Monitoring of ADALAT sales

About two months ago a verbal request was made to change the daily print-out since at the start of the month it still accumulates quantities from the previous month.

On various occasions this inaccurate information has led to discussions with wholesale customers who, not surprisingly, could not confirm our data.

There is no need to stress the importance of accurate information for sound management of this very complex issue concerning customers and PH Germany.

I would ask you to take the necessary measures to correct the program immediately.’⁹¹

2.3. *Wholesalers’ reaction to Bayer Spain’s obstructive behaviour*

(a) Wholesalers’ realization of Bayer Spain’s real objective

- (112) The wholesalers knew that Bayer Spain wanted to prevent parallel exports. The case of the four wholesalers examined below is revealing: the French CERP Rouen group’s Spanish subsidiaries Comercial Genové, Hufasa and Disdasa (about 4 % of the market), Safa, Galenica and DFM (grouped together within SAFA, about 6,5 % of the market), Hermandad Farmacéutica del Mediterraneo (Hefame, about 6 % of the market) and Cofares (the largest

wholesaler in Spain with 20,6 % of the market). These wholesalers together account for about 40 % of the Spanish market and are the major wholesalers on that market, which is otherwise extremely dispersed (some 200 wholesalers in Spain, most of whom operate on a purely local and very restricted market).

(i) Comercial Genové, Hufasa and Disdasa (Spanish subsidiaries of the CERP Rouen group)

(113) As early as the first half of 1989, Comercial Genové stated in its management report:

'Exports have fallen (. . . millions), due mainly to the restrictions imposed by (. . .) and Bayer on the supply of ADALAT RETARD and (. . .)' ⁹²

The management reports for the following years consistently give the same information. These reports will be quoted below in the assessment of the results (paragraph 132) achieved by Bayer Spain.

(114) Comercial Genové is in permanent contact with the other firms in which CERP Rouen has holdings, for example Hufasa. Hufasa had a meeting with the Bayer Spain management in an attempt to obtain supplies. An internal record was drawn up of the meeting, which took place at the end of 1989:

'Following the latest conversation with Bayer management, they stated that they could not accept the quantities requested by HUFASA because they accounted for 50 % of the domestic market and were much higher than those of other firms in the same area (. . .). This led them to believe that a substantial proportion of the product was intended for export (. . .)' ⁹³

A subsequent passage in the record shows that Hufasa negotiated hard in order to obtain larger quantities of supplies, arguing that there was a high level of domestic demand. This passage will be quoted below (paragraph 127) in the examination of the systems established by the wholesalers in order to obtain supplies despite Bayer Spain's obstructive attitude.

(115) Numerous documents exchanged between Comercial Genové and CERP Rouen, its parent company in France, show that Bayer Spain's motives were perfectly clearly recognized:

'Every week I want a copy of the order forms for ADALATE and (. . .) sent to the laboratories and the delivery notes corresponding to those orders.
I am trying to present a watertight case against the labs (. . .)' ⁹⁴

'With regard to your FAX today concerning (. . .) and Bayer laboratories, I give you my word that I am doing my utmost to obtain supplies greater than our requirements.
The laboratories are refusing to listen to any arguments. They know that the quantities they supply to us are easily enough to cover the needs of the Spanish market. (. . .)' ⁹⁵

'Purchases for export to the UK

	HUFASA			DISDASA			GENOVÉ		
	June	July	Aug	June	July	Aug	June	July	Aug
ADALAT 10 mg	2000	1800	0	0	0	0	0	0	0
ADALAT Ret	2200	1000	0	800	0	0	400	0	0

(. . .)

The above table shows the worrying situation of incoming product over the last three months. For ADALAT, I know that the new contact at Bayer is not making things any easier but Disdasa and Genové have not received anything since the beginning of June. (. . .)' ⁹⁶

(116) The following documents show that the supplies did not take place:

'Purchases for export to the UK

Since my memo of 13 August 1990, we should have observed goods going to Didasa, Genové and Hufasa towards the 20th.

In fact, we have the following situation:

	DISDASA	GENOVÉ	HUFASA
ADALATE 10	0	0	27/7/1990: 800
ADALATE LP	0	0	27/7/1990: 400x60 200x40

(...)

N.B.: Since the last date shown, we have not been informed of any further delivery.’⁹⁷

‘Purchases for export to the UK

Even though the problems with Bayer remain the same, that is not the case for (...) (...) For the record, here are the quantities of ADALAT supplied in September and October.’⁹⁸ (The quantities are then given, either zero or minimal, by subsidiary).

‘I am tired of hearing the same old story as soon as we send a new order to Spain.

Apart from oranges and strawberries, I wonder what Spain is capable of exporting. . .’⁹⁹

(117) Lastly, the following letter:

‘Thank you for drawing up the list of laboratories that said “impossible to export”, i.e. all the problem suppliers.
urgent’¹⁰⁰

The reply was as follows:

‘As you know, the only laboratory that told us that it was not possible to export is (...). As for the others, when we ask for too small a quantity for our market or despite the fact that the product is selling very well in Spain, they understand that if the order is higher than our normal requirements, it will be for export. The problem laboratories are:

Bayer
(...)

On the other hand, (...) gives us everything we ask for.’¹⁰¹

(118) Comercial Genové sometimes tried to explain to its customers the reasons why it was unable to supply them:

‘(...) Due to difficulties in deliveries from these laboratories, we have been waiting until now in order to see whether we could get more quantities of such products.

However, the situation today is as follows:

we cannot accept any new order for ADALAT nor (...).’¹⁰²

‘(...) Unfortunately, we cannot supply you both products, because the manufacturers are controlling our orders.

Bayer and (...) do not want that their Spanish products appear in other countries, so they do not supply as much we need. We have only stock for our market.’¹⁰³

‘(...) I am sorry to say that it will be impossible to supply you the mentioned products. The manufacturers are delivering only small quantities of ADALAT, (...) as well as (...).’¹⁰⁴

(ii) Galenica

(119) During the investigation carried out on Galenica’s premises, the Commission obtained documents showing that the company was aware of Bayer’s motives:

‘We are very concerned that trading with your company is becoming more and more difficult due to your inability to supply our requirements for ADALAT RETARD.

Could you please explain to us why you are unable to fulfil our orders.’¹⁰⁵

Galenica's reply to its customer was as follows:

'I (...) apologize for being unable to supply to your company your orders of ADALAT RETARD.

The reason is that the laboratory that produces it (Bayer) does not deliver to us the quantities we order because they want to avoid any kind of export of this product and then, they deliver only the quantity they estimate we need for the internal market.'¹⁰⁶

(iii) Hefame

- (120) Hefame tried to explain the situation to dissatisfied customers in the United Kingdom. The most explicit of such documents state the following:

'In this moment in Spain we have a very big problem about ADALAT, (...) because Bayer and (...) not send goods for us (...).'¹⁰⁷

'I'm sorry for your fax. But it is really in Spain in this moment all the parallel export we have a problem about ADALAT 10 mg, RETARD 40, RETARD 60 and also (...).

In this moment, the situation is:

About the ADALAT is very complicate the prevision

(...) Also I have ready for you 1 000 x 50 ADALAT 10 mg

I understand you are not happy about this news but in one year all are change and the parallel-export is to big and the multinational-control.'¹⁰⁸

'Bayer & (...): impediment of free trade

For quite some time now we have been experiencing serious difficulties in obtaining sufficient quantities of ADELAT RETARD, (...) and (...) from Spain.

I admit that our second supplier is having a hard time too.

It would appear that, once more, Bayer and (...) are doing their utmost to keep availability of their products strictly in line with their presumed needs for Spain, therefore impeding free trade within the EC.

Is there any way in which you can take any action against these companies? If you cannot guarantee that, within the foreseeable future, you can obtain sufficient quantities to meet our requirements I am afraid that we will have to start buying in Italy or France.'¹⁰⁹

(iv) Cofares

- (121) During the investigation carried out on its premises, Cofares made the following statement:

— COFARES' export activity accounts for a very small proportion of its total invoicing because of the difficulties posed by certain laboratories (including Bayer) to orders for export.

— When Bayer set an ADALAT quota for COFARES that was initially clearly insufficient to cover the requirements of its domestic market, in his capacity as a Director of COMPRAS he warned them of a possible complaint because of such restrictions. Since then, Bayer has supplied COFARES with sufficient quantities to meet national consumption of the product in question.'¹¹⁰

It is evident from this statement that Cofares complied with Bayer Spain's requirement that it confine itself to its domestic market.

b. Action taken by the wholesalers in an attempt to obtain supplies

(i) Hefame

- (122) Hefame made supply arrangements by concluding agreements with other small wholesalers and with pharmacists to pass on to it the ADALAT which they had been able to obtain for their orders officially intended for Spain. These small wholesalers, with strictly local markets, are not amongst the wholesalers monitored by Bayer Spain. The

purpose of this system was to enable Hefame to obtain ADALAT for export. One of the documents in the file is an agreement concluded between Hefame and a small wholesaler which stipulates:

'COOPERATION AGREEMENT FOR EXTERNAL MARKETS

(...) THREE: That, in spite of the above, "HEFAME", at the request of its own foreign customers and given its interest in opening up and penetrating new markets, plans to obtain, for export, new products or larger quantities of the products already available to it.

FOUR: That, in addition, (...) is ready to provide HEFAME's Export Department with new products or additional quantities of existing products that could, to a great extent, satisfy the needs of HEFAME's foreign customers and, at the same time, would make it easier for HEFAME to move into new markets and win new customers.

(...)

AGREEMENTS

(...)

III. The first element of cooperation is that (...) agrees to support, by supplying products or quantities of the products that it may have available, in addition to those provided by HEFAME, to facilitate the normal supply of HEFAME's foreign customers with the necessary quantities.

In order to facilitate the agreement with (...), HEFAME shall be required to notify (...) rapidly, and with sufficient notice, of its product requirements in terms of quantity, to meet its supplies to those customers and, at the same time, (...) will meet those needs, as quickly as possible, from its available stock, to make up the losses of which it is informed.

IV. (...)

V. (...)

VI. (...)

If an order includes products that are difficult to obtain (e.g. ADALAT) and ones that are easy to obtain, HEFAME's Export Department undertakes to ask (...) and to include in the export order the quantity of those hypothetical products in identical proportion to those provided by (...) of the products that are difficult to obtain under Section IV of this agreement (...).' ¹¹¹

- (123) The same type of agreement was concluded with a small wholesaler which was operating on a strictly local market and which was therefore not one of the firms monitored by Bayer Spain.

'Cooperation between the two companies in export trade began, within the same framework as the agreement between HEFAME and (...).' ¹¹² (wholesaler referred to in paragraph 122).

- (124) The Commission has in its possession a number of letters showing that the agreement was in operation: orders placed by Hefame with the small wholesaler, the arrangements for delivery, and faxes indicating the quantities requested, sometimes in the following form:

'(...) Our order is as follows: all the ADALAT RETARD that you can supply (...).' ¹¹³

Lastly, the Commission has in its possession documents showing orders placed by Hefame with other small wholesalers through which HEFAME managed to acquire small quantities of ADALAT.

Shortly after the introduction of these cooperative arrangements between HEFAME and other wholesalers, Bayer Spain identified (see paragraph 109, computerized system for identifying exporting wholesalers) these other wholesalers who were receiving abnormally large quantities for their 'normal' requirements on the Spanish market, began to monitor them and supplied them only with amounts to cover their requirements on the local market.

(ii) Comercial Genové, Hufasa and Disdasa

- (125) As stated above, Comercial Genové is a Spanish subsidiary of the French group CERP Rouen. CERP Rouen's case was described in detail in paragraphs 97 to 101.

- (126) Documents were found on the premises of Comercial Genové showing that CERP Rouen used its Spanish subsidiaries, Comercial Genové, Hufasa and Disdasa, to meet British demand. CERP Rouen thus acted as an international group and made use of all its scope both in France and in Spain for obtaining supplies of the necessary quantities for its British customers. Under this system, the Spanish subsidiaries were used in the same way as the French regional agencies: they were asked to make a plausible increase in their orders for the Spanish market, and the amounts thus obtained were supplied to British customers on behalf of CERP Rouen. The following letter from CERP Rouen to those responsible for purchasing in the three subsidiaries confirms this arrangement, which was described by the Comercial Genové management during the investigation:

'EXPORT

The holidays are finally over and I hope that we will get back to normal deliveries of our three "problem products": can you take up the original schedule and try to obtain these quantities. I am refusing all other customers since I prefer not to increase the number of unhappy clients.

We need the following product through GENOVE, HUFASA and DISDASA:

100 000 ADALAT RETARD 60 or 40 pack

(...)

EVERY MONTH to satisfy our two main customers: (...).

I am asking (...), after having discussed the problem with (...) and (...), to send me purchasing forecasts for DISDASA and GENOVE and to (...) for the HUFASA agencies. Let us try to improve things by taking advantage of the post-holiday period.'¹¹⁴

The purpose of this document is clear in the context of the system used in France for spreading orders: the arrangements are similar, Disdasa and Genové are small, Hufasa, which is more powerful, spreads its orders over its various agencies.

- (127) It is apparent from a record of a meeting between Hufasa and Bayer Spain that Hufasa pressed hard to get Bayer Spain to accept that domestic requirements were high and that they had to be met. Hufasa thus completely accepted Bayer Spain's arguments, namely that it had to concentrate on domestic sales. However, the record is explicit: the pressure put on Bayer Spain on the basis of domestic-market arguments was merely a means used by Hufasa to obtain the amounts intended for export:

'Following the latest conversation with Bayer management, they stated that they could not accept the quantities requested by HUFASA because they accounted for 50 % of the domestic market and were much higher than those of other firms in the same area (...). This led them to believe that a substantial proportion of the product was intended for export (...).

Faced with these statements, I pointed out that HUFASA needed substantial quantities of ADALAT because:

- They based their figures for HUFASA on the 1988 financial year, during which there had been a marked reduction in purchases due to the crisis within the company.
- Since they supply quantities below real needs, orders had to rise so that a stock could be built up since that had been impossible to date because of the small quantities delivered, and this had forced us to try to make up the losses in orders.
- At the moment, not only have we recovered the market but we are also above our 1987 level, a year which can be regarded as normal for HUFASA.

In the light of these arguments and a very firm position with Bayer, they agreed to supply us more ADALAT RETARD in quantities similar to those of (...), although they could not provide us with everything that we were asking for because of lack of raw materials from Germany.

The quantities we asked for were:

AR 40 29 700

AR 60 19 200

AN 66 300

Bayer agreed to supply the ADALAT, although they did not commit themselves to these figures, which they regarded as very high. I asked for these quantities by taking account of the information given by (...) and increasing them by 30 %.

After commenting to (...) that Bayer would do their best to supply substantial quantities of ADALAT without reaching the quantities requested, I asked (...) to slightly reduce the quantities requested from Bayer since they did not take account of what we were ordering or that we had reached an agreement with Bayer to maintain higher supplies of ADALAT, it was better not to submit figures that would not be accepted as possible for Hufasa and which revealed our interest in exporting significant amounts. That is why I took the view that it was more important to obtain a quantity of ADALAT for export with very plausible figures rather than to maintain a very high level of orders which would not be supplied. The important thing was actual receipts rather than the order. That is no doubt why (...) orders less than forecast.' ¹¹⁵

- (128) The following letter from CERP Rouen to its Spanish subsidiaries deals with the same concern: pressure must be put on Bayer Spain.

'GOODS FOR EXPORT

I know that we have reached a difficult period, but product is now arriving in lower quantities than ever before, and it does not seem to me that we are increasing pressure on laboratories for an improvement.

The situation has been deteriorating since the beginning of March. I would be grateful to managers if they would make personal contact with the laboratories (...) Bayer and ...) and keep me directly informed. The (...) laboratories cannot have all run out of stock at the same time.

I regret having to intervene once again but we need the sales volume.' ¹¹⁶

- (129) The following documents confirm the efforts made:

'With regard to your fax today concerning (...) and Bayer laboratories, I give you my word that I am doing my utmost to obtain supplies greater than our requirements.

The laboratories are refusing to listen to any arguments. They know that the quantities they supply to us are easily enough to cover the needs of the Spanish market. (...) ' ¹¹⁷

In the letter quoted above (paragraph 117) which listed the laboratories obstructing parallel trade, the end of the letter shows that Commercial Genové was trying all the same to obtain supplies, using the system of increasing Spanish demand in a way that was plausible for Bayer Spain and receiving, though without specifying how, the goods from DISDASA, another subsidiary of the same group (this arrangement was explained in paragraphs 97 to 101 above with regard to CERP Rouen):

'(...) if we want a product that sells well on our market, we could order it along with the usual orders, but if it is rare, we will not be able to hide it.

On the other hand, DISDASA gives us product.' ¹¹⁸

(iii) Galenica

- (130) Galenica also confirmed orally to the Commission inspectors that it had had difficulties in obtaining supplies. Furthermore, 'Summaries of "difficult" products' ¹¹⁹ were found during the investigation carried out on its premises. These summaries take the following form:

'Invoiced	by SAFA	by DFM	by GALENICA
(...)	(...)	(...)	(...)
ADALAT 50 caps.	3 000	0	0
ADALAT RETARD 60 caps.	2 600	0	0' ¹²⁰

Given the context and the practices of the other wholesalers already examined in detail, this document shows that Galenica's orders were spread over the group's three companies in order to obtain a reasonable quantity of the product.

(iv) Cofares

- (131) In its replies to the Commission inspectors' questions during the investigation carried out on its premises, Cofares stated that it preferred to concentrate on the home market, given the pressure exerted by Bayer Spain (see paragraph 121 above).

2.4. Results

(a) Comercial Genové

- (132) The Comercial Genové management report for the first half of 1989 states:

'(...) Exports have fallen by (...) millions), due mainly to the restrictions imposed by (...) and Bayer on the supply of ADALAT RETARD and (...).

There has been a greater imbalance in exports since forecast turnover was PTA (...) million, and actual turnover PTA (...) million because of the supply problems referred to above' ¹²¹

The Comercial Genové report for 1990 states:

'With regard to exports, it is becoming increasingly difficult to get product to cover existing demand, which means that this figure was lower than last year. Consequently, the sales effort was made essentially in the domestic market.' ¹²²

The Comercial Genové management report for 1991 states:

'The domestic market has developed satisfactorily, with growth of 25.2 %, while the export market has experienced greater difficulties (-25.8 %) because of the problems continuously created by the laboratories with regard to supplying products for export.' ¹²³

- (133) A number of documents in the file also show that Comercial Genové refused orders from British customers, for example the following letter:

'We are sorry not to be able to accept any further order for ADALAT, ADALAT RETARD, (...), as long as the situation is not being cleared in Spain (...).' ¹²⁴

- (134) Similarly, the invoices obtained during the investigation show that supplies were few and far between and difficult to obtain.

(b) Galenica

- (135) During the investigation, monthly summaries of 'difficult' products were obtained for the period February 1991 to August 1993. The summaries show that supplies of ADALAT were minimal (a few hundred packets a month, often nothing at all).

(c) Hefame

- (136) The HEFAME management stated, in reply to Commission officials' questions during the investigation, that supplies of ADALAT were cut back drastically from 1989.

(d) Cofares

- (137) At the request of the Commission officials, COFARES provided a summary table of its export sales since 1989, which remained at a minimal level:

	% EXP/ VENTES Ptas	UNIT. ADALAT	% ADALAT EXP Ptas
1989	0.266	50.000	53.69
1990	0.374	15.000	10.63
1991	0.296	10.000	7.89
1992	0.309	50.000	35.18
1993	0.350	40.000	32.13' ¹²⁵

COFARES accepted the regime imposed by Bayer Spain and confined itself strictly to the Spanish domestic market.

3. United Kingdom: identification of the source of parallel imports to the United Kingdom

(138) A Bayer UK internal memorandum dated 26 July 1990 states:

'Further to our recent discussions regarding the country of origin of ADALAT parallel imports and the price differentials across Europe, I have looked at and attach the following: —

1. ADALAT price comparison across Europe (source: Bayer Leverkusen/ Marketing Information).
2. IMS Data (BPI April 1990).
3. Taylor Nelson parallel Imports Monitor — country of origin data (graphs).

I have used the pricing information to compare pack size prices with the equivalent UK price in order to identify the most likely source for each and the relative price differentials. I have also indicated the IMS ADALAT PI data for the 12 months ending April 1990 in order to see which parallel imported pack sizes are most commonly found in the UK.

Analysis of the data showed the following:

ADALAT RETARD 20

30 tablet packs formed the largest proportion of ADALAT RETARD PI during the 12 months to April 1990. The cheapest sources appear to be France and Greece.

The 60 tablet packs appear only to be available in Spain and at a far cheaper price (i.e. an index figure of 66). These packs accounted for £ 2.4 million (NHS prices) during the period concerned.

This largely reflects the country of origin trends shown by the Taylor Nelson data (see graph). France and Italy account for a regular if fluctuating supply of parallel imports with Spain picking up considerably during 1989, presumably accounting for all the 60 tablet packs.

ADALAT 5 mg

ADALAT 5 mg parallel imports only account for a very small proportion of the total. The 50 mg pack size is the most likely to appear and is cheapest in Portugal and Belgium.

ADALAT 10 mg

Most 10 mg parallel imports were available in 50 tablet packs during the 12 months to April 1990. The cheapest European countries for this pack are currently Spain and Portugal with Italy and Belgium also below the equivalent UK price.

30 packs are also parallel imported and are significantly cheaper in France.

The Taylor Nelson data largely mirrors this picture with Spain again gaining ground during 1989.

It must be noted of course that parallel import trends are always likely to be fluctuating ones with exchange rates playing a vital role. It is also clear that pack sizes in stock may vary over time.

I hope the above information is of interest.' ¹²⁶

(139) Many other documents give the same type of information:

'(...) The level of PI's now stands at 35.34 % (this figure is calculated with ADALAT RETARD 10 excluded).

(...) Total ADALAT PI's from this source (Scriptcount PI monitor) currently stand at 51.13 %. However, this data does not take account of Boots and is therefore an indication of the trend only.

Belgium remains the top country of origin for ADALAT 10 mg (30 %), followed by Italy (28 %) and Spain (21 %). Whilst for ADALAT RETARD 20 the largest number of PI's came from Greece (43 %), followed by France (19 %) and Italy and Spain (10 % each).'¹²⁷

(140) A letter sent by Bayer UK to Bayer AG (Region 2) on 27 June 1991 states:

'Please find enclosed patient information leaflets and empty packs of ADALAT RETARD which were discovered at the premises of the UK parallel importer(. . .). According to our source, some 8,000 leaflets relating to Spanish ADALAT RETARD were seen. According to Dr Ebsworth, Spain has managed to control the majority of its product, and hence the batch numbers on the 3 boxes might provide lead to the Spanish wholesalers who are exporting to the UK. Please keep me informed of any developments.'¹²⁸

(141) A memorandum dated 5 May 1992 states:

'Subject: PARALLEL IMPORTS

Further to your request, please find attached the parallel imports data by country of origin since January 91. Both France and Greece are still taking the lion's share with no signs of easing off.'¹²⁹

4. Results

4.1. *Complaints from wholesalers not receiving supplies*

(142) On 2 February, 1990, Bayer Spain faxed to Leverkusen the following letter from the wholesaler Hefame.

'I am very surprised that, even in the new year, delivery of ADALAT in all its pharmaceutical forms has not returned to its normal pattern.

I would be very happy if you could notify us in writing of the reasons for the constantly low stocks and undersupply of the market for the product in question so that we can explain the situation to the Spanish health authorities if necessary.

Our firm Hefame, with its twelve branches covering almost half of Spain, is certainly of such importance to you that you should cover these delivery shortfalls as soon as possible.

I hope that you will take all of this into account in future and that you will return to a normal rate of delivery.'¹³⁰

(143) An internal memorandum drawn up by Bayer Spain on 21 May 1990 makes it clear that Cofares, the largest Spanish wholesaler, was requesting an explanation for the limited supplies it was receiving:

'Notes for the discussion with Cofares on the question of "reductions in supplies of ADALAT and ADALAT RETARD".

From the first quarter of 1989, demand for ADALAT and ADALAT RETARD was greater than the requirements of the Spanish market, and orders were placed with us that were 50 %—100 % higher than normal. We determined the Spanish requirements using the following elements:

- (a) History of sales in recent years to wholesalers in the different provinces;
- (b) Sales statistics of the largest wholesalers that we bought during a certain period;
- (c) IMS market shares and shares on the regional pharmaceuticals market.

On the basis of its medium-term forecasts, raw materials requirements and production capacities, Q.F.B. (Química Farmacéutica Bayer) can meet the requirements of the Spanish market plus any market growth and its own expected growth rates for these products. In order not to leave parts of the market completely without supplies, which would be against the main ethical obligation of a Spanish pharmaceutical firm, namely satisfying the needs of the domestic market, we are obliged for the moment to make deliveries to our customers in

accordance with their market potential and reduce excessive orders. Since, in addition, some wholesalers are nevertheless not supplying certain pharmacists, in some provinces we are also obliged to deliver direct to the pharmacies in order to guarantee supplies to patients suffering from serious indications such as angina and hypertension.

The delivery quantities agreed with Cofares take into account the constant growth and penetration of these chains of wholesalers in new Spanish provinces.’¹³¹

- (144) A memo sent by the Director of the Bayer France production centre at Sens to the Director-General of Bayer France on 21 October 1991 (document already quoted in part at paragraph 94 above) states:

‘VERY IMPORTANT

Confidential

Deliveries of ADALATE 20 mg LP to CERP Rouen.

(...) Since the end of September we have not been supplying CERP Boulogne, and we owe them 40 000 packs.

CERP Boulogne thinks that it is deliberate Bayer policy to prevent the growth of parallel imports because it has noticed that Bayer has the same attitude in Belgium and Spain.

The Belgian and Spanish markets are small markets but the French market is sizeable. (...)

I explained (...) that we had very low stocks and that our main concern was to supply the French market. CERP Boulogne asked whether I took them for fools, etc. (...)

At present we have blocked a total of 11 orders (7 wholesalers), or 137 000 packs.

Thus, we must take a rapid decision to give a very clear definition of our position in this affair.’¹³²

- (145) A letter sent by the French wholesaler CERP Lorraine to Bayer France on 5 March 1992 states:

‘(...) We are taking the liberty of letting you know our thoughts (...). Looking at our orders for June—September 1991, it is clear that Bayer Laboratories are making it difficult to deliver to us.

Between June and September 1991 we ordered some 300 000 packs of ADALATE 20 mg LP from you. These orders were fulfilled, as your invoices testify. This represents an average of 75 000 packs per month. Thus, it is difficult to see how you can protest stock or production problems as reasons for no longer delivering the same quantities to us. Accordingly, your proposals for staggered deliveries (5 000 packs/month) look very much like a disguised refusal to sell.’¹³³

- (146) A letter sent by CERP Rouen to Bayer France on 3 August 1992 states:

‘We must inform you that our Laigneville agency has run out of ADALATE LP because of orders not met by yourselves on the pretext of quotas designed to prevent us exporting to other European countries. However, our Laigneville agency has had overall growth above 15 % since the beginning of the year and 34 % in July. We can no longer accept your refusals to sell without reacting, having regard to the damage caused for which you are responsible.

We would ask you to honour our orders in full from now on (...).’¹³⁴

4.2. Results achieved by Bayer

- (147) The record of the Bayer France Management Committee meeting held on 8 April 1992 states:

‘Following close monitoring of the different wholesalers, we are managing to reduce the impact of re-exports on our business, despite strong pressure from them. Giraldi.’¹³⁵

- (148) Bayer UK's performance in 1990, 1991, 1992 and 1993 shows a steady increase in sales of ADALAT on the British market:

1990 £ [...] million (some ECU [...] million)

1991 £ [...] million (some ECU [...] million)

1992 £ [...] million (some ECU [...] million)

1993 £ [...] million (some ECU [...] million)

- (149) In parallel with this, the trend in Bayer France's sales was as shown below, involving both a decrease in turnover (in FF millions) in ADALAT after 1991 (France and exports) and a decline in exports to minimal levels:

Turnover (FF million)		1990	% Adal	1991	% Adal	1992	% Adal	To date 93	% Adal
ADALATE 10 mg	France	[...]		[...]		[...]		[...]	
ADALATE 20 mg	France	[...]		[...]		[...]		[...]	
ADALATE 10 mg	Export	[...]		[...]		[...]		[...]	
ADALATE 20 mg	Export	[...]		[...]		[...]		[...]	
Total o. "Cardio-vasc."	France	[...]	[...]	[...]	[...]	[...]		[...]	
	Export	[...]		[...]		[...]		[...]	[...]
T.O. BAYER PHARMA (excl. veterinary products)	Total	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

136

CHAPTER II

LEGAL ASSESSMENT

SECTION I

Definition of the market

1. Geographic market

- (150) At the beginning of the infringement, in 1989 in Spain and in 1991 in France, the pharmaceutical industry was mainly active on a national level. In particular, no drug could be commercialized without previous authorization from the competent national authorities and the decision to authorize commercialization of a drug remained entirely with the Member State, which held total powers in this field.

Since 1 January 1995, the harmonization of technical legislation within the Community and the entry into force of new marketing authorization procedures for medicines represent the completion of the single market programme from the point of view of scientific and technical requirements for medicines. Since the beginning of 1995 pharmaceutical companies have the option (and indeed, for biotechnology products, the obligation) to submit an application for authorization of new medicines to the European Agency for the Evaluation of Medicinal Products (EMEA), which later will submit a formal opinion to the Commission, whose decision is binding on all Member States.

- (151) The sale of medicines is influenced by the administrative or purchasing policies adopted in Member States by national health services. For example, some countries take direct or indirect measures to influence prices and there are different levels of reimbursement by the social security system for different categories of medicines. In France and Spain, prices are directly set by the relevant national authority. In the United Kingdom an indirect controlling of prices of branded pharmaceutical products is achieved, through a regulation for overall profitability of undertakings, based on their sales to the National Health Service. These differences in price-fixing methods and refund arrangements mean that there are wide disparities in pharmaceutical product prices in Member States.
- (152) The national markets are therefore deemed to be the relevant geographic markets for the purposes of this Decision.

2. Product market

- (153) The criterion applied in defining the relevant product market for the purposes of this Decision is that the various competing products all have identical therapeutic uses. ADALAT and the competing products which may be substituted for it are used in the treatment of three cardiovascular diseases: coronary heart disease, hypertension and congestive heart failure. Its major uses are in the treatment of hypertension and coronary heart disease (see paragraph 8).

3. Relevant market

- (154) In view of the conduct described in this Decision, consisting in the impeding of parallel exports to the United Kingdom, the relevant market is as follows:

- Primarily, as far as coronary heart disease and hypertension are concerned, the United Kingdom is deemed to be the major relevant market since the agreements directly affect this market by protecting it from parallel imports. The United Kingdom market is the market on which Bayer achieves the largest turnover, through its United Kingdom subsidiary, and on which the effects of the agreements are most clearly identifiable. On this market there has been an observable increase in sales to British customers at British prices.
- Secondly, as far as coronary heart disease and hypertension are concerned, the markets from which the parallel imports originate, France and Spain, are deemed to be relevant markets since they are artificially closed through the hindering of parallel exports. On these two markets, the effects of the conduct described in this Decision are clearly evident to the trading partners of Bayer Spain and Bayer France. The wholesalers have seen their export turnover fall very sharply and their business restricted to the domestic market alone.

SECTION II

Article 85 (1)

- (155) Bayer France and Bayer Spain have committed an infringement of Article 85 (1) by imposing an export ban (point 1.1) as part of their continuous commercial relations with their customers (point 1.2). The agreement constitutes an appreciable restriction of competition (point 2) and has an appreciable effect on trade between Member States (point 3).

1. Agreement

1.1. Export ban

- (156) Analysis of the conduct engaged in by Bayer France and Bayer Spain *vis-à-vis* their wholesalers shows that Bayer France and Bayer Spain have imposed an export ban in their commercial relations with their wholesalers.

The export ban may be deduced from the following additional factors: (a) a system for detecting exporting wholesalers, and (b) successive reductions in the amounts supplied by Bayer France and Bayer Spain where wholesalers export all or some of the products.

(a) System for detecting exporting wholesalers

- (157) The evidence set out in 'The facts' (see paragraphs 78 to 82 as regards France and paragraph 109 as regards Spain) shows that Bayer Spain and Bayer France have a system for identifying exporting wholesalers.
- (158) In Spain, the express object of the system is to detect any wholesalers engaged in exports. Reference should be made in particular to the document entitled 'Distribution control system (Spain)' used by the Bayer Spain manager in his information talk given to Bayer France (see paragraph 109). The document includes phrases such as:

'Establish a limit for each wholesaler'

'Knowledge of "suspicious" wholesalers'

Similarly, the document quoted in paragraph 110, 'Parallel exports of ADALAT 50 and ADALAT RETARD', states:

'It was agreed to restrict as far as possible sales to the four exporting wholesalers identified so far.'

- (159) With regard to France, in addition to the fact that the sales director was informed of the methods used in Spain (see paragraph 109), the Commission has in its possession documents setting out monthly lists of the quantities ordered and the highlighted increase in their amount as compared with the statistics for the previous year (see paragraphs 78 and 79). Furthermore, among the documents in the Commission's possession there is the record of the Bayer France Management Committee meeting (see paragraph 81) which gave the following instruction:

'Given the increasing importance of parallel exports in our Gatt 1 turnover (France), and in order better to define our sales potential, Invoicing will notify Control every month of the quantities likely to be exported by our main customers.'

This system used by Bayer France and Bayer Spain to identify exporting wholesalers is a preliminary to any action by Bayer France and Bayer Spain to impede parallel exports.

(b) Successive reductions in the amounts supplied by Bayer France and Bayer Spain where wholesalers export all or some of the products

- (160) Whenever wholesalers export some of the products supplied, they run the risk of having their subsequent orders cut by Bayer France and Bayer Spain.

The substantiating documents have been examined in detail as regards France in paragraphs 83 to 85 and 96 to 103 and as regards Spain in paragraphs 110 to 131.

- (161) As regards France, the Commission has in its possession in particular the internal memo from the sales director of Bayer France to the Director-General (see paragraph 83) stating:

'Since the end of September we have not been supplying CERP Boulogne, and we owe them 40 000 packs. (...) At present we have blocked a total of 11 orders (7 wholesalers), or 137 000 packs.'

- (162) As regards Spain, the following document (see paragraph 110) indicates clearly that Bayer Spain would take whatever measures were necessary to reduce supplies to detected wholesalers:

'It was agreed to restrict as far as possible sales to the four exporting wholesalers identified so far.'

- (163) The evidence in the Commission's possession shows that supply of the quantities allowed by Bayer France and Bayer Spain is subject to compliance with an export ban.

Bayer France and Bayer Spain make the extent of the reduction in the amounts they supply dependent on the wholesalers' conduct in response to the export ban. If the wholesalers infringe the export ban, this entails a further automatic reduction in the supplies they receive.

- (164) In the case of France, these successive reductions are evidenced in particular by the documents examined in paragraphs 96 to 103. Amongst these documents, particular mention should be made of the letters sent by CERP Rouen's commercial department to its agencies instructing them to obtain supplies of the goods, for example the following letter (see paragraph 99):

'The order for ADALATE LP that we asked you to place (see memo dated 27 November 1991) has not been received by any agency. We believe that you will not receive it. Bayer is very reluctant to supply exceptional orders.'

and the following letter (see paragraph 101):

'The Boulogne agency ⁽¹⁸⁾ needs to build a stock of 8 000 to 9 000 ADALATE LP per week. Please try to build this stock by adding the quantities set out below to your requirements. However, in view of the monthly quotas allocated by Bayer to prevent us (illegally) from exporting, send to Boulogne only if your monthly requirements are met.'

The closing phrase in the above letter ('Send to Boulogne only if your monthly requirements are met') shows that the CERP Rouen agencies were subject to continuous monitoring since they were suspected of exporting and that such monitoring could indeed in some cases result in CERP Rouen's being unable to supply sufficient amounts even on its domestic market.

(165) The figures on the supplies obtained by CERP Lorraine (see paragraph 87) show that Bayer France kept a close eye on its orders and, realizing that CERP Lorraine was exporting, restricted its supplies to it to the level of the previous year.

(166) In the case of Spain, the documents in the Commission's possession include the record drawn up by Hufasa of a meeting arranged with the Bayer Spain management in an attempt to obtain supplies (see paragraphs 114 and 127):

'Following the latest conversation with Bayer management, they stated that they could not accept the quantities requested by HUFASA because they accounted for 50 % of the domestic market and were much higher than those of other firms in the same area (. . .). This led them to believe that a substantial proportion of the product was intended for export.'

(167) This record states:

'(. . .) I pointed out that HUFASA needed substantial quantities of ADALAT because:

- They (Bayer Spain) based their figures for HUFASA on the 1988 financial year, during which there had been a marked reduction in purchases due to the crisis within the company.
- Since they supply quantities below real needs, orders had to rise so that a stock could be built up since that had been impossible to date because of the small quantities delivered, and this had forced us to try to make up the losses in orders.
- At the moment, not only have we recovered the market but we are also above our 1987 level, a year which can be regarded as normal for HUFASA.'

This quotation shows that, as a result of the controls carried out by Bayer Spain once Hufasa had been detected as an exporter, Hufasa was not only unable to meet export demand, but was also, in some cases, unable to meet demand on its domestic market.

(168) Mention should also be made of Hefame, which concluded agreements with a number of small wholesalers who were not likely to be included on any Bayer Spain 'blacklist' since they operated solely on regional markets within Spain. These wholesalers ordered quantities of ADALAT from Bayer Spain and passed them on to Hefame, sharing the profits it made from exporting the products. These small wholesalers, once they were detected, stopped receiving supplies from Bayer Spain in excess of their usual requirements (see paragraphs 122 to 124).

(169) The documents in the Commission's possession include the following statement by Cofares (see paragraph 121):

⁽¹⁸⁾ AS explained above, CERP Boulogne is the agency of CERP Rouen which specializes in exports to the UK.

'COFARES' export activity accounts for a very small proportion of its total invoicing because of the difficulties posed by certain laboratories (including Bayer) to orders for export.

— When Bayer set an ADALAT quota for COFARES that was initially clearly insufficient to cover the requirements of its domestic market, in his capacity as a Director of COMPRAS he warned them of a possible complaint because of such restrictions. Since then, Bayer has supplied COFARES with sufficient for national consumption of the product in question.'

This statement shows that Cofares was detected as being an exporter and was unable to meet demand on its domestic market. Cofares subsequently confined itself to the national market and was accordingly allowed a sufficient level of deliveries to be able to supply the Spanish market.

(c) Conclusions

- (170) All these aspects of the conduct of Bayer France and Bayer Spain show that the two companies have subjected their wholesalers to a permanent threat of reducing the quantities supplied, a threat which was repeatedly carried out if they did not comply with the export ban.

1.2. *The export ban has been incorporated into the continuous relations between Bayer France and Bayer Spain and their respective wholesalers*

(a) The precedent of the Sandoz case

- (171) In the Sandoz case⁽¹⁹⁾, the Commission began by establishing that an export ban existed (the words 'export prohibited' appeared on the invoices), then established that this export ban formed an integral part of the continuous commercial relations between Sandoz and its customers.

The Commission took the view that:

'the type of agreement referred to in Article 85 is represented by the continuous commercial relationship set up and concretized by the whole of the (...) commercial procedures normally provided for by Sandoz PF in its relations with its customers and at least implicitly accepted by them'

The Court of Justice⁽²⁰⁾ upheld the Commission's view, stating:

'(...) The Commission was justified in considering that the set of continuous commercial relations, of which the "export prohibited" clause formed an integral part, established between Sandoz PF and its customers was governed by a pre-established general agreement applicable to the innumerable individual orders for Sandoz products. Such an agreement is covered by the provisions of Article 85(1) of the EEC Treaty.'

In the present case, as in Sandoz, the export ban has been established. It now remains to demonstrate that it constitutes an essential and integral element of the continuous commercial relations between the parties.

(b) Continuous commercial relations

- (172) The whole of the commercial relations between Bayer Spain and its wholesalers on the one hand and between Bayer France and its wholesalers on the other is based on standard commercial procedures with which both parties are perfectly familiar, namely on regular orders placed by telephone, electronic mail or ordinary mail, on regular supplies within very short deadlines, and on invoices expressly including clauses governing the supply of the goods which are the subject of the contract (see paragraphs 47 to 51 for France and paragraph 52 for Spain). This demonstrates that there is a continuous commercial relationship governed by a pre-established general agreement applicable to the various individual orders for ADALAT.

⁽¹⁹⁾ Decision 87/409/EEC of 13 July 1987 in Sandoz OJ No L 222, 10. 8. 1987, p. 28.

⁽²⁰⁾ Case C 277/87, *Sandoz v. Commission*, [1990] ECR I-45.

(c) Incorporation of the export ban into these continuous commercial relations

- (173) The export ban detailed in paragraphs 156 to 170 has been incorporated into these continuous commercial relations between Bayer France and Bayer Spain and their respective wholesalers.

The following components of the export ban demonstrate this point: (i) the quantities ordered, (ii) the export ban, which is systematic and consistent, and (iii) the wholesalers' implicit acquiescence in the export ban.

- (174) (i) The quantities ordered represent an ongoing and essential element of any commercial relationship involving sales. The regular orders placed by the wholesalers, and regularly renewed, show that commercial relations are continuous and ongoing as regards ADALAT.
- (175) (ii) Bayer Spain and Bayer France imposed a ban applicable systematically and consistently to all sales transactions between them and their respective wholesalers where the two companies knew that the wholesalers were exporting.
- (176) (iii) The wholesalers' conduct reflected an implicit acquiescence in the export ban.

— Wholesalers' awareness of the real motives of Bayer France and Bayer Spain

- (177) The documents examined in Chapter I, 'The facts' (see in particular paragraphs 94 and 95 for France and paragraphs 112 to 121 for Spain) show that the wholesalers were aware of the true motives of Bayer France and Bayer Spain as regards parallel exports. Their attitude was very quickly seen to be a determined desire to prevent parallel exports. It was for this reason that the wholesalers soon stopped placing orders explicitly for destinations outside the national territory, realizing that only products intended for domestic consumption would be supplied to them.
- (178) In the case of France, a number of documents obtained by the Commission from the wholesalers indicate expressly that the reductions in supplies of ADALATE were linked to Bayer France's export ban and constituted a penalty that would be imposed if the wholesaler was identified again as engaging in parallel trade. In particular, the CERP Rouen letter already quoted (paragraph 101) states:

'(. . .) in view of the monthly quotas allocated by Bayer to prevent us (illegally) from exporting (. . .)'

The document quoted in paragraph 105 'Export situation at 30/6/1992' states:

'Half-way through the financial year, the export situation in terms of turnover is behind the draft budget as it stands (. . .). This difference is explained principally (not to say exclusively) by the difficulties in obtaining supplies experienced since the start of January with Bayer laboratories, which are blocking supplies of ADALATE LP 20 mg (. . .).'

- (179) In the case of Spain, the Commission also has documents of the same type in its possession. For example, the following Comercial Genové management report (see paragraph 113):

'Exports have fallen by (. . . millions), due mainly to the restrictions imposed by (. . .) and Bayer on the supply of ADALAT RETARD and (. . .).'

Similarly, the letter from Comercial Genové to its parent company in France (see paragraph 115) stating:

'With regard to your fax today concerning (. . .) and Bayer laboratories, I give you my word that I am doing my utmost to obtain supplies greater than our requirements. The laboratories are refusing to listen to any arguments. They know that the quantities they supply to us are easily enough to cover the needs of the Spanish market. (. . .)'

Some wholesalers even went as far as to offer explanations to their customers (see paragraph 119):

'I (...) apologize for being unable to supply to your company your orders of ADALAT RETARD. The reason is that the laboratory that produces it (Bayer) does not deliver to us the quantities we order because they want to avoid any kind of export of this product and then, they deliver only the quantity that estimate we need for the internal market.'

These factors demonstrate that the wholesalers are aware of the requirements imposed by Bayer France and Bayer Spain as regards the destination of the goods supplied.

- (180) This first aspect reflecting the wholesalers' awareness of the existence of the export ban was present in the Sandoz case: the wholesalers could not be unaware of the existence of an express export ban systematically specified on all the invoices. The mere fact that they did not react to the export ban suggested that they accepted it and the necessary evidence substantiating the existence of an agreement. In the present case, the export ban incorporated into the continuous commercial relations between Bayer France and Bayer Spain and their respective wholesalers includes a further element in addition to those deemed relevant in the Sandoz case: the conduct of the wholesalers shows that they have not only understood that an export ban applies to the goods supplied, but also that they have aligned their conduct on this ban.

— Alignment of the wholesalers' conduct on the requirements imposed by Bayer France and Bayer Spain

- (181) It should be noted first that the offer made by most of the French wholesalers to provide Bayer France with a planning forecast of their orders was in fact a test intended to allow the wholesalers to determine Bayer France's real intentions. Bayer France did not respond to this move and thereby confirmed its intentions. The wholesalers subsequently adapted to the new commercial relations which this created for them and aligned their conduct on that of Bayer France, thereby demonstrating, at least in appearance, their acceptance *vis-à-vis* Bayer France of their supplier's export ban in their commercial relations with the supplier.
- (182) By using various devices in order to obtain supplies, in particular that of spreading orders intended for export among the various agencies (see paragraphs 97 to 103 for France and paragraphs 113 to 118 for Spain) and the order placed with other 'non-supervised' wholesalers (see paragraphs 122 to 124), the wholesalers adjusted the way in which their orders were presented so as to bring them into line with Bayer France and Bayer Spain's requirement that export of the product was to be prohibited.
- (183) They began to present their orders to their supplier, Bayer France or Bayer Spain, in such a way as to suggest that the orders were intended to cover only domestic requirements. Once the two companies had seen through this initial ploy, the wholesalers even began to comply with the national 'quotas' imposed by their supplier, negotiating as far as they could to increase them to the maximum, thus bowing to the strict application of and compliance with the figures regarded by Bayer France and Bayer Spain as normal for the supplying of the domestic market.
- (184) This attitude demonstrates that the wholesalers were aware of the real motives of Bayer France and Bayer Spain and of the tactics deployed by the two companies to thwart parallel exports: they adapted to the system established by their supplier so as to comply with its requirements. This behaviour thus demonstrates their compliance with the export ban which was incorporated into the continuous commercial relations between Bayer France and Bayer Spain and their wholesalers.
- (185) This is particularly clear, for example, in the Hufasa document (see paragraph 127) in which the Hufasa purchasing staff negotiated hard with Bayer Spain in order to obtain quantities which were supposedly intended for the domestic market, but which were in fact for export and in which the account given of the meeting by Hufasa states explicitly:

'(...) I took the view that it was more important to obtain a quantity of ADALAT for export with very plausible figures rather than maintain a very high level of orders which would not be supplied. The important thing was actual receipts rather than the order.'

1.3. General conclusion

- (186) The above factors, as a whole, demonstrate that the export ban became an integral element in the continuous commercial relations between the parties. There was therefore an agreement within the meaning of Article 85 (1).
- (187) The Commission has already had to deal with a set of problems that is in many ways analogous to the present case in *Johnson & Johnson*. *Johnson & Johnson's* ⁽²¹⁾ British subsidiary, *Ortho UK*, had amended the clause banning exports by restricting it to third countries. However, it did not inform its customers of this and continued to put pressure on British pharmacists exporting to other Community countries by stopping supplies to them (total halt or drastic reduction in supplies). There was therefore in this case no longer any explicit clause prohibiting exports in any of the commercial documents establishing continuous commercial relations between the parties. The conduct of the parties was the only evidence that these continuous commercial relations involved an export ban. The Commission stated:
- ‘These (dealers) knew that the present and future deliveries were obtainable only if they complied with the request not to export.(...) The continued efforts to prevent dealers from exporting compelled those dealers to accept the fact that exporting was still not allowed. The contracts of sale of *Ortho UK* were still, therefore, subject to prohibitions of exports, which prohibitions formed an integral part of agreements within the meaning of Article 85(1).’
- (188) Further examples illustrating the same type of approach in other sectors could be given ⁽²²⁾.

2. Restriction of competition

2.1. Object and effect of restricting competition

- (189) The agreement providing for an export ban has as its object the restriction of the contractual freedom of wholesalers to meet demand from the United Kingdom, which was thus protected as an export market against competition from ADALAT products originating in other countries of the Community
- (190) It has also had as its effect the stifling of sales, notably on the United Kingdom market, which was protected against parallel imports of ADALAT. This has the effect of artificially partitioning the common market and of preventing the creation of a single market between the Member States, the creation of such a single market being one of the fundamental objectives of the EC Treaty.

2.2. Appreciable restriction of competition

- (191) The market shares held by ADALAT products, as shown in the following table, are substantial, particularly on the United Kingdom market (see paragraphs 23 to 26):

⁽²¹⁾ Commission Decision 80/1283/EEC of 25 November 1980 in *Johnson & Johnson*, OJ No L 377, 31. 12. 1980, p. 16.

⁽²²⁾ For example:

- Commission Decision 78/163/EEC of 20 December 1977 in — *Distillers* (the withdrawal of deduction rebates and discounts in the event of exports has the same object as a formal export ban and may be deemed to be a more effective means of discouraging such exports) — OJ No L 50, 22. 2. 1978, p. 16,
- Commission Decision 85/79/EEC of 14 December 1984 in — *John Deere* (cancellation of contracts, shortening of payment deadlines, etc. in the event of non-compliance with an implicit clause prohibiting exports) — OJ No L 35, 7. 2. 1985, p. 58.
- Commission Decision 87/406/EEC of 10 July 1987 in — *Tipp-Ex* (the withdrawal of preferential sales conditions in the event of exports can be explained only as a deliberate attempt by *Tipp-Ex* to prevent such exports) — OJ No L 222, 10. 8. 1987, p. 1.
- Commission Decision 91/335/EEC of 15 May 1991 in — *Gosme/Martell* (the refusal of discounts and rebates in the event of exports made exporting less attractive for exporters and was a means of discouraging such exports) — OJ No L 185, 11. 7. 1991, p. 23.

	Coronary heart disease	Hypertension
United Kingdom	19,6 %	16,6 %
France	5,1 %	4,1 %
Spain	7,4 %	8,7 %

(192) The Bayer group had the following turnover in ADALAT:

1990	DM [...] million (ECU [...] million)
1991	DM [...] million (ECU [...] million)
1992	DM [...] million (ECU [...] million)

(193) Bayer UK had the following turnover in ADALAT:

1990	£ [...] million (ECU [...] million)
1991	£ [...] million (ECU [...] million)
1992	£ [...] million (ECU [...] million)
1993	£ [...] million (ECU [...] million)

It should also be noted that virtually all of Bayer UK's turnover in the cardiovascular sector is based on ADALAT.

(194) In addition, the figures given in paragraphs 29 to 31 above show that there are wide price differences for ADALAT between France and the United Kingdom on the one hand and between Spain and the United Kingdom on the other. In the case of ADALAT-Retard 20 mg tablet form, the price in Spain is, depending on the type of packaging, from 35 to 47 % below the price in the United Kingdom, while the price in France is 24 % lower. In the case of ADALAT in 10 mg capsule form, depending on the type of packaging, the price in Spain is from 48 to 55 % below the price charged in the United Kingdom. The price in France is from 39 to 45 % below the United Kingdom price.

(195) It should be noted that this substantial price difference narrowed between the United Kingdom and France in September 1992 as a result of the devaluation of the pound sterling which took place at that time. Parallel trade in ADALAT then became economically less advantageous for potential exporters. However, the object of the measures introduced by Bayer France remains the same and is liable to have an impact again if monetary parities so permit. The restriction of competition thus remains potentially appreciable on the United Kingdom market.

(196) These facts, notably the leading position of the brand in the United Kingdom and the wide differences in prices, indicate that the United Kingdom market provides all the right conditions for parallel importing to develop.

(197) The development of substantial parallel imports poses a considerable threat to the protected market on which such imports are carried out, at a time when wide price differences exist between the countries, and in particular in the case of the United Kingdom ADALAT market, which is, on the one hand, one of the major markets for the product in the European Union and, on the other, one of the markets in the Community on which the price of the product is high.

3. Appreciable effect on trade between Member States

(198) Since the object of the agreement is to restrict or prevent parallel exports, trade between Member States is affected in two ways: the closure of the potential markets of origin for such exports (France and Spain) on the one hand and the protection of the market of destination for the exports (United Kingdom) on the other. These three markets, and particularly France and the United Kingdom, are major markets in the Community.

Consequently, the effect on trade between Member States is appreciable.

4. Conclusions

- (199) The evidence examined in this section shows that an agreement comprising an export ban exists between the parties. This restriction of competition is appreciable and has an appreciable effect on trade between certain Member States. All the criteria of Article 85 (1) are thus met.

SECTION III

Bayer's counter-arguments

1. The argument that stocks were depleted

- (200) The 'depleted stocks' argument consistently put forward by the French and Spanish management of Bayer France and Bayer Spain to explain restrictions in supplies is fictitious, as is clear from numerous items of evidence in the file, notably the explanations as to the workings of the Spanish distribution-control system (see the 'important' instructions given during the information talk referred to in paragraph 109), Bayer's refusal to act on the forecasts sent by the wholesalers in order to allow it to make the necessary arrangements (see paragraphs 90 to 93) and of the fact that in France, prior to the blockage imposed at the end of 1991 following the decision taken at Travemünde, Bayer France was able to supply very large quantities within normal delivery periods, even though during the same period of the previous year it had supplied small quantities (see paragraph 87), thereby demonstrating that adjustment to demand was perfectly feasible and that Bayer did not base its production forecasts on the previous year's demand.

- (201) The argument that there was a shortage of stocks or that stocks had been exhausted was used by the parties in the Moët et Chandon (London) case ⁽²³⁾, in which the company argued that the fact that orders for products intended for consumption outside the United Kingdom had to be handled and invoiced by the parent company in France did not constitute an attempt to partition the market, but was a measure intended to minimize the disruptive effects of the structural shortage of champagne. The Commission stated that:

'(. . .) the fact that export orders have to be addressed to the parent company in France does not nullify but rather confirms the existence of the export ban at issue. (. . .) The reasons adduced by the parties, viz the group's sales policy and the measures for sharing out supplies between Member States, serve merely to bring into sharper focus the restrictive object and effect of the export ban at issue which was intended to make them effective. The alleged shortage and the measures taken to deal with it cannot justify so as to exclude the application of Article 85(1) the fact that UK buyers wishing to resell are deprived of the possibility of reselling in the Community countries of their choice products released on to the UK market by Moët et Chandon.'

2. The argument that legislative provisions impose certain obligations regarding the supply of the domestic market

- (202) — *As regards the wholesalers*

French and Spanish legislation gives the wholesalers full autonomy in the policy they pursue with regard to the sale of the products, once they have complied with their statutory obligations. It also leaves them free to export if they so desire. Spanish law makes explicit provision to permit exporting. In France, it is current practice.

- (203) In France, the statutory obligation to hold minimum stocks defined by reference to the requirements of the national or regional market does not in any way mean that the wholesalers should confine themselves to activities covering

⁽²³⁾ Commission Decision 82/203/EEC of 27 November 1981 OJ No L 94, 8. 4. 1982, p. 7.

the national territory. Furthermore, the stock of medicinal products required by French law covers only two thirds of the pharmaceutical products actually sold. The law does not therefore constrain French wholesalers as to the content of the stocks which they hold.

In addition, the notion of minimum stocks laid down for public health protection reasons means that the wholesaler may engage in activities that go beyond the threshold of such minimum stocks. The law does not therefore set any limit to the activity of a wholesaler who, having met the requirements of the national market, wishes to export outside such market.

- (204) In the case of Spain, the law requires wholesalers to keep sufficient stocks for the region in which they exercise their activities. The law does not lay down any particular condition regarding the content of such stocks. The conclusions applicable to French wholesalers are thus applicable *a fortiori* to the Spanish wholesalers.

- (205) — *As regards the producers*

Neither French law nor Spanish law imposes any obligation on producers to supply the national market.

- (206) — *Conclusions*

Consequently, if a producer were to take action, in its contractual relations with its wholesalers, to restrict the wholesalers' activities to meeting the requirements of the domestic market alone, the producer could not argue in its defence that it was merely complying with national law. On the contrary, it would have to be assumed that the producer, in its contractual relations, was going beyond the statutory requirements imposed on the wholesalers.

3. The argument regarding the existence of a patent for ADALAT-Retard

- (207) Bayer argues that according to Article 47 of the Treaty of Accession with Spain, parallel imports of ADALAT-Retard from Spain into the United Kingdom are illegal and that they constitute a breach of the patent rights of Bayer in the United Kingdom, given that Bayer was unable to obtain a comparable patent for this product in Spain. This legal situation is supposed to have prevailed not only from the time that protection of the patent in the United Kingdom was obtained but ever since the date of the application for the patent in the early 1980s.
- (208) This argument could create the impression that Bayer had the legal means to oppose the entry into the UK of parallel imports of ADALAT-Retard from Spain (by Bayer's assertion of the right by way of appropriate action with the competent national authorities) and thus would not have had any need to organize an agreement between Bayer Spain and its wholesalers prohibiting parallel exports from Spain to other Member States.
- (209) Bayer's right to invoke its patent does not preclude the company from using, for reasons of its own, less publicly conspicuous ways of preventing imports. This hypothesis is confirmed by the fact that, as far as the Commission is aware, Bayer has not relied upon its patent rights in proceeding against imports in the United Kingdom.
- (210) It should also be borne in mind that the export ban on ADALAT-Retard from Spain falls within the framework of agreements between, on the one hand, Bayer France and its wholesalers and, on the other hand, Bayer Spain and its wholesalers, and that these agreements are not limited to ADALAT-Retard alone. There is no reason to believe that this particular product would have been treated any differently. The facts set out in this Decision show the contrary.
- (211) Finally, the object of the agreements containing the export ban is to restrict competition, and their illegal nature is not changed by the existence of the pending patent in the UK. Furthermore, the evidence in the possession of the Commission shows that export restrictions on ADALAT-Retard from Spain have operated and have indeed significantly hindered exports of the product to the UK.

SECTION IV

Article 85 (3)

- (212) The agreements between Bayer France and its wholesalers on the one hand and Bayer Spain and its wholesalers on the other were not notified to the Commission. They are not therefore eligible for exemption. In any case, it is unlikely that the agreements would qualify for exemption, since, by imposing a very serious restriction that is not essential to a proper system for distributing the product and is liable to harm the interests of consumers, they run fundamentally counter to the Community rules on competition.

SECTION V

Duration of the infringement

1. Spain

- (213) The infringement may be dated with certainty from 4 April 1989, witness the document, 'Parallel exports of ADALAT 50 and ADALAT RETARD' (see paragraph 110):

'It was agreed to restrict as far as possible sales to the four exporting wholesalers identified so far.'

- (214) The decision taken at Travemünde in September 1991 (see paragraph 76) confirms the general practice within the group:

'Activities to reduce parallel imports to the UK as much as possible will continue.'

The wording of this document shows that the infringement began before the decision ('se continuarán' = 'will continue'), the decision being taken at the highest decision-making level of the Bayer group (*Hauptländertreffen*).

- (215) The infringement is at present still being committed. Wholesalers wishing to export are still encountering restrictions.

2. France

- (216) The restrictions are evidenced by substantiating documents from end of September 1991 ('blocking' of supplies involving 137 000 packets to CERP Rouen and six other wholesalers; see paragraph 83).
- (217) The restrictions had significant effects up to September 1992, when the devaluation of the pound sterling resulted in a sharp decrease in the profit margin on the price of ADALAT, thus making parallel exports of the product less viable, particularly in view of the restrictions imposed by Bayer.

However, it must be borne in mind that, even if the restrictive conduct has since ceased to have restrictive effects in France, there is nothing to indicate any major change in policy in Bayer France's attitude or any change in the conduct of the wholesalers. The Travemünde decision applied to the whole of the group, and Bayer Spain's restrictive policy is still being pursued in Spain.

If monetary parities and prices were again such as to allow it, the restrictive conduct could perfectly well resume in France, just as it could begin to operate in any Community country in which low prices provided an incentive for parallel exports.

- (218) Consequently, the infringement did not end with the devaluation of the pound sterling in September 1992.

SECTION VI

Article 3 of Regulation No 17

- (219) Under Article 3 of Regulation No 17, where the Commission, on application or on its own initiative, finds that there is infringement of Article 85 of the Treaty, it may require the undertakings concerned to bring such infringement to an end.
- (220) In order to bring the infringement to an end, and in view of the fact that the infringement still continues today, Bayer France and Bayer Spain must, in particular, send all their customers a circular stating officially and clearly that exports are permitted within the Community and are not in any way penalized.
- (221) These facts must also be clearly stated in the general conditions of sale applicable between Bayer France and its wholesalers on the one hand and Bayer Spain and its wholesalers on the other.
- (222) In view of the gravity of the infringement involving the impeding of exports, and so as to ensure that the measures prescribed are effective, the undertaking concerned should be threatened with periodic penalty payments.

SECTION VII

Party to which this Decision is addressed

- (223) The Commission considers that, although most of the facts concern relations between the French and Spanish subsidiaries and the wholesalers operating on the French and Spanish markets, the infringement was committed by Bayer FRG, the parent company of the Bayer group.
- (224) The French and Spanish subsidiaries are wholly-owned subsidiaries of Bayer FRG. Consequently, Bayer AG is responsible for their actions ⁽²⁴⁾.
- (225) Furthermore, Bayer AG knew of the activities of its subsidiaries and had indeed prompted them to take such action, as may be seen from the record of the Travemünde meeting (see paragraph 76).
- (226) This Decision is therefore addressed to Bayer AG.

SECTION VIII

Article 15 of Regulation No 17

- (227) Pursuant to Article 15 (2) of Regulation No 17, the Commission may impose fines, within the limits defined by that Article, where, either intentionally or negligently, undertakings have committed an infringement of Article 85 (1).
- (228) The Commission considers that a fine must be imposed on Bayer AG as the representative of the Bayer group.
- (229) In fixing the amount of the fine, the Commission is required to have regard to all the relevant factors and, in particular, to the gravity and duration of the infringement.
- (230) The infringement thwarts the objective of creating a common market, which is a fundamental principle of the Treaty, and must therefore be regarded as particularly serious.
- (231) Many cases involving impediments to parallel exports have already been examined by the Commission and have over many years established the rules applicable in the matter. The following cases in particular may be cited:

⁽²⁴⁾ Commission Decision 82/267/EEC in AEG Telefunken (OJ No L 117, 30. 4. 1982, p. 15), upheld by the Court of Justice in Case 107/82 [1983] ECR 3151.

- Decision 78/163/EEC (Distillers),
- Decision 87/406/EEC (Tipp-Ex),
- Decision 91/335/EEC (Gosme/Martell).

(232) Many cases in the pharmaceutical sector involving impediments to parallel exports have already been examined by the Commission. The following cases in particular may be cited:

- Decision 87/409/EEC (Sandoz). The Decision was upheld by the Court of Justice in *Sandoz v Commission*,
- Decision 80/1283/EEC (Johnson & Johnson).

(233) Bayer is a very large company which has a strong position on the relevant markets in the European Union. It is a powerful and highly diversified international chemicals group. Its turnover amounted to DM 41 195 million in 1992 (some ECU 22 029 million). Its turnover in the health sector amounted to DM 7 198 million in 1992 (some ECU 3 849 million).

(234) The infringement has been in force since at least 1989 in the case of Spain and since at least 1991 in the case of France.

(235) Bayer AG has committed the infringement deliberately. The company could not have been unaware that the agreements in question, which form part of the ongoing business relations with its French and Spanish dealers, would result in a restriction of competition.

Furthermore, a number of the substantiating documents in the Commission's possession show that Bayer knew that its policy of impeding parallel exports constituted a serious infringement of such rules: evidence of this is provided, for example, by the 'important' recommendations made during the information talk at Bayer France (see paragraph 109):

'Discuss (no written information) assigned limits with concerned wholesalers (avoid legal problems).'

Further evidence is provided by CERP Lorraine's statement (see paragraph 95) concerning the CERP Lorraine export director's visit to Bayer France to obtain explanations on Bayer's conduct:

'... He (Bayer Pharma's Administration and Finance Director) replied that he had received strict instructions from Bayer general management to stop parallel exports, that the instructions would never be in writing and that officially they would blame it on problems in obtaining raw materials.'

Bayer says that it considers the elements of its behaviour analysed in this Decision not to fall under Article 85 (1). An error of the legal definition on Bayer's part does not change the fact that the behaviour was adopted in a deliberate way.

(236) Implementation of the agreement has made it impossible for the wholesalers to supply their British customers under normal conditions. Moreover, the consequences which this situation had for them were serious, with a substantial loss of business, a loss of customers and a loss of commercial credibility. For those reasons they should not be fined.

(237) In the pharmaceutical sector price differences between Member States are closely linked with the different national regulations on prices and on the way in which medicines are refunded by the social security. That being so, the infringement committed by Bayer AG, unlike comparable export restrictions in other sectors, does not aim to create discriminatory pricing at the consumer level in the different Member States. This element has to be taken into account in an appraisal of the effects of the infringement.

- (238) Another element to be taken into account in appraising the effects of the infringement is the patent protection for ADALAT-Retard in the United Kingdom. The existence of such protection contributes to the isolation of the British market and its enforcement could have reduced the effects of the export ban on the product from Spain. That, however, holds good only for a relatively small part of the products covered by this Decision. For such products the Spanish market is quantitatively much smaller than the French market. The information in the possession of the Commission shows that the quantities exported from Spain to the United Kingdom were much smaller than those exported from France. Moreover, the quantities of ADALAT-Retard exported from Spain to the United Kingdom were further reduced by the fact that the infringement started earlier in Spain than in France and that Bayer was able to enforce the export ban more effectively in Spain than in France.
- (239) The restrictions on parallel exports are the result of a strategy decided on by the Bayer group itself and merely implemented by the French and Spanish subsidiaries, which did not have any real room for manoeuvre in managing their product-marketing policies. The fine must therefore be imposed on the parent company, Bayer AG, representing the Bayer group,

HAS ADOPTED THIS DECISION:

Article 1

The prohibition on the exportation to other Member States of the products ADALATE and ADALATE 20 mg LP from France and on that of the products ADALAT and ADALAT-Retard from Spain, as has been agreed as part of their ongoing business relations, between Bayer France and its wholesalers since 1991, and between Bayer Spain and its wholesalers since at least 1989, constitutes an infringement of Article 85 (1) of the Treaty on the part of BAYER AG.

Article 2

Bayer AG shall bring the infringement to an end and shall in particular:

- send, within two months of notification of this Decision, a circular to the wholesalers in France and in Spain stating that exports are allowed within the Community and are not penalized,
- include this clarification, within two months of notification of this Decision, in the general terms and conditions of sale for France and Spain.

Article 3

A fine of ECU 3 000 000 (three million ecus) is hereby imposed on Bayer AG in respect of the infringements set out in Article 1.

The above fine shall be paid, in ecus, within three months of notification of this Decision. The amount shall be transferred in ecus to the account of the Commission of the European Communities No 310—0933000—43, Banque Bruxelles Lambert, Agence européenne, 5 rond point Schuman, B—1040 Brussels.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Institute on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, namely at 8,75 %.

Article 4

A periodic penalty payment of ECU 1 000 shall be imposed on Bayer AG in respect of each day of delay in carrying out the requirements specifically set out in Article 2, following the expiry of the two-month time limit specified for their implementation.

Article 5

This Decision is addressed to Bayer AG, D-51368 Leverkusen.

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

Done at Brussels, 10 January 1996.

For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX

Original documents in support of charges

1 Original text:

	Deutschland	Großbritannien	Frankreich	Spanien
Kapsel 5mg	Adalat 5	Adalat 5		
Kapsel 10mg	Adalat	Adalat	Adalate	Adalat
Kapsel 20mg	Adalat 20			Adalat 20
Tablette 10mg	Adalat T10			
Retard Tabl. 10mg		Adalat Retard 10		
Retard Tabl. 20mg	Adalat retard	Adalat Retard	Adalat 20mg LP	Adalat Retard
Retard Tabl. 5+15mg	Adalat SL			Adalat Bifasico
Oros 30mg		Adalat LA 30		Adalat Oros 30 (*)
Oros 60 mg		Adalat LA 60		Adalat Oros 60 (*)
(...)	(...)	(...)	(...)	(...)

(*) ab 1. 3. 1993¹¹

2. In English in the original text.

3. In English in the original text.

4. In English in the original text.

5. In English in the original text.

6. In English in the original text.

7. Original text:

‘Les antagonistes des canaux calciques très efficaces figurent parmi les principes thérapeutiques les plus importants pour le traitement de l’insuffisance coronarienne et de l’hypertension. Epruvé depuis de nombreuses années, notre ADALATE — molécule nifédipine — est aujourd’hui disponible dans plus de cent pays (...).’

8. Original text:

‘Le Ciprobay (...) est devenu en peu de temps notre spécialité pharmaceutique la plus importante après l’ADALATE.’

9. In English in the original text.

CV: cardiovascular

HT: hypertension

CHD: coronary heart disease.

10. Original text:

‘un produit leader à identité forte’.

11. Original text:

— Référence (du produit) en matière d’inhibiteur calcique

— son efficacité est certaine

- utilisable en cas de pathologies associées
- facilité d'emploi
- tolérance
- produit Bayer'.

12. Original text:

'Preisvergleich ADALAT 20 mg ret. Tabl. (in DM p. Tabl.)

	VK	B	GR	NL	P	SP	F	I	D	DK
Loco Grosso	0.49	0.51	0.43	0.63	0.47	0.32	0.37	0.37	0.42	0.84
AVP ex Steuer	0.84	0.85	0.55	0.85	0.68	0.52	0.55	0.55	0.78	1.20
AVP incl. Steuer	0.97	0.90	0.60	0.90	0.68	0.55	0.56	0.60	0.90	1.47

Preisvergleich ADALAT 10mg Kaps. (in DM p. Kaps)

	VK	B	GR	NL	P	SP	F	I	D	DK
Loco Grosso	0.31	0.20	0.26	0.41	0.21	0.16	0.17	0.23	0.27	0.50
AVP ex Steuer	0.53	0.34	0.36	0.59	0.30	0.26	0.24	0.35	0.44	0.74
AVP incl. Steuer	0.61	0.36	0.39	0.62	0.30	0.28	0.24	0.38	0.50	0.90

13. Original text:

'Loco Preisvergleich / Sortiert nach Regionen**ADALAT Tabl. 20 mg Retard **pro Tablette****

LAND	(...)	Pckg. Loco	(...)	Grosso Preis in DM pro**	(...)
(...)					
Belgien		30		0,51	
Dänemark		100		0,82	
(...)					
Frankreich		30		0,37	
Griechenland		30		0,42	
Irland		100		0,49	
Italien		50		0,36	
Niederlande		50		0,70	
Niederlande		100		0,70	
(...)					
Portugal		20		0,55	
Portugal		50		0,47	
(...)					
Spanien		40		0,32	
Spanien		60		0,32	
Spanien		500		0,26	
Ver. Königreich		100		0,49	

ADALAT Kaps 10 mg **Pro Kapsel**

LAND	(...)	Pckg. Loco	(...)	Grosso Preis in DM pro**	(...)
(...)					
Belgien		96		0,21	
Belgien		100		0,20	
Belgien		50		0,26	
Dänemark		100		0,48	
Dänemark		250		0,45	
(...)					
Frankreich		90		0,17	
Frankreich		30		0,19	
Griechenland		50		0,26	
Irland		100		0,31	
Italien		50		0,23	
Niederlande		50		0,46	
Niederlande		100		0,42	
(...)					
Portugal		50		0,21	
(...)					
Spanien		50		0,16	
Spanien		500		0,14	
Ver. Königreich		100		0,31	

14. Original text:

	ADALAT 10 mg Kapsel		ADALAT RETARD 20 mg	
	1990	1991	1990	1991
Belgien	28.1 %	27.0 %	5.1 %	5.6 %
Deutschland	6.1 %	15.7 %	3.8 %	9.5 %
Frankreich	14.9 %	11.8 %	17.1 %	24.9 %
Griechenland	3.1 %	5.1 %	40.5 %	30.1 %
Niederlande	0.8 %	1.0 %	0.1 %	0.7 %
Italien	18.2 %	9.9 %	12.0 %	10.6 %
Spanien	20.8 %	22.6 %	13.4 %	12.6 %
Andere	1.4 %	0.3 %	0.6 %	0.5 %
Nicht zuzuordnen	11.0 %	9.9 %	12.1 %	13.0 %
(...)				

15. Original text:

‘ADALAT und Nachahmer
Umsatzanteile — Entwicklung 1984–1991

	ADALAT	PI (Wertanteil in %)	Generika
1984	95.0	5.0	—
1985	75.9	9.0	15.1
1986	61.2	6.8	32.0
1987	55.4	4.9	37.7
1988	47.4	5.9	46.7
1989	38.6	4.5	56.8
1990	30.6	1.9	67.5
1991	31.4	2.2	66.4

16. In English in the original text.

17. In English in the original text.

PI = parallel imports.

18. In English in the original text.

19. Original text:

‘Unser umsatzstärkstes Produkt, das Herz/Kreislaufmittel ADALAT, haben wir konsequent weiterentwickelt (. . .). Damit haben wir unsere weltweit führende Marktposition auf dem Herz/Kreislaufgebiet gestärkt.’

20. Original text:

‘OCP	38.8 %
IFP Santé	15.2 %
Erpi	11.6 %
CERP Rouen	12.4 %
CERP Rhin-Rhône-Méditer.	6.1 %
Bourelly	4.1 %
CERP Lorraine	3.2 %
GRP (Repha-Vendée)	
(Schulze, RFA)	2.1 %
CERP Bretagne Nord	1.5 %
Chafer (Schulze)	0.85 %
Martin	0.8 %
Bialais	0.15 %’.

21. Original text:

‘Tout établissement de vente en gros de produits pharmaceutiques (. . .) ainsi que ses succursales doivent détenir en permanence un stock de médicaments spécialisés permettant d’assurer l’approvisionnement de la consommation mensuelle des officines du secteur qu’ils desservent et appartenant à leur clientèle habituelle.

Ce stock de médicaments doit correspondre en nature à une “collection” de spécialités comportant au moins les deux tiers du nombre des présentations des spécialités effectivement exploitées et en importance il doit correspondre à la valeur moyenne des chiffres d’affaires mensuels de l’année précédente (Article 1).

Tout établissement de vente en gros de produits pharmaceutiques ainsi que ses succursales doivent être en mesure d’assurer la livraison de tout spécialité exploitée à toute officine faisant partie de leur clientèle habituelle et relevant de leur secteur de répartition et dans les vingt-quatre heures suivant la réception de la commande, de toute spécialité faisant partie de leur “collection”.

Ils doivent surveiller leur approvisionnement des spécialités afin d’éviter toute rupture de stock (Article 2).

Le secteur mentionné à l’article 2 est constitué par la zone géographique dans laquelle le pharmacien responsable de l’établissement de vente en gros de produits pharmaceutiques ou de la succursale d’un établissement de vente en gros de produits pharmaceutiques a déclaré exercer son activité (Article 3).’

22. Original text:

‘COFARES	20,6 %
Federación Farmacéutica	11.0 %
Safa (incl. Galenica)	6.3 %
Hermandad FCA Del Mediterráneo (HEFAME)	6.1 %
CECOFAR	5.3 %
HUFASA (CERP Rouen)	3.9 %
Centro Farmacéutico	3,9 %’.

23. Original text:

‘Voir au verso nos conditions générales de vente.’

24. Original text:

‘condiciones de las ventas’

25. Original text:

‘la aceptación de las mercancías conlleva la conformidad con las siguientes condiciones de venta.’

26. In English in the original text.

27. In English in the original text.

28. In English in the original text.

29. In English in the original text.

30. In English in the original text.

31. In English in the original text.

32. In English in the original text.

33. In English in the original text.

34. In English in the original text.

35. Original text:

‘Allgemein wiesen alle Vertreter von Niedrigpreis-Ländern auf das Risiko von Parallelexporten aus ihren Ländern hin.’

36. Original text:

‘Transferpreise, Parallel und Reimporte.’

37. Original text:

‘Wie können wir die “Eurokäufe” des Grossisten/Krankenhäuser in den Griff bekommen? (...) die Gruppe kam zu folgenden Empfehlungen: (...) 3. Mögliche europäische Großhändler identifizieren.’

38. Original text:

‘(...) die PH Produktion verbleibt vorerst in Spanien. (...)’

Darüber hinaus soll auch über die künftige “Distributionsstrategie”, insbesondere was eine denkbare Zusammenarbeit mit engl. Großhändlern betrifft, diskutiert werden.’

39. Original text:

‘(...)

Stufenplan:

1. Dem Großhandel die Direktbelieferung als Reaktion auf Import vor Augen führen (Drohgebärde)
 2. Regional begrenzte **Direktbelieferung von Apotheken des Großhändlers mit Schnelldrehern
 - (3) Beteiligung bei überregionalen Großhändlern *** (> 75 %), um im Substitutionswettbewerb zu bestehen (evtl. Weiterentwicklung des Großhändlers zum Teilsortimenter)
 - *) Keine Vergütung von Retouren aus Importen
 - *) Möglichkeit Präventiv-Sensibilisierung von Beteiligten mit ähnlicher Interessenlage bsgl. Preisniveau (z.B. ABDA, Großhandel)
 - **) alternativ denkbar Kooperation mit regionalem Großhändler, aber wegen Gefahr der Abhängigkeit suboptimal
 - ***) alternativ denkbar Neugründung eines “MPS-eigenen” Großhändlers, aber da gegenüber Kauf hoher zeitlicher Vorlauf (2 Jahre) und Kostenvorteil fraglich
- (...).’

40. In English in the original text.

41. Original text:

‘(…) Entgegen Ihren Angaben über das Exportvolumen Griechenland/Spanien müssen wir Ihnen mitteilen, daß die genannten Mengen unseres Erachtens nicht korrekt sind.

Zu Ihrer Information beabsichtigen wir 1991 1.220.000 Packungen zu verkaufen. Wir gehen davon aus, daß 850.000 Packungen davon in Griechenland verbraucht werden.’

42. Original text:

‘Wir haben Verständnis für Ihre Fragestellung.
Die Fakten in Belgien sehen jedoch wie folgt aus:

1) ADALAT Kapseln 5 mg:

Angeblicher Export nach England: 16.190 Packungen

Angeblicher Export nach Zypern: ca. 30.000 Packungen D.H. insgesamt ca 46.000 Packungen

Verkauft in Belgien von Bayer Belgien in diesem Jahr (1—11): 19.349 Packungen

Kommentar: nach unserer Kenntnis wird praktisch nichts exportiert.

2) ADALAT Kapseln 10 mg:

147.665 — Belgien/Frankreich?

Wir verstehen nicht ganz, was Belgien/Frankreich bedeutet.

Verkauf Bayer Belgium in diesem Jahr (1—11): 760.817 Pack.

Kommentar: Export von ADALAT Kapseln 10 mg in dieser Größenordnung nach England äußerst unwahrscheinlich.
Handelt es sich bei der Ware möglicherweise um Fälschungen? (…)

43. In English in the original text.

44. In English in the original text.

45. In English in the original text.

46. In English in the original text.

47. Original text:

‘Betr.: England

Besten Dank für die Statistiken betreffend Parallel-Importe nach England. Die Daten sind aufschlussreich.

Es muss angenommen werden, dass die Importe aus Frankreich ab dem 4. Quartal 89 stark zugenommen haben.

Der von Ihnen aufgezeigte Sachverhalt gibt Anlass zu größter Vorsicht bei allen Kunden.’

48. In English in the original text.

49. Original text:

‘Bericht über Besuch der Bayer Italia 18–19/3.91.

1. ADALAT (…)

1.3. Parallelimport scheint bei Kapseln noch zu laufen. Etwa 100.000 bis 150.000 Packungen im 1990 werden geschätzt.’

50. In English in the original text.

51. Original text:

‘[. . .]’

52. Original text:

‘Wichtige Planungshinweise’.

53. Original text:

‘[...]’

54. Original text:

‘Kommentar zur Planung’.

55. Original text:

‘[...]’

56. Original text:

‘Comentarios del Hauptländertreffen en Travemünde (23/09/91)’

57. Original text:

‘Se continuarán realizando actividades con el fin de reducir en lo máximo las exportaciones paralelas a Inglaterra. En el caso de España la situación está estable, a pesar de que es el país con menor precio de ADALAT retard y ADALAT caps.’

58. Original text:

‘Wichtig für die Europa Strategie sind politische sowie auch Parallel Import-Aspekte. Die Verfügbarkeit von ADALAT CC ermöglicht es jedoch, daß die 1x-tägl. Formulierung von ADALAT in allen europäischen Ländern in den Markt eingeführt werden kann, wobei wir gleichzeitig die Hochpreismärkte schützen können.’

59. Original text:

‘Betr.: England

Besten Dank für die Statistiken betreffend Parallel-Importe nach England. Die Daten sind aufschlussreich.

Es muss angenommen werden, dass die Importe aus Frankreich ab dem 4. Quartal 89 stark zugenommen haben. Der von Ihnen aufgezeigte Sachverhalt gibt Anlass zu grösster Vorsicht bei allen Kunden.

Andererseits können wir versichern, dass wir keinen willentlichen Vorschub geleistet haben oder je versucht haben, unser Geschäft auf Kosten eines anderen Markts zu machen. Dies wäre für uns völlig unakzeptabel.

(...) Wir möchten Sie bitten, uns über die weitere Entwicklung der Parallel-Importe nach England zu unterrichten und mit Angaben über Lot-Nr. etc. unsere Kontrolle zu erleichtern.

Anbei senden wir einige zusammenfassende graphische Darstellungen über unsere Verkäufe.’

60. Original text:

‘Vu l'importance croissante des exportations en parallèle dans notre CA Gatt 1 (France) et pour mieux cerner notre potentiel de vente, le service "Facturation" indiquera mensuellement au service "Controlling" les quantités des produits susceptibles d'être exportés par nos principaux clients.’

61. Original text:

‘Comme convenu, je vous fais parvenir le tableau des ventes ADALATE 20 mg LP qui récapitule les ventes dont la destination finale n'était vraisemblablement pas le territoire métropolitain.’

62. Original text:

‘Livraisons d'ADALATE 20 mg LP à CERP Rouen.

(...) Depuis fin septembre, nous ne livrons plus CERP Boulogne, à qui nous devons 40.000 boîtes. (...) A l'heure actuelle, nous avons bloqué, au total, 11 commandes (7 grossistes) soit 137.000 boîtes.’

63. Original text:

‘(...) Boulogne n'a pas reçu sa commande du 10 Février de 3 200 unités.

La réponse donnée par votre service achats a été que ce produit (ADALATE LP) ne devait pas dépasser un contingent de 2000 unités par mois et pour toute commande supplémentaire, une demande écrite doit être adressée directement à votre attention.’

64. Original text:

'Nous pouvons livrer chaque mois 5 à 6000 boîtes environ d'ADALATE 20 mg LP pour nos commandes exceptionnelles sans perturber nécessairement nos livraisons aux pharmaciens d'officine par l'intermédiaire des grossistes répartiteurs.'

('...') Bien entendu, la quantité de 5 à 6000 boîtes dont il a été question ci-dessus concerne toutes les commandes exceptionnelles. Si nous livrons Boulogne, nous ne livrons pas St Etienne du Rouvray et vice-versa.'

65. Original text:

'j'ai bloqué 2000/3000 boîtes à CERP Hérouville'

'j'ai bloqué 2000/4400 boîtes à CERP St Lo'

'ne pas livrer'

'bloqué'

66. Original text:

'Tableau des commandes ADALATE LP 20 mg B/30CP'

Mois	Qté cdée	Qté livrée
Juin 1991	67 000	67 000
Juillet 1991	69 000	69 000
Août 1991	66 000	66 000
Septembre 1991	74 000	35 000
Octobre 1991	71 000	15 000
Novembre 1991	56 000	15 000
Décembre 1991	34 000	15 000
Janvier 1992	75 000	10 000
Février 92	105 000	7 500'

67. Original text:

'Vous rappelez que nous vous avons livré 75 000 boîtes/mois de Juin à Septembre 1991 et vous semblez dire que nous ne vous livrerons que 5 000 boîtes dorénavant.'

Nous n'avons jamais dit cela. Nous avons dit lors de notre entretien, le 17 janvier 1992, à Sens, que, pour éviter des ruptures de stock sur le marché français, nous livrerions en priorité les commandes destinées aux hôpitaux et aux officines.

Par contre, les autres commandes seraient livrées en fonction de nos possibilités. Nous n'avons pas, à notre connaissance failli à cette règle.'

68. Original text:

'J'ai le plaisir de vous envoyer un planning mensuel des commandes d'ADALATE LP 20 mg.'

Ne constatant toujours aucun dérapage au niveau des livraisons France et compte-tenu du fait que l'ADALATE fait partie des plus grosses ventes européennes, nous sommes totalement convaincus que vous n'aurez aucune peine à livrer les quantités commandées.

En plus de notre calendrier d'achat, nous vous commandons 45 000 ADALATE LP 20 MG par mois à livrer à notre agence de Boulogne sur Mer (ceci ne prend pas en compte la commande de 15 000 boîtes passée par Boulogne le 11.10.91 que nous attendons toujours).

Avec un planning, l'argument des difficultés d'approvisionnement ne saurait tenir bien sur plus longtemps. (...).'

69. Original text:

'quantité facturée'.

70. Original text:

'prix unitaire facturé'.

71. Original text:

'renouveler la commande'.

72. Original text:

'A ce jour, nous n'avons plus de livraison d'ADALATE LP CP BT 30 pour nos commandes export à expéditions mensuelles. Vos dernières livraisons ont été:

15 000 ADALATE CP BT 30 vtre facture n° 701893 du 10.02.92

5 000 ADALATE CP BT 30 vtre facture n° 701993 du 04.03.92

Depuis 2 mois nous n'avons plus de produits. Nos clients réclament. Nous nous sommes engagé par cotation sur prix et quantité. Actuellement nous notons une augmentation de la demande. Nous sommes obligés d'augmenter notre planning à 80 000 boîtes/mois. (...)'

73. Original text:

'TRES IMPORTANT
Confidentiel

J'ai eu un entretien téléphonique avec (...) CERP Rouen au sujet des livraisons d'ADALATE 20 mg LP.

La CERP Rouen est notre 3^e client avec un chiffre d'affaires, au 30 Septembre 1991, de (...) Mio F.

(...) Depuis fin septembre, nous ne livrons plus CERP Boulogne, à qui nous devons 40 000 boîtes.

Elle considère qu'il s'agit d'une politique délibérée de Bayer pour empêcher le développement des importations parallèles, car elle a constaté qu'en Belgique et en Espagne Bayer a la même attitude.

Les marchés belge et espagnol sont de petits marchés, mais le marché français est important. (...) J'ai expliqué (...) que nous avions des stocks très bas et que notre principal souci était d'approvisionner le marché français. Elle m'a demandé si je me moquais d'elle, etc. ... (...)'

74. Original text:

'J'ai rencontré Mr Giraldi à Sens le 17/01/92 pour parler des problèmes d'approvisionnement de l'ADALATE LP 20 mg. Je lui ai demandé pourquoi, après nous avoir livré 65 000 boîtes par mois en moyenne entre Avril et Septembre 91, il était maintenant impossible d'obtenir ces quantités. Il m'a répondu qu'il avait reçu des consignes strictes de la direction générale Bayer pour stopper les activités d'export parallèle, que ceci ne serait jamais écrit et qu'officiellement ils invoqueraient des problèmes d'approvisionnement de matière première.'

75. Original text:

'ADALATE LP Suite à notre entretien téléphonique de ce jour, nous avons bien noté que vous adressiez à BOULOGNE les quantités suivantes:

ST ETIENNE ROUVRAY	1 000
LAIGNEVILLE	1 000
ST QUENTIN	400
MARCQ EN BAROEUIL	400
LIEVIN	400
HEROUVILLE	1 600
ST LO	400'

Nous avons demandé à Boulogne de vous adresser personnellement un bon de commande. Merci de votre collaboration.'

76. Original text:

'URGENT Pour aider l'agence de BOULOGNE à réunir 20 000 ADALATE LP 20 mg code PHON:TE 360 nous vous demandons de bien vouloir passer la commande ci-dessous:

Pour aider l'agence de BOULOGNE à réunir 20 000 ADALATE LP 20mg code PHON:TE 360 nous vous demandons de bien vouloir passer la commande ci-dessous:

ST ETIENNE ROUVRAY	6 000
LAIGNEVILLE	4 000
LILLE	4 000
HEROUVILLE	6 000
TOTAL	20 000'

Dès réception, faire suivre ces produits à Boulogne.

Nous vous remercions de votre collaboration et de votre discrétion.'

77. Original text:

'ADALATE LP

La commande d'ADALATE LP que nous vous avons demandé de passer (voir note du 27Nov.91) n'est parvenue dans aucune agence — nous considérons que vous ne la recevrez pas. BAYER est très réticent pour livrer des commandes exceptionnelles.

En conséquence lors des 3 prochaines commandes:

M le 17 Décembre

R le 24 Décembre

C le 2 Janvier 92

Incorporer $\frac{1}{3}$ de la quantité demandée avec chacune de vos commandes hebdomadaires (en respectant le gabarit) — Dès réception, faire suivre la marchandise à BOULOGNE.

Merci de faire le nécessaire — surtout pas de commande téléphonique.'

78. Original text:

'J'essaie de monter un dossier solide à l'encontre des labos'.

79. Original text:

'Service central d'achat Mmes et Mrs les Directeurs d'agence

ADALATE LP — code TE 360 —

Nous avons besoin de 50 000 ADALATE LP pour l'agence de BOULOGNE pour le mois de FEVRIER 92.

Lors des prochaines commandes:

C le 3 Février

H le 10 Février

M le 17 Février

Vous devrez ajouter $\frac{1}{3}$ de la quantité indiquée ci-dessous à chacune de vos commandes hebdomadaires (en respectant le gabarit) — Dès réception, faire suivre la marchandise à BOULOGNE.

Merci de votre collaboration

Service Central d'Achat

ST ETIENNE ROUVRAY	7 000
LAIGNEVILLE	5 000
COIGNIERES	3 000
ST QUENTIN	3 000
LILLE	5 000
HEROUVILLE	6 000
ST LO	5 000
ABBEVILLE	3 000
MEAUX	4 000
VERNEUIL	4 000
TOTAL	45 000
BOULOGNE	+ 5 000
	= 50 000'

Attention: aucune de
ces commandes ne
doit être téléphonique

80. Original text:

'ADALATE LP — code TE 360 L'agence de BOULOGNE a besoin de constituer un stock de 8000 à 9.000 ADALATE LP par semaine

Vous voudrez bien ESSAYER de constituer ce stock en ajoutant les quantités ci-après à vos besoins.

Cependant, compte tenu des quotas mensuels attribués par Bayer pour nous empêcher (illégalement) d'exporter, vous n'expédiez à Boulogne que si vos besoins mensuels sont assurés.

(...)'

81. Original text:

'Bien que je ne vois pas d'issue favorable à court terme concernant les approvisionnements de Bayer (nous réussissons à obtenir quelques minimales quantités du produit par les agences), je pense que le budget devrait pouvoir être réalisé à la fin de l'exercice.'

82. Original text:

Situation export as 30.06.92 'A la mi-exercice, la situation export en termes de CA est en retrait par rapport au budget prévisionnel tel qu'il avait été établi.

CA budgété (..)

CA réalisé (..) soit (..) (- 5,06 %)

Cette différence s'explique principalement (pour ne pas dire uniquement) par les difficultés d'approvisionnement que nous rencontrons depuis début janvier auprès des laboratoires Bayer qui font obstruction aux livraisons d'ADALATE LP 20 mg (cf. ma note de janvier après mon entrevue avec Mr Giraldi à Sens chez Bayer).

En effet, nos besoins mensuels minimums sont de (..) boîtes soit (..) boîtes sur ces 6 derniers mois, or, nous avons été livrés de 10 000 boîtes en janvier et 7 500 boîtes/mois depuis février, soit 55 000 au total d'où une différence de (..) boîtes. Ces (..) boîtes représentent un manque à gagner de (..) (cdes non-honorées).

Ceci signifie également que, malgré ces difficultés, nous avons réussi à compenser une partie de cette différence puisque nous ne sommes pas en RETARD de (..) MF sur l'objectif mais de (..) MF. Aussi, bien que je ne vois pas d'issue favorable à court terme concernant les approvisionnements de Bayer (nous réussissons à obtenir quelques minimales quantités du produit par les agences), je pense que le budget devrait pouvoir être réalisé à la fin de l'exercice.'

83. Original text:

'Nous vous rappelons que nous perdons un CA achat mensuel de (..)mio F ainsi que des clients potentiels. (..)'

84. In English in the original text.

85. In English in the original text.

86. In English in the original text.

87. In English in the original text.

88. In English in the original text.

89. In English in the original text.

90. Original text:

'EXPORTACIONES PARALELAS ADALAT 50: ADALAT RETARD

— Se acuerda restringir en la medida que nos sea posible la venta de los 4 mayoristas exportadores hasta ahora detectados.

— Se elevará el programa de ventas en el P3 a:
200.000/mes para ADALAT 50 caps.
130.000/mes para ADALAT RETARD 60

— Se acuerda la creación de un stock especial (contablemente almacén Felguera) de 50.000 unidades de ambas especialidades, manteniendo el stock teórico habitual en 4 y 6 semanas respectivamente.
El stock especial será actualizado mensualmente mediante petición a fábrica (P3).

— Distribución informará sobre cualquier anomalía que se pueda producir referente a la cuantía de los pedidos.'

91. Original text:

'Modificación listado CLI 208
Control ventas ADALAT

Hace aprox. 2 meses se solicitó verbalmente la modificación del listado diario, que al iniciarse un mes sigue acumulando cantidades del mes anterior.

En varias ocasiones esta información errónea ha llevado consigo discusiones con clientes mayoristas que lógicamente no podían confirmar los datos expuestos por nosotros.

No hace falta resaltar la importancia de la información correcta para una buena gestión de este tema tan complicado, en lo que a clientes y PH Alemania se refiere.

Te ruego tomes las medidas oportunas para una rectificación inmediata del programa.'

92. Original text:

'Las exportaciones han experimentado un descenso (. . . millones) debido principalmente a las limitaciones impuestas por (. . .) y Bayer en el suministro de ADALAT RETARD y (. . .)'

93. Original text:

'A la suite du dernier entretien avec les dirigeants de Bayer, ceux-ci ont déclaré qu'ils ne pouvaient pas accepter les quantités demandées par HUFASA, d'une part parce qu'elles représentent 50 % du marché national, d'autre part parce qu'elles sont très supérieures à celles d'autres entreprises de la même zone (. . .). Ceci les faisait supposer qu'une proportion importante des produits était destinée à l'exportation. (. . .)'

94. Original text:

'Je veux avoir chaque semaine pour l'ADALATE et (. . .) la copie des bons de commande aux laboratoires ainsi que les bons de livraison correspondant à ces commandes.

J'essaie de monter un dossier solide à l'encontre des labos (. . .).'

95. Original text:

'Faisant référence à votre FAX de ce jour concernant les laboratoires (. . .) et Bayer, je vous donne ma parole que je tente l'impossible pour obtenir un approvisionnement supérieur à nos besoins.

Ces laboratoires refusent de considérer tout raisonnement que ce soit. Ils savent que les quantités qu'ils nous livrent sont suffisantes pour couvrir les besoins du marché espagnol amplement. (. . .)'

96. Original text:

'ACHATS EXPORT POUR L'ANGLETERRE

	HUFASA			DISDASA			GENOVÉ		
	Juin	Juillet	Août	Juin	Juillet	Août	Juin	Juillet	Août
ADALAT 10 mg	2 000	1 800	0	0	0	0	0	0	0
ADALAT Ret	2 200	1 000	0	800	0	0	400	0	0

Vous trouverez ci-dessus situation consternante des rentrées de marchandises des 3 derniers mois. Pour l'ADALAT, je sais que le nouvel interlocuteur chez Bayer n'arrange rien mais il n'est rien rentré à Disdasa et Genové depuis début Juin. (. . .)'

97. Original text:

'ACHATS EXPORT POUR L'ANGLETERRE

Depuis ma note du 13.08.90, nous aurions dû constater des rentrées de marchandises vers le 20 du mois à Disdasa, Genové, Hufasa.

	DISDASA	GENOVÉ	HUFASA
ADALATE 10	0	0	27.7.1990: 800
ADALATE LP	0	0	27.7.1990: 400x60 200x40

(. . .)

N.B. Depuis la dernière date indiquée, aucune autre livraison ne nous a été signalée.'

98. Original text:

'Achats export pour l'Angleterre

Si les problèmes avec Bayer sont toujours les mêmes, ce n'est pas le cas pour (. . .) (. . .) Pour mémoire, je rappelle les quantités d'ADALAT livrées en Septembre et Octobre.'

99. Original text:

'Je suis fatiguée d'entendre toujours la même chanson dès que nous transmettons une nouvelle demande en Espagne.

A part des oranges et des fraises, je me demande ce que l'Espagne est capable d'exporter. . .'

100. Original text:

'Merci de me faire la liste des laboratoires qu'on vous a demandés et pour lesquels le labo a dit "pas possible pour exportation", bref tous les fournisseurs à problèmes.
urgent'

101. Original text:

'L'unique laboratoire qui nous a dit pas possible pour exportation est comme vous le savez: (...). Les autres quand nous demandons un produit de vente trop petite dans notre marché ou malgré que le produit se vend très bien à l'Espagne, ils comprennent que si la demande est superior que notre besoin normal, sera pour exportation. Ces laboratoires avec problèmes sont:

Bayer

(...)

Au contraire, (...) nous donnent tout ce que nous demandons.'

102. In English in the original text.

103. In English in the original text.

104. In English in the original text.

105. In English in the original text.

106. In English in the original text.

107. In English in the original text.

108. In English in the original text.

109. In English in the original text.

110. Original text:

— La actividad exportadora de COFARES no es apenas apreciable sobre su facturación total habida cuenta de las dificultades que determinados laboratorios (entre ellos BAYER) plantean en las entregas de producto para la exportación.

— Que en su condición de Director de COMPRAS, cuando BAYER estableció un contingente de ADALAT a COFARES que, al principio era netamente insuficiente para cubrir las necesidades de su mercado nacional, les advirtió de una posible denuncia por tales restricciones de venta. A partir de este momento, Bayer surte a COFARES una cantidad suficiente para el consumo nacional de dicho producto.'

111. Original text: 'PROTOCOLO DE COLABORACION PARA LOS MERCADOS EXTERIORES.

(...) TERCERO. que, no obstante lo anterior, "HEFAME", por requerimiento de sus propios clientes extranjeros y ante su interés por abrir y penetrar en nuevos mercados, tiene el proyecto de conseguir, para la exportación, nuevos productos o mayores cantidades de los productos con que cuenta actualmente.

CUARTO. Que, además, (...) está en disposición de aportar al Departamento de Exteriores de "HEFAME" nuevos productos, o adicionar cantidades importantes de productos ya existentes, que podrían, en gran medida, paliar las necesidades de los clientes extranjeros de "HEFAME" e, igualmente, facilitaría la introducción de "HEFAME" en nuevos mercados o la captación de nuevos clientes.

(...)

ACUERDOS

(...)

III. Como primer punto de la colaboración que ahora se inicia, (...) se compromete a apoyar, mediante la aportación de los productos, o cantidades de los mismos, de los que pueda disponer para, junto a los aportados por "HEFAME", posibilitar el suministro normal y habitual, y en las cantidades necesarias, a los clientes de "HEFAME" en el extranjero.

Para facilitar el citado compromiso de (...), "HEFAME" queda obligada a informar puntualmente, y con la debida antelación, a aquella de las necesidades de producto, según cantidades de los mismos, para cumplir con sus suministros a los mencionados clientes e, igualmente, (...) contestará a ésta, también a la mayor brevedad, de sus disponibilidades para hacer frente a los pedidos de los que se le informe.

IV. (...)

V. (...)

VI. (...)

Cuando en un pedido se mezclan productos de difícil obtención (p.ej ADALAT) con otros de fácil aprovisionamiento, el Departamento de exportaciones de Hefame se compromete a solicitar a (...) y a incluir en el pedido a exportar cantidad de estos hipotéticos productos en proporción idéntica a la aportación por (...) de los productos de difícil obtención según apartado IV, de este protocolo. (...)'

112. Original text:

'Se inicia una relación de colaboración entre ambas sociedades en comercio exterior, dentro de la sistemática que sigue el acuerdo entre Hefame y (...).'

113. Original text:

'(...) Nuestro pedido es el siguiente — todo el ADALAT RETARD que puedan (...).'

114. Original text:

'EXPORT

Les vacances sont enfin finies et j'espère que nous allons retrouver des livraisons normales pour nos 3 "produits-pièges": pouvez-vous reprendre le planning de départ et essayer d'obtenir ces quantités. Je refuse tout autre client car je préfère ne pas augmenter le nombre des mécontents.

Il nous faudrait via GENOVE, HUFASA et DISDASA:

100.000 ADALAT RETARD Bte 60 ou 40

(...)

CHAQUE MOIS pour satisfaire nos deux clients principaux: (...)

Je demande à (...) de me transmettre, quand elle aura vu le problème avec (...) et (...), les prévisions d'achats pour DISDASA et GENOVE et à (...) pour les agences HUFASA. Essayons de faire mieux en profitant de la rentrée.'

115. Original text:

'A la suite du dernier entretien avec les dirigeants de Bayer, ceux-ci ont déclaré qu'ils ne pouvaient pas accepter les quantités demandées par HUFASA, d'une part parce qu'elles représentent 50 % du marché national, d'autre part parce qu'elles sont très supérieures à celles d'autres entreprises de la même zone (...). Ceci les faisait supposer qu'une proportion importante des produits était destinée à l'exportation.

Face à ces affirmations, j'ai indiqué qu'Hufasa avait besoin de quantités importantes d'ADALAT parce que:

- ils se basent pour Hufasa sur l'exercice 1988, où on a observé une diminution importante des achats due à la crise de la Compagnie.
- Comme ils livrent des quantités inférieures aux besoins réels, il faut commander plus pour pouvoir constituer un stock, puisque ceci a été impossible jusqu'à présent dû aux petites quantités livrées, lesquelles nous ont obligés à afficher des manquants dans les commandes.
- En ce moment non seulement on a récupéré le marché mais aussi on se maintient au-dessus du niveau de 1987, année qui peut être considérée comme normale pour Hufasa.

Considérant ces arguments et une position très ferme vis-à-vis de Bayer, il a été accepté de nous fournir davantage d'ADALAT ret. dans des quantités semblables à celle de (...) bien qu'ils ne puissent pas nous fournir tout ce que nous demandions par manque de matière première fournie depuis l'Allemagne.

Les quantités demandées furent:

AR 40 29700

AR 60 19200

AN 66300

Bayer s'est engagé à livrer l'ADALAT nécessaire, bien que sans s'engager quant à ces chiffres qu'ils considèrent très élevés. J'ai demandé ces quantités en prenant en compte les renseignements donnés par (...) et en les augmentant de 30 %.

Après avoir commenté avec (...) que Bayer ferait de son mieux pour fournir des quantités importantes d'ADALAT mais sans parvenir aux quantités demandées, j'ai demandé à (...) qu'il réduise légèrement les quantités commandées à Bayer, puisqu'ils ne tenaient pas compte de ce que nous commandions & que nous étions parvenus à un accord avec Bayer pour maintenir des livraisons plus importantes d'ADALAT, il convenait de ne pas faire apparaître des chiffres qui ne seraient pas acceptés comme possibles pour Hufasa et qui dénonçaient l'intérêt pour réaliser un volume important d'exportations. Pour cette raison, j'ai considéré qu'il était plus important d'obtenir un volume d'ADALAT pour des exportations avec des chiffres très crédibles plutôt que de maintenir un chiffre très élevé de commandes mais qui ensuite ne soient pas livrées. L'important, c'est ce qu'on obtient, pas ce qu'on commande. Ceci est sans doute la raison pour laquelle (...) commande moins que prévu.'

116. Original text:

'MERCANCÍAS PARA EXPORTACIÓN

Sé que hemos llegado a un difícil periodo, pero la mercancía entra ahora en menor cantidad que nunca, y no me parece que se estén multiplicando las intervenciones ante los laboratorios para que haya una mejora.

Desde principios de Marzo la situación se va degradando. Le agradecería a los responsables que intervinieran personalmente ante los laboratorios (... Bayer y ...) y me tuvieran directamente informada. Los (...) laboratorios no puedan estar en quiebra a la vez.

Lamento tener que intervenir de nuevo: necesitamos el volumen de ventas.'

117. Original text:

'Faisant référence à votre fax de ce jour concernant les laboratoires (...) et BAYER, je vous donne ma parole que je tente l'impossible pour obtenir un approvisionnement supérieur à nos besoins.

Ces laboratoires refusent de considérer tout raisonnement que ce soit. Ils savent que les quantités qu'ils nous livrent sont suffisantes pour couvrir les besoins du marché espagnol amplement.'

118. Original text:

'(...) si nous voulons un produit que se vend bien à notre marché, se pourra commander entre les commandes habituelles, mais s'il est rare, nous ne pourrions pas dissimuler.

D'autre part, DISDASA nous donne marchandise.'

119. Original text:

'Resumen de los productos "difíciles"'

120. Original text:

'Facturados	por SAFA	por DFM	por GALENICA
(...)	(...)	(...)	(...)
ADALAT 50 caps.	3.000	0	0
ADALAT RETARD 60 caps.	2.600	0	0'

121. Original text:

'(...) Las exportaciones han experimentado un descenso (...) millones) debido principalmente a las limitaciones impuestas por (...) y Bayer en el suministro de ADALAT RETARD y (...).

En las exportaciones se ha producido un mayor desfase, ya que estaba previsto un giro de (...) millones, y se han realizado (...), por los problemas de suministros de mercancías, indicados anteriormente.'

122. Original text:

'En cuanto a las exportaciones, cada vez resulta más difícil la disponibilidad de productos para cubrir la demanda existente, lo que ha hecho que esta cifra en relación al año anterior, haya sido inferior. Por lo que el esfuerzo de ventas se ha realizado básicamente en el mercado interior.'

123. Original text:

'El mercado nacional ha evolucionado satisfactoriamente con un crecimiento del 25,2 %, en tanto que el de exportación ha tenido mayores dificultades (-25,8 %) por las dificultades que continuamente ponen los laboratorios, para el suministro de productos para la exportación'.

124. In English in the original text.

125. Original text:

	% EXP/ VENTAS Ptas	UNID. ADALAT	% ADALAT EXP Ptas
1989	0,266	50.000	53,69
1990	0,374	15.000	10,63
1991	0,296	10.000	7,89
1992	0,309	50.000	35,18
1993	0,350	40.000	32,13'

126. In English in the original text.

127. In English in the original text.

128. In English in the original text.

129. In English in the original text.

130. Original text:

‘Ich bin sehr überrascht, daß auch im neuen Jahr die Lieferung von ADALAT in allen seinen Darreichungsformen nicht seine normale Formen zurückgefunden hat.

Mich würde es sehr freuen, wenn Sie uns schriftlich wissen lassen würden, worauf die ständigen Fehlbestände und die Unterversorgung des Marktes der genannten Produkte zurückzuführen ist, um dann wenn es notwendig ist, dies den spanischen Gesundheitsbehörden darzulegen.

Unsere Firma Hefame hat mit seinen zwölf Niederlassungen, die fast die Hälfte von Spanien abdecken, für Sie sicherlich eine solche Wichtigkeit, daß Sie diese Lieferausfälle schnellstens beheben sollten.

Ich hoffe, daß Sie dies alles in Zukunft berücksichtigen werden und zu einem normalen Lieferrhythmus zurückfinden werden.’

131. Original text:

‘Argumentationshilfe für die Diskussion mit Cofares über das Thema: “Kürzungen bei der Lieferung von ADALAT und ADALAT RETARD”

Ab 1. Quartal 1989 war die Nachfrage für ADALAT und ADALAT RETARD größer als der Bedarf des spanischen Marktes, es gingen Bestellungen die um den Faktor 50 % bis 100 % höher waren als normal bei uns ein. Den spanischen Bedarf haben wir ermittelt aus folgenden Faktoren:

- a) Historie der Abverkäufe der letzten Jahre an die Großhändler in den verschiedenen Provinzen
- b) Verkaufsstatistiken der wichtigsten Großhändler, die wir für einen Zeitraum eingekauft haben
- c) Marktwerte von IMS und dem regionalen Pharmamarkt

Q.F.B. kann aufgrund seiner Mittelfristprognosen, seiner Materia Prima Bezüge und der Produktionskapazitäten nur den Bedarf des spanischen Marktes erweitern um das Marktwachstum und die eigenen erwarteten Wachstumsraten für diese Produkte erfüllen. Um Teile des Marktes nicht vollkommen unversorgt zu lassen, was gegen die ethische Hauptverpflichtung einer Spanischen pharmazeutischen Firma spricht, nämlich die Bedürfnisse des nationalen Marktes zu erfüllen, sehen wir uns z.Z. gezwungen, die Lieferung an unsere Kunden gemäß deren Marktpotential vorzunehmen und übermäßige Bestellungen zu kürzen. Da es darüberhinaus trotz alldem zu einer Nichtbelieferung von Apotheken durch einige Großhändler kommt, sehen wir uns in gewissen Provinzen auch schon einmal gezwungen, die Apotheken direkt zu beliefern, um die Versorgung der Patienten bei einer so wichtigen Indikation wie Angina Pectoris und Hochdruck sicherstellen zu können.

Die mit Cofares abgestimmten Liefermengen berücksichtigen das ständige Wachsen und Penetrieren von dieser Großhändlerketten in neue spanische Provinzen.’

132. Original text:

‘TRES IMPORTANT
Confidentiel

Livraisons d’ADALAT 20 mg LP à CERP Rouen.’

‘(. . .) Depuis fin septembre, nous ne livrons plus CERP Boulogne, à qui nous devons 40 000 btes.

Elle considère qu’il s’agit d’une politique délibérée de Bayer pour empêcher le développement des importations parallèles, car elle a constaté qu’en Belgique et en Espagne Bayer a la même attitude.

Les marchés belge et espagnol sont de petits marchés, mais le marché français est important. (. . .)

J’ai expliqué (. . .) que nous avons des stocks très bas et que notre principal souci était d’approvisionner le marché français. Elle m’a demandé si je me moquais d’elle, etc. . . (. . .).

A l’heure actuelle, nous avons bloqué, au total, 11 commandes (7 grossistes) soit 137000 boîtes.

Il faut donc que nous prenions rapidement une décision pour définir très exactement notre position dans cette affaire.’

133. Original text:

‘(. . .) Nous nous permettons de vous faire part de nos réflexions (. . .) Il apparaît évident, si l’on se réfère à nos commandes des mois de Juin à Septembre 91, qu’il y a de la part des Laboratoires Bayer une obstruction manifeste à nous livrer.

En effet, entre Juin et Septembre 91, nous vous avons passé commande d’environ 300000 boîtes d’ADALATE 20 mg LP. Ces commandes ont été honorées, vos factures en faisant foi. Ceci représente 75000 boîtes/mois en moyenne. Aussi, il paraît difficilement imaginable d’invoquer de votre part des problèmes de stocks ou de production pour ne plus nous livrer aujourd’hui dans les mêmes proportions. De ce fait, vos propositions de livraisons étalées (à raison de 5000 boîtes/mois) ressemblent à s’y méprendre à un refus de vente déguisé.’

[illegible]