II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 December 1987

relating to a proceeding under Article 85 of the EEC Treaty

(IV/31.846 — Enichem/ICI)

(Only the English and Italian texts are authentic)

(88/87/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 6 and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption, submitted under Articles 2 and 4 of Regulation No 17 on 26 March 1986 by Enichem SpA, Milan (Enichem) and Imperial Chemical Industries plc, London (ICI), concerning the agreements between them signed on 12 February 1986,

Having regard to the summary of the application and notification published pursuant to Article 19 (3) of Regulation No 17 [2],

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

Whereas:

I. THE FACTS

A. Subject of the Decision

(1) This Decision relates to the agreements between Enichem and ICI under which *inter alia* they set up a jointly-owned company, European Vinyls Corporation (EVC), to operate in the vinyl chloride monomer (VCM) and polyvinylchloride (PVC) sectors. The Decision also relates to the agreements between Enichem and ICI to shut down, reduce the capacity of or convert certain plants or facilities.

B. The undertakings

(2) Enichem is the petrochemicals subsidiary of the Italian State holding company, ENI, which has interests in the energy (oil and gas) sector and in several other industries. Enichem is one of the largest European petrochemicals companies, with assets mainly located in Italy. Its turnover in 1985 was Lit 7 664 billion (approximately five billion ECU).

(3) ICI is a British company with worldwide interests in several industries. Its main business is chemicals, of which it produces a wide range. Petrochemicals and thermoplastics account for about a quarter of group turnover (in 1985 £ 10 725 million, approximately 18 billion ECU). It has assets in the United Kingdom and in many countries of the world; nearly 80 % of them are located in EEC Member States.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 217, 15. 8. 1987, p. 2.

C. The products

(4) The products concerned in the agreements are all derivatives of ethylene (obtained from the cracking of naphtha) and either chlorine or hydrogen chloride (HCL). The intermediate product ehthylene dichloride (EDC) is first made by direct chlorination of ethylene with chlorine or indirect chlorination of ethylene and HCL in the presence of oxygen. EDC is then cracked to produce VCM, with HCL as a by-product, and VCM is polymerized into PVC. There are three main types of PVC and many grades or qualities of each type. The three types are suspension/mass PVC (PVC S/M), paste/emulsion PVC (PVC P/E) and PVC copolymers. In western Europe, 83 % of the market is supplied by PVC S/M, 13 % by PVC P/E and 4 % by PVC copolymers.

(5) PVC is further processed by the manufacturer into PVC compounds by combining with various additives (such as plasticizers, fillers, stabilizers and pigments) to meet varied customer requirements, or is sold unprocessed to a wide variety of fabricating industries for manufacture of such products as cable, bags, pipes, bottles, toys, pharmaceutical packs, kitchen ware, shoe soles, window profiles, etc. The various fabrication technologies of such items require different grades/qualities of PVC. A manufacturer therefore has to produce the grades/qualities that are demanded by customers for their fabrication technology. An optimization of the grade/quality range offered to customers is essential for reducing production and inventory costs and for improving competitiveness on the various markets.

(6) The agreements cover Enichem's and ICI's interests in VCM and all forms of PVC, including compounds and sub-standard and scrap materials arising in the production of PVC, and also certain EDC manufacturing plants that are closely associated with VCM manufacture. Three other EDC plants (two belonging to ICI and one to Enichem) are not included in the agreement for geographical or other business reasons, although most of the EDC output from these plants is supplied to the jointly-owned company. None of Enichem's or ICI's chlorine or ethylene manufacturing facilities are to be dedicated to EVC, but the agreements cover distribution of primary (esters) and secondary (chlorinated paraffins) plasticizers which are both used in the PVC processing industry.

D. The market

(7) With many sectors of the petrochemical industry in western Europe — particularly thermoplastic products — suffering from structural overcapacity, manufacturers have been forced at the beginning of the 1980s to look for ways of reducing their capacity either by individual closures or through bilateral deals with other producers. One consequence of such deals is the progressive reduction in the number of competitors in each sector and the tendency towards markets characterized by an oligopolistic structure. Both Enichem and ICI are now in the second round of restructuring, having already rationalized capacity in other sectors in swap deals with Montedison and BP, respectively, which were approved by the Commission (1).

(8) At the time of the agreements, the EDC/VCM/PVC sector still has substantial overcapacity, despite previous rationalization programmes, which raised capacity utilization from 62 % in 1982 to around 75 % in 1986. Because of the complex integration of the industry — all major producers are vertically integrated with ethylene and chlorine production — any changes, and particularly reductions of capacity, at one level of the vertical chain of production have implications for the other levels. The industry therefore has to take special account of upstream pressures and the effects of competition of third country producers.

(9) EDC is safe and easy to transport, unlike its constituents, chlorine and ethylene. The bulk of EDC is used to make VCM and the vast majority of VCM production in western Europe is converted into PVC, with only a small quantity being employed to make chlorinated solvents. Most VCM is used within the same group. Only about 10 % is sold on the 'free' market. Market growth in PVC is forecast to continue at a low level (about 1,7 % per annum) through the 1990s, due to product maturity and the outlook for the industry PVC serves.

(10) In 1986, there were 15 manufacturers of PVC in the Community, some of them jointly owned by others. The top four producers (i.e. Solvay, Enichem, Höchst, ICI) accounted for about 55 % of production capacity. Enichem and ICI were second (with about 15 % of production capacity) and joint third largest (about 11 %), respectively. Enichem has no interests in VCM/PVC production other than those covered by the agreements. ICI has interests in three companies (in one of which it owns a majority stake) outside western Europe which manufacture and sell VCM and PVC. These companies are capable of selling PVC in the

(1) OJ No L 5, 7. 1. 1987, p. 13; OJ No L 212, 8. 8. 1984, p. 1.

common market in competition with EVC. ICI also has a minority stake (25,45 %) in Hispavic SA, a Spanish producer and distributor of VCM/PVC, majority owned by Solvay. Finally, ICI also has interests in downstream PVC processing companies. Enichem does not currently have any investment in the downstream markets.

(11) PVC is readily and safely transportable. Consequently, there is considerable inter-State trade in the product in the common market. Even with excess capacity, imports supply a significant part of each Member State's market; in the home markets of ICI and Enichem, the United Kingdom and Italy, imports account for some 35 and 30 %, respectively.

(12) The plasticizers market has largely the same problems as the EDC/VCM/PVC market, namely upstream pressures and overcapacity. Moreover, given the low growth for flexible PVC, there is little prospect of significant improvement in the performance of the sector. Both primary plasticizers and secondary plasticizers are liquids in their normal state and are stored in bulk tanks and easily transportable. They too are therefore widely traded across national boundaries of Member States. Not all PVC manufacturers also produce plasticizers. Altogether there are 24 producers of plasticizers in the Community, the largest being in West Germany (BASF, 15 % of the production, Huls, 13 %). ICI is the third largest (12 % of the production) and Enichem (4 % of the production) around the ninth largest.

E. The agreement

(13) The basic agreement between Enichem and ICI was signed on 12 February 1986. Under it, EVC is set up as a 50/50 jointly-owned enterprise to produce and sell the products referred to above. EVC is to operate for at least five years from 1 October 1986. After that period it may be dissolved but the party withdrawing from it must offer its shares to the other. Other specific rules are laid down in the event of dissolution of EVC.

(14) EVC is run by a holding company, EVC BV, incorporated in the Netherlands. The holding company wholly owns a Coordination Centre in Brussels, which coordinates the operations of EVC (strategy and operational control) throughout the world, four local operating companies (in the United Kingdom, the Federal Republic of Germany, Italy and Switzerland) and two local sales companies (in France and for the Benelux).

(15) EVC undertakes research and development, production and marketing of the products concerned by the agreement.

(a) *R & D, patents and know-how*

Enichem and ICI make available, free of charge, to EVC their most up-to-date technology (including know-how and patents), research and development facilities and personnel, through research service agreements, in Porto Marghera (owned by Enichem) and Runcorn (owned by ICI). Part of the personnel will be transferred to EVC, part only seconded and still dependent on the two parent companies. The research and technical activities of the parent companies will be combined by EVC in the most effective manner in order to rationalize existing parental R&D programmes. EVC will own the results of this research, including any patent rights arising from it.

(b) *Plants and production*

Enichem and ICI dedicate the entire capacity of their plants for manufacturing the abovementioned products exclusively to EVC. For legal and business reasons, however, the parent companies retain the ownership of the plants and only agree not to compete with the jointly owned company. Enichem's Ravenna VCM plant only supplies VCM to EVC until its closure. The Waldshut plant, although integrated into ICI's business, is owned by Lonza.

The local EVC operating companies fully manage the plants under production service agreements with the parent companies and in line with the instructions of the Coordination Centre. At every site the plant owner makes available competent personnel to EVC and supplies all necessary services, utilities and assistance for the normal running of the plant, including maintenance. The Coordination Centre is responsible for overall production strategy, i.e. which product or grade of product should be made in what quantities in each plant, and for all aspects of inventory management and logistics.

(c) *Distribution*

EVC is responsible for all aspects of marketing, selling and technical services. Distribution is under the overall control of the Coordination Centre and is handled in the abovementioned European countries by the four local operating companies and the two local sales companies and in other European countries by subsidiaries of Enichem and ICI acting as exclusive distributors (e.g. ICI Denmark, Enichem Iberica, ICI Ireland) or agents (e.g. Tricardos, the non-exclusive agent for Greece). In the rest of the world distribution is to be handled by the parent companies as non-exclusive distributors.

For the first few years Enichem and ICI allow EVC to use free of charge their logos and rondel, trademarks and trade names, after which term EVC will have developed its own logo and trademarks/trade names.

(16) Both Enichem and ICI undertake to supply exclusively to EVC the raw material requirements of the plants dedicated to it. Each parent company also undertakes to supply 50 % of the total so-called 'primary requirement' of EVC, defined as 90 % of its post-rationalization raw material requirements, and is entitled to supply up to 50 % of the remaining 10 %, its 'secondary requirement'. If either parent company is unable or unwilling to supply, the other parent has first option to supply; if both parent companies are unable or unwilling to supply, EVC is free to purchase from third parties. The price of the primary requirement is settled between the parent companies and the jointly-owned company in a Raw Materials Committee. The price is the same for both parents. Prices for the secondary requirement are based on prices charged by competitors on the free market.

In addition to raw materials, Enichem and ICI sell EVC its requirements of the auxiliary chemicals, additives and catalysts which Enichem and/or ICI manufacture for use in the production of VCM/PVC. The price is based on market prices or established in accordance with existing transfer pricing arrangements.

As noted above, ICI has activities in downstream PVC markets. If ICI retains these businesses, EVC will continue to supply PVC for them as ICI itself did before the formation of EVC. However, under the agreements, the parties are discussing the acquisition by EVC of ICI's activities in downstream PVC markets. EVC is also to supply VCM to ICI's Runcorn 'Genklene' plant and EDC/HCL to Enichem's trichlor and perchlorethylene plant a Cagliari.

(17) Enichem and ICI have also entered into a supplementary agreement on the distribution of plasticizers for use in the manufacture of PVC compound. Under this agreement, EVC is to act as sales agent for Enichem's primary plasticizers in Italy, where Enichem sells the overwhelming majority of its primary-plasticizers for PVC applications. EVC is also to act as sales agent for ICI's primary and secondary plasticizers in the Benelux, France, Federal Republic of Germany, the United Kingdom and Switzerland, the areas where ICI is strongest. Both Enichem and ICI will continue to sell plasticizers directly outside the abovementioned areas.

F. Economic and structural impact of the agreement

(18) The agreements between Enichem and ICI continue the strategies adopted by the two companies to rationalize their respective VCM/PVC businesses. This rationalization process started in 1982 with the abovementioned swap deals with Montedison and BP, which allowed Enichem and ICI to concentrate their efforts on the sectors where their position as manufacturers was strongest. These first agreements, as well as enabling the parties to specialize, also provided the opportunity for reorganizing part of their petrochemical activities. The aim of Enichem and ICI in setting up EVC is to complete the restructuring of their VCM/PVC business in order to regain competitiveness and progressively reduce losses.

(19) The agreements provide for Enichem and ICI, through their jointly-owned company, to close down substantial VCM/PVC production capacity over the years 1986 to 1988. The closures amount to an important share of the total estimated surplus capacity in the VCM/PVC sector in western Europe in 1986. The plants to be closed — listed in the appendix to the notice published under Article 19 (3) of Regulation No 17 — are the older and less efficient ones. The global restructuring also includes a more rational allocation of production of the different PVC grades and qualities among the plants dedicated to the jointly-owned company with a view to optimizing transport costs. Within two years EVC plans to convert Enichem's Porto Torres PVC S plant to manufacture PVC E and some UK-based PVC S capacity to produce copolymers.

The closures will reduce Enichem's and ICI's combined production capacity for the products concerned by the agreements. EVC's estimated share of EEC production capacity after the closures will be 22 to 23 %. As for plasticizers, EVC's share of EEC sales is estimated at about 15 %.

(20) The formation of EVC and the subsequent rationalization affect market structure in the EEC. The main changes of relevance to competition and trade between Member States concern the PVC sector. The situation resulting from the arrangement has been examined both in relation to the wider EEC market and to the national markets where the impact is greatest.

The figures available to the Commission show that in 1986, when the agreements were signed, a substantial proportion of the EEC market was supplied by competitors of Enichem and ICI. Also in Italy, the United Kingdom and the Federal Republic of Germany, where the parties own production facilities, the market position of competitors was significant. In particular, the proportion of PVC supplied by competitors (importers and/or producers) is estimated to have been as follows (averages for 1985 and first nine months of 1986): EEC, 78 % ; Italy, 50 % ; United Kingdom, 57 % ; Federal Republic of Germany, 88 %.

G. Comments of interested parties

(21) In response to the Commissions's notice pursuant to Article 19 (3) of Regulation No 17, some third parties are worried about possible price increases on the PVC market as a consequence of capacity rationalization. Other third parties are worried that further reductions in the number of PVC suppliers could create difficulties for users.

II. LEGAL ASSESSMENT

(22) The agreements between Enichem and ICI fall within Article 85 (1) since they restrict competition and affect trade between Member States. They cannot therefore be given negative clearance as the parties request in their primary application. They can, however, be exempted under Article 85 (3).

A. Article 85 (1)

(23) Enichem and ICI are undertakings within the meaning of Article 85 (1), and the arrangements between them constitute agreements and concerted practices falling within the scope of that Article.

(a) *Object and effect of restricting competition*

(24) The agreements between Enichem and ICI must be analysed as a whole, having regard to their economic consequences. In the circumstances of the case, the agreements must be regarded as having the object and effect of restricting competition within the common market, for the following reasons :

— one of the main aims of the agreements is to allow an important reduction of capacity,

— in order to allow the jointly-owned company to operate and to achieve its objectives, the agreements provide for a continued cooperation between EVC and the parents who remain potential competitors,

— after the creation of the jointly-owned company, both parties remain potential competitors and, in some cases, actual competitors, between themselves and in relation to EVC, for the products in question,

— there is no transfer of assets to the jointly-owned company.

(25) Reduction of capacity

One of the principal aims of the agreements is to allow more reduction of capacity than would have been possible by unilateral restructuring action. Agreements between competitors designed to close plants and limit capacity by their very nature have a direct effect on competition.

(26) Necessity of continued cooperation among the parties and the jointly-owned company

The continual operation of the production units by the owning party under the production service agreements and the clauses of the basic agreement by which the parties largely or exclusively supply raw materials (mainly EDC) and services required in the downstream business (VCM/PVC) dedicated to the jointly-owned company, are necessary for its effective operation. EVC is dependent on continued cooperation of each parent in order to carry out its activities and the planned reduction of capacity. This continued cooperation is an integral part of the whole arrangement. Cooperation between the parties and the jointly-owned company, which is necessary to produce goods for which the undertakings remain actual or potential competitors, is bound to have a direct impact on competition between them.

Furthermore, in the present case, the supply commitments between the parties and the jointly-owned company restrict competition with third parties. These commitments are explicitly exclusive and have the same duration as the jointly-owned company. Moreover, they often concern supplies between facilities connected by pipeline as a part of an integrated petrochemical operation. The arrangements contractually tie the jointly-owned company to largely (90 % plus possibly the remaining 10 %) obtaining its requirements from the parents and exclude competitors from supplying the products or the parents from selling to other parties.

Finally the jointly-owned company will also depend on the cooperation of the parties for the marketing of its products in the countries where it does not have a local operating or sales company. In particular, in certain Member States (i.e. Denmark, Ireland, Portugal and Spain), Enichem or ICI will act through an exclusive distributorship agreement automatically renewable without any definite expiry date.

(27) The parties and the jointly-owned company remain actual competitors

Enichem and ICI, as independent undertakings, remain actual competitors in the markets of the jointly-owned company. Not all EDC/VCM plants are dedicated to EVC; there are some facilities which remain wholly owned and managed by the parents, although their production should basically be supplied to EVC.

One parent, ICI, has interests in companies outside western Europe which manufacture VCM/PVC and are capable of selling it into the common market in competition with the jointly-owned company. ICI also has a minority interest in another VCM/PVC producer and distributor within the Community (Hispavic).

(28) The parties and the jointly-owned company remain potential competitors

Enichem and ICI, as independent undertakings, remain actual competitors at the upstream level of production dedicated to the jointly-owned company. For two groups as large as the parties, with their extensive technological expertise, and with the active presence they have both retained in the upstream business, it would be comparatively easy and cheap for them to re-enter the downstream businesses which they have transferred to EVC and for which they provide all the feedstock requirements. Consequently, the parties' position cannot be compared to that of a firm desiring to enter the market for the first time without a strong base in the upstream business or experience in the downstream one.

Potential competition is also maintained by the decision not to transfer to the jointly-owned company the majority of the personnel and the ownership of the production facilities and research centres and the patents and know-how. These retentions undoubtedly allow the parties to keep the capability and the expertise for producing the products required in the business dedicated to EVC. The retentions also allow Enichem and ICI to keep abreast of all improvements, leading to a *de facto* permanency on the market of the jointly-owned company.

The necessity for continued cooperation between Enichem, ICI and EVC also increases the potential for competition.

(29) No asset transfer

For various legal and business reasons, the parties have not transferred their assets to the jointly-owned company. The production facilities and the research centres dedicated to EVC remain the property of the parents and remain absolutely dependent on the parents for services, raw materials, technology, patents and personnel (with the exception of part of the research centre personnel). Therefore, there is neither the creation of an autonomous entity, nor is there any total withdrawal from the market of Enichem or ICI which after the agreement remain independent undertakings.

Furthermore, the basic agreement for the creation of the jointly-owned company provides for the possibility of its dissolution or of the withdrawal of one parent after an initial five-year period.

(b) *Effect on trade between Member States*

(30) The agreements between Enichem and ICI concern products in which there is substantial intra-Community trade. Both firms used to export them to other Member States and significant volumes are imported by competitors from other Member States into the countries in which their production facilities are located. As a result of the agreements, the

whole structure of competition is substantially changed from the point of view of both users and other producers in the Community.

B. Article 85 (3)

(31) The agreements between Enichem and ICI meet the conditions for exemption laid down in Article 85 (3). They contribute to improving the production and distribution of goods and to promoting technical and economic progress, while allowing users a fair share of the resulting benefit. They neither impose restrictions which are not indispensable to the attainment of these objectives on the undertakings concerned, nor do they afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(32) The exemption is essentially justified because the agreements allow in the short term major progress in the rationalization of Enichem's and ICI's petrochemical businesses which are part of an industry suffering, at the time of the agreements, serious structural overcapacity in the whole Community. As a result of the deal, the parties are able to restructure their VCM/PVC businesses more quickly and radically than would have been possible individually.

(33) The agreements thus produce objective benefits — notably through an extensive programme of capacity closures in a sector suffering from structural overcapacity — which outweigh the abovementioned restrictions of competition. The individual conditions of Article 85 (3) are satisfied as follows:

Improvement in production and distribution, promotion of technical and economic progress

(34) By cooperating, Enichem and ICI will rationalize their VCM/PVC businesses more quickly and radically than would have been possible on their own. The rationalization improves technical efficiency and makes it possible to close down obsolete units and to convert certain existing plants to the production of different PVC types or grades. It also enables each party to absorb more easily, at a financial and commercial level, the closures they have previously carried out separately. The agreements allow the parties to continue through the jointly-owned company their respective restructuring started in 1982 in order to slim down their activities in thermoplastics after the excessive expansion of the 1970s.

(35) Bilateral arrangements in sectors suffering from structural overcapacity that lead to radical restructuring and, in particular, to capacity closures, are in line with current Commission policy, especially in the petrochemicals sector. In this respect, the agreements, through the planned massive plant closures which will remove an important share of the current excess VCM/PVC capacity in western Europe, lead to essential improvements of production. Because of the plant closures, production will be concentrated on the most modern plant, which can then be utilized at a higher level of capacity. Higher plant-loadings are particularly important in the VCM/PVC business — as in that of other thermoplastic products — where high fixed production costs have a direct impact on unit costs. By allowing fixed costs to be spread over a larger output in this way, unit costs will be reduced. The planned closures are particularly necessary in a sector like PVC where operating rates, even after the first restructuring round, are still too low: 62,4 % in 1981, 60,8 % in 1982, 61,5 % in 1983, 67,5 % in 1984 and 66 % in 1985.

(36) The agreements provide for the dedication of patents and know-how from Enichem and ICI to the jointly-owned company, which becomes responsible for all research and development activities in the sector concerned. This allows EVC to benefit from the most up-to-date technology of the parents and of their respective research centres. Thus the potential rate of technical innovation will increase, further facilitating rationalization efforts and contributing to a reduction in the variable costs.

(37) As a consequence of the agreements, the respective production activities of Enichem and ICI are unified in the jointly-owned company. Thus, the planned closures can be carried on without reducing the range of PVC types/qualities/grades offered to the customers, which is essential for each PVC manufacturer to continue to operate in the market. Such a unification also allows a certain re-allocation of production among the different plants and specialization in different grades and/or sub-grades, which can strengthen the rationalization and bring the production centres closer to their natural markets, thus reducing the costs of transport. Such a reduction could be particularly important for undertakings like Enichem and ICI whose production facilities, mainly located in Italy and the United Kingdom, are decentralized with

respect to the most important users market represented by the countries in the geographical centre of the Community. Similar advantages, at the distribution level, derive from the agreement on plasticizers, especially since the range offered by EVC is more complete than the ranges previously sold separately by Enichem and ICI. This agreement must be considered ancillary to the basic agreement as plasticizers should preferably be sold together with PVC.

Advantage for customers

(38) The agreements between Enichem and ICI allow users, who are essentially in the downstream PVC processing industry, a fair share of resulting benefits, provided that workable competition is maintained as it is here. PVC comes in many types/qualities/grades and sub-grades which are sold to many customers in many different countries ; if the parties had decided independently to close certain plants or to reduce their output of certain products — as heavy losses would probably have forced them to do — their customers would, in the short and medium term, have suffered from interruptions or reductions in supplies and possible deterioration in quality. The cooperation agreements however allow rationalization and ensure users a continued supply of products of traditional and probably better quality. PVC users generally have a wide range of options where price is very often the most urgent argument for choice amongst suppliers. However, because of the nature of PVC, other factors also are particularly significant : a particular supplier cannot be really competitive unless he can provide a product in the package, in reasonable time and to the specification required by the customers. Furthermore, users will benefit from the development of the products and the technologies made possible by the unification in EVC of the parties' R&D activities.

(39) With reference to the agreements on plasticizers, benefits to customers derive from the abovementioned possibility to profit from a wider range of products offered by the same seller. Moreover, in this sector it is useful for customers to obtain PVC and primary and secondary plasticizers from the same source : because of the advantage of an integrated technical service and a steady reduction in administrative costs for customer and supplier alike. In this respect the agreement on plasticizers should be considered ancillary to the basic agreement.

Indispensability of the restrictions

(40) The agreements between Enichem and ICI, with the restrictions of competition that they entail, are, in the context of structural overcapacity of the market in question at the time of the agreements, indispensable to the attainment in the short term of the abovementioned objectives. As already stressed above, the radical restructuring which the agreements make possible could not have been achieved so quickly and be so radical, had it been left entirely to market forces with each party acting independently.

(41) Neither Enichem nor ICI were capable of carrying out individually, to the same extent, the necessary massive capacity reductions. Both parties have independently studied a variety of options designed to improve their respective business situations. Neither has found a satisfactory stand-alone option which would significantly improve its VCM/PVC business without damaging effects to other related activities. Because of the specific integrated nature of petrochemicals, there are clear links between activities in the upstream and downstream markets. Thus any capacity reduction downstream has a knock-on effect upstream and vice versa. The cooperation between Enichem and ICI would maintain their internal ethylene and chlorine demand, even after the planned closures : the adverse knock-on effect would be minimized, avoiding serious consequences for the viability of plants and related businesses. As far as ICI is concerned, it has a number of modern VCM and PVC plants in western Europe, but depressed demand has led to it suffering negative financial consequences from surplus capacity. ICI's market position is clearly insufficient to support its plants : for these to be utilized fully, ICI would need to increase its output which could be dangerous for the European industry as a whole until the structural overcapacity had been eliminated. An equally problematic strategy would be for ICI to undertake significant unilateral plant closures because of the exit barriers caused by the integrated nature of the business and because of the necessity to keep a complete range of PVC grades to offer customers. In Enichem's case, the situation is similar to that of ICI. Enichem is still faced with problems in this sector which have not been completely solved by the first round of restructuring of the Italian petrochemicals industry. Enichem now finds itself with a large number of plants in diverse locations in Italy, for the major part vertically integrated, which in several cases require new investments. However, investment of this sort cannot be economically justified in the prevailing state of the VCM/PVC business and would act against the imperative need to reduce overcapacity in this sector, which is in the general interest of the Community.

(42) For these reasons, the most viable solution for both companies is not to take action unilaterally, but to undertake the restructuring by fully-coordinated cooperation, which can only be achieved through the creation of a jointly-owned company. In order for this company to be able to start operating as quickly and competitively as possible, the plant closures need to be carried out independently of current production and distribution activities and of research and development and technical service activities. PVC is not a homogeneous commodity, but is sold in a great variety of different qualities/grades/sub-grades of each basic type : every customer has its own needs and very often it is necessary for a manufacturer to produce a special quality/grade/sub-grade through a particular technique for an individual customer. Therefore, the information about client needs received by the sales force in the market must be transmitted quickly and effectively to the R&D centres and translated at the production level.

(43) As to the indispensability of the agreements whereby the parents make available to the jointly-owned company patents, know-how and research centres, it should be noted that these arrangements are closely connected with the creation of EVC and are essential for obtaining the expected benefits in the development of products and technologies. The arrangements for supplying raw materials and/or intermediate or auxiliary products or for providing utilities and/or services are equally indispensable in the circumstances, in view of the cost advantages they offer, especially in the short term, for logistical and economic reasons. Furthermore, they are indispensable for the planned closures to avoid the adverse knock-on effect described above. The restrictions provided for by the agreements are indispensable for operating the plants dedicated to the jointly-owned company efficiently.

(44) As for the agreement concerning the marketing of primary and secondary plasticizers on an individual basis, its indispensability derives from the risk of harmful effects, particularly on trade. These could be produced by the loss of the fundamental selling synergy between plasticizers and PVC if, after the setting up of EVC, Enichem and ICI were to continue selling plasticizers.

(45) It is concluded that the Enichem/ICI agreements do not impose on the parties restrictions of competition that are not indispensable to the attainment, in the short term, of the objectives listed in Article 85 (3); less restrictive means would not have achieved the objective as effectively and quickly.

Elimination of competition

(46) The agreements between Enichem and ICI and in particular the arrangements to close certain production facilities, do not afford the parties the possibility of eliminating competition for a substantial part of the products in question.

(47) As shown above in Part I of this Decision, although transport may be costly, the products are readily and safely transportable. Therefore, there is a substantial trade within the EEC and indeed within western Europe as a whole, and European markets are characterized by insignificant barriers to the entry either of new producers or importers. Although the common market is not yet perfectly integrated, the Community, taking into account the impact of imports, more closely corresponds to a definition of the relevant geographical market than do the national markets of the countries in which the production facilities dedicated to the jointly-owned company are located.

(48) As a consequence of the agreement, EVC became the largest Community producer for, and seller of, the products in question (22 to 23 % of PVC nominal production share in the EEC, after the restructuring). In terms of structure, conduct and performance, the anti-competitive impact of the creation and operation of EVC could be significant, particularly on a market characterized by a tendency towards tighter oligopoly. However, workable competition is still maintained both in the common market and in Member States' national markets. Therefore, the continuation of workable competition and, especially, the presence of strong competitors among the European manufacturers, would not enable EVC to exercise market power in the short and medium term. Furthermore, whilst EVC has an extensive PVC grade range, many other producers supply PVC types/qualities/grades and/or other substitutable polymers for the same end uses for the overwhelming majority of EVC's business. In particular, as to the Member States' national markets, EVC's market share is not significantly high except in Italy, the United Kingdom and Ireland ; however on these markets the aggregation of the previous separate market shares of Enichem and ICI respectively makes only a marginal difference to the whole competitive situation in those countries for the products in question.

(49) In 1987 the Commission started an investigation in the PVC sector to check on the possible existence of a multilateral anti-competitive arrangement between the European manufacturers. However, there are no grounds for believing that the agreements in question between Enichem and ICI form a part of such an arrangement. Furthermore, the agreements are bilateral and their extension to

third parties within the Community is expressly excluded for the present and will be carefully monitored by the Commission for the future.

(50) As to the plasticizers market, its structure is more competitive than for VCM/PVC. Notwithstanding the agreement there is a high degree of workable competition which continues to exist and users are able to switch between suppliers in response to price or service criteria. Furthermore, EVC, although combining the sales of Enichem and ICI in this sector, does not become the largest undertaking. Thus the harmful effect on competition is undoubtedly less significant than for the VCM/PVC sector.

Duration of the exemption, conditions and obligations

(51) Article 8 (1) of Regulation No 17 provides that exemptions under Article 85 (3) may be granted only for a specific period and that conditions and obligations may be attached to them.

(52) In view of the nature of the agreements and the short-term outlook for the VCM/PVC industry and its markets, the significant capacity closures and rationalization being undertaken by the two parties through the jointly-owned company represent, as stressed above, the basic reasons for exempting the agreements.

However, the creation of EVC has an important impact on competition, strengthening the position of the largest undertaking on the market. Therefore, and with a view particularly to allowing in a short time concrete implementation of the closure plans on schedule, and to verifying the subsequent immediate reaction of the market, the duration of the exemption should be fixed at five years. This period is, at the present time, considered to be appropriate to serve the objectives listed in Article 85 (3). Furthermore, it corresponds to the period after which, according to the agreements, the parties can dissolve the jointly-owned company. The five years shall date from the day of the notification of the agreements, that is until 25 March 1991.

(53) Neither the jointly-owned company nor its parents should, in respect of the products covered by the agreements, maintain either directly or indirectly any interests in competing producer or distributor undertakings within the common market, of a kind likely to serve as an instrument for influencing the commercial conduct of such undertakings. This shall not, however, prohibit the temporary maintaining — for the time reasonably necessary for total divestment — of a purely financial interest not involving participation in management or staff membership of competitors, or representation in competitors' boards except by independent trustees.

(54) To enable the Commission to check that the conditions of the exemption are scrupulously adhered to, in particular as to the restructuring programme, the jointly-owned company and each parent should be required to submit a report to the Commission every year. The report should give details of the implementation of the rationalization plan and of the progress achieved. It should, in particular, state the capacity closures and all changes in the production and distribution of the products in question, the production and sales of each product by the jointly-owned company and, if applicable, by the parties in the common market as a whole and in each Member State, and the amount of output consumed internally. The report should be sent to the Commission within four weeks of the end of the period to which it refers. The first report should cover the period 26 March 1987 to 25 March 1988.

(55) Although the Enichem/ICI agreements may be exempted because, especially through the significant overcapacity reductions, they satisfy the conditions of Article 85 (3), they have led to the strengthening of important undertakings with a considerable share of production capacity for, and sales of, the relevant products in the Community. In view of the overall trends in the thermoplastics markets and of the dangers which such increases of market power can represent for the maintenance of free competition within the EEC, the Commission has a duty to monitor developments closely. Considering the already strong position achieved by EVC on the market (22 to 23 % of production capacity in VCM/PVC), any expansion in the same or related sectors is very likely to reinforce it. Therefore the jointly-owned company and/or its parents must be required to inform the Commission in advance of any initiative planned by them or their subsidiaries of associated companies with reference to the products under consideration in this Decision or to other products of the upstream and/or downstream markets.

(56) To enable the Commission to monitor the exempted agreements as required by Article 8 (2) of Regulation No 17, the jointly-owned company and the parents must also be required to inform the Commission in advance of any renewals of, or extensions in the scope or nature of, or amendments or additions to, the agreements,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3), the provisions of Article 85 (1) of the EEC Treaty are hereby declared inapplicable, for the period 26 March 1986 to 25 March 1991, to the agreements between Enichem SpA (Enichem) and Imperial Chemical Industries plc (ICI), dealing with the setting up of a jointly-owned company, European Vinyls Corporation (EVC), to operate their VCM and PVC sectors, and the agreement concerning the distribution of PVC primary and secondary plasticizers.

Article 2

The declaration of exemption contained in Article 1 shall be subject to the condition that, in respect of the products covered by the agreements, Enichem, ICI and EVC shall not maintain either directly or indirectly any interests in competing producer or distributor undertakings within the common market of a kind likely to serve as an instrument for influencing the commercial conduct of such undertakings.

Article 3

The declaration of exemption contained in Article 1 shall be subject to the following obligations:

1. Enichem, ICI and EVC shall, each individually, submit a report to the Commission every year during the period of the exemption. Each report shall be sent within four weeks of the end of the period to which it refers. The first report shall cover the period 26 March 1987 to 25 March 1988.

   Each report shall deal with all the activities related to EDC, VCM, PVC and PVC primary and secondary plasticizers, and shall give details of the implementation of the rationalization plan and of progress achieved. It shall, in particular, state the capacity closures and any changes in the production and distribution of the products in question, the production and sales of each product by the jointly-owned company and, where appropriate, by the parties, both in the common market as a whole and in each Member State, and the amount of output to be consumed internally.

2. Enichem, ICI and EVC shall, each individually, inform the Commission in advance of any initiative planned by them or their subsidiaries or associated companies with reference to the products under consideration in this Decision of to other products of the upstream and/or downstream markets.

3. Enichem, ICI and EVC shall, each individually, inform the Commission in advance of any renewals, or extensions in the scope or nature of, or amendments or additions to, the agreements referred to in Article 1.

Article 4

this Decision is addressed to the following undertakings:

— Enichem SpA,
  Piazza Boldrini, 1,
  I-20097 S. Donato Milanese,

— Imperial Chemical Industries plc,
  Imperial Chemical House,
  Millbank,
  UK-London SW1P 3JF,

— European Vinyls Corporation,
  Boulevard du Souverain, 360,
  B-1160 Brussels.

Done at Brussels, 22 December 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission