II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 June 1993

relating to a proceeding pursuant to Article 85 of the EEC Treaty in Cases IV/31.550 — Zera/Montedison and IV/31.898 — Hinkens/Stähler

(Only the German and Italian texts are authentic)

(93/554/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 EEC Treaty (1), as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the applications submitted respectively by Zera-Agrarchemikalien GmbH, Travenbrück-Tralau, Germany, and by the firm Wilhelm Hinkens, Linnich, Germany, pursuant to Article 3 of Regulation No 17, asking the Commission to find that the companies Agrimont SpA (formerly Farmoplant SpA), Milan, Italy, Montedison (Deutschland) Chemie Handels-GmbH (formerly Montedison Deutschland GmbH), Eschborn, Germany, and Stähler Agrochemie GmbH & Co KG, Stade, Germany, have infringed Article 85,

Having regard to the Commission's decision of 27 September 1989 to initiate proceedings in this case,

Having given Agrimont SpA, Montedison (Deutschland) Chemie Handels-GmbH and Stähler Agrochemie GmbH & Co KG the opportunity, pursuant to Article 19 (1) of Regulation No 17 in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Regulation No 17 (2), of being heard on the matters to which the Commission has taken objection,

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

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

Whereas :

I. THE FACTS

A. Brief description of the subject of the proceeding

(1) The subject of this Decision is an agreement between two subsidiaries of the producer parent group on the one hand and the German exclusive distributor on the other granting the exclusive distributor, by means of product differentiation of the herbicide Digermin, absolute territorial protection for the German market and thus preventing parallel imports from other Member States into the Federal Republic of Germany.

(2) This Decision does not relate to the admissibility of the exclusive distribution arrangement for Germany under competition law. The Commission has not undertaken any assessment of the agreement, nor was the agreement notified to it.

B. The undertakings

(3) Farmoplant SpA, Milan (hereinafter referred to as Farmoplant), a wholly owned subsidiary of the Italian Montedison group, was until May 1986 primarily a producer of agricultural plant protectants, including Digermin. In June 1986, Farmoplant was absorbed into the newly established

subsidiary Agrimont SpA (hereinafter referred to as 'Agrimont'), which combined all of the Montedison group's agricultural activities. At the beginning of 1989, Agrimont was transferred in full from Montedison to the newly established group Enimont SpA, Milan, 50 % of whose shares were held by Montedison and 50 % by Ente Nazionale Idrocarburi (ENI). As a result of ENI's takeover of Montedison's share, Agrimont was incorporated into EniChem Agricoltura SpA, Milan, with effect from 1 November 1991.

According to the 1984 annual report, Agrimont's sales revenue amounted to Lit 89 003 million (some ECU 64,4 million) (1).

(4) Montedison (Deutschland) Chemie Handels-GmbH, Eschborn, formerly Montedison Deutschland GmbH (hereinafter referred to as 'MED'), was in charge of the distribution of Montedison products in the Federal Republic of Germany. MED was initially a wholly owned subsidiary of Montedison International Holding Co., Zurich, and then, as from early 1989, was wholly owned by the new Enimont group. In October 1991, Montedison (Deutschland) Chemie Handels-GmbH was merged with Agip (Deutschland) AG and renamed initially Enimont (Deutschland) AG and subsequently EniChem Deutschland AG. The company's head office is in Munich, with a branch in Eschborn that manages the agricultural chemicals sector.

MED's turnover in 1984 amounted to DM 566,6 million (some ECU 253,16 million). The turnover for plant protectants was DM (. . .) (2), with Digermin accounting for DM (. . .).

(5) Stähler Agrochemie GmbH & Co KG, Stade, which until 30 June 1984 was Aagrunol Stähler Pflanzenschutzunion GmbH & Co KG (hereinafter referred to as 'Stähler'), was, on the basis of an agreement with MED concluded on 9 September 1980, the exclusive distributor of the herbicide Digermin in the Federal Republic of Germany. The firm's annual turnover amounted to around DM 22,0 million (ECU 9,26 million) in 1982, around DM 28,0 million (ECU 12,33 million) in 1983 and around DM 33 million (ECU 14,7 million) in 1984.

C. The product

1. *The active ingredient trifluralin*

(6) The active ingredient trifluralin contained in the herbicide Digermin is a dinitroanaline derivative which was developed by Eli Lilly in the United States and since 1963 has been distributed worldwide, usually under the brand name Treflan. Trifluralin has become the most successful active ingredient used in herbicides in the history of the chemical industry. Its uses range from cotton wool, rape and sunflowers to vegetables such as soya beans, turnips and cauliflower. In Germany, Eli Lilly has been distributing its trifluralin product since about 1968 under the brand name Elancolan.

2. *The product Digermin*

(7) Digerin is a herbicide in which the non-water-soluble active ingredient trifluralin is dissolved (or 'formulated' in chemical terminology) in a concentration of 480 g per litre in one or more solvents, such as xylene. Emulsifiers and other auxiliary agents must be added so as to ensure that the active ingredient remains in suspension in the solution ('formulation') after it has been mixed with water in the spraying tank.

(8) The competing products available on the German market in the period covered by the Decision until the end of 1988 (see points 14 and 35 below), namely Elancolan (distributed by Elanco, the plant protection division of the German company Eli Lilly GmbH) and Zera-Trifluralin (distributed by Zerea Agrarchemikalien GmbH, which has used its own registration since 1985), have an identical concentration of the active ingredient, but certain differences as to solvents (for further details, see recitals 61 to 68 below).

3. *Ranges of application*

(9) The permitted range of application of Digermin is determined by its registration in the various countries. In Germany, Digermin is registered for use in weed control in the cultivation of rape, stubble turnips and cauliflower. The main area of application is the growing of rape.

(10) Within the European Community, Digermin is registered in Italy, France, Spain and the United Kingdom as well as Germany, mostly for crops other than rape.

4. *Registration procedures*

(11) After Agrimont had initially stated, in reply to questions put by the Commission, that registration in the other Member States had been applied for after it had been obtained in Germany, Agrimont

(1) The conversion rates used are the annual average rates of the relevant currencies against the ecu.

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

and MED gave the following chronological order in their reply to the statement of objections and at the oral hearing:

Member State	Application (technical documentation) for registration	Registration obtained
Italy	5. 11. 1975	8. 2. 1980
Germany	13. 1. 1977	30. 1. 1978
Spain	18. 2. 1977	15. 2. 1984
United Kingdom	19. 3. 1979	20. 9. 1979
France	3. 6. 1981	26. 6. 1982

It was not possible to establish which formulations were used in the applications for registration in Italy and Spain. However, it is established that a different formulation was registered in Germany than in all the other Member States (for details see recitals 69 and 70).

(12) MED pointed out during the hearing that the German registration authority, in its letter of 10 March 1980, had included in the registration decision the requirement that the nitrosamine content (NDPA) must not be greater than 1 mg/kg (or 1 ppm). According to Stähler's memo of 14 January 1981 attached as an Annex to the statement of objections, the nitrosamine content of German Digermin at that time still amounted to 10 ppm. In 1983, however, the Digermin produced for other Member States as well as for Germany matched the German requirements (see recital 49). The nitrosamines are contained in the active ingredient itself and are not caused by the solvents.

(13) Digermin began to be distributed in the individual Member States in parallel to the expiry of Eli Lilly's patents for the active ingredient trifluralin, starting in Germany in 1979.

(14) According to MED, the registration in Germany was not extended after the end of 1988 — that is to say, Digermin has not been distributed in Germany since the beginning of 1989.

D. The market

1. *Definition of the relevant market*

(15) (a) Registration

A key criterion for defining the relevant product market is the field of application for which a herbicide is registered. A herbicide may be distributed in a particular Member State only for the area of application defined in the registration decision (e.g. winter and summer rape). Accordingly, the only products competing with Digermin, which is registered in Germany essentially for weed control in the growing of rape, are other herbicides registered in Germany similarly for use in rape growing.

The sometimes varying degrees of effectiveness of the agents used to control unwanted plants (broad-leaved and gramineous weeds and volunteer cereals) substantially influence the farmer's choice of product. Other important selection criteria are when and how the product is to be used. Since for those reasons rape herbicides cannot be universally substituted for one another, further differentiation is called for in determining the relevant market.

(16) (b) Treatment procedures

Rape is sown in the period from about mid-August to early September. Depending on weather conditions, the seed emerges (begins to germinate) after eight to 15 days. Accordingly, a distinction should be made between three treatment procedures in the use of the herbicides registered in Germany for the growing of rape.

In pre-sowing treatment, the appropriate herbicides are applied and worked into the soil immediately before the seed is sown. Such herbicides include Digermin, Elancolan, Zera-Trifluralin, Devrinol and TCA (NaTa).

In pre-emergence treatment, the appropriate herbicides are applied immediately before the rape germinates, i.e. about eight days after sowing. Such herbicides include primarily Butisan-S, Teridox (not marketed after 1986), Lasso, Traton, Devrinol and TCA (NaTa).

In post-emergence treatment, the appropriate herbicides are applied to the soil or the plants after the rape has germinated, usually in winter. Such herbicides include primarily Galtak, Kerb 50 W, Fervin, Fusilade, Legurame and, as from 1985, Pradone-Kombi.

(17) In the technical literature on plant protection, it would appear that pre-sowing treatment continues to be described and recommended as a tried and largely reliable procedure for weed control in the growing of rape. Until 1984 at least, there was according to the specialized literature no preparation that allowed selective spraying of herbicide in post-emergence treatment with a sufficiently broad effect, particularly on light soils. It was therefore recommended, as the safest procedure, that pre-sowing products (including Digermin) containing trifluralin should be used and that, if necessary, a pre-emergence preparation should also subsequently be sprayed if any weeds resistant to trifluralin appeared.

The farmer's choice between pre-sowing, pre-emergence and post-emergence herbicides may be based not only on effectiveness and price. He must also take account of factors such as soil quality, water protection requirements and weather conditions at the time of sowing. In dry soils, however, pre-sowing herbicides, particularly trifluralin, offer reliable conditions of application at a cost per hectare of treated surface that compares favourably with pre-emergence herbicides.

Another important factor is that, in contrast to Teridox and Butisan-S, trifluralin does not get into ground water, which is an aspect of increasing importance in water catchment areas.

Farmers must thus, on the basis of a series of criteria, decide before sowing whether they wish to make preventative use of a pre-sowing herbicide. Recourse to such herbicides is no longer feasible once sowing has taken place.

(c) Effectiveness against weeds

(18) A comparison of the ranges of effectiveness of the preparations associated with the three treatment procedures shows that the previously clear subdivision of the rape herbicide market according to treatment procedures has been transformed by new developments. Thus, the pre-emergence herbicide Butisan-S became available from 1983 and the post-emergence herbicide Pradone Kombi from 1985, offering a wide spectrum of effectiveness against weeds. Other pre-sowing preparations that had a limited or complementary range of effectiveness were hardly in competition with trifluralin preparations (e.g. Devrinol and TCA (NaTa) and Lasso, which is of only limited effectiveness).

It must therefore be assumed that, for the purposes of this Decision, the relevant product market has widened from what had until 1983 been a purely trifluralin market to include Butisan-S and later, as from 1985, Pradone Kombi.

2. *Market shares*

(19) The area in which rape was grown in the Federal Republic of Germany increased fourfold between 1976 and 1988. The demand for rape herbicides also grew as a result.

(20) Befor Digermin entered the market, Elancolan was the only trifluralin herbicide in Germany. Elancolan sales amounted to some 40 000 litres a year in 1976. In 1980, almost 90 % of the German rape-growing area was treated with Elancolan.

(21) The market share of trifluralin preparations declined in the period 1983 to 1988, covered by this Decision. In 1984, 40 % of the German rape-growing area was treated with trifluralin (Elancolan, Digermin and Zera-Trifluralin). According to Stähler, the share of the two trifluralin preparations Elancolan and Digermin in the market for pre-sowing preparations (excluding the herbicide TCA (NaTa), but including Butisan-S) in Germany in 1983 amounted altogether to some 52 to 54 %. Digermin's share of that product market was around 11 to 13 %. In October 1985, Stähler estimated the share of trifluralin preparations in the market for rape herbicides at 25 to 30 %, that of Butisan-S (pre-emergence preparation) at 35 % and that of Pradone-Kombi (post-emergence preparation) also at 25 to 30 %. It was not possible to determine precisely Digermin's market shares over the whole of the relevant period.

(22) Within the German trifluralin market segment, Digermin's share, according to Stähler's documentation, amounted to 18 % in 1983. In 1985, Stähler estimated Digermin's share of the market for German trifluralin preparations at about 30 % and that of Zera-Trifluralin at 10 %. Elancolan continued to be the market leader amongst trifluralin preparations during this period with a 60 % share.

3. *Prices*

(a) Germany

(23) In 1976, before Digermin was introduced on to the market, Elancolan, the only trifluralin preparation available on the German market, cost DM 40 (ECU 15.9) a litre. Digermin's price in Germany showed a steady rise between 1979 and 1985:

(24)

Year	Total amount in litres	Purchase price per litre (Stähler)
1979	7 000	DM (...)
1980	20 000	DM (...)
1981	35 000	DM (...)
1982	40 000	DM (...)
1983	49 473	DM (...)
1984	49 494	DM (...)
1985	50 494	DM (...)

(25) Stähler's factory prices were about (...) % above its purchase prices. Depending on the market situation, customers were granted price discounts from the factory price that ranged up to 18 %, depending on the amount purchased, and averaged between 6 and 10 %.

(26) The 1983 price catalogue for resellers published by Lagerland eG, Munich, gives the purchase price for Digermin as DM 47,35 (ECU 20,8) and DM 50,90 (ECU 22,4) per litre, together with a non-binding recommended selling price of DM 54,45 (ECU 23,9) and DM 58,50 (ECU 25,7) per litre. The prices for Elancolan are identical.

(27) The 1985 price list published by Deutsche Getreidehandelsgesellschaft mbH & Co, Hamburg, gives the selling price for Digermin (Stähler) as DM 50,15 (ECU 22,5) per litre. Here too, the prices for Elancolan are identical.

(b) France

(28) In October 1981, i.e. before the registration of Digermin in June 1982, the selling price of Treflan (Eli Lilly) was FF 72 (ECU 11,2) per litre. With the market entry of Digermin and other trifluralin products, prices fell significantly as from 1983. The prices for Digermin are substantially lower in France than in Germany.

(29) The purchase prices of (...) for Digermin in the period 1982 to 1986 averaged, to the Commission's knowledge, at only about one third of Stähler's purchase prices. The prices were roughly in the order of 20 to 35 % of Stähler's ex-factory prices. Whereas the difference between Stähler's purchase price and the factory price amounted to (...) %, the difference between purchase and sales prices in the case of (...) amounted sometimes to only a few percent, on average 20 to 30 % and in individual cases 70 to 80 %.

(c) Other Member States

(30) By invoice dated 24 May 1983, Farmoplant, through the agency of Montedison Belgio (Montedison's Belgian subsidiary), sold 6 000 litres of Digermin to (...), the Netherlands, at a price of Fl 8,35 (ECU 3,3) per litre.

(31) According to Farmoplant's invoice of 26 September 1985, Digermin was sold to an Italian customer at a price of Lit 8 800 (ECU 5,9) per litre, and according to the invoice of 1 August 1983 it was supplied at £ 1,7860 (ECU 3,17) per litre to the United Kingdom. On the basis of Farmoplant's record of total deliveries of Digermin to the United Kingdom in 1983, the price per litre was DM 7,16 (ECU 3,15).

(32) Those price differences set out in points 23 to 31 above, ranging in some cases over 400 % were due, according to MED, to the specific characteristics of the German market, which on the one hand required a great deal of expenditure on the complicated and costly registration procedure and on customer servicing, but which also allowed lucrative prices to be charged, on the other.

E. Organization of distribution

(33) Within the Montedison group, the subsidiaries in the individual European countries had exclusive distribution rights for the respective Montedison products. In the Federal Republic of Germany and France, the Montedison subsidiaries brought third companies into the distribution system.

(34) Since the end of 1977, MED had been negotiating with Stähler on taking over the sole distribution of Digermin in Germany. Stähler was at that time close to marketing its own trifluralin product and was prepared not to go ahead with its further development and registration. On 3 October 1978, MED asked Farmoplant to assent to the conclusion of a distribution agreement with Stähler. On 13 October 1978, MED and Stähler confirmed their mutual intention of transferring sole distribution to Stähler; discussions on the matter were to be completed by the end of 1978. At the end of October 1978, Stähler undertook the cost of instructing a lawyer to make enquiries about Eli Lilly's patent so as to investigate the earliest possible date at which it could start distribution. Stähler began marketing Digermin, which was supplied by Farmoplant and MED, on 24 August 1979, the day on which the patent expired.

(35) On 9 September 1980, the written distribution agreement was signed between MED and Stähler, giving Stähler co-distribution rights for Digermin in the Federal Republic of Germany. In reality, however, Stähler obtained an exclusive distribution right, since MED waived distribution through third parties on condition that the minimum purchase quantities laid down in the agreement, which were subsequently extended by the amendment to the agreement of 25 November/1 December 1982, were achieved.

The agreement, which was initially concluded for three years, was extended by the amendment to five years (until 31 December 1984). After 1 January 1985, the agreement was extended by one year at a time, with a three-month period of notice. In the reply to the statement of objections, MED stated that the distribution agreement with Stähler had been annulled at the end of 1988 because of the expiry of Digermin's registration.

(36) In addition to the conditional exclusive distribution right, the agreement contains :

— an exclusive purchasing obligation : Stähler undertakes to purchase Digermin exclusively from MED,

— a ban on competition : Stähler undertakes not to manufacture and distribute during the term of the agreement any herbicide of the same or similar chemical composition for the same application purpose, and not to request or demand any official registration of any such herbicide for itself or any third party.

Prices have to be agreed afresh at the start of each season. Either partner can, on the basis of market developments, request negotiations on a subsequent change in prices. In the event of a substantial reason for disagreement, each party is entitled to give notice of termination.

(37) In the period between 13 May 1981 and 30 August 1985, a series of meetings between MED and Stähler took place at which, on at least one occasion, a representative of Farmoplant was also present. The subjects agreed at those talks included the coordination of jointly financed advertising for Digermin and an information campaign against imported Zera-Trifluralin. In addition, confidential talks were held on product strategy, and the group's situation, particularly the problems relating to parallel imports, was discussed.

(38) There were only isolated competitive reactions to the market leader Eli Lilly. An advertising campaign by Stähler for Digermin in 1981 was immediately met by a counter advertising campaign Eli Lilly for Elancolan. In 1982, Eli Lilly complained to Stähler about alleged discounts for new customers, whereupon in 1983 Eli Lilly granted the customers special discounts that led to a decline in Digermin's turnover and forced Stähler to grant similar price concessions. In September 1984 MED granted Stähler, at its request, a refund to offset falls in prices caused by parallel imports from France.

2. *France*

(39) Since its registration in 1982, the distribution of Digermin in France was carried out by La Littorale, a subsidiary of the Union Carbide Corporation of the United States of America. Farmoplant supplied La Littorale or its customers direct. The quantities distributed in France were by and large similar to German sales.

F. German registration rules

1. *General registration requirements*

(40) Under paragraph 11 (1) of the German Plant Protection Law, plant protection products may be imported or commercially distributed only if they are registered with the Federal Biological Institution (Biologische Bundesanstalt, hereinafter 'BBA'). Registration has to be requested by the manufacturer, distributor or importer.

(41) The applicant must present the requisite documents as to efficacy, persistence and toxicology together with test results. Until the amendment of the German Plant Protection Law in 1987 (see recital 47), an applicant's task was facilitated by the fact that, in its toxicological assessment, the Federal Health Office took account, in principle, of all known facts deriving from all toxicological investigations submitted by all applicants, including the literature on the subject.

2. *Registration requirements for parallel imports*

(42) Where an already registered product is imported, its composition (formulation) must correspond to the preparation formula lodged with the BBA (identity), and it must be labelled in the manner prescribed in paragraph 20 of the German Plant Protection Law (showing in particular the trade name, registration number, name and address of the importer, nature and quantity of the active ingredients and methods of use).

(43) Normally, the identity of the product may be established by an invoice specifying the manufacturer and the name of the product. However, if the registration holder can persuade the customs authorities, the BBA or the plant protection offices that the imported product is not identical to the registered product, then the importer must prove the imported product's identity.

(44) Where a product is imported which is identical to an already registered product, but whose labelling (in particular the trade name) does not correspond to the registration, subregistration is required. Where the identity of the product is proved, such subregistration is also usually issued without any further formalities.

3. *Requirements regarding proof of identity*

(45) Proof of identity can be established by an importer only with difficulty. The preparation formula lodged with the registration authority, being a business secret belonging to the registration holder, may not be made accessible to the importer. However, a detailed chemical analysis is expensive, time-consuming and open to errors. Furthermore, full chemical identity exists only in the case of products deriving from the same production batch.

4. *Monitoring of registration requirements*

(46) Compliance with the formulation laid down in the registration is not monitored systematically by the authority responsible for registration or any other supervisory authority. Checks are carried out only in response to complaints.

5. *Subregistration made more difficult by amendment to the Law*

(47) Since the amendment to the German Plant Protection Law which entered into force in January 1987, subregistration of an already registered plant protectant (for example, where the trade name is changed) is in practice virtually impossible to obtain, since the first registration holder can oppose the necessary utilization of his application documents for up to five years following the filing of the application (up to a maximum of 10 years after first registration), after which period a product is often scarcely still marketable. This does not affect the parallel importation of a registered plant protectant where no changes have been made (for example, to the trade name).

G. Parallel imports of Digermin

1. *Imports from the Netherlands in 1983*

(48) The phenomenon of parallel imports of plant protectants was, as was confirmed at the hearing, not unknown to the participants, particularly as a result of the parallel imports carried out by the firm Stefes in 1978 and 1979. The parallel importation of Elancolan in 1982 by Zera-Agrarchemikalien GmbH (hereinafter referred to as 'Zera') marked the first attempt to import a trifluralin product. It failed because the imported Elancolan had a nitrosamine (NDPA) content that was above the German limit.

(49) On 8 August 1983, under the product name 'Zera-Trifluralin', Zera obtained from the Federal Biological Institution for Digermin imported from the Netherlands a subregistration to the existing registration for Digermin. The subregistration was issued on the basis of a satisfactory demonstration by Zera that the product was Digermin from Farmoplant's production and that the nitrosamine limit applicable for Germany had not been exceeded. Zera was able to produce confirmation from Farmoplant that the product was Digermin with a nitrosamine (NDPA) content of less than 1 ppm.

(50) On 9 August 1983, MED pointed out to Farmoplant that parallel imports of trifluralin whose declared origin was Montedison were being offered at 20 % discounts.

(51) On 10 August 1983, MED wrote to the BBA pointing out that the two products were not identical.

(52) In reply to a telex dated 24 August 1983, MED informed Farmoplant on 26 August 1983 that Zera was selling the product at DM 12 (ECU 5,28) per litre less than Stähler. MED had to know where the product originated so as to be able to continue a high-price policy. As regards the registration of Zera-Trifluralin, MED would provide proof of the differences as compared with Digermin.

(53) By telex dated 12 September 1983 to Farmoplant, MED reported that Zera had provided proof of identity to the BBA. Zera had sold about 10 000 litres. Prices had fallen by some DM 10 (ECU 4,4) per litre. The dealers were demanding loss compensation. MED would pursue the strategy agreed on 12 August 1983 in Milan :

— civil action against Zera,

— putting pressure on the BBA to revoke Zera's registration.

(54) As a result of sales of Zera-Trifluralin at a price of DM 34 (ECU 14,9) per litre, Stähler was able to achieve in Schleswig-Holstein, instead of a planned net sales revenue of at least DM 38,32 (ECU 16,8) per litre, only DM 34,69 (ECU 15,27). The quantity sold, at 14 630 litres, was well below the planned sales amount of 20 000 litres. Stähler suggested to MED that Zera should be sued for the loss of DM 256 885,30 (ECU 113 138,91).

(55) MED's claims, supported by an expert opinion, that the two products were not identical prompted the BBA to revoke Zera-Trifluralin's subregistration on 17 October 1983. Zera raised objections and later lodged an administrative complaint, which was settled in February 1984 by an arrangement under which the BBA allowed Zera-Trifluralin's subregistration to run till 31 May 1985. Parallel to this, Zera had since 1983 been pursuing the registration of its own product under the trade name Zera-Trifluralin. Before the expiry of the subregistration time limit, Zera-Trifluralin was given its own registration by the BBA.

(56) Following an unsuccessful attempt at the beginning of September 1983 to obtain an interim injunction, MED lodged a civil-law application against Zera in January 1984, seeking a restraining injunction and damages. In support of the application, it submitted an affidavit by Stähler and an expert opinion to the

effect that there was no identity between Digermin and the imported Zera-Trifluralin. Though successful before the court of first instance, the action was dismissed in 1985 at second instance.

(57) In June 1984, MED and Stähler agreed a circular to Stähler's customers in which it was pointed out that the formulation sold by Zera in Germany was not identical to that distributed by MED, that MED did not assume any product guarantee for Zera-Trifluralin and that legal proceedings were being instituted against Zera (see also recital 86).

2. *Imports from France in 1984*

(58) In August 1984, the French firm (. . .), sold Digermin, which it had procured from (. . .) to two German customers :

— the firm Stefes, of Kerpen,

— the firm Hinkens, of Linnich.

(59) Stähler itself reported the matter to the Plant Protection Office, and Hinkens' goods were confiscated and administrative offence proceedings initiated. In its notification to the Plant Protection Office, Stähler stated that it had had a comparative chemical analysis carried out. After comparative tests between the imported Digermin and Stähler's Digermin had led to differing results (see recital 67), Sopravit took back the Digermin from Hinkens.

(60) MED reported to Farmoplant in April 1985 that an attempt was being made to prevent parallel imports to the firm Stefes (see also recital 91). In view of the administrative proceedings inititated against Hinkens, Stefes bought the goods back from its customers and sold them to Stähler in March 1985.

H. Territorial protection through product differentiation

1. *Existence of different formulations*

(a) Information provided by Agrimont

(61) During the period covered by the Decision, Montedison distributed, on its own evidence, two different formulations of the product Digermin within the Member States. Following the inconsistent information initially provided by Farmoplant as to the number of formulations in Europe and other parts of the world, Agrimont informed the Commission by letter dated 24 February 1987 that the formulation manufactured for the Federal Republic of Germany was '73 B', which differed as regards the solvent from formulation '73 D', which was used in all other Member States in which Digermin was registered. Agrimont stated that other trifluralin-based formulations were neither registered nor sold under the Digermin brand name in the Member States.

(62) This explanation is confirmed by Farmoplant's internal production instructions of September and November 1982, where the formulation '73 D' is specified as being for 'all countries except Germany' and the formulation '73 B' as being 'for Germany'. References to the use of the 'German' preparation formula are also to be found on MED's orders for Stähler, whereas such references are not included on orders for La Littorale, France, and the Chemische Fabriek Brabant.

(63) In 1984, in the legal action brought by MED against Zera (see recital 56) before the Lübeck Landgericht, a member of Farmoplant's board testified that there was one formulation for France, the United Kingdom and Germany, another for eastern Europe and a third for Asia, Africa and South America.

(64) Contrary to this, Farmoplant informed the Commission in a letter dated 18 October 1985 that different formulations existed for Germany, France, Italy and the United Kingdom respectively.

(65) The lists of components of the two formulations sent by Agrimont by letter dated 25 February 1987 contained only the trade name, but not the chemical designation of the additional solvent used in the German formulation. Comparison with the formulations registered in France and Germany was therefore not possible on the basis of those documents.

(b) Results of the comparative tests

(66) Despite a number of analyses carried out in 1983 and 1984 to compare imported and 'German' Digermin, the question of identity remained unclarified, since the analyses led to conflicting results. An expert opinion commissioned by MED in August 1983 identified differences in the solvents, while a contrary expert opinion commissioned by Zera in February 1984 saw the differences as being due to contamination of the active ingredient owing to the fluctuations customary between batches of the formulation.

(67) Three comparative tests between Digermin imported from France in 1984 and 'German' Digermin carried out by a French and a German laboratory came to the conclusion that what was involved was virtually identical material from diffe-

rent production batches. By contrast the BBA, in a comparative test it carried out on 17 September 1984, detected a difference from which it concluded that the products were not identical.

(68) The Commission, not having any complete elucidation of the question of what differences exist between the formulations, has come to the view that it must be assumed that there are two different formulations. The differences did, however, sometimes seem to be so small that they could be scarcely detected by the use of the usual analytical methods.

2. *Reasons for the existence of different formulations*

(a) Chronological order of the registration

(69) In reply to the express question as to the reasons for the existence of different formulations, Agrimont, in a letter dated 25 February 1987, referred to the fact that the registration of Digermin in the Federal Republic of Germany had taken place earlier than in the other Member States (see recital 11). The field trials for the German registration procedure had been based on the formulation '73 B'. Once registration had been obtained, a change in the formulation would have required a fresh registration procedure, at considerable cost in terms of time and money. In the other Member States, the registration procedure had been commenced in the subsequent period. There, use had been made of the formulation '73 D', which complied with the requirements of such countries.

(70) In the replies to the statement of objections and at the hearing, Agrimont and MED statetd for the first time that the registration applications had been made in Italy earlier than and in Spain at the same time as in Germany (see recital 11 above). However, no information could be given on the formulations on which such applications were based. According to Farmoplant, the procedures in Italy and Spain allowed a subsequent change in the formulation.

(b) Differing requirements in Member States

(71) In the case brought by MED against Zera before the Lübeck Landgericht, a member of Farmoplant's board stated that the differences in composition stemmed from the provisions in the various countries.

(72) In its letters of 22 December 1986 and 25 February 1987, Agrimont pointed out that the formulations had to comply with the differing requirements in the various countries. Despite the Commission's request by letter of 5 February 1987 to explain the reasons fully, Agrimont did not explain what such differing requirements consisted of and what consequences this had for the formulation. Agrimont emphasized only the particularly strict requirements of the German registration authorities, entailing a separate formulation.

(73) The Commission then asked the registration authorities in Germany and France to inform it whether the compositions of 'German' and 'other' Digermin transmitted by Agrimont to the Commission were capable of being registered in their Member State. The German and French registration authorities replied that in principle the compositions could be registered subject to an appropriately substantiated application and, possibly, the presentation of the results of additional comparative tests on efficacy and residue persistence.

(c) Registration costs

(74) According to information provided by Agrimont, the cost factor played a crucial role in deciding whether a new registration should be sought for an amended formulation.

The figures on the costs of re-registering a formulation differ very widely.

(75) The complainant Zera stated that, in drawing up the documentation needed for registration, it had incurred costs of around DM 550 000 (ECU 245 909). The costs which MED specified to the Federal Biological Institution as expenditure for drawing up the registration documents were comparable at DM 500 000 (ECU 211 328). Digermin's registration in Germany was a first registration.

(76) By contrast, Farmoplant, replying to the Commission's enquiry by letter dated 18 October 1985, estimated the costs of drawing up the documents for a product that was to be newly registered at Lit 5 billion (ECU 3,2 million). On top of this, registration in other Member States would cost a further Lit 100 million (ECU 64 142) per species.

That contrasts with MED's estimate, given in its letter of 19 November 1976, of relatively low individual test costs (DM 500 of ECU 211 per individual test, DM 8 000 or ECU 3 381 total costs for preliminary tests and DM 10 000 or ECU 4 226 in costs for registration). The proposal for an improved formulation of Digermin, which MED put forward in the telex of 24 April 1984 to Farmoplant, was not substantiated in any further detail by MED, although if implemented the registrations in all the European countries would have had to be changed.

(77) The annual registration fees charged by the authorities in the Member States (for re-formulation in Germany, some DM 2 000 or ECU 940) where relatively small and hardly significant compared with the costs of drawing up the documents.

(78) In a letter dated 1 February 1982, Montedison Belgio informed Farmoplant of the costs of registering plant protection products in Belgium. The following costs are specified for the registration of an already registered product:

Initial charge	Bfrs 25 000 (ECU 528)
Analysis of the formulation	Bfrs 7 000 (ECU 148)
Additional charge	Bfrs 60 000 (ECU 1 268)
Total	Bfrs 92 000 (ECU 1 944)

The costs for biological tests in connection with the registration of a new product amount to Bfrs 720 000 (ECU 15 215).

(d) Lower production costs

(79) Though the Commission had on several occasions enquired as to the reasons for registering different formulations, it was not until the hearing that Agrimont and MED stated that the reason was that the formulation registered in the other Member States was cheaper to produce than the 'German' formulation, namely by some Lit 190 (ECU 0,14) per kg. The German formulation contained not only the solvent xylene, which was also contained in other formulations, but also an additional, more expensive solvent. Assuming total sales of Digermin outside Germany of 700 tonnes in 1983, that meant a cost reduction of some Lit 133 million (some ECU 86 500).

On the other hand, in its letter of 18 October 1985 (see point 64), Agrimont had informed the Commission that the Italian formulation contained the same solvent as was specified during the hearing as a particularly expensive component of the German formulation.

(e) Avoiding patent infringements

(80) Similarly, Agrimont and MED stated for the first time at the hearing that the selection of a formulation differing from Elancolan was intended to ensure that Eli Lilly's German patent, which protected the use of trifluralin as a pre-emergence herbicide, was not infringed. At the hearing, MED referred to two judgments delivered by a German court in 1986 in which the holder of a patent was allowed to restrain the use of a patented plant protectant in field tests preparatory to marketing it once the patent had expired. Only since 1981, as the result of an amendment to German patent law, had the use of patented plant protectants in field tests been allowed.

Despite enquiries from the Commission, however, the relevance of the alleged patent protection of the active ingredient trifluralin to the question whether it could legitimately be used in field tests remained unclear, since it had actually been used in preparatory field tests. At any rate, there is extremely far-reaching identity between the active ingredient trifluralin contained in the products Digermin and Elancolan, as may be seen from the fact that MED, in extending the period covered by the German registration of Digermin was able to use a toxicological study on trifluralin drawn up by Eli Lilly for Elancolan.

Neither in the letter of 19 November 1976 (see also recital 76) in which MED, at a time when the field tests for Germany were still in progress, commented on the patent situation, nor in the expert opinion of Veba-Chemie AG of September 1975 presented by MED at the hearing was reference made to the issue of the legitimacy of using the patented trifluralin for field tests.

3. *Territorial protection agreement*

(81) In a series of memos, in correspondence between MED, Farmoplant and Stähler, and in the documents concerning the legal action brought by MED against Zera, there are indications that the registration of differing formulations in Germany and the other Community countries was aimed at preventing parallel imports into Germany, the market with the highest prices.

(82) Stähler's memos of 12 December 1977, 22 June and 13 October 1978 show that the negotiations touched on registration matters as well as questions as to quantities and prices. As is evident from the memo of 14 January 1981, Stähler was aware of the basic composition of Digermin.

(83) A handwritten note by Mr (...) (MED) headed 'Dr Stähler — ASU — 12 January 1983' contains the following remark:

'Digermin formulation abroad different than in Federal Republic of Germany — NDPA < 0,1 ppm against re-imports.'

MED confirmed at the hearing that the note concerns a conversation which took place on that day between (...) and Dr Stähler.

(84) In the telex which Farmoplant sent MED on 24 August 1983, it was announced that analytical differences between Zera-Trifluralin and Digermin had been established. However, if the BBA wished to discuss the practical importance of the differences, that would be 'quite a different matter' ... It was accordingly extremely important to know the BBA's intention.

(85) In a telex sent by way of reply on 26 August 1983, MED announced that it would 'demonstrate to the BBA that Digermin differs from Zera-Trifluralin. The more differences, the greater the prospects of success. We are not at the moment interested in a discussion with the BBA ... We must know where the product comes from in order to defend our position now and in the future. If that is not possible, we cannot pursue a high-price policy'.

(86) In a draft letter to customers providing information on Zera parallel imports, Stähler at first suggested stating 'that a formulation analogous to Digermin is not otherwise available in Europe'. In the letter sent by Stähler to its customers, and also in the letter of 3 January 1984 from MED to the Chemische Fabriek Brabant, it was finally stated that the Zera product was 'not identical' and 'not comparable' to MED's Digermin.

(87) By memo dated 20 February 1984, Farmoplant asked MED for its views on the possibility of registering different formulations of the product specialities in each country. It was said that this would have the advantage of making the cross-supply of a product form one country to another difficult and thus of providing greater room for manoeuvre on prices with regard to the specific market. The disadvantages would be higher costs as a result of more costly inventory management and smaller production batches.

(88) MED gave its view on this in the telex sent to Farmoplant on 8 March 1984: appreciable differentiation was appropriate of there were significant price differences or competition from an identical product; smaller degrees of differentiation were appropriate for the control of sales channels.

(89) In the statement of 3 April 1985, MED explained through its lawyer that:

'the distribution system (exclusive rights for each Member State) is accompanied by a price control system characterized by entirely different prices. This price differential has to do amongst other things with the particular characteristics of the German market, which ... also allows lucrative prices to be charged. However, such prices can of course be charged only if the distribution firms of the Italian parent company, including the firm Montedison-Belgium ... and the plantiff (MED) comply with the prices imposed by the Italian parent and do not undercut them in particular by, for example, Montedison-Belgium's channelling cheap imports into the Federal Republic of Germany. Montedison-Belgium was and is prohibited, through appropriate agreements with the parent company Montedison in Italy, from engaging in such practices ... If they were allowed, ... the high level of prices in Germany would of course immediately collapse'.

In a subsequent written plea before the appellate court, MED retracted this submission as an informational error (the Commission's investigation of MED took place on 24 and 25 September 1985, the judgment on appeal was delivered on 25 March 1986). MED then asserted that neither it nor the companies associated with it in the group imposed distribution bans on their respective herbicide customers with a view to preventing parallel imports into other European countries. Each customer could in principle dispose of the purchased goods as it wished. Only on account of the differing chemical compositions in the various distribution territories was it useful to know the country of destination, so as to ensure, through clarification, information and advice, that the goods were not marketed under the name 'Digermin' or under reference to a Digermin registration in a country in which the formulation did not comply with the local registration requirements.

(90) A memo on talks with MED drawn up by Stähler on 1 February 1985 contains the following under the heading '4. Digermin':

'Our sales were specified as 44 tonnes. Prices and quantities are to be discussed later.

It is guaranteed that this year Digermin is being formulated differently for Germany, as against all the other countries in Europe.

I have already briefly informed (...) of the difficulties for this year.

(...) does not see any basic problems in extending Digermin's registration, since he believes that he has arranged everything with Elanco.'

(91) By telex dated 22 May 1985, MED confirmed the following to Farmoplant:

'As far as the supply of Digermin is concerned, it remains agreed that you will supply the German formulation to us. Any supplies you make to other countries will be with formulations that differ from that supplied to us. We are agreed that you will make representations to the French company (...) so that it is guaranteed that its Digermin is not re-exported to Germany as happened last season. If such occurrences as described above were to happen again, we would be forced to revise the price.'

I. TERRITORIAL PROTECTION THROUGH TRADE MARK LAW

(92) Because of an objection by the firm Fahlberg-List (Ciba-Geigy), the trade mark 'Digermin' could not be registered in Germany. In mid-1985, MED stepped up its efforts to have the trade mark registered, 'in order to protect Digermin against re-imports'. However, no registration was achieved in the subsequent period.

II. LEGAL ASSESSMENT

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

Agreement between undertakings in restraint of competition

1. *Undertakings within the meaning of Article 85 (1)*

(94) Agrimont and MED were both wholly-owned subsidiaries of the same group. In all questions of registration and distribution, MED received continuous instructions from Farmoplant/Agrimont. This means that MED not only belonged to the same group, but was also to a large degree dependent on instructions from Farmoplant/Agrimont, which, within the Montedison group, was responsible for agricultural products and for the product areas herbicides, fungicides and insecticides. Consequently, MED and Farmoplant/Agrimont are to be regarded as a single economic entity.

(95) Stähler is a legally and economically independent undertaking; it is therefore an undertaking within the meaning of Article 85 (1).

2. *Agreement in restraint of competition*

(96) This Decision is not concerned with whether the *de facto* exclusive distribution granted to Stähler under the agreement of 9 September 1980 is permissible under competition law.

(97) The high-price policy pursued in Germany by MED and Farmoplant could be maintained *vis-à-vis* the exclusive distributor, Stähler, who had indeed accepted a competition ban and minimum sales obligations, only if that firm was granted absolute territorial protection. This was achieved through a policy of product differentiation.

There is much to suggest that the granting of absolute territorial protection through product differentiation was from the outset an underlying premise of the exclusive distribution agreement.

However, it is assumed here, to the benefit of the parties, that — so long as the danger of parallel imports had not yet materialized — the granting of absolute territorial protection through product differentiation can be regarded as a unilateral measure. However, following the appearance of parallel imports in 1982 at the latest, this market strategy, as a reaction to them, became an underlying premise of the exclusive distribution agreement and hence the subject of an agreement between the parties within the framework of their continuing commercial relationship.

(a) Existence and content of the agreement

The existence and content of such an agreement may be inferred from the overall assessment of the documents and circumstances described below.

(98) When it took over the exclusive distribution. Stähler was required by MED and Farmoplant to pursue a high-price policy geared to the prices of Elancolan. This is reflected in Stähler's purchase prices (see recital 24), which in the period 1982 to 1986 were on average three times as high as the purchase prices of the French distribution firm (see recital 29). A similarly large price differential is evident compared with the purchase prices of the Dutch undertaking, (...) (see recital 30). It follows from this that even the selling prices of the resellers in the other Member States were below Stähler's purchase price. Whilst, following the introduction of Digermin on the French market in 1982, the prices for trifluralin products fell substantially (see recital 28), the prices for Digermin on the

German market rose steadily. As a result of the increase in the area of rape cultivation (see recital 19), Montedison was able to achieve some share of the herbicide market without seriously encroaching on Eli Lilly's sales. With one exception (see recital 38), MED and Stähler did not at any time attempt to increase Digermin's market share at Elancolan's expense through aggressive competitive pricing, although the difference between purchase price and ex-factory price was distinctly greater in the case of Stähler than in the case of the French distributing company (see recital 29). This pricing policy is reflected in the price-lists at the wholesale stage, where Elancolan and Digermin were available in 1983 and 1985 at identical list prices (see recitals 26 and 27). The fact that MED and Stähler agreed anew on prices at the start of each season, as part of the exclusive distribution agreement, indicates that Stähler was at least tacitly in agreement with the supplier's high-price policy.

(99) As an experienced specialized dealer which, before taking over the sole distribution of Digermin, had itself been about to register a trifluralin product (see recital 34), Stähler was aware of the dangers which parallel imports of plant protection products, such as had emerged in Germany in 1978 and 1979, could in general pose for prices and sales. The assumption of the economic risk attached to the exclusive distribution of Digermin, coupled with minimum purchase amounts and a competition ban (see recital 35) and tied to the high price policy of MED and Farmoplant would thus be inexplicable in economic terms without the certainty that absolute territorial protection was being guaranteed by MED and Farmoplant. However, it is being assumed here, to the benefit of the parties, that this certainty at that time (1979), when Digermin was not yet registered in Member States other than Germany, had not yet been consolidated into an underlying premise of the agreement.

(100) As from 1982, when the first parallel imports of Elancolan appeared, leading to fears of parallel imports of Digermin in the following season (1983), the question of absolute territorial protection for Stähler became an economically crucial question in view of the continuing obligations under the exclusive distribution agreement regarding minimum purchases and compliance with the competition ban (see recital 36) and the high-price policy pursued. From the beginning of 1983 at the latest, the question of absolute territorial protection was under discussion between the parties, who debated the previous market strategy of territorial protection through product differentiation. Thus the granting of absolute territorial protection became the subject of an agreement, the explanations now given of the technical conditions governing territorial protection and the measures taken by MED and Farmoplant would, as part of the continuing commercial relationship, ensure the further maintenance of territorial protection and the precondition for it, namely product differentiation. The granting of absolute territorial protection was in line with Stähler's wishes, and Stähler moreover participated actively in its implementation.

(101) As may be seen from the handwritten note drafted by (...), on 12 January 1983, a conversation was held on that day with Dr Stähler in which it was established that differences of formulation and/or the nitrosamine (NDPA) content afforded protection against (re)-imports into Germany (see recital 83).

(102) MED conceded at the hearing that one of the subjects discussed on 12 January, had been the fear that, following Elancolan's abortive attempt at parallel imports in 1982, Zera would now try to bring in parallel imports of Digermin. However, MED argued that the note should be interpreted as meaning that the Digermin formulations in other countries would not comply with the strict limit applying in Germany for the admissible NDPA content (carcinogenic nitrosamines).

This argument does nothing to alter the crucial point that Stähler was afforded the certainty of being secure against parallel imports.

(103) MED's reference to the Judgment of the Court of Justice of the European Communities in Case 8/74 Procureur du Roi v. Dassonville [1], under which a sole importer is not debarred from exploiting the existence of national rules on certain certification requirements as regards the content of an agreement, is mistaken, because the present case does not involve specific legal requirements that are independent of the manufacturer's will, but differing registrations issued upon application by the manufacturer himself.

(104) The actions of the parties in the period following the conversation of 12 January 1993 provide a series of further indications that suggest the existence of an agreement between MED and Farmoplant on the one hand and Stähler on the other. It is clear from the correspondence between MED and Farmoplant that the product differentiation for Germany was used solely as a means of preventing parallel imports, so as not to jeopardize the high level of prices on the German market. In some cases, the product differentiation even formed the basis for considering extending this model to other products and Member States.

[1] [1974] ECR 837.

In the telex of 26 August 1983 to Farmoplant, MED pointed out, shortly after the appearance of parallel imports from the Netherlands into Germany, that without differing formulations for Digermin no high-price policy could be pursued on the German market (see recital 85).

In 1984 Farmoplant asked several subsidiaries to give their views on the possibility of registering a different formulation in each country. It was said that this would have the advantage of making cross-supplies more difficult and hence of allowing greater room for manoeuvre on prices on each specific market (see recital 87). MED in its reply thought that differentiations would be appropriate : appreciable differentiations where there were significant price differences or where there was competition from an identical product, smaller differentiations so as to control sales channels (see recital 88).

(105) The objection raised by Agrimont and MED, that it must be inferred from the very existence of such intra-group correspondence, containing no specific reference to Digermin, that there was no intention to partition the market, does not carry conviction ; previously, in 1983, intensive correspondence had taken place between Farmoplant and MED on the strategy for preventing parallel imports and for maintaining the high-price policy on the German market (see recitals 53, 84 and 85). In the legal action brought before the German courts against Zera, MED also stated that the high level of prices in Germany could be maintained only by preventing parallel imports from other Member States (see recital 89).

(106) Farmoplant and MED agreed a joint strategy in August 1983 to prevent parallel imports from the Netherlands (see recital 53), the precondition for which was the maintenance of product differentiation. MED pointed out to Farmoplant in August 1983 that the prospects for the success of any moves against parallel imports depended on the demonstration of as many differences as possible in the formulations (see recital 85).

(107) That defensive strategy against parallel imports was not pursued unilaterally by MED and Farmoplant, but involved the participation and commitment of Stähler.

As may be seen from a series of talks between MED and Stähler, concerning among other things the problems caused by parallel imports (see recital 37), Stähler was aware of the defensive strategy pursued by MED and Farmoplant. Stähler was in addition brought into this strategy.

(108) Stähler took part in the civil action against Zera by making a sworn statement (see recital 56). It suggested to MED that it should claim damages in the proceedings against Zera for loss of earnings suffered as a result of the sales of Zera-Trifluralin in 1983. In June 1984, before the period in which most farmers begin to stock up for the sowing of rape as from August, MED and Stähler agreed a circular sent by Stähler to customers (see recitals 57 and 86). The fact that Stähler's suggested draft of the circular was initially to include the statement that a form analogous to Digermin was not otherwise available in Europe indicates that Stähler at that time had full confidence in the territorial protection granted by MED. Through that circular, which, in view of the parallel imports that had appeared contrary to expectations and despite product differentiation, was intended to help supplement Stähler's territorial protection through direct influence on customers, Stähler took on its own autonomous role in the joint defensive strategy. The fact that, as was objected at the hearing, Stähler was obliged by the distribution agreement to cooperate would not have any effect on the possible anti-competitive nature of an arrangement entered into within the framework of such cooperation.

(109) The joint moves against parallel imports on the basis of product differentiation continued in 1984. Stähler took independent action in August 1984 against parallel imports from France by the firm Hinkens by formally reporting the matter. In its report, Stähler also stated that it had had a comparative chemical analysis carried out (see recital 59). In August 1984, Stähler asked MED to grant it a refund to offset falls in prices caused by parallel imports from France, and MED granted the refund in September 1984 (see recital 38). In addition, Stähler bought up Digermin, imported by the parallel importer Stefes in March 1985 (see recital 60). Those autonomous moves against parallel imports reflect Stähler's confidence in the continuation of product differentiation by MED and Farmoplant.

(110) In parallel to this, MED for its part urged Farmoplant to take action against the French distributor (. . .) (see recitals 60 and 91).

(111) Two documents dating from 1985 provide further evidence of the existence of an agreement to the effect that Stähler was to be afforded territorial

protection by ensuring that supplies to Germany had a different formulation from supplies to other countries.

Stähler's memo of 1 February 1985 on talks with MED stated that it was guaranteed that 'this year Digermin is being formulated differently for Germany than for all the other countries in Europe' (see recital 90). Because of the difficulties that emerged, particularly in 1984, in proving formulation differences for the purposes of preventing parallel imports, Stähler had reason to doubt whether Farmoplant was still adhering to the agreed territorial protection through product differentiation. That explains Stähler's interest in reaffirming the agreement, operative since early 1983, on the provision of absolute territorial protection through product differentiation. Stähler could regard product differentiation as continuing to be ensured only if it was once again confirmed to it by MED. The use of the word 'guaranteed' shows that assurances of continuing product differentiation had to be given to Stähler during the talks in such a way as it could rely upon them.

In the telex sent to Farmoplant on 22 May 1985 (see recital 91), MED confirmed the continuation of an agreement on the maintenance of product differentiation between Germany and the other Member States. In addition, an agreement was confirmed that Farmoplant would make representations to the French distribution company (. . .) so as to ensure that imports of Digermin into Germany, such as had occurred in the previous year (1984), would be avoided. Even if, purely on its wording, the telex related only to an intra-group arrangement between MED and Farmoplant, it has to be seen in the temporal and factual context of Stähler's memo of 1 February 1985. Since MED alone was not in a position to ensure the maintenance of product differentiation, it had to make sure of this afterwards within the group, with the collaboration of the manufacturer Farmoplant. Unless there had been a previous assurance given to Stähler, there would have been no obvious reason for MED to have expressly confirmed once again, within the group, a practice of product differentiation that had been pursued for many years.

(112) The objection raised by MED and Farmoplant during the hearing that the telex of 22 May 1985 was an intra-group agreement and that it should not be made use of is not sound. Even if the agreement referred to in the telex were a purely intra-group agreement between MED and Farmoplant, the Commission is not prevented from using the document in conjunction with other evidence to prove an agreement with a third party not belonging to the group.

(113) The overall assessment of the evidence set out in recitals 98 to 112 above shows that, within the framework fo the continuing commercial relationship between the parties, an agreement was entered into for the granting of absolute territorial protection through product differentiation.

(b) Duration of the agreement

(114) The agreement began after the appearance of the parallel imports of Elancolan at the beginning of 1983 at the latest (see recitals 101 and 102) and lasted until the annulment of the distribution agreement on 31 December 1988. MED and Agrimont stated at the hearing that the *raison d'être* for the product differentiation agreement had already ceased to exist with the entry into force of the amendment to the German Plant Protection Law on 1 Janaury 1987 (see recital 47). However, for all practical purposes that amendment merely excluded cases where — in the case of Zera-Trifluralin — the imported plant protection product was registered under a new trade name. However, the parallel importation of Digermin under the same trade name was not affected by the amendment to the Law.

(c) Parties to the agreement

(115) MED must not be regarded as Stähler's only partner in the agreement on product differentiation, since only Fermoplant was in a position to implement the agreed product differentiation and to maintain the registration of differing formulations in the Member States. Consequently, both MED and Farmoplant must be regarded as parties to the agreement concluded with Stähler.

3. *Anti-competitive nature of the agreement*

(116) Under Article 85 (1) the agreement is prohibited if it has the object or effect of restricting competition. Since the agreed product differentiation was aimed, using registration requirements, at preventing parallel imports, it is clear that the agreement had such an object.

In response to the Commission's enquiries, Agrimont at first put forward several reasons why the registration of differing formulations in Germany and other Member States was objectively necessary for legal or economic reasons. Then, at the hearing, further reasons were specified. As is explained below, none of those reasons is appropriate or sufficient to show any objective need for product differentiation that might make it appear impossible or unreasonable, even at a later point in time when an anti-competitive objective was added, to behave any differently than to make use of the existing product differentiation and the differing registrations.

(a) Chronology of the registrations

(117) The fact that the registrations followed on from one another chronologically, which Agrimont and MED adduce as an argument negating the existence of any agreement, is not in itself any reason for the registration of differing formulations. The sequence of the registrations is, leaving aside the quite different chronological order in which the applications for registration were submitted, primarily due to the different times at which Eli Lilly's patents for trifluralin expired in the Member States.

(b) Differing requirements in the Member States

(118) Agrimont asserted only cursorily that the formulation '73 D' used for the later registrations corresponded to the requirements of the relevant countries (United Kingdom, Italy, France and Spain). Despite the Commission's requests, it was not explained what these differing requirements were and what the consequences were for the formulation.

(119) In response to the Commission's enquiries, the registration authorities in Germany and France confirmed that the formulation registered in the one country could in principle have been registered in the other country. The results of trials on efficacy and on the persistence of residues might possibly have had to be presented.

(120) Although Agrimont emphasized on several occasions that the requirements of the German registration authority were particularly strict, it did not offer any explanations of why it had not taken the obvious step of trying to have the formulation registered in Germany also registered in other Member States. This would have been an obvious course of action — at least in Member States with comparable climatic conditions. The Commission therefore maintains, for the abovementioned reasons, that the assertion that the registration requirements in the Member States necessitated the differing formulations registered by Farmoplant is not well-founded.

(c) Registration costs

(121) The high costs of first registration of Digermin to which Agrimont refers (see recitals 75 to 77) would suggest *prima facie*, with a view to saving unnecessary costs, that there should have been uniform registration in as many countries as possible; they do not constitute a comprehensible reason for the maintenance, unchanged, of the registration of differing formulations.

(122) Similarly, the argument adduced by Agrimont that the high costs of registering an amended formulation made any subsequent alteration of the 'German' formulation economically unacceptable does not stand up. If the costs for altering a registration were really so prohibitive, it is inexplicable how Farmoplant and MED came on several occasions to consider changing the formulations of Digermin and other herbicides without any discussion of the costs that would attend such changes in the registration (see recitals 76 and 87). That conclusion is confirmed by Montedison Belgio's report to Farmoplant in 1982 of the substantially lower costs of a change in registration of plant protection products in Belgium (see recital 84).

(123) Moreover, it could not be deduced from the cost situation that the subsequent exploitation of the existing registration situation to fulfil an agreement on the partitioning-off of the German market was not used for the purposes of restricting competition.

(d) Production costs

(124) Despite several written requests from the Commission for the reasons for registering differing formulations, it was not until the hearing that Agrimont and MED, for the first time, stated that amongst other things lower production costs were crucial to the subsequent registration of a different formulation in Member States other than Germany (see recital 79). Although the registration applications had been made earlier or simultaneously in Italy and Spain, the possibility had existed there of changing the formulations applied for.

In the Commission's view, however, this reason cannot be accepted as valid. On the one hand, the statements of Farmoplant/Agrimont on the composition of the formulation are contradictory. On the other, as regards the question whether the agreement with Stähler had as its object a restriction of

competition, it is irrelevant what motive underlay the original choice of the formulations. Furthermore, the possibility of saving production costs would rather suggest bringing the German registration into line with that in the other Member States. At any rate, in the face of the facts evincing the efforts to partition off the German market (see recitals 81 to 91), Agrimont did not adduce any facts whatsoever to show that an attempt to bring the 'German' formulation into line with that in the other Member States was not made for cost reasons alone.

(e) Patent protection

(125) Despite repeated enquiries by the Commission as to the reasons for the registration of differing formulations, it was not until the hearing that Agrimont and MED for the first time stated that the choice of a formulation differing from Elancolan was intended to ensure that Eli Lilly's German patent for trifluralin was not infringed. The product differentiation was thus — at least as far as Germany was concerned — allegedly called for by consideration of the patent situation (see recital 80).

Despite questions put by the Commission at the hearing, it remained unclear whether and to what exent the patent protection, which according to the documents presented applied solely to the active ingredient trifluralin, was relevant at all to the admissibility of its use in field tests during the term of the patent. Although precise information regarding patent protection and its duration had been obtained from MED before the registration of Digermin in Germany, the relevant documents (see recital 80) do not give any indication of awareness of such a problem. In response to the Commission's repeated previous enquiries as to the reasons for the registration of differing formulations, Agrimont and MED consistently cited other reasons (see recitals 117 to 124). The Commission therefore takes the view that MED's objection that the differing formulation for Germany had been chosen mainly in order to avoid the risk of patent infringement is not convincing.

(f) No misuse of legal forms

(126) Agrimont accused the Commission during the hearing of trying to deal under Article 85 with facts and circumstances that obviously related to Articles 30 and 36 of the EEC Treaty. Instead of using Article 30 to attack the German Plant Protection Law, which gave protection against imported products that were not identical to the product registered in Germany, the Commission was indicating the private undertaking which had taken advantage of those legislative provisions.

That objection is not valid, since in the present case it is not the legislative provisions and their unilateral exploitation which is in question, but the conclusion of an agreement between undertakings relating to anti-competitive conduct.

4. *Appreciable effect on trade between Member States*

(127) As a result of the agreement to maintain product differentiation so as to partition off the German market and thus maintain the high-price policy, trade between Member States was adversely affected. Despite the substantially higher level of prices in Germany, imports from other Member States into Germany were significantly impeded. The German market was accordingly isolated and competition with a substantial part of the common market was thereby impeded. Significantly, when parallel imports of Digermin appeared in 1983 and 1984, prices on the German marked immediately fell appreciably.

(128) The effect on intra-Community trade is also appreciable, since the market share of Digermin in the relevant market is not inconsiderable. In the Commission's view, the relevant market is the trifluralin-based rape herbicides registered in Germany together with the products Butisan-S and Pradone Kombi (see recitals 15 to 18). Digermin's share on this product market is well over 5 %, namely 11 to 13 % (see recitals 19 to 21). The objection raised by MED at the hearing that other products, such as Teridox, Lasso and Devrinol, should be included in the assessment of the relevant market does not affect the appreciability aspect, since, even taking MED's submission into account, Digermin's market share during the period in question would not fall below 5 %. Furthermore, market share is only one of the criteria to be taken into account in determining the appreciability of the restriction of competition. This is in any case evident from the fact that the relevant undertakings MED and Farmoplant are wholly owned subsidiaries of a large international company, so that, on the basis of turnover parameters, it is not possible to regard the case as being of minor importance.

5. Non-applicability of Article 85 (3)

(129) The agreement is not eligible for exemption under Article 85 (3). The agreement was not notified in accordance with Article 4 (1) of Regulation No 17 and is not covered by any of the exceptions provided for in the second paragraph of that Article. Even if the agreement had been notified, the conditions provided for in Article 85 (3) would not have been met. The arrangement entered into does not contribute to improving the production or distribution of goods or to promoting technical or economic progress. Rather, the importation of cheaper Digermin into Germany was prevented. There is no obvious way in which consumers were allowed a fair share of any resulting benefit; on the contrary, the agreement and its implementation through the maintenance of product differentiation made it possible in Germany to maintain a significantly higher level of prices, with no obvious compensatory benefits for consumers.

6. Parties to whom the Decision is addressed

(130) During the period covered by the Decision, the plant protectants sector within the Montedison group was allocated entirely to Farmoplant and Agrimont. However, Montedison's subsidiaries in the Member States were not in a subsidiary-parent company relationship with Farmoplant/Agrimont, but belonged to anoher parent company within the same group. Furthermore, plant protectants represented only a part of the turnover of such subsidiaries. The Commission does not have any information to indicate that other group companies apart from Farmoplant/Agrimont had responsibility for this product sector. Consequently, it appears appropriate to address the Decision to the two group companies concerned.

The corporate divisions as such survived the legal transition to EniChem and the merger with the group companies EniChem Agricoltura SpA and EniChem Deutschland AG. They were, of course, transformed into dependent divisions or branch establishments of the EniChem companies, but this does not alter the economic and functional continuity. The Decision is consequently to be addressed to the abovementioned EniChem companies as legal successors.

7. Article 3 of Regulation No 17

(131) Since the infringement ended with the annulment of the distribution agreement between MED and Stähler, there is no longer any reason to require the undertakings concerned, in accordance with Article 3 of Regulation No 17, to bring the infringement to an end. The Commission is not aware of any facts indicating that the agreement between the undertakings concerned has been resumed.

(132) It has been the Commission's consistent practice to issue a Decision recording an infringement, even in cases where the parties have brought the infringement to an end, if the Decision — as in this case — is needed to clarify a point of law. Such a practice makes for legal certainty and has been endorsed by the Court of Justice in Case 7/82, GVL v. Commission [1],

HAS ADOPTED THIS DECISION:

Article 1

Farmoplant SpA, Milan (subsequently Agrimont SpA), Montedison Deutschland GmbH, Eschborn (subsequently Montedison (Deutschland) Chemie Handels-GmbH) and Stähler Agrochemie GmbH and Co KG have infringed Article 85 of the EEC Treaty by participating, between the beginning of 1983 and the end of 1988, in an agreement under which Farmoplant and Montedison Deutschland undertook to afford Stähler absolute territorial protection through product differentiation in respect of the plant protection product Digermin, in order thereby to protect the German market against parallel imports from other Member States.

Article 2

This Decision is addressed to:

— EniChem Agricoltura SpA,
Via Medici del Vascello 40/C,
Casella Postale 12120,
I-20138 Milano,

— EniChem Deutschland AG,
Sonnenstraße 23,
D-W-8000 München 2,
and

— Stähler Agrochemie GmbH & Co, KG,
Postfach 2047,
D-W-2160 Stade.

Done at Brussels, 22 June 1993.

For the Commission
Karel VAN MIERT
Member of the Commission

[1] [1983] ECR 483, paragraph 25.