

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 4 December 1986

in proceedings under Article 85 of the EEC Treaty

(IV/31.055 — ENI/Montedison)

(Only the Italian text is authentic)

(87/3/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 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 19 October 1983 by Ente Nazionale Idrocarburi, Rome ('ENI') and Montedison SpA, Milan ('Montedison'), concerning a set of agreements between them which had come into effect on 17 March and 27 September 1983,

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

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

Whereas :

I. THE FACTS

A. Subject of the Decision

- (1) This Decision concerns a set of agreements between ENI and Montedison under which they transferred to one-another part of their basic

chemicals and thermoplastics businesses and a number of further agreements concerning supply and plant operation arrangements and licensing of patents and know-how. The Decision also concerns agreements between ENI and Montedison to shut down, reduce the capacity of, or convert certain plants or facilities.

B. The undertakings

- (2) ENI is the Italian state holding company for the energy sector. It was originally set up to explore and develop domestic oil and gas reserves as a contribution to supplying the country's energy needs. Later it expanded its activities on a multinational scale into all parts of the energy and related sectors, including petrochemicals (run by the subsidiary Enichem). ENI's consolidated turnover in 1982, when the agreements in question were signed, was Lit 37 228 billion (approximately 28,50 billion ECU).
- (3) Montedison is a diversified privately-owned Italian group whose traditional core businesses are in the chemical and pharmaceutical industries. It has a worldwide sales organization and production facilities in several countries. Montedison has recently been engaged in a major restructuring of its activities, of which the operations concerned by the present agreements are an important part. The group's turnover in 1982 was approximately Lit 9 019 billion (approximately 7 billion ECU).

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 199, 8. 8. 1986, p. 4.

C. The products and their markets

- (4) The products concerned by the agreements are all derivatives of naphtha, the basic feedstock used in the European petrochemical industry. They are, in particular, the base chemicals (ethylene, propylene, benzene and C4-butadiene), the thermoplastics (low-density polyethylene (LDPE), high-density polyethylene (HDPE), linear low-density polyethylene (LLDPE), polypropylene (PP), polystyrene (PS), polyvinyl chloride (PVC), acrylonitrile-butadiene-styrene (ABS)), and other products of less importance for the two groups because their production capacity was limited (such as acrylic resin and nitrile butadiene rubber — NBR).
- (5) The markets for the products in the Community are closely linked to the state of the European petrochemical industry. After steadily expanding until the early 1970's, the industry was caught with structural overcapacity for most products which put many producers into difficulties and forced them to look for ways of reducing their capacity. This was reflected in the Community by individual closures or through bilateral agreements. In Italy, the ENI/Montedison agreements were the centrepiece of a Government plan, known as the 'Chemical Plan', drawn up in 1981 to rationalize the Italian petrochemical industry.

The markets for the basic chemicals concerned in the ENI-Montedison agreements (ethylene, propylene, etc.) are not totally transparent owing to the logistics of transport — which for economic and safety reasons is often by pipeline, leading to *de facto* links between supplier and customer — and the high proportion of each producer's output that is consumed within the business. Therefore, the capacities of the 25 Western European producers are not reflected by sales on the free market which are difficult to define.

However, the markets for thermoplastics (which account for the greater part of the value of the businesses transferred under the agreements) are more transparent. A large number of producers operate on these markets in the Community and in each Member State, and are active in inter-State trade: an estimation of each market share is, therefore, possible, and the results of these estimates are summarized below.

D. The agreements

- (6) The agreements between ENI and Montedison were signed on 31 December 1982 and the asset transfers to ENI and Montedison took effect on 17 March and 27 September 1983, respectively.

Except where otherwise specified below, the basic agreement involved the reciprocal transfer of certain lines of business and all fixed and intangible assets, including research facilities, know-how, patents, production units, distribution organizations, and their staff, leading to *de facto* specialization by each party.

- (7) As for the transfer of assets, the main elements of the arrangements were as follows:
- (a) Montedison transferred part of its cracking business (ethylene and other naphtha derivatives) to ENI, retaining however its cracking business carried out at the Porto Marghera site.
 - (b) Montedison transferred its LDPE, LLDPE, HDPE, ABS, PVC, acrylic resin and NBR businesses to ENI.
 - (c) ENI transferred its PP and PS businesses to Montedison. To make up the difference in value between the assets it had transferred to Montedison and those it had acquired, ENI also paid Montedison a certain sum in cash.
 - (d) Some exceptions were made from the asset transfers. A number of obsolete plants that it was planned to close down, notably Montedison's acrylic resin and NBR units at Rho, and its PVC unit at Terni and ENI's polystyrene unit at Porto Torres, were not transferred, but instead the other party was given an exclusive licence to distribute their output during the transition period until the closure. These units have all since been closed, except for the acrylic resin unit, which is scheduled for closure.
 - (e) Also excepted from the transfers were a number of versatile patents and unpatented technologies which also had valuable applications in the transferor's business. They were therefore not assigned along with the business transferred but only licensed to the transferee under a non-exclusive licence.
- (8) The parties also entered into a series of supply and plant management contracts to cope with the new situations created by the dual ownership of plants, or complexes of plants, which had been designed as integrated petrochemical operations but in which some facilities were now owned by one party and some by the other. Most of the supply contracts covered supplies of

basic materials, often via existing pipelines, and provision of services and utilities, usually by the original site owner. Under the management contracts, the original owner of transferred production units was to continue to manage and operate the units for a time for the new owner. All these management contracts ended before 1986, except those relating to the PVC business in Porto Marghera and Mantova which are still in force.

The supply contracts were concluded for varying, and in some cases indefinite, periods, subject to a possibility of termination. In case of transfer of assets to a third company, each party can rescind the contract if there are reasonable grounds (Article 2558 Italian Civil Code). Basic materials supplied under long-term contracts are priced at, or slightly below, the NWE (North-West European) contract price. The quantities of these basic materials to be supplied are generally stipulated in the contracts; in the case of utilities, the quantities to be supplied depend on requirements at each plant. About 70 % of the products supplied between the parties are made up of the basic chemicals (ethylene, propylene and benzene); the remainder comprises small quantities from within the same complex of basic materials such as hydrochloric acid and gas, hydrogen, chlorine, suspension agents.

(9) As required by Italian law (Article 2557 of the Civil Code) on transfers of businesses, the agreements imposed an obligation on the seller of the business not to compete with the buyer for five years. The non-competition clauses applied within Italy and in the rest of the world.

(10) For practical reasons related to Italian legal requirements, the two groups assigned the businesses transferred to non-trading subsidiaries — Riveda in Montedison's case and Savitri in ENI's case — whose shares were then acquired by the other party.

E. Economic and structural impact of the agreements

(11) The agreements give effect to the respective industrial strategies adopted by ENI and Montedison. The selection of the businesses in which each was to concentrate was based on a study of their relative strengths, in terms of technology, marketing expertise, production facilities, and

objectives, in the main thermoplastics products. It was also to some extent prompted by a desire to move back to their original core business, which in ENI's case lay in the oil industry and, in Montedison's case, in the chemical industry.

(12) Montedison was stronger in PP, PS and HDPE, whilst ENI was stronger in LDPE, PVC, ABS, acrylic resin and NBR. In the basic chemicals the two groups were fairly even. The agreements reflected their relative strengths, except in the case of HDPE, which was transferred to ENI despite Montedisons' stronger position in this product. It was felt that to separate it from the other polyethylenes would upset the symmetry of the transaction, especially as the market tends to regard the polyethylenes as different varieties of a single product. With regard to the basic chemicals businesses, Montedison transferred to ENI all its crackers (excluding that at Porto Marghera) since the main product of cracking, ethylene, was needed by ENI as the basic raw material for its polyethylene and PVC production.

(13) As well as enabling the parties to specialize, the agreements also provided an opportunity for slimming down the consolidated businesses, another objective of the companies' strategies and the Chemical Plan. ENI and Montedison were therefore able not only to make and implement plans for converting or closing down plant which was obsolete or did not fit into the new integrated operations, but also to cancel the building of new plant not justified by demand.

(14) ENI and Montedison have carried out in connection with the agreements the planned closures and similar measures.

(15) The closure and other measures have reduced ENI and Montedison's combined capacity for the main products concerned by the agreements as follows: by 19 % for ethylene, 39 % for LLDPE/LDPE, 2 % for HDPE, 16 % for PVC, 21 % for PS, 40 % for expandable PS and 7 % for PP. There has been no change in their capacity for ABS, butadiene, chlorine, dichloroethylene (EDC) and vinyl chloride monomer (VCM).

(16) The rationalization, however, also immediately changed the two groups' positions on their markets. The main changes of relevance to competition and trade between Member States were in the thermoplastics markets. The resulting

situations have been examined both on the wider Community market for the products and in Italy, where the impact was greatest.

- (17) The data available to the Commission show that, at the time the agreements were signed, a substantial share of each market, both in Italy and in the Community as a whole, was supplied by competitors of ENI and Montedison. In Italy, the principal market of the parties, the proportions supplied by competitors (importers or producers) are estimated to have been as follows: 47 % for LLDPE and LDPE; 63 % for HDPE; 55 % for ABS; 39 % for PVC; 43 % for PP; 47 % for standard and high-impact PS, and 55 % for expandable PS. In the EEC, competitors of ENI and Montedison supplied 90,5 % of LLDPE and LDPE, 93,5 % of HDPE, 88,5 % of ABS, 87 % of PVC, 80,5 % of PP, 86,5 % of standard and high-impact PS, and 91 % of expandable PS.

F. Comments of interested parties

- (18) No comments opposing the present agreements were received from third parties in response to the Commission's Notice pursuant to Article 19 (3) of Regulation No 17. However, an organization representing plastics transformers warned that further reductions in the number of suppliers of certain products could create difficulties for users.

II. LEGAL ASSESSMENT

- (19) The agreements between ENI and Montedison 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)

- (20) ENI and Montedison 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*

- (21) The agreements had two main economic consequences. In the first place, with regard to the

thermoplastics sector, each of the parties previously produced and distributed a full range of these products. The agreements provide for them to swap parts of their respective thermoplastics businesses so as to leave each party producing a smaller range of products not overlapping with that of the other party. Secondly, with regard to the cracking sector, and also to a lesser extent the thermoplastics sector, after the agreements both parties were able to close a certain number of production units.

- (22) The agreements must be analysed as a whole, consideration being given to their economic consequences. In the circumstances of this case, these agreements between ENI and Montedison have the object and effect of restricting competition within the common market:

- the agreements to swap assets lead to a specialization in thermoplastics, but left both parties as potential competitors in the field given over to the other party,
- one of the main aims of the agreements was to permit a reduction of capacity,
- in order to achieve both the specialization and the reduction in capacity, there was a necessity for continued cooperation between the parties who remain both actual and potential competitors,
- the asset swaps leading to specialization and reduction of capacity with the necessity for continued cooperation between the parties cannot be regarded as simple transfers of assets outside the scope of Article 85 (1).

(i) Specialization

As a result of the agreements the parties cease to produce certain thermoplastics and concentrate on others. In effect, the agreements provide on a reciprocal basis that production and distribution for part of each parties' activities are to be carried out by a competitor. The result of this specialization is a sharing of markets between the parties which substantially eliminates the competition that previously existed between them. These restrictions on competition and specialization are formalized and made legally binding by the reciprocal non-competition clause stipulated for five years in the basic agreement. In addition, and for the reasons explained below, even after the specialization and plant closures, the parties still remain actual and potential competitors who are forbidden to compete.

(ii) Reduction of capacity

One of the principal aims of the agreements was to allow each party to reduce more capacity than would have been possible by unilateral action. The aim was to close capacity not only for certain thermoplastics but also more importantly for crackers. In particular, the closure of the crackers transferred by Montedison to ENI would have taken place more slowly and to a lesser extent if Montedison had rationalized unilaterally and without any cooperation from ENI. Agreements between competitors designed to close plants and limit capacity, by their very nature, have a direct effect on competition.

(iii) Necessity for continued cooperation between the parties

The continued operation of certain production units by the original owner under supply or management contracts, and the reciprocal contracts by which the parties largely or exclusively supply products required in downstream businesses transferred to the other party, are necessary for the effective operation of the transferred assets. Each party is dependent on continued cooperation from the other in order both to specialize in a limited range of products and to carry out the reduction in capacity. This continued cooperation is a necessary and integral part of the whole arrangement. Mutual cooperation between two parties which is necessary to produce goods where both remain as actual or potential competitors is bound to have a direct impact on competition between them. In addition, this cooperation increases the potential for competition by the operator of the plant or the supplier of the raw materials in businesses which have been given over to the other party as part of the specialization arrangements. Each party retains the capability and expertise for producing the products required in the downstream businesses at least for a time, in the case of the management contracts, and indefinitely in the case of many of the supply contracts.

Furthermore, in the context of the present case, the reciprocal supply contracts between ENI and Montedison tend to restrict competition with third parties. Although they are

not explicitly exclusive, are of limited duration and priced at or near market prices, the arrangements are all automatically renewable without any definite expiry date. Moreover, they concern mutual supplies between facilities connected by pipeline often on the same site or between sites designed as parts of an integrated petrochemical operation. The arrangements virtually tie the parties to obtaining their requirements from one-another, and in practice exclude competitors from supplying the products or the parties from selling to third parties.

(iv) Not a simple asset transfer

In the circumstances of the present case, the economic effects of the reciprocal asset swaps must be seen as a whole: the result is a *de facto* specialization accompanied by concerted action to reduce capacity. In addition, and for reasons set out below, both parties still remain actual and potential competitors, even though they are forbidden for a time from competing. Furthermore, the parties have not withdrawn completely from the sector and they are dependent on each others' cooperation for the continued effective operation of certain of their newly acquired assets. Therefore it cannot be argued that the agreements constitute simple assets transfers outside the scope of Article 85(1), nor can it be argued that the non-competition obligation is required by the Italian Civil Code because the agreements as a whole have objects and effects which go beyond the situation described by Article 2557 of the Italian Civil Code.

(23) Parties still remain actual and potential competitors

Even though the parties are temporarily forbidden from competing, they still remain actual competitors in the field of cracking because they both retain cracking capacity. In addition, they remain potential competitors for thermoplastics.

- (i) For two groups as large as ENI and Montedison with their extensive technological expertise, and with the active presence they have both retained in the upstream cracking businesses, it would be comparatively easy and cheap for them to re-enter the down-

stream businesses which they have transferred to the other party. The cracking businesses retained by both parties provide the feedstock required for all the thermoplastics, even those given over to the other party. In this respect, the parties' positions cannot be compared to that of a firm desiring to enter the market for the first time without a strong base in the upstream businesses or experience in the downstream ones.

- (ii) Potential competition was also maintained by the decision to license, rather than assign outright, certain patents and know-how. While there were good technical reasons for not assigning technology that was also important in the transferor's business, the retention of such technology undoubtedly allowed the parties to keep access to the technology and to keep abreast of improvements made to it in each other's business. This is particularly important where it is technically and economically feasible for both parties to convert certain of their retained thermoplastics production units to produce the thermoplastics given over to the other party as part of the specialization arrangements.
- (iii) As stated above, the necessity for continued cooperation between the parties, in the form of management and supply contracts, increases the potential for competition.

(b) *Effect on trade between Member States*

- (24) The agreements between ENI and Montedison concern products in which there is substantial intra-Community trade. Both firms export them to other Member States and significant volumes are imported into Italy by competitors from other Member States. As a result of the agreements the whole structure of competition is substantially changed from the point of view both of consumers and of other producers in Italy and in the rest of the EEC.

(c) *Refusal of negative clearance*

- (25) In support of their primary application for negative clearance, the parties submitted that, in their coordinated withdrawal from certain product lines, they were acting under the directives of the Italian Government as set out in the 'Chemical Plan', and only doing what they would have done anyway, separately, in pursuit of their respective corporate strategies. However,

these factors do not render Article 85 (1) inapplicable. Firstly, the role of government planning was not so large as to absolve the parties completely of responsibility for their agreements. Secondly, while it is true that market forces would anyway have induced the parties to reduce their exposure in thermoplastics and to withdraw from some markets, this would have been a much more gradual process and would have led to a less clear-cut division of labour between the parties than occurred under the agreements.

B. Article 85 (3)

- (26) The agreements between ENI and Montedison 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 consumers a fair share of the resulting benefit. They neither impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, nor do they afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- (27) The exemption is justified because the agreements are an essential first step in the rationalization of ENI's and Montedison's petrochemical business which forms part of an industry suffering serious structural overcapacity in the whole Community. As a result of the agreements, the parties were able to restructure their businesses more quickly and fundamentally than would have been possible individually.
- (28) The agreements thus produce objective benefits — notably in reducing the excess capacity in an industry 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

- (29) Through cooperation the two groups will rationalize, more quickly and radically than was possible without cooperation, by concentrating on a few core businesses and discarding others in which they were less competitive and which dragged down their general performance. Besides improving technical efficiency and giving each party a less scattered set of assets, the rationalization also provided an opportunity for closing

down obsolete production plant and cancelling investment in new plant no longer required. It also enabled the parties to absorb more easily at a financial and commercial level the closures they have previously carried out separately.

- (30) Under the agreements, ENI and Montedison were able to slim down their operations after the excessive expansion of the 1970's. The more rational location of assets reduced the need for costly transportation of by-products and chemical intermediates and brought the production centres closer to their markets. Because of the plant closures, production will concentrate on the most modern plant which could then be utilized at a higher level of capacity. This allowed fixed costs (which are relatively high in this industry) to be spread over a larger output, thus reducing unit costs. The narrower product range also provided an opportunity to concentrate R & D resources on a smaller number of areas, so increasing the potential rate of technological innovation in production which could also reduce variable costs.

- (31) It must also be noted that overcapacity and over production in the European petrochemical industry are deep-rooted structural problems and the drastic changes required would have taken longer to achieve had they been left to market forces. The ENI/Montedison agreements not only significantly accelerated the trend towards the restoration of balance between supply and demand in the common market, but also allowed the parties to go further with such closures than they could have done individually.

- (32) The consequences of the closures can be seen by the increases in the plant operating rates after the coordinated rationalization. The operating rate for HDPE, for example, went up from 37,8 % and 35,2 % of capacity in 1981 and 1982 to 61,7 % and 72,3 % in 1983 and 1984. For LDPE it rose from 42 % and 45,5 % in 1981 and 1982 to 62,5 % and 76,6 % in 1983 and 1984. For PP it rose from 55 % and 57 % in 1981 and 1982 to 67 % and 68,6 % in 1983 and 1984. The operating rates for PVC fluctuated but rose slightly: from 62,4 % and 60,8 % in 1981 and 1982 they remained at 61,5 % in 1983 but rose to 67,5 % in 1984, only to fall back again slightly in 1985 to 66 %.

Advantages for consumers

- (33) The agreements between ENI and Montedison allowed consumers who are mostly in the plas-

tic-processing industry a fair share of the resulting benefits. First of all, they ensured customers continued supplies of products of equivalent quality to those available previously. If the parties had decided separately to close certain plants or to run down certain businesses — as their heavy losses would probably have forced them to do sooner or later — their customers would in the short and medium term have suffered from interruptions or reductions in supplies and deterioration in quality. Secondly, under conditions where workable competition is maintained — as is the case here — in the medium term consumers will obtain benefits from the cost savings which the rationalization made possible. In particular, the agreements will permit each party to increase the loading of plants, which will bring about reduced unit costs: in fact, in the sectors under reference there are high fixed costs such that under-utilization of capacities leads to large increases in unit costs.

Furthermore, the agreements will allow ENI and Montedison to concentrate on the product lines in which they were more efficient and to close down loss-making facilities. Thus, consumers will benefit in the long term since, this will permit each party to finance new investment and research and development, rather than just cover operating costs.

Indispensability of the restrictions

- (34) The agreements between ENI and Montedison with the restrictions of competition that they entail were, in the context of structural overcapacity, indispensable to the attainment of the abovementioned objectives. As noted above, the radical reorganization which the agreements made possible could not have been achieved so quickly, or have been so far-reaching, had it been left entirely to market forces and individual action. The reciprocal non-competition clause, which in this case is limited to five years, is indispensable for the formalization of the whole agreement.

- (35) Neither of the parties was capable alone of carrying out to the same extent the necessary capacity reductions. In fact, because of the specific integrated nature of petrochemicals, there is an evident link between the downstream and upstream market: every capacity reduction downstream has a knock-on effect on the upstream activities at the other end of the production process. Cooperation between the parties on the

plant closures allowed them to minimize this adverse knock-on effect which otherwise could have had serious consequences for plant viability. Montedison's position was vulnerable, its financial resources previous to the agreement were reduced by huge losses and yet it faced the costs of enforced plant closures which it was unable to pay for by savings or improved profits elsewhere. ENI's petrochemical businesses, too, were making heavy losses which were depressing the group's overall performance despite the profits being made from its mainstream oil and gas interests. Before putting money into a reorganization of the petrochemical businesses, the group therefore wanted to be sure that the reorganization would put them back on their feet and not just prop them up temporarily or delay the inevitable end. For this purpose, the achievement of which was in the general interest of the Community petrochemicals industry, a division of businesses with Montedison, on the lines agreed, was the only practicable option.

- (36) As to the indispensability of the arrangements whereby the original owner of a plant continued to operate it on the new owner's behalf, it should be noted that some of these arrangements were interim solutions pending the closure of obsolete plant which for labour reasons had been left to the original owner; all such plants have now been closed except for an acrylic resin unit at Rho which is to be closed. The other arrangements of this nature were almost all terminated within two years of the agreements' taking effect. The only ones still in force are those at Porto Marghera and Mantova, where Montedison operates for ENI facilities connected with the PVC business (dichloroethylene, oxy. dichloroethylene, vinyl chloride monomer, expandable PVC, PVC compound, chlorine, plasticizers and agents for plasticizers), which although transferred to ENI as part of the asset swaps are in plants otherwise wholly owned and operated by Montedison, so that there is still a practical need for the arrangements.

- (37) The reciprocal supply contracts between ENI and Montedison were indispensable for attaining the objectives of the agreements for logistical and economic reasons arising from the situation prior to the agreements. In some cases, they covered supplies of raw materials or intermediates from facilities owned by one party that were connected (often by pipeline) with facilities transferred to the other party. The ethylene swap, whereby Montedison supplied ethylene to ENI from a plant in the North of Italy and ENI supplied it to Montedison in the South of Italy,

illustrates the essentially logistical considerations underlying these arrangements. Other contracts to supply intermediate products or small quantities of raw materials or to provide utilities or special services within the same plant were equally indispensable in the circumstances, in view of the cost advantages they offered. Moreover, both parties are free to terminate the contracts and purchase or sell the products elsewhere if the circumstances should change or the contracts cease to be to their advantage. The restrictions imposed are indispensable for operating the plants efficiently.

- (38) It is concluded that the ENI/Montedison agreements did not impose on the parties restrictions of competition that were not indispensable to the attainment of the objectives listed in Article 85 (3); less restrictive means would not have achieved the objectives as effectively.

Elimination of competition

- (39) The agreements between ENI and Montedison, and in particular their agreements to stop producing competing ranges of thermoplastics and to close certain plants, do not afford the parties the possibility of eliminating competition for a substantial part of the products in question.

- (40) As shown above in Part I of this Decision, partly because of the low transport costs, there is substantial trade in thermoplastics within the Community and indeed within Western Europe as a whole. Even though 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 does Italy. Therefore, although the agreements have substantially increased each party's individual production capacity for, and sales of, the products assigned to them in the rationalization, workable competition is still maintained both in Italy and in the common market.

- (41) As a result of the agreements, ENI became the leading Community producer of LDPE (12 %) and PVC (15 %) and Montedison's position as the largest EEC producer of PP (21 %) was strengthened. Even for the products where the agreements have most impact, workable competition is still not eliminated. This is so even though the sales of these products by the parties are particularly concentrated in Italy — the parties' principal market — because the possibi-

lity exists for competitors to increase sales there without particular difficulties. Commission investigations revealed that several non-Italian producers of the products in question have Italian selling subsidiaries which would facilitate increased penetration into the Italian market.

Duration of the exemption, conditions and obligations

- (42) 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.
- (43) In view of the nature of the agreements and the short- and medium-term outlook for the petrochemical industry and its markets, and in view particularly of the further rationalization being undertaken by the two groups, the appropriate duration of the exemption, which serves the objectives listed in Article 85 (3), is considered to be 15 years from the date of the notification of the agreements, that is until 18 October 1998.
- (44) To enable the Commission to check that ENI and Montedison scrupulously abide by these conditions, and that competition is not unduly or further restricted, the parties shall be required to submit a report to the Commission every three years, on the products assigned to them under the agreements. The reports should state the production and sales of each product by the party, or by subsidiaries or companies it controls in the common market as a whole and in each Member State; the amounts of output consumed internally within the group, giving the name and business of the producer and consumer; and full particulars of each company's total output of the products concerned in the EEC and in other countries. The report should be sent to the Commission within two months of the end of the period to which they refer. The first report should cover the period from 19 October 1986 to 18 October 1989.
- (45) Although the ENI/Montedison agreements are exemptable because they satisfy the conditions of Article 85 (3), they lead to a considerable increase in the parties' share of production capacity for, and sales of the relevant products in the Community and, more specifically, in Italy. In view 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 closely developments in all the sectors. Therefore, ENI and Montedison must be required to inform the Commission in advance of any further operation

in which they or their subsidiaries or associated companies will take part, with reference to the products and sectors under consideration in the present decision.

- (46) To enable the Commission to monitor the exempted agreements as required by Article 8 (2) of Regulation No 17, ENI and Montedison 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.
- (47) In addition, the Commission reserves the right to ask the parties to supply any other information it deems necessary to check that competition is not restricted more than this Decision allows.

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 19 October 1983 to 18 October 1998, to the agreements between Ente Nazionale Idrocarburi (hereinafter ENI) and Montedison SpA (hereinafter Montedison) which became effective on 17 March and 27 September 1983 involving a reciprocal transfer of certain lines of business in the petrochemical sector (base chemicals, thermoplastics and certain rubbers) and the contracts and behaviour associated with and dependent on these aforesaid agreements implying both plant closure and a *de facto* specialization by each party.

Article 2

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

1. ENI is required to submit, during the period of the exemption, a report every three years to the Commission, arriving not later than two months after the end of the period which it covers. The first report shall refer to the period from 19 October 1986 to 18 October 1989.

The report shall concern the activities related to LDPE, LLDPE, HDPE, ABS, PVC, acrylic resin, NBR and the cracking products. It shall state the production and sales of each product by ENI, or by subsidiaries or companies it controls, in the common market as a whole and in each Member State; the amounts of its total output of each product concerned in the EEC and in other countries, specifying the amounts of output consumed internally within the group, giving the name and business of the producer and consumer.

2. Montedison is required to submit, during the period of the exemption, a report every three years to the Commission, arriving not later than two months after the end of the period which it covers. The first report shall refer to the period from 19 October 1986 to 18 October 1989.

The report shall concern the activities related to PP, PS and the cracking products. It shall state the production and sales of each product by Montedison, or by subsidiaries or companies it controls, in the common market as a whole and in each Member State; the amounts of its total output of each product concerned in the EEC and in other countries, specifying the amounts of output consumed internally within the group, giving the name and business of the producer and consumer.

3. ENI and Montedison shall, individually, inform the Commission in advance of any further operation in which they, or their subsidiaries or associated companies, will take part with reference to the products and sectors under reference in the present decision.
4. ENI and Montedison shall, individually, inform the Commission in advance of any renewals or exten-

sions in the scope or nature of, or amendments or additions to, the agreements referred to in Article 1.

5. ENI and Montedison shall answer any request for any other information the Commission deems necessary to verify that competition is not restricted more than this Decision allows.

Article 3

This Decision is addressed to the following undertakings:

- Ente Nazionale Idrocarburi,
Piazzale Enrico Mattei, 1,
I-00100 Roma,
- Montedison SpA,
Foro Buonaparte, 31,
I-20100 Milano.

Done at Brussels, 4 December 1986.

For the Commission

Peter SUTHERLAND

Member of the Commission
