

COMMISSION DECISION

of 25 November 1980

relating to a proceeding under Article 85 of the EEC Treaty
(IV/29.702: Johnson & Johnson)

(Only the English and German texts are authentic)

(80/1283/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to Council Regulation No 17 of 6 February 1962 ⁽¹⁾, and in particular Articles 3 and 15 thereof,

Having regard to the application submitted to the Commission, pursuant to Article 3 of Regulation No 17, on 22 March 1979 on behalf of Eurim Pharm GmbH of Piding, Federal Republic of Germany,

Having regard to the Commission Decision of 21 June 1979 to initiate proceedings in this case,

Having heard the undertakings concerned in accordance with Article 19 of Regulation No 17 and having offered the undertakings concerned an opportunity of being heard in accordance with Commission Regulation No 99/63/EEC of 25 July 1963 ⁽²⁾, which opportunity the undertakings declined,

Having heard the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions delivered pursuant to Article 10 of Regulation No 17 on 30 November 1979,

Whereas:

I. THE FACTS

1. The subject of these proceedings is the practices of Ortho Pharmaceutical Ltd on the one hand, and Cilag Chemie GmbH (Alsbach) and Cilag Chemie AG (Schaffhausen) on the other hand, all three being subsidiaries of Johnson & Johnson Inc., who, by imposing restrictions on dealers in the United Kingdom and in Germany, hindered exports of Gravindex pregnancy tests, in particular from the United Kingdom to the German importer Eurim Pharm GmbH.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

A. The undertakings

Johnson & Johnson Inc., New Brunswick, USA

2. Johnson & Johnson Inc. (hereinafter called 'Johnson & Johnson') is one of the largest pharmaceutical and medical manufacturers in the world. Its turnover of \$ 2 914 millions in 1977 was divided as follows (in millions of dollars):

| | | |
|--|---------|------------------------|
| — Consumer (toiletries and hygienic products, including baby care items): | 1 266.7 | (136.6) ⁽³⁾ |
| — Professional (diagnostic, products, medical equipment, etc.): | 836.8 | (144.5) |
| — Pharmaceutical (prescription drugs, contraceptives, therapeutics, veterinary products): | 518.3 | (137.5) |
| — Industrial (textile products, chemicals, etc.): | 292.3 | (33.8) |
| Total | 2 914.1 | (452.4) |
| of which Europe: | 600.5 | (137.6) |

Johnson & Johnson has subsidiaries world-wide. In Europe it has 38 subsidiaries in 14 countries, including 28 subsidiaries in all Member States of the EEC except Luxembourg.

There is no central European office of Johnson & Johnson. The subsidiaries are responsible directly to the parent company in the USA. The activities of the European subsidiaries are limited to serving their respective national markets.

⁽³⁾ Figures in brackets represent the 'operating profit'.

Ortho Pharmaceutical Ltd, High Wycombe, UK

3. Ortho Pharmaceutical Ltd (hereinafter called 'Ortho UK') is a wholly-owned subsidiary of Johnson & Johnson. Its turnover in 1977 was about £ 4.6 millions. About 85 % of turnover was in pharmaceutical products, principally contraceptives, and the remaining 15 % in diagnostic products. The firm manufactures the largest part of its products itself. In a minority of cases, including Gravindex, the active ingredients are imported from other subsidiaries of the Group in the USA and are only processed by Ortho UK.

Cilag-Chemie GmbH, Alsbach, Germany and Cilag-Chemie AG, Schaffhausen, Switzerland

4. Cilag Chemie GmbH (hereinafter called 'Cilag Alsbach') was formed in 1950 and is a wholly-owned subsidiary of Cilag-Chemie AG of Schaffhausen, Switzerland (hereinafter called 'Cilag Schaffhausen'), which is in turn a 100 % subsidiary of Johnson & Johnson. Its turnover in 1977 was about DM 50 millions. The firm is engaged simply in assembly, packaging and marketing of products obtained from Cilag Schaffhausen. Its activities involve pharmaceutical (about 76 % of turnover) and diagnostic products (about 24 %). Besides Cilag-Alsbach, another wholly-owned subsidiary of Johnson & Johnson, Dr Molter GmbH, sells pharmaceutical products, including diagnostics, in Germany. Its turnover in 1977 was about DM 15 millions.

Eurim Pharm GmbH, Piding, Germany

5. Eurim Pharm is an independent company, engaged chiefly in importing drugs from other EEC countries into Germany and marketing them to hospitals and doctors. It was formed in 1975. Its proprietors are Andreas Mohringer, a chemist, and H. Leipold.

Mohringer joined the firm in October 1976, merging with it his own importing firm 'Mohringer Pharmazeutika', formed in April 1975.

Its present business concerns some 100 pharmaceutical products, from well-known manufacturers, as well as some 20 diagnostic products, including Gravindex slide tests.

B. The product

6. Gravindex is a diagnostic product for the detection of pregnancy. Like all pregnancy tests, it works by measuring the Choriongonadotrophin (HCG —

Placenta hormone) content of the urine. Two basic types of pregnancy tests may be distinguished:

- (a) tests carried out at home; these are intended for use by the women themselves, and may be bought from retail chemists;
- (b) tests carried out in the laboratory; these may be subdivided into two sub-types, the slide test and the tube test. Gravindex belongs to the first sub-type. Slide tests are claimed to take some three minutes; whereas the tube test may take from half an hour to over two hours. The disadvantage of the longer time taken for the tube test is compensated by the advantage of its being able to confirm a suspected pregnancy a full week earlier than the slide test.

In the Federal Republic of Germany, laboratory tests are mainly sold directly to doctors; in Great Britain, to hospitals, but also to pharmaceutical dealers.

These proceedings deal only with pregnancy tests intended to be carried out in the laboratory.

7. Each Gravindex test consists of two bottles, containing respectively 2 mg of antigen and 2 mg of antiserum. The active ingredients (antigen and antiserum) of all Gravindex tests sold in Europe are manufactured exclusively by Ortho Diagnostics Inc. of Rariton, New Jersey, USA, one of Johnson & Johnson's American subsidiaries.

Ortho UK receives the active ingredients directly from Ortho Diagnostics ready for filling and packaging in the United Kingdom. Cilag Alsbach receives the active ingredients, already in 2 mg bottles, from Cilag Schaffhausen. Cilag Alsbach is itself responsible only for packing and labelling.

8. In the Federal Republic of Germany there are at present eight different slide tests and seven different tube tests on the market. The most important supplier, from the point of view of both turnover and number of products, is the Dutch firm Organon, with five tests in its range and a share of the German market for laboratory pregnancy tests of about ... % ⁽¹⁾. After the market-leader Organon follow the two subsidiaries of Johnson & Johnson, Dr Molter (market share of about ... %, representing a turnover in 1978 of DM ... millions), and Cilag Alsbach (market share of about ... %, representing a turnover in 1978 of almost DM ... millions), and (with considerably lower market shares) Hoffmann-La Roche, Denver (USA) and the

⁽¹⁾ In the published version of the Decision, some figures have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

Dutch firm Chefaro, the products of which are traded in Germany by the firm Roland.

C. Prices

9. In the United Kingdom nine different slide tests and five different tube tests are marketed by 11 different enterprises. Of these enterprises Organon is the most important, next is Burroughs Wellcome, and Ortho UK takes the third place with a market share of about ... %, representing a turnover in 1978 of about £ As potential serious competitors can be named Hoffmann-La Roche (which has recently re-entered the UK market for laboratory pregnancy tests) and Mercia Diagnostics.

10. Total trade sales in the EEC of Gravindex pregnancy tests by the subsidiaries of Johnson & Johnson in the years 1973 to 1978 were:

| | |
|-------|------------------------|
| 1973: | ... EUA ⁽¹⁾ |
| 1974: | ... EUA |
| 1975: | ... EUA |
| 1976: | ... EUA |
| 1977: | ... EUA |
| 1978: | ... EUA |

11. Although the active ingredients of the Gravindex pregnancy tests all come from Ortho Diagnostics (USA) and the subsidiaries such as Ortho UK and Cilag Alsbach only have to bottle and/or package them, there are big differences between the selling prices of Gravindex pregnancy tests throughout the common market. Prices are highest in Germany and lowest in the United Kingdom. In 1977 the Cilag-Alsbach price was 3.75 times the price charged by Ortho UK to dealers. Chart I shows the prices of Gravindex slide tests in the different Member States in the last six years and the differences between them.

12. Eurim Pharm imports Gravindex slide tests from the United Kingdom into Germany. It purchases these tests from various British chemists. In Germany Eurim Pharm sells the tests in the original packing together with the German registration number and instructions in German. Its selling prices are about 25 % lower than those of Cilag Alsbach, even after the goods have passed through the hands of an additional middle-man (the UK wholesaler or retailer).

Eurim Pharm's selling prices, and those of Ortho UK and Cilag Alsbach, are set out in Chart II.

⁽¹⁾ EUA: European units of account (calculation based on the mean unweighted exchange rate throughout each year).

CHART I

Prices of Gravindex slide tests excluding VAT charged by Johnson & Johnson subsidiaries to dealers

(25 test pack except where otherwise stated)

| | 1973 | | 1974 | | 1975 | | Price index calculated for each year on base UK = 100 | | |
|----------|-------------------------|--------|-------------------------|--------|-------------------------|--------|---|------|------|
| | | EUA | | EUA | | EUA | 1973 | 1974 | 1975 |
| D (DM) | 90·91 ⁽¹⁾ | 27·747 | 90·91 | 29·482 | 90·91 | 29·812 | 372 | 401 | 393 |
| UK (£) | 3·75 ⁽¹⁾ | 7·465 | 3·75 ⁽¹⁾ | 7·356 | 4·25 ^{(1) (2)} | 7·589 | 100 | 100 | 100 |
| I (Lit) | — | — | 15 000·00 | 19·336 | 15 000·00 | 18·529 | — | 263 | 244 |
| F (FF) | 134·60 ⁽¹⁾ | 24·617 | 155·00 | 27·032 | 155·00 | 29·140 | 330 | 367 | 384 |
| B (Bfr) | 1 289·00 ⁽¹⁾ | 26·966 | 1 289·00 ⁽¹⁾ | 27·781 | 1 289·00 ⁽¹⁾ | 28·287 | 361 | 378 | 373 |
| DK (Dkr) | 111·54 ⁽¹⁾ | 15·040 | 134·90 | 18·583 | 156·00 ⁽²⁾ | 21·902 | 201 | 253 | 289 |

| | 1976 | | 1977 | | 1978 | | Price index calculated for each year on base UK = 100 | | |
|----------|--------------------------|--------|-----------|--------|---------------------|--------|---|------|------|
| | | EUA | | EUA | | EUA | 1976 | 1977 | 1978 |
| D (DM) | 90·91 | 32·290 | 90·91 | 34·328 | 90·91 | 35·566 | 414 | 377 | 340 |
| UK (£) | 4·85 ⁽¹⁾ | 7·803 | 5·95 | 9·102 | 6·95 ⁽²⁾ | 10·468 | 100 | 100 | 100 |
| I (Lit) | 16 500·00 ⁽²⁾ | 17·739 | 18 000·00 | 17·879 | 21 000·00 | 19·440 | 227 | 196 | 186 |
| F (FF) | 155·00 | 29·000 | 155·00 | 27·649 | 155·00 | 27·004 | 372 | 304 | 258 |
| B (Bfr) | 1 289·00 | 29·862 | 1 289·00 | 31·529 | 1 289·00 | 32·176 | 383 | 346 | 307 |
| DK (Dkr) | 196·00 | 28·987 | 196·00 | 28·589 | 223·00 | 31·769 | 371 | 314 | 303 |

⁽¹⁾ 20 test pack.⁽²⁾ Mean unweighted price.

EUA: European unit of account (mean unweighted exchange rate throughout each year).

CHART II

Prices of Gravindex slide tests excluding VAT
(charged to dealers in the UK and Germany)

| | 1973 | | 1974 | | 1975 | | Price index calculated for each year on base UK = 100 | | |
|--|---------------|----------------|--------------|----------------|-----------------------------|----------------|---|------|------|
| | | EUA | | EUA | | EUA | 1973 | 1974 | 1975 |
| Eurim Pharm (DM) (20 test pack) | | | | | 58.19 (2.91) | 19.083 (0.954) | | | 251 |
| Cilag Chemie GmbH (DM) (20 test pack) | 90.91 (4.545) | 27.747 (1.387) | | | | | 372 | | |
| (25 test pack) | | | 90.91 (3.64) | 29.482 (1.180) | 90.91 (3.64) | 29.812 (1.194) | | 401 | 393 |
| Ortho Pharmaceutical Ltd (£) (20 test pack) | 3.75 (0.187) | 7.465 (0.373) | 3.75 (0.187) | 7.356 (0.368) | 4.25 (0.213) ⁽¹⁾ | 7.589 (0.379) | 100 | 100 | 100 |

| | 1976 | | 1977 | | 1978 | | Price index calculated for each year on base UK = 100 | | |
|--------------------------------------|--------------|----------------|--------------|----------------|-----------------------------|----------------|---|------|------|
| | | EUA | | EUA | | EUA | 1976 | 1977 | 1978 |
| Eurim Pharm (DM) (20 test pack) | 58.19 (2.91) | 20.668 (1.034) | 58.00 (2.90) | 21.901 (1.095) | 58.00 (2.90) | 22.691 (1.135) | 265 | 241 | 217 |
| Cilag Alsbach (DM) (25 test pack) | 90.91 (3.64) | 32.290 (1.293) | 90.91 (3.64) | 34.328 (1.373) | 90.91 (3.64) | 35.566 (1.424) | 414 | 377 | 340 |
| Ortho UK (£) (25 test pack) | | | 5.95 (0.238) | 9.102 (0.364) | 6.95 (0.278) ⁽¹⁾ | 10.468 (0.419) | 100 | 100 | 100 |
| (20 test pack) | 4.85 (0.25) | 7.803 (0.390) | | | | | | | |

⁽¹⁾ Mean unweighted price.

EUA: European unit of account (mean unweighted exchange rate throughout each year).

Prices in brackets: prices per test.

D. Export prohibitions in the terms of trading for pharmaceutical dealers

(a) *Ortho UK*

13. At least since 1 January 1973 and until January 1977, all the firm's 'UK trade price lists' intended for sales to pharmaceutical dealers included, under 'terms of trading', the following condition :

'Export prohibited except by prior arrangement'.

(See for example the October 1975 price list.)

The corresponding (amended) condition in the January 1977 and all subsequent price lists reads as follows:

'Export prohibited to non-EEC countries except by prior arrangement'.

The October 1978 trade price list contains, however, no restrictions. The UK trade price lists do not mention the product Gravindex, as it is not a pharmaceutical, but a diagnostic product. However, in a letter to the Commission of 16 January 1980 Ortho UK stated: 'In view of that fact that no diagnostic price lists are circulated to the trade as a matter of course, we treat our contractual arrangements with wholesalers and retailers as being governed by the terms endorsed on the UK pharmaceutical trade price list.'

(b) *Cilag Alsbach*

14. This firm issues separate price-lists ('Preislisten') for diagnostic products and pharmaceutical products. The former apply exclusively to hospitals, while the latter relate to sales to retailers and hospital pharmacists. The pharmaceuticals price lists issued from 1958 up to 27 February 1978 included, in the section headed 'Wiederverkauf', the following condition:

'Der unmittelbare oder mittelbare Weiterverkauf nach dem Ausland einschließlich der Freihafengebiete ist nicht statthaft'. (Direct or indirect sale to other countries, free ports included, is not allowed).

(See for example 24 January 1977 price list).

The product Gravindex pregnancy tests appears in those price lists from 1967 on.

E. Enforcement of the export prohibition by Ortho UK

15. From an article in a German magazine dated May 1975, Cilag Alsbach learned that the chemist Mohringer was offering Gravindex, imported from other EEC Member States, at a more attractive price : Mohringer 20 tests for DM 58.19 (DM 2.91 per test), Cilag Alsbach 12 tests for DM 55 (DM 4.58 per test).

By test purchases, Cilag Alsbach ascertained that the Gravindex offered on the German market came from Great Britain. Ortho UK was immediately informed of this discovery (See Ortho UK internal note of 7 July 1975).

16. In July 1975, Cilag Schaffhausen asked its British counterpart to take the necessary measures to stop imports from the UK into Germany. It was agreed that Cilag Alsbach would establish the package numbers of the imported items by test purchases, so that Ortho UK could ascertain the British exporter (see letter Ortho UK to Cilag Schaffhausen dated 19 December 1975).

17. Ortho UK also contacted Mohringer direct, by letter dated 17 December 1975, asking him to name his supplier who was, according to Ortho UK 'contravening (Ortho UK's) terms of trading'. Ortho UK required Mohringer's cooperation, in order to 'prevent any further breach of our trading regulations'. The same letter made it clear that Ortho UK's export prohibition was aimed principally at 'Europe' (which in this context must be taken substantially to mean other EEC countries).

18. In March 1976 Cilag Schaffhausen found that Mohringer was still able to offer large quantities of Gravindex on the German market; so Dr Fuller, Vice-Chairman of Johnson & Johnson International Inc., New Brunswick, a wholly-owned subsidiary of Johnson & Johnson carrying on the international activities of the concern, was brought into the affair by letter of 22 March 1976 from Cilag Schaffhausen, stating, *inter alia* :

'We have now too much written and discussed without having made any progress in solving this very unpleasant and important problem. We would like that you contact now all responsables to find at least a strategy for further actions.'

At the initiative of Mr A. S. Poole, Vice-President, International of Ortho Diagnostics, the 'Gravindex problem' was discussed at a meeting early in April 1976.

In a letter to Cilag Alsbach dated 5 April 1976, Ortho UK affirmed their decision to impede exports of Gravindex slide tests. They said they felt that they knew

the possible source of the supply to Mohringer and would take every step to eliminate the 'Gravindex problem'.

19. On 7 April 1976, Ortho UK wrote to the retail chemist in London, the supposed exporter of Gravindex tests, threatening to cut off his supplies. Since he denied making the exports, subsequent deliveries to him and to another purchaser, the firm of . . . , were marked with special code numbers so as to permit an incontestable identification. (This is shown by internal notes from Ortho UK dated 14 and 23 April 1976 and letter from Ortho UK to Cilag Alsbach of 23 April 1976.)

20. In January 1977 Ortho UK issued a new price list, wherein the global export ban was replaced by a prohibition on exports to non-EEC countries, which later was omitted from the October 1978 price list. No special notice of the changes was given to Ortho UK's customers.

Despite the January 1977 change the search for Mohringer's (Eurim Pharm's) source of supply was pursued. By letter of 19 January 1977 to Cilag Alsbach, Ortho UK confirmed that if an exporter were identified, the supply of Gravindex to the German market would be stopped.

21. A definite identification of a British exporter was made in February 1977. By test purchase from Eurim Pharm, Cilag Alsbach Obtained possession of a Gravindex package which was specially identified by the batch number and also by a triangular piece cut out of the package insert (see letter from Cilag Alsbach to Ortho UK of 4 February 1977).

22. Although Ortho UK should have been aware that the imposition on customers of a prohibition on exports to other EEC Member States would infringe the competition rules of the EEC Treaty ⁽¹⁾, the Ortho UK company nevertheless substantially stopped supplies to certain chemists in May and June 1977, by totally withholding supplies or by drastically restricting them (see letters from Ortho UK to Cilag Alsbach dated 18 May and 11 July 1977). The letter of 18 May indicated four 'possible methods' of stopping the trade of Gravindex slide tests from the UK into Germany. Firstly, as abovementioned, Ortho UK had stopped deliveries to certain dealers. (Quoting them: 'However, this will probably only result in temporary sustaining the flow as other distributors might be approached'.) A

second possibility was to raise the UK price to a level close to that of the European selling price (again quoting 'but our pricing laws in the UK will not allow us to do this'). Thirdly, Ortho UK might change the Gravindex trade mark. They wrote: 'but this, yet again, would only lead to a temporary sustenance of the business, as I am sure that people would realize it was the same product'. Fourthly, they might consider withdrawing the 20 test pack from the UK market completely.

Orders from three chemists, placed during May and June 1977, were held up for six to seven months, although Ortho UK's stocks were sufficient at the times these orders were placed, and other customers' orders were dealt with much more quickly. Ortho UK claims that the delay in deliveries was caused by an unprecedented increase of orders in the second half of 1977 so that from May 1977, Ortho UK had an excess of orders on hand over its stocks. However, the excess of unserved orders was mainly due to a shortage of 200 test packs and yet the orders of the three chemists called for 20/25 test packs. Although Ortho UK argues that 20/25 test packs may be used to satisfy orders for the 200 test pack, when the latter is in short supply, there is no evidence of this substitution having been carried out in practice.

In August 1977 the 20 test pack was withdrawn from the UK market. In March 1978 the price of the 25 test pack was raised 20 % and in August 1978 by a further 9.5 %. Also in August 1978, the price of the 200 test pack was raised 10 %. Thus three of the four possibilities for action against exports of Gravindex slide tests as indicated in the letter from Ortho UK of 18 May 1977 were put into effect.

The Commission has no information on any enforcement of a prohibition on exports by Ortho UK after January 1978.

23. Cilag Alsbach for its part ceased its efforts to stop imports of Gravindex products in July 1977, recognizing expressly that, since the decision of the Court of Justice of May 1976 in the Centrafarm case, they were aware that it is unlawful to prohibit or hinder 'parallel imports' (see Cilag Alsbach internal note of 21 July 1977).

F. Proceeding

24. This proceeding is brought only against Johnson & Johnson, Ortho UK, Cilag Schaffhausen and Cilag Alsbach and not against their customers, the United Kingdom and German chemists who were formally parties to the agreements involved, because the purpose

⁽¹⁾ Judgment of the Court of Justice 13 July 1966, Case Nos 56—58/64 (Grundig/Consten) (1966) European Court Reports 322. Decisions of the Commission of 1 December and 21 December 1976 (Miller International and Theal/Watts) (OJ No L 357, 29. 12. 1976, p. 40 and OJ No L 39, 10. 2. 1977, p. 19).

of the export ban was to protect the partitioning of the national markets. The restrictive agreements with the chemists were only the vehicle for this protective policy, which was indeed contrary to the interests of those chemists.

25. These proceedings are confined to examining, in respect of the Gravindex slide tests only, the export prohibitions contained in the 'UK trade price lists', the 'Preislisten' and elsewhere, the enforcement of the UK export prohibitions and the conduct of both Ortho UK and Cilag Alsbach.

26. Following receipt by the parties of the Commission's Statement of Objections dated 26 July 1979, Johnson & Johnson informed the Commission by their telex of 13 September 1979 and Ortho UK, Cilag Alsbach and Cilag Schaffhausen by letters from their legal advisers dated 27 September 1979, containing replies to the Commission's Statement of Objections, that they were declining the Commission's invitation to attend a hearing, because they believed that the case was 'fully and clearly set out in the reply'. Johnson & Johnson, for its part, replied to the Statement of Objections by letter from its General Counsel also dated 27 September 1979.

II. APPLICABILITY OF ARTICLE 85 (1)

27. Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market 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.

A. Agreements between undertakings

28. Ortho UK, Cilag Alsbach and their respective dealers are undertakings within the meaning of Article 85 (1).

The **export bans** which were embodied in the price lists applied by Ortho UK and Cilag Alsbach for sales of their products to pharmaceutical dealers, formed an essential part of the contracts of sale between each company and its dealers. These contracts are agreements between undertakings within the meaning of Article 85 (1).

The prohibition of exports from the United Kingdom continued to be applied after the amendment of the

terms of trading in January 1977. Ortho changed the wording so that ostensibly only exports to non-EEC countries were still prohibited, but in reality, exports to EEC countries were still not allowed. On the contrary, Ortho UK stressed to those dealers which it supposed were exporting, that exports to EEC countries were still prohibited. It made and carried out threats to withhold or delay supplies, and also instituted a system of checks on dealers. The dealers knew that the present and future deliveries were obtainable only if they complied with the request not to export. Those actions were pursued both before and after the amendment of the terms of trading in January 1977 without any interruption. After that date they were even intensified in order to bring to an end the exports of Gravindex pregnancy tests. The continued efforts to prevent dealers from exporting compelled those dealers to accept the fact that exporting was still not allowed.

The contracts of sale of Ortho UK were still, therefore, subject to prohibitions of exports, which prohibitions formed an integral part of agreements within the meaning of Article 85 (1). For the purpose of determining the applicability of Article 85 (1), the facts that it was not in the dealers' interests to observe the prohibition and that some of them did not do so, are irrelevant; that Article extends to any distribution system whose object is to restrict competition, whether or not it is successful in doing so.

B. Restriction of competition

29. In the UK trade price lists, applied by Ortho UK until January 1977, a provision was embodied prohibiting export from the United Kingdom except by prior arrangement. The 'Preislisten' applied by Cilag Alsbach until 28 February 1978 contained a provision prohibiting direct or indirect resale to other countries. These provisions had as their **object** the restriction of competition within the common market. They were aimed at preventing buyers in the United Kingdom and Germany from reselling the products of Ortho UK and Cilag Alsbach to other countries including the common market countries and thus from competing in those countries. Article 85 (1) is applicable even if the export prohibitions were not always enforced as the exporting dealers' supplies were constantly at risk in the event of the exports becoming known to the supplier.

30. **Moreover, in this case the export prohibition imposed by Ortho UK had restrictive effects.**

Ortho UK's intention, to restrict competition within the common market, appears clearly from its efforts to discover, at the request and with the assistance of Cilag

Alsbach, the dealers supplying Gravindex pregnancy tests to the German importer Eurim Pharm.

31. In fact, Ortho UK did prevent dealers in the United Kingdom from reselling Gravindex pregnancy tests to Eurim Pharm. After threatening to withhold supplies from the chemist in April 1976, when Gravindex pregnancy tests originating from him continued to appear on the German market, in May 1977, Ortho stopped supplies of the products to certain chemists who, in Ortho UK's view, were apparently supplying German undertakings. At the same time orders from at least three chemists were considerably delayed.

32. These facts show that the amendment of the export prohibition by Ortho UK was a pure fiction. In practice, Ortho UK acted as if there had not been any amendment; so that the agreements operated as if they had never been amended.

33. The parties claim that their actions are of too little importance to restrict competition within the common market to an appreciable degree.

However, it has been established (see figures under point 2 above) that the 1977 turnover of the Johnson & Johnson group in Europe was \$ 600 million and the 'operating profit' in Europe in that year was \$ 137 million. In those figures the pharmaceutical sector comprises about 17 % and 30 % respectively.

Moreover, the Johnson & Johnson group has, with the Gravindex product, an important share of the market in the Member States. On the market for laboratory pregnancy tests, which must be considered as the relevant product market, the Gravindex slide test has a market share in the United Kingdom of about ... %. On the German market the corresponding market share is about ... %, but there the sales of Dr Molter, also a subsidiary of Johnson & Johnson, which sells slide tests and has a market share of about ... %, must also be taken into account. The only competitors with a higher market share are Organon and Burroughs Wellcome in the United Kingdom and Organon in Germany. Even if one considered the market for laboratory pregnancy tests as a part of a larger market including home tests, the restriction of competition would still be appreciable as home test sales are not larger than laboratory test sales, thus leaving to the Johnson & Johnson group a market share in Germany of well over ... %. The practical significance of the export prohibition is made clear by the fact that Cilag Alsbach considered even relatively small quantities of imports from the United Kingdom 'a very unpleasant and important problem' (see letter from Cilag Schaffhausen to Dr Fuller of

22 March 1976), as so-called 'parallel importers' compete directly with manufacturers for clinics' and doctors' business.

Therefore, the actions on the part of Ortho UK and Cilag Alsbach which impeded the export of Gravindex pregnancy tests by British dealers to the German market, restricted competition within the common market to an appreciable degree.

34. Any argument that Ortho UK's actions could be excused by the UK pharmaceutical price regulation scheme or by other statutory price controls would be unfounded; the fact that the United Kingdom prices are controlled by a public authority does not justify restrictions of trade between Member States ⁽¹⁾. Moreover, price control has been a feature of the United Kingdom market for many years for Ortho UK's products as well as for others, and the prices fixed under it provide a fair return, including a reasonable profit, on the overall activities of the undertakings concerned.

C. Effect upon trade between Member States

35. An export prohibition is, by its very nature, liable to affect trade between Member States. Such a condition has as its object to impede trade between Member States or to confine such trade to channels chosen by the undertaking imposing the prohibition. In this case the restrictions prevented trade between, in particular, the United Kingdom and other Member States, caused or at least contributed to an artificial partitioning of the common market and were likely to hinder the establishment of a single market among Member States.

36. This effect on trade between Member States has been appreciable. The only trade in Gravindex pregnancy tests between the United Kingdom and the other Member States, and in particular Germany, was that done by so-called 'parallel importers'. Every influence on this trade has an appreciable effect, especially when price differences exist to an appreciable extent (e.g. the price in Germany is 3.75 times the price in the UK) providing considerable incentive and scope for exports from the United Kingdom to Germany. It therefore seems reasonable to conclude that but for the export prohibition there could have been a significant flow of Gravindex tests from the UK to Germany with a

⁽¹⁾ See judgment of 31 October 1974, Case No 16/74 (Centrafarm v. Sterling Drug) [1974] ECR 1183.

corresponding effect on the German price and corresponding benefits to German users. Moreover, the existence of price differences was the reason for the actions of Ortho UK, as is shown for instance by the letter from Ortho UK to the chemist of 7 April 1976. But even if such important price differences did not exist at a given moment, e.g. between Germany and the other Member States for the product Gravindex, this situation might have changed. Therefore also the export ban imposed by Cilag Alsbach is likely to affect trade between Member States to an appreciable degree, especially taking into account Cilag Alsbach's position on the market ⁽¹⁾.

III. INAPPLICABILITY OF ARTICLE 85 (3)

37. The agreements in question do not qualify for exemption under Article 85 (3) because they were not notified to the Commission, and they are not agreements of the kind which, under Article 4 (2) of Regulation No 17, do not need to be notified. Moreover they do not fulfil the conditions for exemption presented by Article 85 (3). The export prohibitions in question do not contribute to the improvement of distribution nor have the other requirements of Article 85 (3) been fulfilled.

IV. APPLICABILITY OF ARTICLES 3 (1) AND 15 (2) OF REGULATION NO 17

A. Article 3

38. The Commission has established that Ortho UK and Cilag Alsbach have infringed Article 85 (1) by the following practices :

1. the inclusion of an export prohibition in the UK trade price lists of Ortho UK at least from January 1973 to January 1977;
2. the inclusion in the year 1977 of a *de facto* prohibition of exports from the United Kingdom to other EEC Member States in contracts of sale between Ortho UK and its dealers;
3. the inclusion of an export prohibition in the 'Preislisten' of Cilag Alsbach from 1967 to March 1978.

39. In order to avoid any misunderstandings resulting from former prohibition clauses the undertakings

concerned must be required under Article 3 of Regulation No 17 to bring to the notice of their dealers that exports to other Member States of the EEC are not prohibited and duly to satisfy the Commission that this has been done.

B. Article 15 (2)

40. Article 15 (2) empowers the Commission to impose a fine from 1 000 to 1 000 000 units of account, or a sum in excess thereof, but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where, either intentionally or negligently they infringe Article 85 (1) of the Treaty.

In fixing the amount of the fine, regard shall be had to both the gravity and the duration of the infringement.

41. On the facts set out above, the Commission has reached the conclusion that the parties knew, or at the very least should have known, that the export prohibitions had restrictive effects on competition and were likely to affect trade between Member States.

Cilag Alsbach has admitted that after the judgment of the Court of Justice of 20 May 1976 in the Centrafarm case ⁽²⁾ it was aware that it was unlawful to hinder parallel imports. However, the company should have known that, following the judgment of the Court of 13 July 1966 in the Grundig/Consten case ⁽³⁾ and that of 31 October 1974 in the Centrafarm v. Sterling Drug case ⁽⁴⁾, it was already laid down that export prohibitions were considered contrary to Community law. This is also true for Cilag Schaffhausen, which insisted on the enforcement of the export ban imposed on British dealers in order to protect the market of its subsidiary Cilag Alsbach.

The claim made by Ortho UK that it is unreasonable to impute to ordinary traders knowledge of the fact that an export prohibition is contrary to Article 85 (1) is untenable. Ortho UK must have known that such a clause and the abovementioned practices had as their object and effect a restriction of competition within the common market. It is of no relevance therefore to know if the company was aware that it infringed Article 85 (1) ⁽⁵⁾.

Johnson & Johnson knew or should have known that it and its affiliates have to comply with the law of the

⁽¹⁾ Judgment of the Court of Justice of 1 February 1978, Case No 19/77 (Miller international Schallplatten), (1978) ECR 151.

⁽²⁾ Case No 104/75, (1976) ECR 613.

⁽³⁾ Case Nos 56—58/64, (1966) ECR 322.

⁽⁴⁾ Case No 15/74, (1974) ECR 1164—1165.

⁽⁵⁾ Judgment of the Court of Justice of 1 February 1978, Case No 19/77 (Miller International Schallplatten), (1978) ECR 152 and of 12 July 1979, Case Nos 32/78, 36—82/78 (BMW Belgium), (1979) ECR 2435.

European Communities. It had been informed of the 'very unpleasant and important problem' of parallel imports and nevertheless did not stop the policy of its affiliates of preventing such parallel imports, which would have influenced the price differences.

42. As regards the gravity and duration of the infringements, export prohibitions are serious restrictions of competition and contrary to the goal of a single market among the Member States.

The infringements lasted for considerable periods:

1. the infringement referred to at point 38, subparagraph 1 above, from at least January 1973 to January 1977;
2. the infringement referred to at point 38, subparagraph 2 above, throughout 1977;
3. the infringement referred to at point 38, subparagraph 3 above, from 1967 to March 1978.

43. The export prohibitions imposed on the United Kingdom dealers are the principal infringements taken into account. In this respect the Commission bears in mind that the price differences for Gravindex pregnancy tests in 1973 to 1978 were considerable, as is shown by Chart I. The prohibition on exports by British dealers to other EEC Member States prevented the Gravindex products from the United Kingdom, where the prices were the lowest in the EEC, having an influence on the higher price levels (up to 3.75 times higher) in other Member States.

44. In determining the gravity of the infringement it must be taken into account that Ortho UK and Cilag Alsbach sought to prevent exports by chemists in a determined and vigorous manner and continued to do this even after the formal export prohibitions were removed from Ortho's terms of trading. The means employed included measures to identify the exporters, threatening to cut off a dealer's supplies and even a refusal to supply certain chemists by withholding supplies totally or by drastically limiting them.

Moreover, Cilag Alsbach continued its actions even after the Decision of the Court of Justice of 20 May 1976 in the Centrafarm case although it was aware — as it has admitted — that after that Decision it was unlawful to hinder parallel imports.

45. The fact that Ortho UK imposed the export prohibition and that Cilag Alsbach insisted on its application, shows that the object of their combined actions was to maintain the separation of, in particular, the United Kingdom and German markets and the wide difference between the prices in the UK and elsewhere. They intended to protect their marketing policies from any possible change in the market and price situation.

46. On the other hand it is taken into account that the export prohibitions imposed on the German dealers had little practical significance since prices in other markets were and continued to be lower and exports therefore of no interest. Nevertheless they expressed the general policy of preventing parallel exports in any circumstances and this must be regarded as a grave contravention even if for economic reasons it was not effective.

47. Ortho UK, Cilag Alsbach and Cilag Schaffhausen are subsidiaries of Johnson & Johnson and the various measures to prevent parallel exports were taken in their common interest, under the control and with the knowledge of the parent company.

In fact Ortho UK and Cilag Alsbach are not only subject both in theory and in practice to the general power of Johnson & Johnson to give policy directives, being wholly-owned subsidiaries, but are also dependent on the parent company for the goods involved, namely Gravindex slide tests. The companies Ortho UK and Cilag Alsbach only bottle and package this product. There is no question of an autonomous commercial policy for the European subsidiaries. It is established that Cilag Schaffhausen brought the parent company into this affair, not only to inform it, but with the express purpose of finding a solution to — quoting them — 'a very unpleasant and important problem', using the parent company's authoritative power. If the various companies in the group had really been accustomed to operating independently of each other, Ortho UK would be unlikely to have imposed an export prohibition at all, and it would certainly not have devoted a considerable amount of management effort to enforcing it, when the only result of such actions, from Ortho UK's point of view, would be a reduction in its own sales potential. None of the enforcement measures taken by the various companies and described at points 15 to 22 above is explicable otherwise than in the context of a general group policy of maintaining separate national markets with different prices. After the date of Cilag Schaffhausen's letter of 22 March 1976 to Dr Fuller (see point 18), the group continued to operate the policy of partitioning the common market. This shows that the parent company knew of this policy, and approved of it.

48. Therefore, the Commission regards Ortho UK, Cilag Schaffhausen, Cilag Alsbach and Johnson & Johnson as jointly responsible and must impose a fine on them jointly and severally. However, this finding does not affect the amount of the fine.

49. The companies involved sell many products, and the maximum fine which could be imposed under Regulation No 17 would be 10 % of total turnover in all products. This decision concerns an infringement in connection with one product. The imposition of export bans on trade between Member States must always be regarded as a particularly grave infringement, justifying the imposition of fines reflecting this fact.

50. The Commission has taken into account the substantial differences between the prices of Gravindex in the different Member States, in particular between those in the UK and elsewhere, the vigorous way in which the export ban was enforced, the fact that the infringement was undoubtedly intentional, and the group's market share. The Commission also takes into account the size of the Johnson & Johnson group and the need to suppress unlawful activities and to prevent any recurrence, and the resulting need for a fine large enough to be a deterrent to such an enterprise. Account has been taken of the principles of equity and proportionality. The Commission has therefore thought it appropriate to impose a fine of the sum set out in Article 3,

HAS ADOPTED THIS DECISION:

Article 1

The inclusion

- (a) by Ortho Pharmaceutical Ltd of an export prohibition for the product Gravindex in the UK trade price lists from 1 January 1973 to 1 January 1977;
- (b) by Ortho Pharmaceutical Ltd of a *de facto* export prohibition for the product Gravindex from the United Kingdom to other EEC Member States in the contracts of sale with its dealers during the year 1977, and
- (c) by Cilag Chemie GmbH of an export prohibition in the 'Preislisten' for the product Gravindex from 1 January 1967 to 27 February 1978

constituted infringements of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

Ortho Pharmaceutical Ltd and Cilag Chemie GmbH shall bring it to the notice of their dealers, in writing, that exports to other Member States of the EEC are not prohibited. The Commission shall be informed within three months of the way in which this notice has been given.

Article 3

A fine of two hundred thousand (200 000) European units of account, that is to say 112 894.20 (one hundred and twelve thousand eight hundred and ninety-four point twenty) pounds sterling or 510 476 (five hundred and ten thousand four hundred and seventy-six) DM or 460.152 (four hundred and sixty thousand one hundred and fifty-two) Sfrs, or 266 260 (two hundred and sixty-six thousand two hundred and sixty) US dollars is hereby imposed on Ortho Pharmaceutical Ltd, Cilag Chemie GmbH, Cilag Chemie AG and Johnson & Johnson Inc., jointly and severally.

This sum shall be paid either to Lloyd's Bank, London, the account of the European Communities No 108.63.41, or to Sal. Oppenheim Cologne, the account of the European Communities No 000 0064 910, or to Union des Banques Suisses, Geneva, the account of the European Communities No 255.340.30.G, or to the Chemical Bank, New York, the account of the European Communities No 400-360.950 within three months of the date of notification of this Decision to the undertakings to which it is addressed.

Article 4

This Decision shall be enforceable in the manner provided for in Article 192 of the Treaty establishing the European Economic Community.

Article 5

This Decision is addressed to the following undertakings:

- (a) Ortho Pharmaceutical Ltd,
PO Box 79,
Saunderton,
High Wycombe,
UK-Buckinghamshire — MP14 YMJ;
- (b) Cilag Chemie GmbH,
Neue Bergstraße 9,
D-6146 Alsbach an der Bergstraße;
- (c) Cilag Chemie AG,
Hochstraße 205/9,
CH-8201 Schaffhausen;
- (d) Johnson & Johnson Inc.,
501 George Street,
New Brunswick;
USA-New Jersey 08903.

Done at Brussels, 25 November 1980.

For the Commission

Raymond VOUEL

Member of the Commission