

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 December 1982

relating to a proceeding under Article 85 of the EEC Treaty (IV/29.629 — Rolled zinc products and zinc alloys)

(Only the French and German texts are authentic)

(82/866/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Whereas :

Having regard to the Treaty establishing the European
Economic Community,

THE FACTS

A. General

(a) The products in question are :

1. *Rolled products of pure zinc or titanium zinc* in strip or sheet form for use in the building industry (wall and roof coverings, gutters, drain-pipes) and in the graphic arts.

Consumption of rolled products in the building sector varies markedly from one country to another depending on the methods and types of construction used. France, Germany, Belgium and the Netherlands are traditionally the largest consumers in Western Europe.

As far as production of zinc sheet is concerned, there are six rolling mills of various sizes in the Member States :

- Compagnie Royale Asturienne des Mines (hereinafter called CRAM), France,
- Rheinisches Zinkwalzwerk GmbH & Co. KG (hereinafter called RZ), Federal Republic of Germany,
- Société des Mines et Fonderies de la Vielle-Montagne (hereinafter called VM), France,
- Pertusola, France,
- Billiton, Netherlands,
- SAMIM, Italy.

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

Having regard to the Commission Decision of 9 June 1981 to initiate proceedings,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, in accordance with Article 19 (1) of Regulation No 17 and with Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17⁽²⁾,

Having regard to the opinion delivered on 23 September 1982 by the Advisory Committee on Restrictive Practices and Dominant Positions in accordance with Article 10 of Regulation No 17,

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

2. *Zinc alloys* intended mainly, after processing by pressurized casting, for the motor, electrical engineering and ironmongery industries.

The majority of such alloys are sold under the Zamak trade mark (95 % of French consumption).

Since the cost of constructing an alloying shop is not prohibitive, every crude zinc producer who has metal to spare tends to equip himself with a zinc alloying shop.

(b) The companies in question are :

— *Compagnie Royale Asturienne des Mines (CRAM)*

Although its head office is still in Belgium, the Company's main centre of activity is in France at the factory in Auby-les-Douai (département du Nord). It also has mining, industrial and commercial interests in Spain, Morocco and Norway.

Nominal rolled zinc products production capacity (i.e. for a standard product made by three shifts) is 80 000 tonnes per year. Real capacity is 52 000 tonnes per year.

In the case of alloys, nominal capacity is 30 000 tonnes per year.

— *Société des Mines et Fonderies de zinc de la Vieille-Montagne (VM)*

The head office is at Angleur, near Liège, Belgium, and it has factories in Belgium, France, Germany and Sweden.

It is one of the largest producers of zinc in the world.

It has a nominal annual rolled zinc products production capacity of 70 000 tonnes. Real annual capacity is 50 000 tonnes.

— *Rheinisches Zinkwalzwerk GmbH & Co. KG (RZ)*

This company, whose head office is at Datteln (Federal Republic of Germany, forms part of the international Metallgesellschaft Group.

It operates almost exclusively in the rolled and shaped zinc products sector.

It has a rolled zinc products production capacity of 40 000 tonnes per year.

— *Société Minière et Métallurgique de Penarroya (PYA)*

whose head office is in Paris, France, is a subsidiary of IMETAL, a member of the Rothschild

Group. Its main activities concern mining, metallurgy, refining, processing and chemistry of non-ferrous metals.

It ranks first among worldwide lead producers and eighth among zinc producers.

In 1971 it ceased production of rolled zinc products.

Its annual alloy producing capacity is approximately 15 000 tonnes.

— *Société anonyme de Prayon*

Prayon is a holding company which coordinates all the metallurgical, chemical and commercial activities of its subsidiaries. In 1977 it ceased production of rolled zinc products and it markets rolled zinc products processed under contract by CRAM, especially in Belgium and Germany.

B. The practices and agreements to which objection is taken

This Decision relates to the following concerted practices and agreements :

- I. measures to protect markets ;
- II. a contract relating to reciprocal supply and servicing ;
- III. rationalization measures for the production and distribution of rolled and alloyed zinc ;
- IV. a rationalization contract.

I. Measures to protect markets

In 1974, 1975 and 1976 different prices were charged for rolled products in the various EEC countries. The prices charged by RZ, CRAM and VM were, as a rule, higher in Germany and France than in other countries such as Belgium, Denmark and Luxembourg. Such price differences were also to be found in relation to prices charged in many non-member countries.

On the other hand, the prices charged by the three producers in one and the same country differed only slightly and, in some cases, not at all.

These disparities worked to the advantage of importers, who bought rolled zinc products in a country in which prices were low and resold them in a country where prices were higher.

At the beginning of 1975, with a view to carrying out such parallel imports, Gebr. Schiltz N.V. of Aartselaar, Belgium an importer of sanitary equipment, ordered rolled sheets measuring 2×1 and 3×1 m, from CRAM. CRAM demurred on the ground that, although the dimensions requested were widely sold in France and Germany, there was no demand for them in Belgium, and for that reason it refused to supply the goods.

Subsequently, Schiltz tried to obtain the same sheet metal by giving CRAM to believe that it was intended for re-export to Egypt. On that express condition, CRAM agreed to supply the goods requested and quoted Schiltz a price of FF 4 350 per tonne delivered free at the port of Antwerp for supply to Egypt, and at a price of FF 4 455 per tonne free at warehouse in Bruges in the case of supplies intended for resale in Belgium.

Schiltz was thus able, between February and October 1976, to secure a commitment from CRAM that it would supply a total of almost 2 000 tonnes of rolled products, a large proportion of which was immediately sent by Schiltz to his German customer Kestermann. The remainder was to pass through the hands of a Dutch wholesaler, ROBA, which in turn had a supply agreement with a customer in Germany.

CRAM clearly attached importance to strict compliance with the condition concerning exportation to Egypt. The invoices and other documents were all endorsed 'destination Egypt'. In various items of correspondence Schiltz was reminded of its undertaking and was asked to prove that it was being complied with by sending the relevant documents.

Between February and August 1976, orders for about 1 000 tonnes of rolled products were thus fulfilled. Between 8 September and 11 October, CRAM accepted four further orders for a total of 915 tonnes, the sale of which was confirmed.

On 13 October 1976 CRAM started to deliver these new orders at a rate of about two lorry-loads a day. These deliveries continued until 20 October, when they were suspended without any explanation. Prior to that date, approximately 220 tonnes had been dispatched in 11 lorry-loads of 20 tonnes each.

On Monday 8 November 1976, CRAM telephoned Schiltz, accusing it of having diverted to Germany all or part of the goods intended for Egypt and

threatening to terminate deliveries. Four days later, on Friday, 12 November, CRAM called upon Schiltz by telex to settle the 11 outstanding invoices for October and to increase them by the amount of the discount and expenses. CRAM's telex continues as follows:

'2. You will have to furnish proof that the 240 tonnes have been exported to Egypt, as you promised in your orders of 7 September 1976 and 8 September 1976. We confirm our telephone conversation of 8 November 1976 when we pointed out that according to our agents in Germany, the rolled zinc products we supplied to you for export to Egypt have been sold in whole or in part on the German market. In view of the special rates we quoted you for export to the Middle East, we feel this is a breach of good faith which justifies the above demands.

3. Not until points 1 and 2 have been settled will we discuss with you the question of the deliveries concerning the 631 tonnes for Egypt plus 44 tonnes for Iran. ...'

From April to October 1976, Schiltz used the same stratagem (ordering rolled zinc products for delivery to Antwerp with a view to re-exporting them to Egypt) *vis-à-vis* RZ. Still under the pretext of exporting to the Middle East, and in particular to Egypt, Schiltz ordered in turn from RZ 1 252 tonnes of rolled zinc products which it then proceeded to sell in Germany. The orders were fulfilled by RZ and dispatched to Antwerp at the prices then charged by that firm for its sales in Belgium, which were, at least initially, 19 % lower than those which it charged on the German market. To start with, at least, RZ delivered goods to Schiltz at prices virtually identical to those charged at that time by CRAM for its deliveries to the same exporter.

As in the case of orders from CRAM, RZ's supplies were granted to Schiltz on the express condition that they were re-exported to the Middle East, and in particular to Egypt (see telex from RZ dated 9 April 1976: 'We offer to you conditionally — and only for export overseas — ...' — 'Subject to acceptance of the country of destination, which has still to be named.' See also telex dated 22 April 1976: 'We should appreciate it if you would furnish proof of exportation as agreed ...').

This destination, which, as far as RZ was concerned, was a fundamental term of the agreement, was accepted by Schiltz since it confirmed, by telex dated 26 October 1976, an order for 550 tonnes accompa-

nied by the following instructions : 'Delivery : one ton pallet free at port of Antwerp Dock 130 at the premises of our freighter "United Stevedoring". Ask for "John". Each pallet must be marked "Genoa-Alex". Destination : via Genoa to Alexandria and Iran.'

But instead of being loaded onto ships bound for the Middle East, the rolled products were stored at the port of Antwerp, only to be loaded shortly afterwards onto lorries bound for Germany. So that the 'diversion' did not appear in the foreign trade statistics, Schiltz declared the goods to the customs as 'double galvanized sheet metal'.

At that time, its earlier orders had not yet been entirely fulfilled and a delivery in this connection was expected on 28 October.

This delivery was the last one, since RZ, having had two visits made to Schiltz's premises by its employees on 27 October in Antwerp and on 29 October at Kestermann's premises in Herten, had proof that the rolled zinc was being re-imported into Germany and it thus decided to cease making outstanding deliveries.

During this period, CRAM and RZ were maintaining regular contacts in connection with their trading policies and, in particular, their prices, as can be seen from telex 672/MY/SCN from RZ to CRAM dated Tuesday, 26 October 1976 :

'Change in prices of zinc semi-finished products in Germany

As a result of exchange rate trends and the resulting fall in raw material prices, the domestic German price of zinc in strip and sheet form has dropped from DM 318.20/100 kg to DM 307.90/100 kg with effect from 26 October 1976.

Basic gauge : 0.70 mm.

This price applies to quantities of at least five tonnes carriage paid. The current price differentiation according to different gauges remains unchanged.

This for your information.

Signed : MFG, Meyer, Rheinzink, Datteln'.

II. Contract between CRAM, RZ and VM concerning the reciprocal provision of emergency supplies

On 5 August 1974, CRAM, RZ and VM concluded a contract whereby they undertook to supply each other with rolled zinc products in the event of serious disruption resulting in significant loss of production at

any one of their factories, for whatever reason. Under the contract, each firm undertakes in those circumstances to supply the other parties by doing jobbing rolling work. The rolled products supplied must be of the same grades as those normally produced by the undertaking in deficit, and must bear the applicant's trade marks (Article 3 of the agreement). Assistance must be forthcoming as soon as the production shortfall of the undertaking invoking the agreement exceeds 20 tonnes per day, or a total of 200 tonnes (Article 1). The procedure is as follows :

'Article 4.2 : Each contracting party undertakes to effect delivery of not more than 1 500 tonnes on condition, however, that its own production is not disrupted. Where only one contracting party suffers a loss of production, it may only require that the shortfall be made up equally by the other two contracting parties ...'

'Article 4.3 : Where two contracting parties are affected simultaneously by a total loss of production, the third contracting party undertakes to supply not more than 2 000 tonnes per month to make up for the quantities lost and to divide that amount equally between the two contracting parties concerned, unless one of them asks for a smaller quantity. In the event of a partial loss of production by one or both contracting parties, the supplier shall determine the quotas corresponding to the losses in question ...'

Clauses 11.1 and 11.3 fix the duration of the contract of 5 August 1974 between CRAM, RZ and VM as follows :

- *Clause 11.1 :* 'This contract shall be valid until 31 December 1976 and shall be renewed for successive periods of one calendar year unless terminated in writing at least six months before the end of a calendar year by one or two contracting parties',
- *Clause 11.3 :* 'In the event of termination by only one contracting party, the contract shall remain in force between the two remaining contracting parties ...'.

At the end of 1979, none of the three undertakings had availed itself of the right to terminate provided for in these clauses of the contract. One year later, therefore, the contract was still binding on the parties.

Even before conclusion of the contract, VM had secured delivery in 1972 and 1973 of 5 900 tonnes of rolled zinc products by RZ and 5 502 tonnes by CRAM, following delays in the commissioning of its new rolling mill.

Since the contract entered into force, it has been resorted to during the following periods and in the following circumstances :

- from April to June 1977, by the delivery by CRAM to VM, following stoppage due to a strike at the latter's plant, of 2 427 tonnes of rolled zinc products,
- from May to August 1977, again because of the strike, by the delivery by RZ of 850 tonnes of rolled zinc products to VM's German subsidiary.

According to VM, these two emergency operations were carried out 'in the spirit of the agreement concluded in 1974 between the three parties'; however, the terms were apparently negotiated separately between the parties concerned :

- in 1977, by the delivery by RZ to CRAM, following technical problems with the latter's slitting line, of 550 tonnes of rolled products out of an 'open-ended' contract for a total of 750 tonnes. These deliveries were stopped as soon as the defective machinery was again working properly.

III. *Rationalization measures agreed between CRAM and PYA in respect of the production and sale of rolled zinc products and zinc alloys*

On 4 May 1971, CRAM and PYA concluded a contract for the 'rationalization' and coordination of their respective activities in the field of rolled zinc products and zinc alloys. This contract is valid for an initial period of 15 years. Its term of validity is then automatically extended for periods of five years, unless terminated by one of the parties who must give three years' notice.

The contract is designed to establish, between two undertakings which manufacture the products covered by the agreement in France, close collaboration in the production of rolled zinc products and zinc alloys and, in respect of those same products, in investment, research, trade and distribution.

For production of rolled zinc products, the agreement includes the following clauses :

- *Clause I.2* : 'PYA undertakes to give jobbing rolling work to CRAM, and CRAM undertakes to carry out jobbing rolling work for PYA at its factory at Auby, involving a quantity of zinc corresponding to its sales requirements in France'.

- *Clause I.14* : 'During the lifetime of this agreement, save where CRAM is unable to honour its commitments and save, of course, as otherwise agreed with CRAM, PYA hereby undertakes to refrain, whether directly or indirectly, from rolling or causing to be rolled in France all grades of zinc or zinc alloys which CRAM might wish to roll using its continuous rolling mill. PYA also undertakes to refrain from importing into France rolled zinc products or zinc alloys which CRAM is capable of supplying.

Consequently, except in the circumstances provided for at I.12⁽¹⁾, PYA shall gradually close down its rolling mill at Noyelles-Godault ...'

As far as the production of alloys is concerned, point III — 'Proposal by PYA' — of the preamble to the contract states that ... 'PYA has undertaken the creation of an alloy production capacity. The workshop, which became operational at the beginning of 1971, has an initial annual production capacity of 10 000 tonnes of alloys: this tonnage represents the minimum which is technically necessary for starting production. Later on, PYA plans to increase its alloy production, its aim being gradually to supply 30 % of the French market by 1975.

This intention is justified by the desire to seek and promote increasingly elaborate applications for the crude metal with a view to increasing the return on the investment by each French producer in the context of harmonious long-term market growth.'

The agreement specifies as follows the consideration to be granted by CRAM to PYA in return for the latter's undertaking to terminate production of its rolled products :

- *Clause II.6* : '... as consideration for the closure of the rolling mill at Noyelles-Godault, CRAM shall not increase its alloy production capacity as long as that of PYA's workshop does not exceed 15 000 tonnes and shall, if necessary, reduce production by its alloy manufacturing shop in correlation with the undertaking to carry out processing on a jobbing basis, this being the consideration for the jobbing rolling work'.

⁽¹⁾ The clause referred to concerns the possible refusal by CRAM to roll certain types of zinc and zinc alloys, demand for which is too small for production to be economically viable.

- *Clause II.8*: 'In order to ensure full utilization of PYA's alloying shop and to enable CRAM to meet its customers' requirements, CRAM undertakes to give production work to PYA on a jobbing basis and PYA undertakes to produce for and supply to CRAM, in pursuance of a contract to undertake processing on a jobbing basis, a quantity of alloys equal to the difference between the requirements as stated by CRAM for its sales in France and production at CRAM's alloying shop. This quantity, unless agreed otherwise, shall be limited to 5 000 tonnes per year.

Such processing on a jobbing basis shall terminate at such time as PYA produces for its own sales in France an annual quantity of 15 000 tonnes'.

- *Clause II.11*: 'Orders placed by CRAM for processing by PYA shall be calculated so as to ensure full utilization of PYA's alloying shop up to a maximum of 5 000 tonnes of processing on a jobbing basis on behalf of CRAM'.
- *Clause II.15*: 'During the life of this agreement, save where PYA is unable to honour its commitments and save, of course, as otherwise agreed by PYA in advance, CRAM hereby undertakes to refrain, whether directly or indirectly, from producing or causing to be produced in France all grades of zinc alloys which PYA might wish to produce in its alloying shop...'

The agreement also applies to investment by the parties in the fields covered by the agreement.

Clauses I.14 (in fine) and II.6, which have already been quoted, testify to this since they require PYA, except in quite exceptional and, furthermore very improbable circumstances, 'gradually to close down its rolling mill at Noyelles-Godault' (I.14), and CRAM 'not to increase its alloy production capacity as long as that of PYA's workshop does not exceed 15 000 tonnes' (II.6) and to 'reduce, if necessary, production by its alloy manufacturing shop in correlation with the undertaking to carry out processing on a jobbing basis, this being the consideration for the jobbing rolling work' (II.6).

Clause II.7 supplements these terms as it states that 'once PYA has achieved its objectives as set out in the preamble, both companies shall cooperate with a view to creating new alloy production capacity'.

In the field of rolled products, the only field in which one of the parties undertakes to cease all production, Clause I.4 of the contract stipulates that 'PYA and CRAM pool the research which they have carried out separately into the rolling of zinc. Consequently, PYA shall transmit to CRAM the documents drawn up

following the work carried out by the Ecole des Mines, Paris, on behalf of PYA, and CRAM shall transmit to PYA the documents drawn up at Aubry and at Liège following the work carried out in casting, rolling and lubrication...'

The contract also contains clauses which directly concern trade with producers in other Community countries.

Under Clause I.14, PYA undertakes to refrain 'from importing into France rolled zinc products or zinc alloys which CRAM could supply itself'. Conversely, under Clause II.15 CRAM undertakes to refrain 'from importing into France zinc alloys which PYA is capable of supplying'.

The undertaking by CRAM to supply rolled products to PYA concerns only those quantities which satisfy 'the sales requirements in France' of that undertaking. This restriction is repeated in Clause I.9 of the agreement, under which 'the quantities which CRAM agrees to job roll shall correspond to the requirements as stated by PYA for its sales in France'.

Nevertheless, the scope of these clauses is restricted by Clause I.10, which stipulates that 'CRAM agrees, moreover, subject to its available capacity, to job roll for PYA, on terms to be agreed, zinc intended for sale outside France. Unless otherwise agreed, PYA shall refrain from exporting to Spain, Portugal and the Portuguese overseas territories, Norway or Sweden, and CRAM to Italy and Greece...'

A similar restriction concerning alloys is to be found in Clause II.14. This stipulates that 'PYA agrees, moreover, subject to its available capacity, to produce on a jobbing basis for CRAM, on the terms set out at II.8 (1), and II.9 (2), alloys for sale by CRAM outside France, on condition that CRAM does not export to Italy and Greece without prior agreement...'

Furthermore, as regards the marketing of zinc from sources other than CRAM in the event that CRAM should be unable to supply, PYA would have to comply with the rules of fair competition.

IV. *Rationalization agreement between CRAM and Prayon*

On 1 October 1977, CRAM and the Société de Prayon of Prayon-Trooz, Belgium (hereinafter called Prayon), concluded a 'rationalization' contract whereby Prayon undertook to obtain all its rolled zinc products requirements from CRAM under a contract for the jobbing rolling of crude zinc produced and supplied by Prayon.

The contract covers an initial period of 15 years. Its term of validity is then automatically extended for periods of five years, unless it is terminated by one of the parties who must give two years notice.

As regards the production by CRAM of rolled zinc products on behalf of Prayon and the undertaking by that firm to procure its supplies solely from the other party, the contract states:

- *Clause I.2*: 'Prayon undertakes to have rolled by CRAM and CRAM undertakes to job roll for Prayon at its factory at Auby, a quantity of zinc of not less than 7 000 tonnes and not more than 10 000 tonnes per year, corresponding to Prayon's normal requirements for sale in its traditional markets. This agreement shall take effect in full on 1 January 1979 ...'.
- *Clause I.3*: 'The processing on a jobbing basis shall be carried out on the terms of the most favoured colleague, namely: a flat-rate rolling charge will be paid to CRAM by Prayon ...' (the method for calculating the charge follows).
- *Clause I.12*: 'During the life of this agreement, save in the cases of non-competitiveness on the part of CRAM provided for in Articles I.9 and I.10, or save where CRAM is unable to honour its commitments or save, of course, where otherwise agreed by CRAM in advance, Prayon hereby undertakes to refrain, whether directly or indirectly, from rolling, causing to be rolled or supplying all quantities of zinc or zinc alloys which CRAM might wish to roll using its continuous rolling mill'.

The 'cases of non-competitiveness on the part of CRAM' which are mentioned in Clause I.12, and in which Prayon is therefore released from its obligations, relate exclusively, as far as rolled products are concerned, to circumstances in which CRAM does not offer Prayon terms comparable to those of its competitors in regard to its supplies 'intended for sale by Prayon outside its traditional markets or beyond its normal requirements' (Clause I.9).

LEGAL ASSESSMENT

1. The market protection measures (1976)

1. Concerted action to protect the German market

Various signs indicate that, at least in 1976 and on the occasion of the supplies to Schiltz of rolled zinc products allegedly intended for Egypt, a concerted practice existed as between CRAM and RZ, the main

purpose of which was to protect the German market in respect of sales of those products.

It was during the same brief period culminating on 21 October 1976 (cessation of deliveries by CRAM) and 29 October 1976 (cessation of deliveries by RZ) that these two producers exerted pressure on Schiltz in order to induce it to cease its exports to the Federal Republic of Germany.

It has been established that, on the same date as that on which CRAM suspended its deliveries for no apparent reason, namely 21 October 1976, RZ accused Schiltz of not complying with the export-to-Egypt clause. It is impossible to perceive only a coincidence in this identity of date when it is noted that, on 26 October 1976, RZ informed CRAM by telex of a reduction in its prices of approximately 3 % on the German market. This notification is devoid of purpose as between competitors other than as part of a concerted effort to combat together parallel exports to that market. In this connection, RZ has referred to direct supplies by CRAM which might have explained such a telex, but the content and tone of the telex in no way support any claim that it was intended to secure a reduction in CRAM's prices for supplies to RZ. The falseness of this argument is glaringly apparent from the reference in the telex to a price reduction for standard gauges, whereas CRAM has always supplied RZ, in very small quantities, with nothing but ultra-low gauges.

Furthermore, it is significant that CRAM awaited the outcome of the enquiries conducted by RZ in regard to Schiltz and Kestermann before demanding from Schiltz, on 8 November 1976, payment of the sums which were owed to it.

None of these findings can be explained other than by the existence of an exchange of information between CRAM and RZ with a view to taking parallel and concurrent action against Schiltz in a concerted practice for the protection of the German market's price for the level, by means in particular of preventing parallel exports or re-imports of rolled zinc products originating in Germany. Such a concerted practice falls within the scope of Article 85 in view of its obvious effect on trade between Member States.

2. Obligation to resell in a specific country

The clause stipulating that Schiltz shall export to Egypt the tonnages of rolled zinc products supplied by CRAM and RZ constitutes, by its very object, a restriction on competition. This clause limits the freedom of the subsequent seller to market the goods where he

wishes and is designed to enable the two producers to prevent any parallel imports within the common market.

In the case in point it is noteworthy that the prices which Schiltz was charged by RZ and CRAM for sales intended for Egypt were practically identical, or very close, to those charged by the same producers for sales intended for Belgium. The export-to-Egypt clause was thus essentially a means of protecting the producers' respective markets and above all the German market, which is the most vulnerable in view of the high level of prices and of the distribution facilities.

The export-to-Egypt clause also had a restrictive effect, since the suppliers immediately and permanently ceased supplies contracted for and refused the additional orders already received as soon as it became apparent that the clause was not being complied with and that the goods were being resold in Germany. RZ's attitude in this connection is unambiguous, as is that of CRAM, which refers to delays in payment by Schiltz, but which took 17 days to raise the matter with Schiltz following its sudden suspension of deliveries, without formally calling upon Schiltz to pay.

The restriction of competition which results from the obligation to resell in a specific country may itself affect trade between Member States to an appreciable degree owing to the fact that the subsequent seller is established in the common market, within which he must remain free to sell the goods where he wishes depending on the circumstances and *inter alia* on the prices quoted to him. In the present case, such resale from Belgium was an easy matter in the Federal Republic of Germany and even in France, since price levels in those countries were considerably higher.

Furthermore, the application of Article 85 (3) cannot be contemplated in the present case, firstly because it has not been requested, and secondly because there are none of the benefits referred to in that provision, in a clause which is, in reality, designed only to protect the respective markets of the producers. Even if, in certain circumstances, a clause concerning resale in a specific country might be granted an exemption, in this case there can be no question of an exemption in the light of RZ's and CRAM's prices.

Accordingly, the clause concerning resale in a specific country concluded between CRAM and Schiltz on the one hand, and between RZ and Schiltz on the other, is therefore caught by Article 85 of the Treaty.

II. Reciprocal assistance contract between CRAM, RZ and VM

1. The contract of 5 August 1974, whereby CRAM, RZ and VM undertook to supply each other with rolled zinc products in case of need, constitutes a restriction of competition by virtue both of its object and its effect, as it deprives the parties, at least in the situations for which it provides and which have occurred, of their independence of action and their ability to adapt individually to circumstances. Under the contract, each party undertakes not to benefit, by increasing direct sales to customers, from production stoppages or reductions in output sustained by the other parties, while conversely shielding itself against the risk of such action by the others.

The contract could oblige, and can still oblige, the parties to supply each other with considerable tonnages.

A contract of such general scope and of such long duration, being automatically renewable any number of times, institutionalizes mutual aid in lieu of competition and is likely to prevent any change in the respective positions on the market.

At the very time when an incursion by one party into the market of another could be accomplished with the least difficulty, especially as the products involved are virtually identical apart from the trade mark, the former party must, on the contrary, divert part of its production from the normal sales channel and supply it to the latter party. The effect of the contract will be to place the latter party in a position of dependence such that it will never use goods received under the contract for competitive purposes. The restriction noted is likely to affect trade between Member States, since it affects the conduct on their respective markets of three of the principal European producers of rolled zinc products.

2. Although, in the absence of any notification, the granting of an exemption pursuant to Article 85 (3) is ruled out, it must be stressed that the substantive conditions for such exemption are not met.

The parties have maintained that the agreement was concluded at a time when they were commissioning ultra-modern rolling plant whose operation was intricate, especially in the beginning, and that, consequently, the agreement was necessary to ensure supplies to subsequent sellers in the event of one of the new machines breaking down.

The Commission does not object to occasional and irregular deliveries between competitors. It considers that the compatibility of or likelihood of exemption for possible agreements on a non-exclusive basis, limited in time, for deliveries between competitors in order to guarantee supplies would have to be examined. In this case, however, **no exemption is possible. Production cannot be held to have been improved since the investments had already been made. In any event, an agreement so widely cast and of such long duration would not have been necessary to accommodate the accident risk occasioned by lack of experience of the operation of the new machines.** Similarly, distribution cannot be held to have been improved in respect of security of supply. Customers of a producer unable to supply would merely have had to organize the dispatch of the consignments requested without having abruptly to set up a new sales network, as has been claimed by the parties.

III. Measures agreed between CRAM and PYA concerning the production, supply and sale of rolled zinc products and zinc alloys

A. Restrictions of competition

1. Production

The contract of 4 May 1971 contains, as far as the production of rolled products and alloys is concerned, provisions in restraint of competition.

PYA's undertaking (Article I.14) to refrain from manufacturing rolled zinc products alters the structure of supply within the common market by reducing from three to two the number of producers on the French market, with the two remaining producers, CRAM and VM, accounting for more than half of Community production.

In reply to the Commission's objections on this point, it was claimed that PYA was obliged for other reasons to cease production of rolled zinc products. One cannot fail to note, however, that the agreement in question establishes a direct and indisputable link between such cessation of production, coupled with an undertaking to refrain therefrom for at least 15 years (minimum duration of the agreement) and the following undertakings by CRAM concerning alloys, which can be viewed only as a reciprocal measure. That is, moreover, how the Commission Française de la

Concurrence interpreted the agreement in its opinion of 8 February 1979.

For its part, CRAM renounced (Article II.6) its freedom to determine the level of its production of zinc alloys by undertaking not to increase its production capacity and even, if necessary, to reduce its production, until alloy production by PYA reached 15 000 tonnes per year.

Similarly, the mutual undertaking by CRAM and PYA (Article II.7) to cooperate in creating new alloy production capacity once PYA had reached its objective of 15 000 tonnes per year (30 % of the French market at that time) deprives the parties of their normal freedom of action in this respect.

The various clauses referred to above are therefore designed to restrict competition on the market in general and, between the parties themselves, at the production stage.

2. Supply and sales

The contract of 4 May 1971 also contains restrictions on the purchase and sale of goods which are, in fact, closely interwoven with the abovementioned restrictions.

Firstly, PYA undertakes, in respect of its sales in France (Article I.2), to procure rolled zinc products only from CRAM, which undertakes to supply PYA. In respect of its sales of the same products outside France, PYA is obliged (Article I.10) to grant CRAM preferential treatment on equal terms, which, despite the less rigorous term imposed, lessens its freedom of procurement. In both cases, the obligation on the part of CRAM to supply PYA may have the effect of reducing the amount of goods available for its own exports.

Even if CRAM were unable to supply the goods, in which case PYA becomes free once more to procure its supplies from third parties, the obligation on the part of PYA (Article I.13) to 'comply with the rules of fair competition' when marketing rolled products supplied by third parties is clearly designed to protect CRAM from any competitive disturbance, and implies fairly clearly that CRAM expects no less from PYA in respect of the marketing of rolled products which it itself supplies to the latter.

The prohibition imposed on CRAM (Article I.10) forbidding it to export to Greece and Italy completes, despite the fact that such exports could only be limited in quantity, the list of restrictions concerning rolled products.

As regards zinc alloys, CRAM undertakes (Article II.8) to order up to 5 000 tonnes from PYA (which undertakes to supply them) so as to enable the latter to attain a production of 15 000 tonnes per year. Although this provision is only one aspect of CRAM's undertaking, referred to above, to reduce if necessary its own production (Article II.6), it implies the supplying of goods to a company by a competitor on terms which rule out any competition.

On a more general plane, CRAM grants PYA preferential treatment in respect of all alloys supplied throughout the duration of the agreement (Article II.15). These provisions, together with those concerning production (see section A.1 above), imply an undertaking by the parties to refrain, when selling alloys, from competitive conduct likely to run counter to the objective of harmonization of production and of sales policies, which is clear from the agreement of 4 May 1971 (see *inter alia* Article I.3 of the preamble).

The various clauses referred to above must therefore be considered as being intended to restrict, at the procurement of supplies and distribution stages, competition between the parties in respect of the two types of product in question.

B. Effect on trade between Member States

The clauses referred to above concerning production and the sale of goods in Greece and Italy are likely to influence to an appreciable degree the opportunities which the parties have to export in the common market. Those concerning mutual supplies reduce the freedom of the parties to import goods from the common market, and even to export to it, at least in a fully competitive manner, as far as the obligation on the part of CRAM to supply PYA with rolled products, is concerned.

It must be stressed that, as far as alloys are concerned, the statement in the agreement (Article II.8 in fine) whereby the annual production by PYA of 15 000 tonnes would be 'for its own sales in France' does not lead to the confinement to sales in France only of the unconditional limitation of production capacity, or perhaps even of production, agreed to by CRAM.

The same applies to the mutual undertaking (Article II.7) to confer together regarding capacity once PYA had reached this objective of 15 000 tonnes per year. It is improbable that the cooperation agreed upon would cover only the capacity intended for sale in France,

with complete freedom of action being retained with regard to that intended for export.

Nor, as regards the undertaking by PYA to procure rolled products only from CRAM, does the reference (in Article I.2) 'to (PYA's) sales requirements in France' have the effect of leaving PYA free to procure supplies outside France. However, to make doubly sure, Article I.14 (end of first paragraph) formally prohibits it from doing so, save as indicated above in the event of CRAM being prevented from supplying the goods.

C. Inapplicability of Article 85 (3)

As a result of the failure to notify the agreement of 4 May 1971, it is not possible to contemplate its exemption pursuant to Article 85 (3) of the Treaty.

In this respect, the Commission would emphasize that it does not consider it impossible that it might, subject to the deletion or amendment of certain unnecessary or excessive provisions, have granted an exemption, for a limited period, under Article 85 (3) to the essential provisions of the agreement, in so far as they would have been likely to improve production or distribution by enabling PYA to penetrate the alloys market, while retaining its presence as a dealer on that in rolled products.

Nevertheless, should that have been the case, the Commission would not in view of the circumstances of the case have considered it indispensable for the purposes of Article 85 (3) that the restrictions provisionally allowed should have been agreed to for a period of 15 years, renewable for periods of five years.

Furthermore, the Commission could not have considered as indispensable the clauses concerning:

- PYA's undertaking to grant CRAM preferential treatment on equal terms for the supply of its sales requirements outside France,
- the prohibition on exports by CRAM of rolled zinc products to Italy,
- the prohibition on imports by PYA of rolled zinc products into France, save where CRAM is unable to supply.

IV. Rationalization contract between CRAM and Prayon

1. By letter dated 17 June 1981, the Commission complained to CRAM and Prayon about the commitment entered into by the latter under the agreement of 1 October 1977 to cease production of rolled zinc products.

It is clear from the undertakings' answers to the Statement of Objections and from the explanations given at the hearing that Prayon's decision to close down its rolling mill is unrelated to, and was taken before the conclusion of the contract of 1 October 1977. It was made for reasons of profitability and industrial policy. This being so, the objection concerning the undertaking to cease production of rolled zinc products must be dropped.

2. Nevertheless, the agreement of 1 October 1977 contains other provisions which restrict competition.

The undertaking to entrust to CRAM jobbing rolling work on its behalf, involving between 7 000 and 10 000 tonnes of zinc per year, on the terms 'of CRAM's most favoured customer' (terms defined precisely in the agreement) is likely to prevent Prayon from dealing, possibly on better terms, with another producer in the common market.

Prayon is also obliged (Article I.12 of the agreement) to approach CRAM alone for its supplies of rolled products 'beyond its normal requirements' (i.e. a maximum of 10 000 tonnes of zinc per year) or so as to enable it to supply goods 'outside its traditional markets'. It is only in these two sets of circumstances that CRAM loses its preference if it does not offer terms comparable to those of any third party. Despite this mitigating factor, the clause constitutes a restriction of competition in that it increases still further Prayon's dependence on CRAM.

These restrictions are appreciable and likely to affect trade between Member States owing both to the size of the undertakings in question and to their position as exporters.

3. A declaration of the inapplicability pursuant to Article 85 (3) of the EEC Treaty of the provisions of Article 85 (1) has not been requested and moreover could not have been granted.

According to the parties, the objective of the agreement is to enable Prayon to retain its presence on the rolled products market despite the closure of its rolling mill. CRAM's undertaking to carry out jobbing rolling work for Prayon is said to guarantee the latter supplies in such quantity and quality and on such terms as would enable it to continue to distribute the product. The sole rights granted to CRAM by Prayon in respect

of part of the work and the preferential treatment accorded in respect of the remainder are claimed to be necessary to guarantee CRAM continuous access to this outlet and to enable it to take certain technical and commercial measures.

In the present case, however, these obligations are, in view of their duration, **not indispensable** to the attainment of the objective of the agreement. No factor justifies an initial duration of 15 years with provision for renewal for five years, save where notice of termination is given subject to two years' notice. Such a long duration might be justified in the case of agreements which require major investment on the part of the supplier and which concern a specific product which the purchaser cannot easily procure elsewhere on the market. Not only, however, did CRAM underutilize its new rolling mill, but rolled zinc products, the subject matter of the agreement, were also produced by at least two other manufacturers.

ARTICLE 15 (2) OF REGULATION No 17

By virtue of Article 15 (2), the Commission may by decision impose on undertakings fines of from 1 000 to 1 000 000 ECU 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 is to be had both to the gravity and to the duration of the infringement.

The Commission considers that fines should be imposed on CRAM and RZ in respect of their participation in a concerted practice for the protection of the German market against parallel imports of rolled zinc products by Schiltz.

These two undertakings, by their participation in this concerted practice, have infringed intentionally, or at the very least negligently, Article 85 (1) of the Treaty. They knew or should have known that the prevention of parallel exports is a serious infringement of Article 85 (1), as is made clear by a long line of judgments of the Court of Justice and Commission decisions.

With regard to the gravity of the infringement it is evident that CRAM and RZ tried, by means of the concerted practice, to impede the creation of a single market between the Member States of the Community, one of the EEC Treaty's fundamental aims.

With regard to its duration, the infringement began at the latest on 21 October 1976 and persisted until at least 29 October 1976, as has been shown above.

As for the amount of the fines, although the infringement is serious, account must be taken of the short duration of the concerted practice.

Furthermore, the responsibility of the two undertakings in the concerted practice is the same. However, the size of the two undertakings should be taken into account,

HAS ADOPTED THIS DECISION:

Article 1

1. The concerted action taken in 1976 by CRAM and RZ with a view to protecting the German market against parallel imports of rolled products by Schiltz constitutes an infringement of Article 85 of the Treaty.

2. The agreement concluded in 1976 between CRAM and Schiltz on the one hand, and between RZ and Schiltz on the other requiring the latter to resell rolled zinc products in a specific country with the object of restricting parallel imports into the Community constituted an infringement of Article 85 of the Treaty.

Article 2

1. For their involvement in the infringement referred to in Article 1 (1), the following fines are hereby imposed on the following undertakings:

- CRAM, a fine of 400 000 (four hundred thousand) ECU, i.e. FF 2 625 000,
- Rheinische Zinkwalzwerk GmbH and Co., a fine of 500 000 (five hundred thousand) ECU, i.e. DM 1 157 230.

2. These fines shall be paid

- by CRAM to Société Générale de Paris to the account of the Commission of the European Communities, No 5 770 006 5,
- by RZ to SAL Oppenheim, Cologne to the account of the Commission of the European Communities, No 64910,

within three months of the date of notification of this Decision.

Article 3

The reciprocal assistance contract dated 5 August 1974 between CRAM, RZ and VM constitutes an infringement of Article 85 of the Treaty.

Article 4

The following provisions of the contract of 4 May 1971 between CRAM and PYA constitute an infringement of Article 85 of the Treaty:

1. Undertaking by PYA to refrain from manufacturing rolled zinc products (Article I.14).
2. Undertaking by CRAM not to increase its production capacity in the field of zinc alloys as long as that of PYA does not exceed 15 000 tonnes per year, and to reduce, if necessary, its own production by having up to 5 000 tonnes per year produced on its behalf by PYA (Article II.6 and 8).
3. Mutual undertaking by CRAM and PYA to cooperate with a view to creating new alloy production capacity once PYA's production has reached 15 000 tonnes per year (Article II.7).
4. Undertaking by PYA to procure rolled products only from CRAM in respect of part (sale in France) of its requirements (Article I.2), to grant it preferential treatment on equal terms in respect of the remainder (Article I.10), and to 'comply with the rules of fair competition' when selling rolled products acquired from third parties in the event of CRAM's being unable to supply (Article I.13); prohibition on CRAM exporting rolled products to Greece and Italy (Article I.10) and on PYA importing rolled products save where CRAM is unable to supply (Article I.14).
5. Undertaking by CRAM to grant preferential treatment to PYA in respect of all supplies of alloys.

Article 5

The exclusive rights granted by Prayon to CRAM under their contract of 1 October 1977 as regards jobbing rolling up to a certain tonnage, and the preferential treatment on equal terms which is granted to it above that tonnage or with a view to non-customary sales, constitute an infringement of Article 85 of the Treaty.

Article 6

The parties referred to in Article 7 are hereby ordered to bring to an end forthwith the infringements established and to refrain in future from any contractual provision or concerted practice having the same effect.

Article 7

This Decision is addressed to:

1. in its entirety:

Compagnie royale asturienne des mines
42, avenue Gabriel
F-Paris Cedex 08;

2. as regards Articles 1, 2 and 3:

Rheinisches Zinkwalzwerk GmbH & Co.
Bahnhofstraße 90
Postfach 4354
D-4354 Datteln;

3. as regards Article 3:

Société des mines et fonderies de zinc de la Vieille
Montagne SA
B-4900 Angleur, Liège;

4. as regards Article 4:

Penarroya SA
Tour Maine Montparnasse
33, avenue du Maine
F-75755 Paris;

5. as regards Article 5:

Société de Prayon SA
144, rue J. Wauters
B-4130 Engis.

This Decision shall be enforceable in accordance with
Article 192 of the Treaty establishing the European
Economic Community.

Done at Brussels, 14 December 1982.

For the Commission

Frans ANDRIESEN

Member of the Commission
