COMMISSION DECISION

of 15 July 1975

relating to a proceeding under Article 85 of the EEC Treaty

(IV/27.000 — IFTRA rules for producers of virgin aluminium)

(Only the English, French, German and Dutch texts are authentic)

(75/497/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 17/62 of 6 February 1962 (1), and in particular Articles 1, 3 and 4 thereof;

Having regard to the notification submitted on 28 April 1972 in conformity with Article 4 (1) of Regulation No 17/62 for the International Fair Trade Practice Rules Administration (IFTRA) at Vaduz (Liechtenstein) and the undertakings signatory to the agreement dated 27 April 1972, and known as the 'IFTRA rules for producers of virgin aluminium';

Having heard the undertakings concerned pursuant to Article 19 (1) of Regulation No 17/62 and in accordance with Commission Regulation No 99/63 of 25 July 1963 (2);

Having regard to the Opinion of the Advisory Committee on Restrictive Practices and Dominant Positions obtained pursuant to Article 10 of Regulation No 17/62 on 23 April 1975,

Whereas :

I

THE FACTS

A. The IFTRA rules

The 'IFTRA rules for producers of virgin aluminium' (hereinafter referred to as the IFTRA rules) are applicable to the marketing of primary aluminium and have been adopted by almost all the producers of primary aluminium within the EEC, and by a majority of producers situated in western Europe but outside the EEC.

The IFTRA rules are divided into three parts, namely the 'Anti-Dumping Agreement' (Document 1), 'Fair Trade Practice Rules' (Document 2) and the 'Contract of Commitment and Legal Protection' (Document 3). The 'Anti-Dumping Agreement' provides for the obligation to refrain from dumping in the same terms as those used in clause 2, Group A of the 'Fair Trade Practice Rules', but the parties have indicated that the document relating to the 'Anti-Dumping Agreement' has not been signed.

The following is the text of the material parts of the 'Fair Trade Practice Rules' followed by extracts and a summary of the provisions of the 'Contract of Commitment and Legal Protection'.

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

'Document 2

IFTRA

Fair trade practice rules for producers of virgin aluminium for the European markets

Introduction

Protection and promotion of true competition make it imperative to refrain from and fight unfair trade practices and all other falsifications of competition.

The undersigned expresses therefore by group A of these rules his opinion of what constitutes unfair trade practices which he intends to refrain from according to the contract of commitment, and by help of advice how to conform to the rules foreseen in B I 1 of the contract of legal protection, and which he can fight by requesting IFTRA procedures of fact finding and judgement, as foreseen in B I 2 of the contract of legal protection for practical cases of violation of the rules.

Group B contains, in form of non-committing advice for individual and autonomous decisions, principles of pricing and distribution of mass-produced goods which promote true competition and help to avoid falsification of competition. Non-observance is not illicit as such, but may result in unfair trade practices in the cases indicated under B, and in particular through supplementary facts as described under A. This can then be examined by procedures according to the contract of legal protection.

The fair trade practice rules do not aim at agreement on prices. On the contrary they are based on free individual and autonomous decision on prices by every signatory.

Group A

The rules of group A embrace mainly unfair trade practices which are considered to violate already existing laws, and principles as established by supreme court decisions.

1. Destructive sales below cost

   a) Sales below cost are not unfair as such. Unintentional sales below cost can be influenced, therefore, only by non-committing advice under B.

   b) Intentional sales below cost are unfair trade practices, if made illicit by motive, method and intent in the individual case. If for instance it is exercised, with the designed intention to take undue advantage of differing financial strength or multilevel-tax-favoured activities or possibilities to compensate losses with profits in other fields, in order to jeopardize unduly or destroy a competitor's existence. This even more so if it is the intention to obtain or abuse a dominating position in the market and restrain competition.

   c) It is considered an unfair trade practice, therefore, when integrated producers (producing virgin aluminium as well as wrought aluminium) sell wrought aluminium below cost price, and this is done with the designed intention to jeopardize unduly or destroy the existence of non-integrated producers of wrought aluminium.

2. Dumping

   Dumping as condemned under Article VI of the GATT is an unfair trade practice.

   This is valid for direct sales and must not be circumvented by sales through third persons of every legal construction or deliveries of scrap or wrought aluminium or compensation and later advantages or other extras.

3. Misrepresentation of non-discrimination

   The producer who declares it to be his price policy to treat equally comparable cases of business on the basis of his price list or prices rebates and conditions, and to deviate from them only when and in so far as it is necessary in his own defence against provable competitive offers, in order to simplify and rationalize the customers' buying and his own selling, and to give his customers equal chances in their competitive sales (declaration of normal, non-discriminating price policy),

   and then treats them nevertheless differently without being forced to do so by provable competitive offers, and without revoking his declaration openly in time,

   is discriminating against his customers and is also acting unfairly with regard to his competitors, because his practices are capable of being misleading.

   The same applies if a producer creates the same impression by the methods and means of his announcement of price lists, prices, rebates and conditions, or when during talks about them with customers interested in equal treatment for reasons of their sales competition. For example, when during these talks he asks for confidence in his equal treatment of customers.

4. Misleading omission of promised enlightenment

   A producer who commits himself explicitly through unilateral declaration or conclusively according to A 3 to enlightenment and verification of price information given by customers or agents pretending more favourable competitive quotations,

   is acting unfairly if he omits or prevents the enlightenment and verification and is misleading in competition,

when pretending for instance that he is forced to deviate from his normal prices by competitive quotations which in reality he did not check and verify,

or preventing competitors' enlightenment by not giving the promised information about his own prices.

5. Misleading collusion

It is an unfair trade practice to agree with a customer to keep secret any deviations from the normal prices of the producer to prevent his enlightenment,

if this is contrary to a commitment of enlightenment of the producer or customer.

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Group B

Group B contains, in form of non-committing advice for individual and autonomous decisions, principles of pricing and distribution of mass-produced goods which promote true competition and help to avoid falsification of competition. Non-observance is not illicit as such but may result in unfair trade practices in the cases indicated under B and in particular through supplementary facts as described under A. This can then be examined by procedures according to the contract of legal protection.

1. Basis of pricing

a) Reasonable pricing depends on a calculation adequate to determine the costs in order to guarantee fulfilment of obligations existing in respect of country, personnel, creditors and contracting partners.

b) Cost comparisons between enterprises help to find faults in expenditure and cost calculation and promote true competition.

c) In case of progressing supranational market integration it is advisable to make comparisons of national calculation schemes to work out a harmonized calculation scheme, without fixing the amounts, and offer it for individual and autonomous decision of application in order to avoid falsification of competition due to differing national systems in determining costs and allocating them to different types of goods.

d) Market statistics help to analyse how the market has influenced prices in the past and enables use of such market analyses for future pricing.

2. Pricing

a) Reasonable pricing should follow the principles of veracity and clarity of prices.

b) Establishment of price lists helps to realize these principles and to promote true competition by market transparency. Price lists correspond to the cost conditions of industrial mass production, which can ill-afford daily changing prices; they simplify and rationalize the producer distribution and the customer buying.

c) Price lists, by clear descriptions of goods and their technical nature, help avoid misleading prices of producers and misleading price information about competitive offers by customers.

Clear descriptions are even more important for international commerce in cases of differing national types and standards.

d) A producer who is using price lists should change them if he wants to deviate from the old prices in general for a limited or unlimited period of time. This results from the principles of veracity and clarity of prices, and avoids misleading practices of his own selling organization and misleading price information of customers to competitors.

e) A producer who has not made a declaration of normal price policy or created such an impression (compare A 3) is, however, well advised to change in general his price list, prices, rebates and conditions, instead of deviating from them secretly and in favour of a few customers only, because it would be self-deception to believe that this would remain secret. The customer would only regard this as a sign of price instability and use it for his price information to competing producers in order to get more advantages. Furthermore it could result in misleading practices by his own selling organization.

f) For the purpose of international commerce every individual producer should express his prices in the currency of the country of destination in order to avoid misleading conversion by his own sales organization or by customers in their price information to competitors.

He is furthermore free to follow the prices practised in the country of destination in his own interest to obtain the best returns and to avoid falsification of competition, which would otherwise be the consequence of the different currency exchange rates, as fixed by governments to foster or deter exportation.

3. Quantity rebates

a) Rebates and discounts are part of the pricing and should follow the principles of veracity and clarity of prices.

b) Fixed rebate schedules match the cost conditions of mass production far better than daily changing rebates. They help to avoid misleading price information by customers about competitive quotations and promote true competition. They simplify and rationalize the producer selling and the customer buying. Market statistics and analyses as foreseen under B I d make it easier to make up the right schedule.

c) If the producer practises a system of consumer prices, the rebates which are to be deducted from the consumer price should correspond to the advantages the different quantities entail for this production. Exaggerated consumer prices and rebates tend to replace true competition by misleading rebate competition, which decreases the transparency of the market and fosters misleading price information by customers.

d) Apart from clear quantity rebates, extra charges for lesser quantities also help to promote true competition, if they in turn correspond to the additional production costs. Extra charges deter customers from placing small orders and contribute towards more rational production lots.

e) Granting of quantity rebates, turnover bonuses or other advantages in advance before the corresponding turnover has been reached or secured or allowing such deductions without claiming the difference as soon as it becomes obvious that the quantity will not be reached leads to deception of customers and competitors relying on the conditions generally applied by the producer.

4. Functional rebates

a) A producer should examine the true qualification of a customer before granting rebates, deductions or other advantages connected with a certain function.

b) A mere designation of function such as wholesale dealer proves often to be no more than the admission to the trade. The producer is entitled, therefore, to stipulate his conditions for granting functional rebates such as qualifications required and their usefulness to the producer.

5. Competitive rebates

Rebates which are granted openly for competitive reasons without any connections to quantities or functions are not unfair as such, but could easily lead to a chain of reactions boomeranging on the instigator. They could bring about misleading price information by customers if the true competitive character of these rebates is concealed.

In international commerce these competitive rebates are customary in so far as they are necessary to equalize competitive advantages of the home market producer, caused for instance by the complications and difficulties of importation. Competitive rebates exceeding equalization lead to counteractions and to chain reactions which normally end up at the originator and foster misleading price information by customers.

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'Document 3

IFTRA

Contract of commitment and legal protection for producers of virgin aluminium

A. *Commitment*

The undersigned producer agrees by his signature to the opinion expressed by the attached fair trade practice rules or anti-dumping agreement and undertakes the commitment to abstain from trade practices which are declared unfair by these rules.

This commitment shall be valid for direct sales of virgin aluminium of 99 % and higher purity of CCT heading No 76.01 A and its alloys in the shape of ingots, sows, billets and slabs, and must not be circumvented by sales through third persons of every legal construction, or deliveries of scrap or wrought aluminium or compensation and later advantages or other extras.

B. *Legal protection*

I. IFTRA tasks for legal protection

1. Advice

Advise the use of the fair trade practice rules or anti-dumping agreement in order to respect the limits imposed by national and supranational anti-cartel legislation. The advice takes place at quarterly or half-yearly meetings.

2. Procedures

Fact finding and establishment of contraventions against the fair trade practice rules or anti-dumping agreement and assessment of the obligation to stop contraventions and of contractual penalties.

The possibility to apply for decision by ordinary courts, or for protection by governmental measures, are not excluded'.

Clause B II provides for contractual penalties for contraventions of the IFTRA rules, B III for 'procedures' whereby such contraventions are established, and clause B IV provides for appeal to a 'court of arbitration'. Clause B VI (1) provides that 'the fair practice rules or anti-dumping agreement may be used under the condition that the rules or agreement form a unit together with the contract of commitment and legal protection. Any other use requires previous written approval from IFTRA'.

Clause B VI (2) and (3) respectively provide for the payment of fees and the duration of the IFTRA agreement.

The procedure and constitution of the court of arbitration referred to above are contained in an appendix to the contract of commitment and legal protection, which being a part of the latter is said at paragraph 10 not to require separate signature.

B. **Structure of the market**

At the primary level of production the market in aluminium is characterized by a marked concentration of supply. Among the EEC Member States, four (Belgium, Luxembourg, Denmark and Ireland) have no production, and of the remaining members France has one producer, Italy has two major producers and one minor, the Netherlands has two and the United Kingdom has three. Germany is an exception to this pattern, having five producers. Of the remaining countries of western Europe (defined for these purposes as including the EEC, Austria, Greece, Iceland, Norway, Portugal, Spain, Sweden and Switzerland) no country, except Norway, which has five, can number more than two producers. It should also be emphasized that of the above 29 producers at least 19 are associated with one another through majority or minority shareholdings and that 10 are undertakings in which five major producers in Canada and the USA have an interest.

The four most important groups operating in western Europe (Pechiney-Ugine Kuhlmann, Alusuisse, Vereinigte Aluminium Werke and Alcan), the first three of which are signatory to the IFTRA rules, represent around 65 % of the productive capacity of western Europe (as defined above) i.e. 3 424 000 metric tons (1).

Within the EEC, approximately 85 % of the productive capacity of primary aluminium (2 051 000 metric tons) is held by undertakings which have become party of the IFTRA rules or by undertakings in which the parties to the IFTRA rules have a controlling interest. In France and Germany, practically the entire productive capacity is so held, whereas in the Netherlands more than 50 % and in the United Kingdom 38 % of the productive capacity is held by undertakings which have adopted the IFTRA rules. In so far as the remaining countries of western Europe are concerned, undertakings which have become party to the IFTRA rules, or undertakings in which the former have a controlling interest, account for more than 70 % of Norway's productive capacity (711 000 metric tons), almost the entire productive capacities of Austria, Greece, Iceland, Spain and Sweden (572 000 metric tons), and almost 90 % of the productive capacity of Switzerland (90 000 metric tons). All the signatories to the rules are members of vertically integrated groups producing primary aluminium and semi-manufactured and finished products.

Within western Europe primary aluminium is consumed in the following proportions. The motor vehicle and construction industries take up approximately 37 % and 22 % respectively. Packaging takes up between 15 % and 20 % whilst the aircraft and shipbuilding industries account for approximately 13 % of consumption.

(1) Figures quoted are for 1973/74.

II

ORIGIN AND APPLICATION OF THE IFTRA RULES

The parties maintained that during the years 1970, 1971 and the beginning of 1972 the production of primary aluminium far exceeded consumption. This fact caused serious difficulties in this sector and was said to have led, or to have risked leading, certain undertakings, impelled by the need to dispose of their production, to engage in practices violating alleged principles or rules of law concerning the fairness of competition, and dumping in particular. It was argued that in consequence a need was felt by some of the parties to agree, and to induce the other parties to agree, upon a certain number of rules, or to collectively reaffirm rules already considered to exist, and jointly to issue a certain number of principles and recommendations so as to ensure that, despite the unfavourable circumstances prevailing in the trade, the market behaviour of the parties would remain within the bounds of reasonable and fair competition. The parties maintained that this was the reason for the preparation of the IFTRA rules which are the subject of the decision and their adoption in 1972 by most European producers of primary aluminium. Shortly after the rules had been notified to the Commission, the economic situation was said to have been reversed by an appreciable growth in the demand for primary aluminium ending the pressures

and strains on the industry. It was maintained that, as a result, the IFTRA rules have in practice had no role to play, nor have they had any application, that the rules, however, offered, should the economic climate again become adverse, a mutual guarantee against a recourse to unfair or pernicious competitive actions. The IFTRA rules were therefore kept by the parties as a 'safety net' in spite of their alleged lack of practical use.

The Commission has not, however, been informed of any matter which could be construed as being an act of unfair competition by any of the parties or their competitors during the time which preceded the adoption and notification of the IFTRA rules. In particular, in respect of the alleged dumping from third countries in 1970 and 1971, which the parties insisted had occurred, not only was the information sent to the Commission insufficient to establish that any act of dumping had taken place, but was also inadequate to justify the opening of proceedings under Council Regulation (EEC) No 459/68 (1) on dumping from third countries.

Whatever the above considerations may be, the action of the Commission is not to be determined by the notion that, because the rules are said not to have been applied, there is no need to take any steps with regard to them. The very existence of such rules is likely to influence the parties by discouraging them from certain actions contrary to the letter or spirit of those rules.

It should be borne in mind above all that Article 85 (1) prohibits any agreement having a restriction of competition as its object, even if it is not proven that it has been applied. It is therefore necessary to examine the object of the IFTRA rules. Should such an object prove to be restrictive of competition, by reference to Article 85 it would be necessary to prohibit the rules since, apart from the restrictive effect arising from their very existence, the rules are readily available for immediate and general application, as the parties attending the hearing have themselves admitted.

III

EXAMINATION OF THE CLAUSES OF THE IFTRA RULES TO WHICH OBJECTION HAS BEEN TAKEN

A. The restrictions of competition

The IFTRA rules constitute an agreement within the meaning of Article 85 between all the undertakings which are signatory to the rules, since on signing the IFTRA rules each undertaking accepts obligations toward the other signatories and creates in the latter an expectation that it will conduct its commercial policy in a certain way.

The mere labelling of an agreement between undertakings as rules against unfair competition does not suffice to remove the agreement from the ambit of Article 85 (1) of the EEC Treaty. In the present case the agreement in question contains several clauses which in fact either discourage competition directly or give the parties the opportunity and means to take joint action to prevent normal methods of competition.

In establishing the object of the clauses of this agreement, regard must be taken both of the reasonable construction of its terms and of the fact that the agreement must be considered to have a restriction of competition as its real object if such restriction would be the natural and probable consequence of its application.

Document 2, group A, clause 1

Clause A 1, supported by clauses 1 and 2 of group B and the contract of commitment and legal protection, establishes a system for the enforcement by the parties of rules which they allege to represent existing law. Since the law of Member States on the matters concerned by clause A 1 is not uniform, it follows that the adoption of a uniform private code by undertakings in several Member States may lead such undertakings to apply in their own country, or in the countries to which they export, rules more stringent than those they are obliged by law to observe. In assessing the object and effect of clause A 1 it is to be emphasized that its provisions are designed to be enforced by IFTRA, a private agency created by the parties, and whose activities are not subject to the permanent control of a public authority. It may therefore be supposed that it will tend to protect the collective interests of its members even to the detriment of third parties, by interpreting and applying the IFTRA rules in a manner likely to ensure the maximum restraint of competitive action among its members.

The clause concerned with 'destructive sales below cost' is alleged to have as its object 'the protection and promotion of true competition'. In the present case the principal object of clause 1 cannot reasonably be said to be the 'protection and promotion of true competition'. The clause exceeds the scope of legislation by Member States on unfair competition by creating a framework which facilitates and encourages the suppression of commercial initiatives which, whilst being inconvenient to the other parties to the agreement, are not 'destructive' in the reasonable sense of that term ; i.e. such as to imperil the existence of a competitor.

(1) OJ No L 93, 17. 4. 1968, p. 1.

The vagueness of the text of A 1 (b) in particular supplies a means to the parties to protect themselves from measures of price competition which they consider to be excessive. By declaring sales below cost to be unfair where 'undue advantage' is taken of 'differing financial strength' with the intention to 'jeopardize unduly' a 'competitor's existence' or to 'obtain ... a dominating position', the opportunity is given to the parties to interpret and eventually condemn, by means of the contract of commitment and legal protection, any measure of price competition as being unfair and therefore prohibited. Owing to the difficulty of accurately assessing real costs, especially those of competitors, the apprehension that even sales at or near cost may be made the subject of proceedings under the contract of legal protection will in itself discourage price competition between the signatories.

It is, however, the nature of price competition that offers may be made which are inconvenient to competitors in that the latter are constrained to match such offers. A contractual limit on price competition agreed between competitors such as that set out in clause A 1 tends to prevent such offers and is therefore restrictive in its object.

Document 2, group A, clause 2 : dumping

The clause should not be examined in isolation, but by reference to the introduction to document 2, which forms an integral part of the IFTRA rules. It is clearly apparent in the light of the introduction that the signatories to the rules have undertaken the obligation to refrain from dumping, at least in each other's respective territory, in terms that imply furthermore the simultaneous acceptance of the contract of commitment and legal protection (document 3).

Despite the fact that clause A 2 contains no territorial limitation as to its application, the parties maintained, by relying on the reference made to Article VI of the GATT which was said to be no longer applicable between Member States of the EEC, that the clause was not concerned with sales from the territory of one Member State of the EEC to that of another. The argument is, however, without real substance since it is obvious that reference is made to the concept of dumping as contained in, and the principle formulated by, Article VI of the GATT, and no reference is made in the rules to the territories to which this provision of the GATT is or is not applicable. Consequently the clause in its natural sense requires the parties to refrain from dumping in each other's territory, and applies to trade within the Community.

The obligation undertaken to refrain from 'dumping' has as its object or effect the prevention of acts which in fact are quite compatible with the rules of competition of the EEC.

Within the EEC, subject to the transitional provisions applicable to the three new Member States, the rules on dumping contained in Article 91 of the EEC Treaty have ceased to be applicable. A low-price sale from one Member State to another is no more subject to such rules than such a sale from one zone to another within the same Member State. It is clear that the sole object and effect of the IFTRA rules relating to dumping, as far as sales from one Member State to another are concerned, is to prevent the type of inconvenient competitive offer which is no longer prevented by any Community legal provision.

It is, moreover, necessary, as far as sales between the common market and third countries and sales during the transitional period between the six original members of the EEC and the three new members are concerned, to stress that the appraisal of whether acts can be considered as dumping and the imposition of defensive measures under the existing rules relating to dumping are matters which may be undertaken only by a competent authority, namely a national authority or the Commission of the European Communities. Any other method is open to the risk of abuse. Such an authority is the only entity entitled to assess, after an examination which is necessarily complicated and lengthy, whether the imposition of anti-dumping measures which interfere with the free movement of goods is justified.

It is therefore often difficult to predict whether a proposed sale will constitute unlawful dumping, and in consequence a reciprocal undertaking to refrain from dumping will necessarily discourage the parties from sales which may indeed inconvenience other parties in their national markets, but which would not ultimately be found contrary to the rules concerning dumping. Moreover the threat of the institution of 'procedures' by a competitor and the imposition of contractual penalties provided for in the contract of commitment and legal protection, should IFTRA establish what it considers to be dumping, are further inducements not to disturb the markets of competitors by any measures of price competition.

This agreement to refrain from dumping and the adoption of private rules to this end are therefore to be regarded as having the object and the effect of restricting competition within the meaning of Article 85 (1).

This conclusion is not rebutted by the efforts of the parties to present dumping as the subject of various treaties, legislation and regulations which entitle any undertaking to require any other to abstain from acts of dumping which are causing it damage, so that it is alleged that no objection could be taken to undertakings agreeing to abide by such treaties, legislation and regulations. The provisions of public international law relied upon (Article VI of the GATT and Article 10 of the Paris Convention for the Protection of Industrial Property) do not, in fact, constitute a source of positive law directly applicable to undertakings. In so far as the provisions of existing law in this subject are concerned, both national legislation and regulations and, for the Community, Council Regulation (EEC) No 459/68 entitle undertakings suffering or alleged to be suffering damage only to seek the intervention of a competent authority. In any event the appraisal of whether or not to condemn an act of dumping is not, as has been emphasized above, to be assigned or left to undertakings or private organizations or to arbitration.

Document 2, group A, clauses 3, 4 and 5

The above clauses discourage the signatories from selling at prices below those they have published and imply over and above the obligation to disclose price information to customers that of exchanging such information with competitors. In consequence the above clauses, under colour of protecting customers against discrimination, provide the parties with means of shelter from competition to the extent that price stability is increased and that the parties are enabled to predict each other's price policy with a reasonable degree of certainty.

Undertakings must not agree to limit the freedom which is theirs for activities not subject to the ECSC Treaty to apply whatever variations they think fit on their published prices and discounts, even where they have informed competitors or customers that they intend to adhere to those prices and discounts. Subject to Article 86 (c) of the EEC Treaty selling below published prices is not in itself unfair. It is, moreover, often necessary in order to gain a foothold in a market, which latter operation should be encouraged to promote the economic integration of the Community. Price competition must not be obstructed by a necessity to publish revised price lists before any change in price is made.

Apart from the possibility provided for by clause 3, that producers may make an express 'declaration of normal, non-discriminating price policy', and the likelihood that in times of economic difficulty for the industry pressures may be brought to ensure that such declarations be made, the clause further provides that such a declaration will be assumed to have been given, where the producer 'creates the . . . impression' (clause 3, last paragraph) that he will 'treat equally comparable cases of business on the basis of the price list or prices rebates and conditions' (clause 3, first paragraph). All the consequences of non-observance of declarations ensue whenever this 'impression' is created, even unwittingly.

Given the evident variety of circumstances where, by operation of the last paragraph of clause 3, the signatories will be deemed bound by implication not to depart from their price lists, and the fact that the signatories do indeed publish price lists, the clause discourages the signatories from selling at prices below these appearing in their price lists, except in response to a competitive offer the existence of which they must be able to prove.

In addition it is clear that with reference to the last paragraph of clause 3, the producer may not be aware of what impression he has created upon customers or competitors. Since the latter may bring proceedings or cause proceedings to be brought under the contract of legal protection based on an impression they alone have received, it would appear that this eventuality cannot be predicted with any certainty by the signatories. The apprehension that proceedings may be brought and the allegation made that 'unfair' practices have been committed is likely to deter them from applying prices or rebates differing from those they have made known and to persuade them to behave as if a 'declaration of normal, non-discriminating price policy' had been made.

Clauses 3, 4 and 5 taken together form a group of obligations the implementation of which requires the exchange of price information between competitors, for the following reasons.

The requirement under clause 4 that a producer 'check and verify' allegedly competitive quotations cannot be met unless that producer is in possession of price information disclosed by the competitor from whom the competitive quotation originates.

Moreover, clause 4 deems it to be an unfair practice for a producer to fail to provide price information to a competitor, where he has undertaken the obligation so to do, or where, by reference to clause 3, the producer 'declares' that his price policy will not be discrimina-

tory, or even where the producer 'creates the ... impression' that he will treat customers equally. Clause 5 is applicable in the same circumstances and constitutes a further measure tending to ensure full exchange of price information between competitors.

These clauses are therefore restrictive of competition both in their object and effect.

Document 2, group B

These provisions are set out in the form of a legal and economic commentary on certain types of apparently free and autonomous cooperation and desirable individual behaviour. Although the provisions of Group B purport to contain 'non-committing advice', they form an integral part of the fair trade practice rules, and it would be unreasonable to suppose that the provisions of group B have no effect or that they have been adopted with no intention that they be implemented.

In clause B VI (1) of the contract of commitment and legal protection it is stated that 'the rules ... form a unit together with the contract of commitment and legal protection. Any other use requires the previous written approval from IFTRA'. No such written approval has been given to any signatory.

It follows that the provisions of group B may form the basis of 'procedures' instituted by a party to IFTRA under the contract of commitment and legal protection to compel observance of the collective recommendation contained in group B. In this regard, it is to be emphasized that the contract of commitment and legal protection provides for the selfsame 'procedures' in respect of matters arising under both group A, as to which there cannot be any doubt of its obligatory nature for the parties, and group B of the IFTRA rules. The allegedly 'non-committing' nature of the provisions of group B is thus belied by the measures provided to ensure their implementation.

The provisions of group B amount to a recommendation to producers to align their sales policies with those of their competitors, and the contractual organization of sanctions in the contract of commitment and legal protection enables competitors to ensure that the recommendation to align policies is acted upon.

Document 2, group B, clause 1

Clause 1 should be construed by reference to the object of the IFTRA rules taken as a whole, namely the promotion of concerted behaviour on the market, and in the light of document 3 (expressly referred to in the preamble to document 2), which provides for both 'advice' and 'procedures' to be administered by persons representing all the signatories to the rules.

In its communication of 29 July 1968 [1] concerning cooperation between enterprises, the Commission indicated at II (1) d that agreements having as their sole object the joint preparation of calculation models are not considered to restrict competition provided they do not contain specified rates of calculation.

The communication, however, cannot apply to the present case, since the clause is contained within a series of provisions which are restrictive of price competition. Furthermore the provisions of group B in general and clause B 1 (1) of the contract of commitment and legal protection provide a framework for the giving of concrete recommendations which may induce at least some of the parties to the agreement to behave in an identical manner on the market.

The object of the clause is to establish close cooperation in cost studies, the calculation of cost prices and market analyses, within the framework of an approximation of behaviour in the market and, more particularly, as to prices. The clause gives the parties the means to know each other's costs, and, particularly in view of the structure of the relevant market, enables them to predict each other's price policy with greater certainty, whereby price competition is likely to be diminished or eliminated. The exchange between competitors of information on costs can in no way be considered as a means of combating unfair competition but rather enables the parties to minimize price competition. The clause must therefore be regarded as restrictive of competition within the meaning of Article 85 (1).

Document 2, group B, clause 2

Under the pretext of ensuring optimum knowledge of market conditions, this clause, seen in its entirety, constitutes an encouragement to compile price lists, to adhere to them strictly and to fix prices in the currency of the countries of destination. This encouragement cannot but become pressure when the provisions of the contract of commitment and legal protection, especially under B I, are applied. But mutual encouragement is itself a restriction of competition, for every producer should have complete discretion to establish his own policy in these matters without risking the accusation that he is violating the spirit of

[1] OJ No C 75, 29. 7. 1968, p. 3, amended by OJ No C 84, 28. 8. 1968, p. 14.

an agreement. The contractual organization of a system requiring adherence to various existing prices and whereby price stability is encouraged by the recommendations which are made to the parties to use and adhere to price lists, a system which is aggravated by the recommendations to adopt a harmonized 'calculation scheme' provided for in clause B 1 c constitutes a major restriction of competition, both in its object and its effect.

The mutual recognition at clause 2 (f) of a right 'to follow the prices practised in the country of destination' and the unjustifiable assertion made by the signatories that this is necessary 'to avoid falsification of competition' implies the obligation not to undercut such prices. This clause is an especially serious restriction of competition since its result is to prevent the economic integration of the common market and to deny the consumer all of its benefits in respect of the product in question and also for the numerous processed aluminium products. Furthermore a clause implying the obligation not to undercut national market prices cannot be described as a means of combating unfair competition in any way whatsoever.

The provisions of clauses 1 and 2 of group B establish a framework within which undertakings are induced not to undercut prices prevailing in various Member States and to use the device of price and cost comparisons to restrict competition between themselves.

Document 2, group B, clauses 3, 4 and 5

Any producer may at his own discretion independently conduct business according to principles more or less comparable with those set out in the above clauses. However, the establishing of a code of conduct on the question of rebates, enforced by 'procedures' under the contract of legal protection has the overriding object of restricting competition, since it discourages competition in the granting of rebates and leads to identical or similar behaviour by the parties in areas where each should be free to decide his own policy.

Clause 5, paragraph 2 in particular acknowledges that competitive rebates may be granted on export so that aluminium may be sold at the price prevailing on the home market of the country of destination. This process is termed 'equalization' in the rules. However, the subsequent sentence amounts to a collective recommendation not to grant competitive rebates exceeding 'equalization' i.e. not to undercut the prices prevailing in the home market. The clause is complementary to clause 2 (f) and is restrictive in the same degree.

B. Effects on trade between Member States

The above provisions combine to circumscribe the commercial freedom of producers as regards their export sales to other Member States and consequently to prevent or to restrict such sales. These provisions may therefore affect trade between Member States inasmuch as they concern sales from a producer in the common market to a purchaser in another Member State and even where they relate to sales in the common market from a third country. Since the product in question is used in the manufacture of a large number of semi-finished and finished products and is imported into Member States for processing and resale in other Member States the restrictions discussed above must also have a serious effect on trade between Member States in those products.

C. Inapplicability of Article 85 (3)

None of the restrictive provisions referred to above contributes to technical or economic progress or improves production or distribution ; in particular the IFTRA rules reduce the opportunity for competition within the common market and tend to insulate national markets and therefore impede rather than improve distribution.

Furthermore both because of the structure of the market, and because of the number and importance of the parties, the agreement affords the latter the possibility of eliminating competition in respect of a substantial part of the products in question. There can therefore be no question in this case of applying Article 85 (3).

IV

By letter received on 24 February 1975 the signatories informed the Commission, through their legal representative, that they had terminated their agreement on 18 February 1975 and asked that the proceedings be closed with no further steps being taken.

There is, however, the consideration discussed above, that it is not possible to accept the argument that an agreement, signed and clearly in force, has never been applied. The very existence of the agreement must have had a restrictive effect, if only by dissuading the parties from certain competitive actions.

Furthermore the object of the agreement was clearly and seriously restrictive, and the undertakings involved are large and the economic sector concerned important. The restrictions of competition forming the object of the IFTRA rules agreed between most producers of primary aluminium in western Europe could not fail seriously to aggravate the rigidity present in a market having the features described above. These circumstances are sufficient to justify the bringing of a decision by the Commission that the agreement in question was in breach of Article 85,

HAS ADOPTED THIS DECISION :

Article 1

The provisions of clauses 1, 2, 3, 4 and 5 of group A and of clauses 1, 2, 3, 4 and 5 of group B of the fair trade practice rules (document 2 of the agreement known as the 'IFTRA rules for producers of virgin aluminium') constituted infringements of Article 85 (1) of the EEC Treaty from 27 April 1972 to 18 February 1975.

Article 2

This decision is addressed to the International Fair Trade Practice Rules Administration (IFTRA) Vaduz, Liechtenstein and the following undertakings :

Alusuisse Deutschland GmbH, Konstanz, Federal Republic of Germany,
Gebrüder Giulini GmbH, Ludwigshafen (Rhein), Federal Republic of Germany,
Kaiser-Preussag Aluminium GmbH & Co, Voerde (Niederrhein), Federal Republic of Germany,
Metallgesellschaft AG, Frankfurt (Main), Federal Republic of Germany,
VAW, Vereinigte Aluminium-Werke AG, Berlin,
Péchiney-Ugine Kuhlmann S.A., Paris, France,
Holland-Aluminium N.V., Den Haag, the Netherlands,
The British Aluminium Company Limited, London, England,
Empresa Nacional del Aluminio S.A., Madrid, Spain,
Årdal og Sunndal Verk (ÅSV), Oslo, Norway,
Elkem — Spigerverket A/S, Oslo, Norway,
Norsk Hydro A/S, Karmøy, Oslo, Norway,
Vereinigte Metallwerke Ranshofen-Berndorf A.G., Braunau am Inn/Ranshofen, Austria,
Schweizerische Aluminium AG., Zürich, Switzerland,
Gränges Essem AB, Västerås, Sweden.

Done at Brussels, 15 July 1975.

For the Commission

The President

François-Xavier ORTOLI