

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 November 1992

relating to a proceeding pursuant to Articles 85 and 86 of the EEC Treaty
(Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486
BIC/Gillette and Others)

(Only the English and Dutch texts are authentic)

(93/252/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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

Having regard to the applications for a finding of an infringement submitted on 12 February and 14 March 1990, pursuant to Article 3 of Regulation No 17, by Warner-Lambert Company and BIC SA respectively,

Having regard to the notification on 23 February 1990, pursuant to Article 4 of Regulation 17, of agreements between The Gillette Company and Eemland Holdings NV,

Having given the undertakings concerned, The Gillette Company and Eemland Holdings NV, the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) and (2) of Regulation No 17 and Commission 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 heard Warner-Lambert Company and BIC SA pursuant to Article 19 (2) of Regulation No 17,

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

Whereas :

I. FACTS

- (1) This Decision concerns the infringement of Articles 85 and 86 of the EEC Treaty arising from the sale by Stora Kopparbergs Bergslags AB of the Wilkinson Sword wet-shaving business in the Community and the United States of America to Eemland Holdings NV and in the rest of the world to the Gillette Group (hereinafter called 'Gillette'), which involved agreements between Gillette and Eemland and a substantial investment by Gillette in Eemland.

A. Complaints

- (2) On 12 February 1990 the Commission received a complaint from Warner-Lambert Company concerning the sale of the Wilkinson Sword wet-shaving business. Warner-Lambert alleges that the transaction and related agreements involving Gillette constitute an infringement of Article 85 (1) of the EEC Treaty on the part of Gillette and Eemland and an infringement of Article 86 on the part of Gillette. A second complaint relating to the same matter was filed on behalf of BIC SA on 14 March 1990.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

B. Notification

- (3) The Gillette Company notified certain agreements concerning Gillette's investment in and relationship with Eemland, requesting negative clearance or an exemption. The notification was received on 23 February 1990.

C. The parties

- (4) (i) *Stora Kopparbergs Bergslags AB* (Stora) is a Swedish company, it is the largest forest-products company in Europe and diversified into non-forest product areas through the acquisition of Swedish Match AB in May 1988. The consumer products group of Swedish Match AB consisted of shaving products and toiletries (essentially shaving products manufactured and sold under the Wilkinson Sword trade mark), matches (including the brand names Swedish Match and Bryant and May) and disposable lighters (including the Cricket and Feudor brands).

- (ii) *Eemland Holdings NV* (Eemland) is a Netherlands company (formed in February 1988) which has been utilized for this transaction and had not previously traded. The company changed its name from Eemland Management Services BV to Swedish Match AB before adopting its present name.

- (iii) *The Gillette Company*, which is based in the United States of America, is the parent company of Gillette which has business interests worldwide in the development, manufacture and sale of a wide range of personal care products. These include in particular the manufacture and sale of shaving products which contribute over half of the group's worldwide profits.

- (iv) The following parties are equity investors in Eemland:

- (a) Messrs Rossi, Gabrielsson, Stenström and Gruber (managers of the Wilkinson Sword business);
- (b) Morgan Capital Corporation (a member of the J. P. Morgan banking group);
- (c) Procuritas MBO Invest AB;
- (d) Forsäkringsbolaget SPP ömsesidigt (SPP insurance);
- (e) Aktieselskabet Kjøbenhavns Handelsbank (Copenhagen Bank);

- (f) Livsforsäkringsaktiebolaget Skandia (Scandia Insurance);

- (g) Spira Invest AB.

- (v) *Warner-Lambert Company* (Warner-Lambert) is based in the United States of America and is a diversified researcher, manufacturer and marketer of prescription pharmaceutical, over-the-counter health-care products, confectionary products and other products. It is active on the wet-shave market through its Schick brand of razors and blades.

- (vi) *La Société Bic SA* (BIC) is based in France and is active on the wet-shave market through its own brand of razors and blades.

D. The products

- (5) The products to which this Decision refers are wet-shaving products. The core products are razor blades, of which there are essentially three types — traditional double-edged blades (sold for insertion into fixed razor heads), system blades (contained in plastic cartridges for insertion into a separate razor handle) and disposable razors. Also included are razors for use with double-edged and system blades.

E. The market

- (6) The market concerned is the wet-shaving market consisting of razors and razor blades. Dry-shaving are not considered by most wet shavers to be sufficiently close substitutes for wet-shaving products to form part of the same market. Also excluded from this market are other hair removal products such as hair-removing creams and lotions, and wax and electric epilators, which are not close substitutes for wet or dry shaving products and therefore form a separate market. The share of total sales of wet-shaving products accounted for by each of the three product types referred to in recital 5 varies between Member States. Sales of traditional double-edged blades have been declining in the Community as consumers have switched to system blades or disposable razors. Because of price differences between the types of blades the division of the market between the three types of blades is different when considered by value and by volume. In the Community as a whole the segmentation by value shows that double-edged blades accounted for 12 % of the market in 1989, system blades or cartridges accounted for 52 % and disposable razors for the remaining 36 %. By volume the corresponding figures are 16 % for double-edged blades, 36 % for system blades and 49 % for disposable razors. The profit margin achievable on

shaving products also varies between the three product types. Disposable razors achieve the lowest margin; double-edged blades are a high-margin product but system blades achieve the highest margin. There is little continued real growth in blade usage in the Community and market value growth has generally come from manufacturers' investment in the innovative and higher-margin systems segment. There are four major producers of shaving products in the Community (which are also the four largest producers in the world): Gillette, Wilkinson Sword (now the trade mark of Eemland), Schick (the trade mark of Warner-Lambert) and BIC. It has been acknowledged by Eemland that Gillette is the price leader in the Community as a result of its strong market position. This lessens the extent of price competition in this market.

- (7) In considering the relevant geographic market it is not necessary for the purposes of this Decision to decide whether there are national markets in each Member State or whether the Community forms one market.
- (8) The market share data (for 1989) in the table on the following page show that Gillette has a strong position within the Community, with a market share of 59 % (by volume) and 70 % (by value) for the Community as a whole. Wilkinson Sword has a much smaller market share, supplying 14 % (by volume) and 13 % (by value). BIC has a similar market share in volume terms (17 %) but a much lower share by value (8 %) because it concentrates on low-margin disposable razors. The fourth brand, Schick, supplies less than half of the Wilkinson Sword share of the market. Gillette is the market leader in every Member State (although in Greece BIC has a higher market share when measured by volume rather than by value). Gillette's lowest market shares are in the United Kingdom, Greece and Portugal. Its highest market shares are in Denmark (81 % by volume and 89 % by value) and in Spain (71 % by volume and 8 % by value). Wilkinson Sword is strongest on the British, German and French markets. In 1989 sales in the Community and the United States of America accounted for about 79 % (by value) of Wilkinson Sword production (and about 72 % by volume). Sales in other countries were mainly of the cheaper, lower-margin products.
- (9) Apart from being highly concentrated, the market also exhibits considerable barriers to entry. These barriers consist of significant economies of scale on the production level, the importance of advertising and the considerable resources and expertise of the established manufacturers. Eemland has expressed

the view that 'realistically and in the foreseeable future, only on existing manufacturer of wet-shave products could be expected to establish new production facilities for the Community market'. This would appear to be the case in view of the considerable investment required to set up viable production facilities, the cost of advertising and research development and the need to establish a distribution network. A new razor-blade factory needs to produce approximately 600 million blades per year if it is to be economically viable according to Warner-Lambert, which estimates that this would require an investment of at least US\$ 150 million. Eemland is of the opinion that a minimum competitive volume would be about 500 million blades — if products in all three segments were produced — and this would cost about US\$ 75 million to 80 million to set up. Furthermore, the research and development costs for a new razor require large-scale investment. Gillette is reported to have spent an estimated US\$ 200 million in developing its latest product, the 'Gillette Sensor' and to have spent a further US\$ 175 million on an advertising campaign in North America and Europe alone to bring the new system onto the market. This high level of investment suggests that the barriers to entering the wet-shaving market are considerable. There is only very limited scope for making *de novo* entry into the market by purchasing off-the-shelf product designs and equipment for manufacturing, assembling and packaging blades, moulds and cartridges. Any such production would be aimed at sales under 'private labels' (own labels) to avoid the need for heavy advertising expenditure. There has been some modest growth in own-label sales but they still account for only 5 to 7 % of blades sold in the Community (Eemland's estimate). It may not be surprising therefore that no new competitor has entered the market in western Europe for some 15 years. In a market with these characteristics, it follows that the principal means of increasing market share are advertising, the acquisition of a competitor or substantial research and development leading to a new or improved type of product.

F. The Agreements

- (10) By a series of agreements, most of which were signed on 20 December 1989, Stora sold its consumer products division to Eemland which in turn sold the Wilkinson Sword shaving products business outside the European Community and the United States of America to Gillette. Eemland subsequently sold the matches and lighters businesses which were part of the Stora consumer products division to third parties for a total consideration of approximately US\$ 340 million.

Market shares : wet-shaving products by brand (1989)

(%)					
	Volume	Value		Volume	Value
<i>Total EEC</i>			<i>Great Britain</i>		
Gillette	58,6	70,1	Gillette	44,5	62,4
Bic	16,5	8,0	Bic	27,2	12,9
Wilkinson Sword	14,0	12,6	Wilkinson Sword	17,6	16,4
Schick	5,5	5,9	Schick	0,6	0,6
Others	5,4	3,4	Others	10,2	7,7
<i>Federal Republic of Germany</i>			<i>Italy</i>		
Gillette	57,2	62,2	Gillette	65,5	77,7
Bic	2,5	0,8	Bic	19,5	10,5
Wilkinson Sword	38,2	35,1	Wilkinson Sword	13,5	10,3
Schick	1,1	1,3	Schick	—	—
Others	1,0	0,7	Others	1,5	1,4
<i>France</i>			<i>Portugal</i>		
Gillette	62,1	69,7	Gillette	44,4	52,9
Bic	13,4	7,1	Bic	20,5	12,1
Wilkinson Sword	7,6	5,8	Wilkinson Sword	7,2	6,1
Schick	11,7	14,2	Schick	27,8	28,9
Others	5,2	3,3	Others	0,1	0,0
<i>Spain</i>			<i>Greece</i>		
Gillette	71,4	81,4	Gillette	33,0	49,7
Bic	10,7	4,7	Bic	49,6	39,4
Wilkinson Sword	8,9	6,7	Wilkinson Sword	1,8	1,9
Schick	2,2	2,6	Schick	1,2	1,3
Others	6,8	4,6	Others	14,4	7,7
<i>Belgium and Luxembourg</i>			<i>Denmark</i>		
Gillette	58,2	67,0	Gillette	80,8	89,2
Bic	16,0	8,8	Bic	10,6	5,0
Wilkinson Sword	0,8	0,7	Wilkinson Sword	4,5	2,0
Schick	13,4	15,6	Schick	2,2	1,6
Others	11,7	8,0	Others	1,9	2,2
<i>Netherlands</i>			<i>Ireland</i>		
Gillette	70,4	77,3	Gillette	49,0	60,1
Bic	2,8	1,1	Bic	15,9	9,1
Wilkinson Sword	—	—	Wilkinson Sword	33,9	29,8
Schick	18,9	16,4	Schick	0,5	0,4
Others	7,9	5,2	Others	0,6	0,6

Note :

'others' includes own-label sales. Eemland supplies own-label products but the other three suppliers do not.

(Source : Gillette/A.C. Nielsen)

- (11) It was originally intended that Gillette would acquire all the Wilkinson Sword businesses outside the Community but after the execution of the agreements the American anti-trust authorities raised objections. The parties therefore agreed to exclude the American business from the arrangement. Consequently Eemland has retained the wet-shaving products business, principally under the Wilkinson Sword brand name, in the Community and the United States of America.
- (12) Gillette played a leading role in arranging the purchase from Stora of its consumer products division which was achieved by means of a highly leveraged buy-out. Eemland, which was the shell company used for the buy-out, was financed by a number of investors including Gillette through its subsidiary Gillette UK Limited. Gillette says that its reason for participating in the financing of Eemland was its wish to acquire various Wilkinson Sword trade marks and wet-shaving activities in certain countries outside the Community.
- (13) Eemland is funded by a mixture of equity and loan capital. The equity consists of ordinary shares (which carry voting rights) and convertible loan stock. Gillette holds loan stock (for which it paid US\$ 13,7 million) representing 22 % of the issued equity and quasi-equity capital, but has no voting rights. The other equity holders are Morgan (which has 24 % of the total equity and 0,4 % of the voting rights), a group of Scandinavian investors who hold almost all the voting rights and the management who have 0,74 % of the equity and 3,3 % of the voting rights.
- (14) Gillette's loan stock is entitled to interest at levels corresponding to the dividend which would have been receivable had the loan stock been converted into share capital immediately prior to any dividend payment date. Gillette's equity interest confers no voting rights, no representation on the Board, no representation at shareholders' meetings and no access to internal information. Gillette will never be entitled to nominate any director of the Board of Eemland, and undertakes that it will not exert or attempt to exert any influence over the Board or any member of the Board. There are certain circumstances in which Gillette may acquire voting rights in Eemland (on a conversion of its loan stock into ordinary shares) namely on a winding up of Eemland or a listing of the ordinary shares of the company or the sale of the company's equity to a third party.
- (15) The debt structure of Eemland consists of two forms of debt, namely subordinated debt and senior debt, together with a loan note from Stora. The subordinated debt is in the form of a loan made by various institutions to the value of approximately US\$ 68,9 million and a loan made by Gillette also to the value of approximately US\$ 68,9 million, the interest on which (6 % over Libor) is capitalized and not paid until the debt is repaid. The senior debt consists of loans provided by a syndicate of banks to the value of approximately US\$ 409 million which are repayable over a period of up to five years. The senior debt is expected to be repaid in part out of the proceeds of sale of the matches and lighters business. In order to overcome last-minute difficulties in arranging the sale, Stora agreed to accept part of its consideration in the form of a junior subordinated interest-free loan note from Eemland for some US\$ 48 million, and Gillette agreed to pay Stora up to US\$ 11 million to reflect the fact that the loan note carries no right to interest. Following the reassignment to Eemland of the American business, Gillette made a further loan to Eemland to the value of US\$ 6,4 million, carrying interest at the rate of 8 % per annum. This sum is the aggregate of the consideration which was paid by Gillette to Eemland under the intellectual property, manufacturing and distribution agreement (hereinafter called the intellectual property agreement) and the non-Community sale agreement, attributable to the American business. Gillette's loans, which represent 13,6 % of the total financing of Eemland, will be repaid after the senior debt and the loans from the institutions referred to above.
- (16) Under the Equity Holders Agreement (as amended) there are restrictions on the disposal of shares and Gillette acquires certain pre-emption rights. With certain exceptions, no equity holder is entitled to dispose of its holding prior to 1 January 1993.
- The disposal of equity after that date is subject to the following pre-emption rights :
- (a) the Scandinavian investors must give a right of first refusal to other members of that group ;
 - (b) notwithstanding the rights of the Scandinavian investors *inter se*, any disposal of equity is subject to pro rata pre-emption by the other equity holders, Gillette being allowed to seek a non-associated third party purchaser for its entitlement, approved by 75 % of the ordinary shareholders (except Morgan Capital corporation, for reasons of American banking regulations) ;

(c) any equity holder wishing to dispose of 10 % or more of the total equity of Eemland has to procure for other equity holders the opportunity to dispose of a pro rata proportion of their holdings in excess of 10 % on the same terms ;

(d) a 26 % investors' group (i.e. the holders of 26 % or more of the equity, excluding for this purpose Gillette) may indicate that they wish to obtain a stock exchange listing for all the ordinary shares, in which event Gillette has the option to buy, or find a purchaser for, the equity of the 26 % investors' group at the price at which it is proposed to obtain a listing. If Gillette exercises the option, it must ensure that an identical offer is made to all the other equity holders ;

(e) a 65 % (with the support of the management) or 75 % investors' group (excluding for these purposes equity held by Gillette) may indicate that they wish to sell all their equity, in which event Gillette has the option to buy, or find a purchaser for, that equity at the third-party sale price. If Gillette exercises the option, it would have to ensure that an identical offer is made to all the other equity holders. Similarly, if it were to decline the option, the selling group would have to ensure that an identical offer is made to allow the other equity holders (including Gillette) to sell their equity.

The rights described in subparagraphs (d) and (e) above have been waived in side letters by the equity holders concerned, with the exception of Gillette. The Agreement also provides that Eemland may not sell to a third party any business or assets which amount to 'the whole or any substantial part' of its wet-shaving business or assets unless it first offers the business or assets to Gillette, at the same price and on the same terms. Gillette would have 30 days in which to accept such an offer or to find an alternative non-associated third-party purchaser. In the event that Eemland increased its capital and issued new shares, all of the equity holders (including Gillette) would have first call over those new shares.

- (17) There are supply arrangements between Gillette and Eemland in the intellectual property agreement of 2 January 1990 and a temporary supply agreement signed on 20 July 1990 whereby Eemland agrees to supply Wilkinson Sword branded products to Gillette for markets outside the Community and the United States of America. The agreement, on arms-length terms, ran for a

period of two years which expired on 1 January 1992. Gillette has continued to purchase from Eemland, on an *ad hoc* basis, a smaller volume of Wilkinson Sword products. Eemland has assigned its overseas production sites in Brazil (Manaus, annual production approximately 213 million blades) and Zimbabwe (annual production approximately 25 million blades) to Gillette.

- (18) Under the terms of the non-Community sale agreement and the intellectual property agreement, Eemland agrees to sell the Wilkinson Sword wet-shaving activities and intellectual property subsisting outside the Community to Gillette. The subsequent American agreement provides for Eemland to retain the American business. Following the division of the Wilkinson Sword trade marks, Eemland agrees not to supply products under the Wilkinson Sword trade mark outside the Community and the United States of America, and Gillette similarly agrees not to supply such products in the Community or the United States of America, including an obligation not knowingly to sell any product bearing such a mark for supply or delivery inside the Community. Eemland remains free to supply wet-shaving products outside the Community and the United States of America as own-label products or under new brands, subject to certain restrictions.

- (19) The intellectual property acquired from Stora which relates exclusively to the existing business carried on outside the Community and the United States of America is assigned to Gillette subject to an irrevocable non-exclusive licence-back to Eemland of the registered patent and design rights, but not the trademarks. Where the intellectual property relates in part to the business in the Community or the United States of America and in part to countries outside those areas, Eemland will give Gillette the exclusive right to benefit from such intellectual property outside the Community and the United States of America. The parties 'acknowledge that Wilkinson Sword is a valuable international trade mark and that it is in their respective interests to maintain its worth'. Gillette also acquires a first option to purchase any moulds, dies or tools used to supply Gillette under the arrangements described above, should Eemland cease to supply or arrange for third parties to supply Gillette with wet-shaving products under the Wilkinson Sword brand name. The parties also recognize that they may have a customer for one or more products which resells for retail not only in the Community and/or the United States of

America but also in an adjacent country, and they declare their intention to resolve such problems 'in good faith and in a manner that preserves the value' of their respective businesses.

- (20) Under the terms of the agreements Gillette has agreed to indemnify Eemland, Stora and the investors against losses arising from anti-trust proceedings relating to 'the European Wilkinson Sword business'.
- (21) Following the intervention of the American anti-trust authorities mentioned above, an agreement was concluded between the Department of Justice, Gillette and Eemland which led to a consent order being entered by the US Court. Under the terms of this order, Gillette is prevented from acquiring any additional interest in any securities of Eemland other than as interest on existing debt or as conversions of existing shares to voting shares, or from acquiring any assets from Eemland except in limited circumstances. However, Gillette remains free to nominate an alternative purchaser where it is entitled to do so. In the event that Gillette acquires voting rights by conversion of its existing loan stock, it would have to give a proxy to Eemland to cast its votes in the same proportion as the votes cast by the other equity holders. Gillette also undertakes not to exert any influence over Eemland or to do anything to cause Eemland to become insolvent or, if it was insolvent or at risk of becoming insolvent, not to vote against any reorganization plan proposed or supported by Eemland. These restrictions may be waived with the agreement of the Department of Justice or the US courts.

II. LEGAL ASSESSMENT

A. Article 86

- (22) The market concerned is the market for wet-shaving products, namely razor blades and razors, including disposable razors. Gillette occupies a dominant position on this market in the Community as a whole and in each Member State. This is clear from the market share figures given in the table in recital 8. In 1989 in the Community as a whole Gillette achieved a market share of 70 % by value and 59 % by volume. Furthermore Gillette had 50 % or more of the market (by value) in every Member State, which establishes its dominant position in the wet-shaving market in the Community⁽¹⁾. The market shares based on value are a

more reliable indicator of the strength of the various suppliers on this market in view of the heterogeneous nature of the product and the range of product prices. A comparison of Gillette's market shares with the figures for the other competitors on the market also highlights Gillette's dominance. There are only four significant competitors on the market and there is a considerable gap between Gillette and its nearest rival. This dominance is reinforced by the high entry barriers to the wetshaving market, which were examined in the preceding section.

- (23) An undertaking in a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market⁽²⁾. By participating in the buy-out of the Wilkinson Sword business, Gillette has failed to discharge that special responsibility and has abused its dominant position. Gillette was instrumental in arranging the buy-out and notwithstanding the care with which the agreements were drafted, the structure of the wet-shaving market in the Community has been changed by the creation of a link between Gillette and its leading competitor. The Court of Justice has referred to an abuse of a dominant position 'relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and ... has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'⁽³⁾. The change in the structure of the wet-shaving market brought about by Gillette's participation in the overall arrangement will have an adverse effect on competition in that market in the Community and therefore Gillette's involvement constitutes an abuse of its dominant position.

- (24) In the Joined Cases BAT and Reynolds (hereinafter called the Philip Morris Case)⁽⁴⁾, the Court of Justice considered the situation in which a company acquires a minority shareholding in a competitor. The Court indicated that an abuse of a dominant position can arise only where a shareholding in another company results in at least some

⁽¹⁾ Case C-62/86, Akzo Chemie BV v. Commission [1991] ECR, I to 3359 (paragraph 60).

⁽²⁾ Case 322/81, Michelin v. Commission [1983] ECR 3461 and 3511 (paragraph 57).

⁽³⁾ Case 85/76, Hofmann-La Roche v. Commission [1979] ECR 461 and 541 (paragraph 91).

⁽⁴⁾ Joined Cases 142 and 156/84, BAT and Reynolds [1987] ECR p. 4487.

influence on that company's commercial policy. Gillette has not only become a major shareholder in Eemland but has also become its largest creditor and has acquired important pre-emption and conversion rights and options in Eemland. The position of Gillette is a matter which the management of Eemland will be obliged to take into account and consequently it is a factor which will influence the commercial conduct of Eemland. It follows that Gillette will have at least some influence on Eemland's commercial policy. Although the Court did not strike down the agreements in the Philip Morris Case it is important to note that in that case the Court was considering a situation in which the shareholding was acquired in and not by the undertaking which was said to occupy a dominant position. In the present Case it is a dominant undertaking, Gillette, which has acquired a substantial shareholding in its principal competitor. Despite the similarities between the form of the agreements in the present Case and the form of the agreements in the Philip Morris Case, Gillette is taking a minority interest in a competitor in circumstances which are fundamentally different from those underlying the Philip Morris Case, and in particular the market is dominated by Gillette which makes the existing competition more vulnerable to structural changes.

These rights ensure that no other competitor on the market such as Warner-Lambert or BIC can improve its competitive position through the acquisition of Eemland. It also ensures that no other company hostile to Gillette can take over Wilkinson and effectively prevents the management of Eemland from entering into a merger or joint venture with someone of whom Gillette does not approve. Consequently the medium and long-term commercial fate of Eemland is to some extent in the hands of Gillette. This is emphasized by the fact that Eemland, having sold the matches and lighters division as originally planned, will be entirely dependent upon its shaving products business, thereby making it more vulnerable to Gillette. The pre-emption rights can be considered as a new barrier to entry in this market, given that they are held by a dominant undertaking (unlike in the Philip Morris Case). Other competitors on the market are adversely affected because they are deprived of one of the most obvious ways of challenging Gillette's market dominance, namely by taking over Eemland. Gillette, which is by far the strongest operator on this market, has entered into a relationship with its strongest competitor and although it has not acquired any direct control over Eemland, this relationship enables Gillette to exercise some influence over Eemland's commercial conduct.

(25) Gillette has acquired 22 % of the equity of Eemland, which cannot be disregarded simply because of the absence of voting rights and other usual shareholders' rights or because of Gillette's covenant not to exert or attempt to exert any influence over the Board or any member of the Board of Eemland. Gillette is also a major creditor of Eemland, having contributed US\$ 69 million of mezzanine debt (representing 11,6 % of the debt of Eemland) and almost US\$ 14 million in equity loan stock, has agreed to make payments to Stora of up to US\$ 11 million and has accepted a loan note from Eemland for the sum of US\$ 6,4 million in respect of the American business. The level of Gillette's investment in Eemland compares with Eemland's estimated worldwide turnover in 1989 of US\$ 123 million. Eemland cannot reasonably be expected to ignore this financial dependence on Gillette. For example, the continuing availability of the interest-free loan from Stora, which Eemland currently enjoys, is dependent upon Gillette's willingness to make the payments of up to US\$ 11 million to Stora.

(26) In addition, Gillette has important pre-emption and conversion rights and options in Eemland.

(27) It is also necessary to consider the potential effects of the arrangements. Gillette will acquire certain contingent rights and in particular will be able to acquire voting rights in Eemland under certain circumstances, as described in recital 14 above. This possibility is likely to influence Eemland's commercial policy. At the very least Gillette's conversion rights will influence Eemland's decision-making in respect of those events which may trigger the conversion. This could seriously hamper Eemland's business strategy.

(28) The arrangements as a whole can be viewed as a strategy by Gillette to weaken the competitive position of Eemland and correspondingly to strengthen Gillette's own position. It is significant that Gillette took a leading role in arranging this transaction and in shaping the arrangements. One of the major consequences of this transaction is that Eemland's scope of action on the Community wet-shaving market has been considerably circumscribed. The options which are open to the company are severely limited by the burden of debt which it carries, by the limited geographical scope of its markets and by the influence which Gillette will be able to exercise through its interests in Eemland.

(29) The highly leveraged nature of the buy-out means that Eemland is in a weak position because of the burden of debt which that company is carrying. Eemland's ability to engage in an expensive advertising campaign, for example, is severely limited. Yet advertising is an important part of the manufacturer's competitive strategy on this market, as was noted earlier. Furthermore, because of the geographic separation of the Wilkinson Sword trade mark Eemland will not be able to sell outside the Community and the United States of America under the Wilkinson Sword brand name. Consequently, the company's scope for expansion is limited. Indeed Eemland has lost those markets in which there is the greatest potential for growth.

(30) By weakening the competitive position of Eemland, Gillette as the dominant player on this market will benefit from this lessening of competition. Indeed, Gillette can reasonably be expected to take account of its significant equity holding and creditor relationship with Wilkinson in setting its Community strategy. Outside the Community it is likely that Wilkinson Sword will be used not as a competing brand but as a strategic one. This will very probably have an effect on competition within the Community. One possibility would be concentration on different market segments, with Gillette targeting the top end of the market (particularly the systems segment) and obliging Wilkinson to concentrate on the lower-price part of the market. It is noteworthy that Gillette intends to increase its sales of Sensor razors from [...] in the year of launch (1989) to [...] in 1992⁽¹⁾ while its sales of Contour razors is estimated to drop from [...] units to an estimated [...] units in 1992⁽²⁾. This would indicate that Gillette hopes to concentrate on the market segment where it is technologically superior to its rivals, leaving the lower end of the market to Wilkinson Sword products.

(31) Furthermore, there are several other aspects of the arrangements which will further weaken competition on this market. Firstly, Gillette's access to the existing Wilkinson Sword technology which relates to the business taken over by Gillette will strengthen Gillette's competitive position. This occurs because Eemland will have no initial competitive

advantage over Gillette in that respect: both parties start from the same position. Secondly, Gillette's access when arranging this transaction to detailed financial projections for Wilkinson Sword wet-shaving products, including margin and sales estimates, will also have given Gillette a competitive advantage.

(32) There is a considerable amount of trade in wet-shaving products between Member States. As indicated earlier, Eemland has factories in Germany and in the United Kingdom, for example, but supplies wet-shaving products throughout the Community. Consequently, the matters referred to above will affect trade between Member States. It follows that Gillette's participation in this operation involving one of its principal competitors on the wet-shaving market in the Community constitutes an infringement of Article 86.

B. Article 85 (1)

(33) Gillette and Wilkinson are undertakings within the meaning of Article 85 and the series of agreements to which they are both parties are agreements within the meaning of that provision.

(34) The agreements relating to this operation have the object or effect of influencing the commercial behaviour of Eemland on the wet-shaving market in the Community. In the Philip Morris judgment the Court of Justice acknowledged that the acquisition by one company of an equity interest in a competitor may serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business⁽³⁾. Even though in the circumstances of this case Gillette's acquisition of an equity interest in Eemland as such may not suffice for the finding of an infringement of Article 85 (1) it has to be noted that it was accompanied by a number of agreements which have as their object or effect a restriction of competition between Gillette and Eemland. The relevant agreements in this context are the non-Community sale agreement, the intellectual property agreement and the supply agreement. These agreements must be assessed together and in the context of the operation as a whole.

(35) The geographical separation of the Wilkinson Sword trade mark between the Community and neighbouring markets resulting from the first two of the above agreements will lead to commercial

⁽¹⁾ In the published version of the Decision, some information has been omitted, pursuant to the provision of Article 17 (2) of Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets. However, for a better understanding of the text, some general information has been given in a footnote in those cases where it was possible to do so without violating the non-disclosure requirement for business secrets.

In this case, sales are intended to increase almost fourfold.
⁽²⁾ Sales are estimated to fall by almost one third.

⁽³⁾ BAT and Reynolds v. Commission [1987] ECR 4487 and 4577 (paragraph 37).

cooperation between the respective owners of the trade mark, namely Gillette and Eemland. Both Gillette and Eemland will at least initially be manufacturing and retailing identical products under the same trade marks (albeit in separate geographic areas) and will therefore have a common interest in promoting those products and the value of the trade marks. Indeed, the parties themselves recognize this, as can be seen from the clause in the intellectual property agreement quoted in recital 19 above referring to worldwide goodwill. It follows that there is a strong incentive for the two companies to cooperate and this is particularly obvious in the case of neighbouring markets. There are similar conditions of competition in the European Free Trade Association (EFTA) countries, for example, and the Community. The agreements create an artificial separation of markets. There is no natural border between the Community and non-Community countries for the purposes of trade in shaving products. Advertising and packaging are common to both sides of the border. There is an increased tendency for key accounts in the razor business to become part of large buying groups which regard Europe as one market and do not distinguish between a Community and a non-Community market. Consequently, the trade mark-sharing arrangements do not reflect commercial reality and the parties will be obliged to cooperate at least in relation to these neighbouring markets. This again is recognized in the agreements which state that the parties will cooperate when problems arise in relation to common customers.

- (36) Eemland, in its reply to the Commission's statement of objections, acknowledged that it could face difficulties in dealing with customers in Germany who also want to purchase products from Eemland for associated companies in Austria, and in dealing with retail buying groups which may seek to conclude arrangements on a Europe-wide basis.

- (37) A further matter which Eemland has brought to the attention of the Commission, in its reply to the statement of objections, is that Gillette's participation in the company has had a negative impact on the perception of Wilkinson Sword products in the Community. This has occurred, according to Eemland, because Eemland's competitors have been able to say to trade customers (albeit wrongly) that there is no difference between Gillette and Wilkinson Sword and that they should therefore purchase an alternative second brand to Gillette, other than Wilkinson Sword. This will obviously have an effect on competition in the wet-shaving market within the Community.

- (38) The supply arrangements between Gillette and Eemland provide another element of cooperation between the parties. Gillette has been a substantial customer of Eemland and continues to purchase Wilkinson Sword products for sale outside the Community. These factors lead to a restriction of competition on the wet-shaving market in the Community since, in a market which is characterized by a small number of competitors and high barriers to entry, a newly created relationship between competitors which results in commercial coordination, especially a relationship between the market leader and a leading competitor, will lead to an appreciable restriction of competition. Even though the supply agreement expired on 1 January 1992, Gillette has continued to purchase Wilkinson Sword products from Eemland on an *ad hoc* basis (see recital 17 above).

- (39) For the above reasons, it is considered that the non-Community sale and the intellectual property agreements between Gillette and Eemland restrict competition on the wet-shaving market in the Community in so far as they relate to neighbouring markets in Europe. For the reasons set out in recital 32 above and in view of the marketing policies of large buyers of wet-shaving products who buy on a Europe-wide basis, these agreements will affect trade between Member States. Consequently, these agreements contravene Article 85 (1).

C. Article 85 (3)

- (40) The agreements in question cannot be exempted from the application of Article 85 (1) since they do not contribute to improving the production or distribution of wet-shaving products or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. The restrictions imposed on the undertakings concerned are not indispensable to the attainment of these objectives. Gillette claims in its notification that the agreements will enable Eemland to be better placed to produce and distribute its products within the Community but produces no evidence to support this assertion, which the Commission does not accept. Furthermore, the agreements in question afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of wet-shaving products. Consequently, the Commission rejects the application for exemption pursuant to Article 85 (3).

D. Other anti-trust proceedings

- (41) The Commission has taken into account the final judgment entered in the US courts with the consent of Gillette and Eemland, but notes that the restrictions imposed on the parties may be waived with the agreement of the Department of Justice or the US courts. Furthermore, at least some of the restrictions will automatically expire after 10 years. The restrictions accepted by the parties do not, in any event, remedy the adverse effects of the arrangements within the Community.

E. Article 3 of Council Regulation No 17

- (42) Where the Commission finds that there is an infringement of Article 86 of the EEC Treaty, it may require the undertakings concerned to bring such infringement to an end. In the present case, Gillette has abused its dominant position by participating in the buy-out of the Wilkinson Sword business in the Community, thereby creating links between a dominant undertaking and its most important competitor, resulting in some influence over the commercial behaviour of the latter. In order to terminate the infringement of Article 86, it is therefore necessary for Gillette to withdraw from Eemland, disposing of both its equity interest and its interest as a creditor of Eemland. The Commission considers that a period of [...] would be reasonable in the circumstances of this case, to allow Gillette to make appropriate arrangements for these disposals. If the matter is not resolved within that period, an independent third party is to be appointed to ensure that the disposals are effected as soon as possible thereafter.

- (43) Both Gillette and Eemland have contravened Article 85 (1) by entering into the non-Community sale and the intellectual property agreements with regard to neighbouring markets in Europe, thereby influencing their commercial conduct and leading to a restriction of competition in the Community wet-shaving market. The commercial cooperation between Gillette and Eemland which is necessitated by the division of the Wilkinson Sword trade mark between the Community (and the United States of America) and the rest of the world must be terminated in order to prevent coordination of commercial conduct in neighbouring geographic markets. At the same time, this will provide Eemland with a viable geographic base for its current and future operations. To this end, Gillette will be required to re-assign to Eemland the Wilkinson Sword businesses in Czechoslovakia, Hungary, Poland, Turkey,

the former Yugoslavia and all the EFTA countries as well as the former German Democratic Republic. The Commission understands that Eemland has retained *de facto* control of the businesses in the former German Democratic Republic and the EFTA countries pending the outcome of anti-trust proceedings,

HAS ADOPTED THIS DECISION:

Article 1

Gillette's participation in the purchase of the Wilkinson Sword business from Stora as described in this Decision constitutes an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.

Article 2

Gillette and Eemland have infringed Article 85 (1) of the EEC Treaty by entering into the non-Community sale agreement and the intellectual property manufacturing and distribution agreement in so far as these agreements relate to the former German Democratic Republic and to neighbouring markets in Europe and thereby result in commercial cooperation between Gillette and Eemland within the Community.

Article 3

An exemption pursuant to Article 85 (3) of the EEC Treaty for the agreements as mentioned in Article 2 is hereby refused.

Article 4

Gillette shall bring the infringement mentioned in Article 1 to an end within a period of [...] by disposing of its equity interest in Eemland and its interest as a creditor of Eemland, failing which Gillette shall irrevocably appoint an independent third party, on terms to be approved by the Commission, to act on Gillette's behalf in making the disposals required by this Decision.

Article 5

Gillette and Eemland shall bring the infringements mentioned in Article 2 to an end within a period of [...] by re-assigning to Eemland the Wilkinson Sword businesses including trade marks in the former German Democratic Republic, Czechoslovakia, Hungary, Poland, Turkey, the former Yugoslavia and the EFTA countries.

Article 6

This Decision is addressed to :

- The Gillette Company,
Prudential Tower Building,
Boston, Massachusetts,
United States of America ;
- Eemland Holdings NV,
Egelenburg 152,
1081 GK Amsterdam,
The Netherlands.

Done at Brussels, 10 November 1992.

For the Commission

Leon BRITTAN

Vice-President
