

## II

(Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 24 July 2002

relating to a proceeding pursuant to Article 81 of the EC Treaty

(Case COMP/E-3/36.700 — Industrial and medical gases)

(notified under document number C(2002) 2782)

(Only the English and Dutch texts are authentic)

(2003/207/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

## PART I — FACTS

Having regard to the Treaty establishing the European Community,

## A. SUMMARY OF THE INFRINGEMENT

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup> as last amended by Regulation (EC) No 1216/1999 <sup>(2)</sup>, and in particular Articles 3 and 15(2) thereof,

## 1. INTRODUCTION

(1) This decision concerns the following undertakings:

- AGA AB,
- Air Liquide BV,
- Air Products Nederland BV,
- BOC Group Plc.,
- Messer Nederland BV,
- NV Hoek Loos,
- Westfalen Gassen Nederland BV.

Having regard to the Commission Decision of 9 July 2001 to open a proceeding in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty <sup>(3)</sup>,

Having regard to the final report of the hearing officer in this case <sup>(4)</sup>,

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

Whereas:

<sup>(1)</sup> OJ L 13, 21.2.1962, p. 204/62.

<sup>(2)</sup> OJ L 148, 15.6.1999, p. 5.

<sup>(3)</sup> OJ L 354, 30.12.1998, p. 18.

<sup>(4)</sup> OJ C 78, 1.4.2003.

(2) The infringements consist of the participation of those producers of gases for industrial and medical purposes in a continuous agreement and/or concerted practice contrary to Article 81(1) of the Treaty. The companies concerned took part in agreements/concerted practices regarding price increases for the products concerned, moratoria to implement these price increases, minimum prices and various other trading conditions concerning these products. The undertakings involved belong to some of the world's leading industrial gases groups. The infringements are limited to the industrial and medical gases market in the Netherlands.

- (3) The Commission has evidence that the undertakings participated in the infringements from 1989 until 1991 and from 1993 until 1997 in the case of AGA Gas BV, Air Liquide BV, Air Products Europe Inc. and NV Hoek Loos, in 1990/91 and from 1993 until 1997 in the case of Messer Nederland BV, from 1994/95 to 1997 in the case of Westfalen Gassen Nederland BV and in 1994/95 in the case of BOC Group plc.
- (7) In 1989, following a Commission investigation into the industrial gases sector and the initiation of proceedings under Community competition rules <sup>(5)</sup>, the world's major producers of industrial gases, including Air Liquide SA, AGA AB, Union Carbide, Air Products Europe Inc., Linde AG and Messer Griesheim GmbH, committed themselves vis-à-vis the Commission to modifying their tonnage contracts. Supply and purchasing commitments under on-site and pipeline contracts would no longer be of an exclusive nature but would relate to quantities falling within a fixed minimum/maximum range <sup>(6)</sup>.

## 2. THE PRODUCTS

- (4) Industrial gases, in some languages called technical gases, are either derived from air (atmospheric gases: oxygen, nitrogen, argon) in air separation 'tonnage plants' or are produced in tonnage plants through a chemical process (carbon dioxide, hydrogen, acetylene), often as a by-product. The core of the industrial gases industry is formed by the three atmospheric gases oxygen, nitrogen and argon, which together are believed to account for some 60 % by value — and considerably more by volume — of the total European industrial gases markets. Some atmospheric and non-atmospheric gases are offered in extremely pure forms or in mixtures for medical or special purposes, for example medicinal oxygen.
- (5) Industrial gases are used in most industries and manufacturing processes. Medical gases are used in hospitals, clinics and in home treatment. The largest volumes of industrial and medical gases are used for producing, cutting and welding metals and in the chemical industry. The food industry, electronics industry and health care are each believed to account for some 10 % of the gases market. Each gas serves specific purposes and therefore has a user's market of its own.
- (6) There are three different types of gases markets based on delivery methods: tonnage sales are made to certain large customers who require very large quantities of, primarily, the atmospheric gases oxygen and nitrogen. These supplies are made through either dedicated 'on-site' production plants or dedicated pipeline links. The contracts, which include the capital investment necessary for such plant or pipeline links, are tailor-made and, in view of the importance of those investments, last up to 15 years. The Netherlands and Belgium have very dense pipeline networks. Tonnage sales are a separate market, given that the few companies which need such large quantities would not consider bulk or cylinder supplies an alternative, save as a back-up system.
- (8) Air gases and other gases such as carbon dioxide are delivered to medium-sized customers in liquid form (bulk) at low temperatures. The gas is transported to customers by road or rail tankers; the customers are supplied with storage tanks and vaporisation equipment. Pipelines are used between air separation plants or large production units and liquefaction plants; liquefaction plants are often constructed at the same site as tonnage plants (piggyback plants), thus avoiding investment in a pipeline between the two.
- (9) The commitments provided to the Commission in 1989 by the world's major producers of industrial gases referred to in recital 7 also covered sales of the liquid air gases nitrogen, oxygen and argon under bulk contracts. Here too, supply and purchase commitments should relate to quantities up to a fixed maximum. The Commission allowed a supplier to maintain the exclusive right to fill and to maintain storage tanks for reasons of safety. A customer wishing to use more than one supplier would need more than one storage tank. The duration of liquid air gas contracts was reduced to three years. Customers would continue to be free to purchase or lease cryogenic tanks from the gas supplier; they can stipulate that tank rental contracts should be separate from the gas supply contract. Tank rental contracts can be made for a maximum period of five years.
- (10) Smaller customers of air gases, as well as buyers of welding gases, gas mixtures and special or very pure gases, are supplied by means of cylinders usually made of steel. Cylinders may be filled at, and distributed from, the supplier's production plant. Alternatively, liquid gases are transported in tankers to cylinder filling centres, where the transformation into compressed gas and the filling of cylinders takes place. From there cylinders in various sizes holding gas under pressure are either transported directly to the customer, or to depots,
- <sup>(5)</sup> Case IV/30.869.
- <sup>(6)</sup> Press release IP (89) 426, 7 June 1989.

sometimes independent undertakings, which supply retail customers. Welding gases, such as acetylene, are only transported in cylinders and under low pressure.

customers can obtain the different types of industrial gases they need from a single supplier.

### 3. THE SUPPLIERS

#### (a) *Hoek Loos*

(11) Although the volumes of cylinder gases sold are limited, their importance in revenue terms is quite important. This is so because of the higher prices and related charges that go with cylinder sales. In the cylinder business, large suppliers usually categorise customers on the basis of the quantities purchased in a given period. The more important cylinder customers will usually be served directly by the industrial gases undertaking, whereas smaller customers will deal with a depot holder. The commitments given to the Commission in 1989 by the world's major producers of industrial gases did not cover supplies of gases in cylinders.

(12) The industry generally views these three different distribution methods as separate product markets and the Commission took the same view in case IV/30.869 — Industrial Gases <sup>(7)</sup> and in the merger decisions Air Liquide/BOC <sup>(8)</sup> and Linde/AGA <sup>(9)</sup>. The customer will generally choose the supply method on economic grounds within the possibilities available for a specific gas at a specific user's location. This does not mean that a given customer cannot buy from a single undertaking several gases supplied in different forms, for example oxygen by pipeline, carbon dioxide in liquid form and a specific argon mixture in cylinders.

(13) In all three forms of delivery the price of transport and packaging is very high compared with the value of the gases themselves. Usually both the tank and the cylinders remain the property of the supplier of the gases and are rented by the customer. Cylinders and tanks need to undergo regular safety checks by the owner.

(14) Because transportation is expensive and because few suppliers are able to produce all industrial gases themselves in every region, the industrial gases groups and their national subsidiaries tend to supply each other with large quantities of gases by pipeline or in liquid form. They do so by means of swap deals or under take-or-pay or other contracts. Such supplies between groups are often of a cross-border nature. Filling depots belonging to one supplier will sometimes also fill cylinders on behalf of competitors. In this way

(15) The largest industrial gas company in the Netherlands at the time of the investigation, was NV Hoek's Machine en Zuurstoffabriek, now named NV Hoek Loos, and hereinafter referred to as 'Hoek Loos'. It was founded in 1891 and is located in Schiedam. On 31 December 1996 Hoek Loos had 1 798 employees, 826 of whom worked in the Netherlands. Hoek Loos's structure was modified in 1996, when the NV became a holding company for a number of working companies including Hoek Loos BV, Hoek Loos Medische Gassen BV, the Belgian company Hoek Loos NV and the company Holox Inc., United States of America.

(16) The ultimate parent company of Hoek Loos is Linde AG in Wiesbaden, Germany. The Linde group achieved a turnover of DEM 8,801 billion worldwide in 1996 with a staff of over 30 000. Besides producing, marketing and selling industrial and medical gases in many countries of the world, Linde also engineers and produces various types of installations for the chemicals sector, transportation vehicles, hydraulic systems and refrigeration systems. Linde's gases activity accounted for a turnover of [...] <sup>(\*)</sup> in 1996.

(17) [...].

(18) In 2000 Hoek Loos became a 100 % subsidiary of Linde when Linde bought up all remaining Hoek Loos shares traded on the stock exchange.

(19) Hoek Loos is active in the Netherlands, Belgium and the south-east of the United States of America. Hoek Loos produces, markets and distributes industrial and medical gases as well as related equipment, systems and services. Until 1996 it also manufactured medical equipment. In the Netherlands, where it owns air separation units located in IJmuiden and Botlek/Rotterdam, Hoek Loos supplies gases in cylinders, in bulk and by pipeline and also offers gases through on-site installations. Hoek Loos is a founding member of the Dutch sector association VFIG. Being the largest member, Hoek Loos has always chaired the VFIG.

<sup>(7)</sup> Press release IP (89) 426, 7 June 1989.

<sup>(8)</sup> COMP/M.1630, Decision of 18.1.2000.

<sup>(9)</sup> COMP/M.1641, Decision of 9.2.2000.

<sup>(\*)</sup> Business secrets have been omitted from the text.

**(b) AGA**

- (20) At the material time the second important industrial gases company in the Netherlands was AGA Gas BV, founded in 1971 and located in Amsterdam <sup>(10)</sup>. At this time, AGA Gas BV was owned by AGA Invest BV, which in turn was owned by AGA AB of Lidingö, the ultimate Swedish parent of the AGA group. AGA AB achieved a turnover of SEK 12,860 billion worldwide in 1996 with a staff of over 10 000.
- (21) AGA Gas BV has undergone a change of corporate structure since the period under investigation and no longer exists as such. Following the Commission decision on the merger of Linde and AGA <sup>(11)</sup>, AGA AB was acquired by Linde AG and one of the remedies offered in order for the Commission to reach its favourable decision, was the divestiture of AGA Gas BV's cylinder gas business in the Netherlands.
- (22) In December 2000, AGA Gas BV was split by a legal demerger into AGA Gas BV (the remainder) and AGA Transfer BV, renamed AGA Amsterdam BV. AGA Gas BV basically retained the liquid business, the medical gases business, the speciality gases business and the Mison business. AGA Amsterdam took over the cylinder gases business.
- (23) In 2001 AGA Gas BV (the remainder) was subsequently merged into AGA Invest B.V and the latter sold by AGA AB to Hoek Loos. AGA Amsterdam BV was sold to Air Products Holdings BV and Prodair Corporation.
- (24) At the material time AGA Gas BV (hereinafter AGA) produced, marketed and sold industrial and medical gases as well as related equipment, systems and services. Until 1995 AGA and Hoek Loos had a joint production joint venture called Cryoton in the Rotterdam area. From that year on AGA retained a liquid CO<sub>2</sub> production unit, whereas the air separation unit was allocated to Hoek Loos.
- (25) AGA is a founding member of VFIG. As the second-largest member, AGA has traditionally supplied the treasurer of the VFIG.

**(c) Air Products**

- (26) A third long established player in the Netherlands is Air Products Nederland BV (hereinafter Air Products), located in Waddinxveen. [...]. Air Products is a founder member of the VFIG.
- (27) Incorporated in the State of Delaware (United States of America), Air Products Europe Inc. is in charge of the European operations of Air Products and has its headquarters in the United Kingdom.
- (28) Air Products' ultimate parent is Air Products and Chemicals Inc., Allentown, Pennsylvania, United States of America. The group employed 16 700 employees in 1998; [...].

**(d) Air Liquide**

- (29) Air Liquide BV (hereinafter Air Liquide) was founded in 1988 and is today located in Eindhoven.
- (30) Its ultimate parent is Air Liquide SA, France. Air Liquide markets and sells bulk and cylinder gases in the Netherlands. It also serves one large customer in Belgium. Tonnage contracts are dealt with by an intermediary company within the Air Liquide group called Air Liquide Nederland BV. Air Liquide is a founding member of the VFIG.
- (31) The Air Liquide group employed some 27 000 employees in 1996. The Air Liquide group holds a strong position in the industrial gases markets of France and Belgium.

**(e) Messer**

- (32) The parent company of Messer Nederland BV, until 1997 called Messer Griesheim Nederland BV (hereinafter Messer), located in Moerdijk, is the Messer group in Frankfurt, Germany, with a turnover of DEM 2,300 billion in 1996 and some 7 200 employees worldwide.
- (33) At the material time the ultimate parent company was the Hoechst group, which held a two-thirds stake in the Messer group (the other third being owned by the Messer family) and which had about 120 000 employees in 1996. Messer, which started operations in 1989, became a member of the VFIG in October 1991.

<sup>(10)</sup> AGA has, however, been present in the Netherlands since 1917.

<sup>(11)</sup> COMP/M.1641, Decision of 9.2.2000.

- (34) At present the Messer Group is majority owned by Allianz and Goldman Sachs, which acquired a two-thirds stake in the Messer Group when they purchased Hoechst's shares.

(f) **Westfalen**

- (35) Westfalen Gassen Nederland BV (hereinafter Westfalen) started operating in the Netherlands in 1989. Located in Deventer, its ultimate parent company is Westfalen Gase AG of Münster, Germany, which had approximately 1 100 employees in 1997. Westfalen became a member of the VFIG in July 1994.

(g) **BOC**

- (36) Based in Guildford, Surrey, United Kingdom, the BOC Group plc had about 40 000 employees in 1996. Approximately 70 % of the group's turnover in 1996 came from the gases business. At the time it was also active in the semiconductor and vacuum technology, distribution and health-care sectors. The BOC Group has its Community stronghold in the United Kingdom.
- (37) At the material time the BOC Group conducted its gases activities in the Benelux (operated out of Zaventem, Belgium) through four legal entities: BOC NV (the Belgian company responsible for the Zaventem headquarters function), BOC Gas BV (a Dutch company responsible for the tonnage and bulk business in Terneuzen, the Netherlands), BOC Cylinder Gas NV (responsible for the cylinder filling operation in Herenthout, Belgium) and BOC Gaz SA (a French company responsible for sales in France). These BOC companies, which together constitute the undertaking BOC Gases Benelux (hereinafter BOC), are responsible *inter alia* for marketing cylinder and bulk gases in Belgium, the Netherlands and neighbouring areas of northern France and western Germany. BOC Gas BV became a member of the VFIG in May 1991.
- (38) The BOC Group sold its gases operations in the Benelux and Germany to the Air Liquide Group at the end of 1998 for a total cash consideration of GBP 112 million.

(h) **NTG**

- (39) Nederlandse Technische Gasmaatschappij BV (hereinafter NTG) is located in Tilburg and was founded

in 1985. NTG became a member of the VFIG in mid-1989. Until an air separation unit owned by its sister company BTG started operations in Belgium in late-1998, NTG purchased most of its bulk gases from other gas companies. NTG only markets and sells gases in bulk and in cylinders, it is not active in the tonnage markets.

- (40) NTG's ultimate parent company is SOL SpA in Monza, Italy, founded in 1927, which is a multinational group engaged in the production, applied research and marketing of industrial, pure and medicinal gases. The SOL Group employed some 900 people in 1996.

4. OTHER ACTORS

(a) **Hydrogas**

- (41) Hydrogas Holland BV (hereinafter Hydrogas) is located in Vlaardingen. It has access to several carbon dioxide production plants in Sluiskil and is very much specialised in the bulk supply of this particular gas to other gas companies and to end-users. Hydrogas realised a turnover on liquid gases of NLG 25,4 million in 1996, mostly in sales to other gas companies within the Norsk Hydro group and to competitors. Hydrogas became a member of the VFIG in May 1991.
- (42) Hydrogas's ultimate parent company is Norsk Hydro ASA of Oslo, Norway, which is active in the fertilisers, industrial chemicals, oil and natural gas, aluminium, magnesium and petrochemicals sectors. The Norsk Hydro group achieved a turnover of some NOK 70 billion in 1996 with 32 000 employees. 51 % of Norsk Hydro's share capital is held by the Norwegian government.
- (43) The Commission notes that although Hydrogas will be mentioned as having attended some of the VFIG meetings below, no conclusion is drawn for this company as regards any infringement.

(b) **UCC, Praxair, Indugas**

- (44) Union Carbide Corporation of Danbury, Connecticut, United States of America, manufactures, markets and sells various chemicals in many countries of the world. Until 1 July 1992 its product branches included industrial gases. Its subsidiary in the Netherlands and Belgium, Union Carbide Benelux NV (hereinafter Union Carbide), was also a supplier of industrial gases. Union Carbide is not and has never been a member of the VFIG.

(45) On 1 July 1992 Union Carbide Corporation hived off its industrial gases branch, which took the name Praxair Inc., as a Delaware, United States of America, corporation. Praxair Inc. achieved a turnover of USD 4,449 billion in 1996. In the Netherlands, Praxair operates as Praxair NV (hereinafter Praxair), located in Olen, Belgium. The Praxair Group owns and operates a number of facilities producing atmospheric gases in Belgium and the Netherlands. Most are on-site plants dedicated to serving the customer on whose site the facilities are located. Two such plants, located in Zwijndrecht and the Belgian town of Lommel, produce atmospheric gases that are sold on the market by pipeline and in liquid form. The Praxair Group does not operate any filling plants for atmospheric and medical gases in the Netherlands and does not sell gases in cylinders there. Praxair is not and has never been a member of the VFIG.

(46) Indugas NV (hereinafter Indugas), located in Schoten (Belgium), was founded as a reseller and distributor of industrial gases and welding products in 1979 by Union Carbide and the Belgian company Antwerpse Chemische Bedrijven LCB NV. Union Carbide (Praxair since 1 July 1992) and LCB each own 50 % of Indugas's capital stock. Indugas purchases bulk atmospheric gases from Praxair, most of which it then fills into cylinders. Since 1979 Indugas has been the sole distributor for Union Carbide/Praxair's atmospheric gases and mixtures of such gases. It also became sole reseller for Praxair's specialty gases in the Netherlands on 1 January 1995. In 1996 Indugas sold gases worth NLG 16 million in the Netherlands through its subsidiary Indugas BV. Indugas became a member of the VFIG in September 1993.

(47) The Commission notes that the statement of objections was not sent to the companies referred to in section A.4(b) and that therefore no conclusion will be drawn as regards any infringement, even though some of those companies are mentioned in certain documents described below.

**(c) ACP and Ijsfabriek Strombeek**

(48) Two small, independent Belgian producers of industrial gases are, to a certain degree, also active on the Dutch market.

(49) Acide Carbonique Pur NV/SA (hereinafter ACP) is located in Heusden-Zolder in Belgium. This undertaking, which does not belong to one of the multinational

industrial gases groups, sells cylinder gases on the Belgian market only. ACP also produces carbon dioxide in Geleen (Netherlands), which it sells in liquid form mainly in Belgium, the Netherlands, Germany and France. ACP's total turnover for industrial gases is BEF 526 million.

(50) Ijsfabriek Strombeek is another independent public limited company and is located in Meise in Belgium. In 1996 it sold cylinder gases in the Benelux, Germany and the United Kingdom, and liquid gases in Belgium, the Netherlands, Germany, France and Greece. The company realised a total turnover of BEF 567 million. In the Netherlands Ijsfabriek Strombeek's only significant market share is for nitrous oxide (laughing gas), which it sells both in cylinders and in bulk.

**5. THE TRADE ASSOCIATION — VFIG**

(51) The association 'Vereniging van Fabrikanten van Industriële Gassen' (VFIG) was founded on 23 March 1989. There was no notarial deed, nor was the association included in the public register of associations (Verenigingenregister). According to Article 5 of its statutes, VFIG's members are undertakings which manufacture and sell industrial gases in the Netherlands. Article 4 of its statutes defines VFIG's objective as being to promote the interests of its members in technical matters and regarding safety issues of industrial gases within Community industry. The secretariat of VFIG is managed by Teppema BV, which is a daughter company of Moret Ernst & Young <sup>(12)</sup> Management Consultants.

(52) At the material time VFIG membership was as follows:

Hoek Loos	Founding Member, Chair Holder, 1989
AGA	Founding Member, Treasurer, 1989
Air Products	Founding Member, 1989
Air Liquide	Founding Member, 1989
NTG	Member since mid-1989
BOC	Member since May 1991
Hydrogas	Member since May 1991
Messer	Member since October 1991
Indugas	Member since September 1993
Westfalen	Member since July 1994

<sup>(12)</sup> The name changed to Ernst & Young in 1999.

(53) Pursuant to Article 7 of the statutes, members meet at least once a year. At these meetings member companies are usually represented by their general manager and/or another manager. Since 1990 members have usually met two to four times a year, as shown in the list at recital 106. This list also shows that larger member companies attend all meetings, but smaller ones do not. Minutes of those meetings are drawn up by the secretariat and put on the agenda of the next meeting for approval. The members meeting can decide to set up commissions. A Technical Commission was thus created in 1991 and has met at least once a year ever since.

(54) Moret Ernst & Young produce quarterly statistics on the amounts of liquid and cylinder gases sold by members on the Dutch market. The data is presented in aggregated form, allowing each participant to assess its own market share only. Members of VFIG are not obliged to participate in the statistical system, but since 1993 most have.

## 6. THE INDUSTRIAL AND MEDICAL GASES MARKETS

### (a) *The relevant product markets*

(55) This Decision only concerns supplies of gases in liquid form (bulk) and in cylinders. Tonnage contracts fall outside of the scope of this Decision. In bulk form, the most relevant gases for this Decision are the three atmospheric gases nitrogen, oxygen and argon as well as carbon dioxide (CO<sub>2</sub>). Supplied in cylinders, nitrogen, oxygen, argon, carbon dioxide, acetylene and argon mixtures are the most relevant gases. Every one of these gases has several fields of use.

(56) Nitrogen accounts for 78 % of our atmosphere; it has a liquefaction point of minus 196 °C. Its specific properties are its inertia and, in liquid form, its ability to absorb heat. In gaseous form it is used to protect liquids and solids from corrosion, microbiological attack, the formation of explosive mixtures and other effects which can arise from their being in contact with air. It is traditionally used in the steel and other metallurgical industries, in the oil and petrochemicals industries and, increasingly, in the foods (freezing and packaging) and electronics industries. Nitrogen is supplied by pipeline, in bulk or in cylinders.

(57) Oxygen accounts for 21 % of our atmosphere; it has a liquefaction point of minus 183 °C. Its oxidative property is used to improve the efficiency of combustion processes and chemical reactions. As technical or industrial oxygen it is mainly used for the production of steel, other metals, glass, ceramics, chemicals, pulp and paper; it is also used for cutting and welding; newer applications include water treatment and fish farming. Oxygen is supplied by pipeline, in bulk and in cylinders. Oxygen is also used for medical purposes in a purer and more expensive form, in which form it is supplied in cylinders or in bulk.

(58) Argon is a noble gas, which accounts for only 1 % of our atmosphere; it has a liquefaction point of minus 186 °C. It is even more inert than nitrogen and is therefore used in blanketing operations, including as a shielding gas in welding and in certain highly inert processes in electronics and metallurgy. Argon is not only produced in air separation units, but also as a by-product of the ammonia process. Argon is generally supplied in bulk or in cylinders.

(59) Carbon dioxide is mainly produced as a by-product of chemical processes, notably as a by-product of hydrogen. Industrial gases companies generally buy CO<sub>2</sub> from chemical and petrochemical companies and sell it in bulk and in cylinders. CO<sub>2</sub> is used as dry ice for freezing purposes; in gaseous form for fertilisation in greenhouses and carbonisation of soft drinks and beer; it is also used in fire extinguishers, as a protective gas for storage of flammable and explosive substances and for many other purposes. For some applications it is interchangeable with nitrogen.

(60) Argon mixtures are sold in cylinders only. They are used for welding and for calibration purposes.

(61) Acetylene is a fuel gas, based on carbide production, with a very high flame temperature. It is used for welding, cutting and other purposes. It is supplied in cylinders under low pressure.

(62) It is generally recognised in the industry that, for each gas, each method of distribution gives rise to a distinct product market <sup>(13)</sup>. The cost to the producer, the main factors being labour, energy, depreciation and transport,

<sup>(13)</sup> Also confirmed in merger decisions M.1630 Air Liquide/BOC and M.1641 Linde/AGA.

varies considerably according to the method of distribution. Therefore, prices charged to the consumers of the gases differ enormously depending on the form of delivery used. Cylinder gases are far more expensive than the same gases in liquid form, which are in their turn more expensive than those supplied by pipeline in gaseous form. The cost charged to customers for transportation and rent, as well as possible safety and other charges, will therefore differ according to the method of delivery. Furthermore, the gases commercialised by the different methods are tailored to different customer requirements.

- (63) One aim of the agreements concerned by this Decision was to fix the cost of delivery of cylinder gases in general. The Commission notes that those agreements applied to the delivery of all cylinder gases and not just the most important ones described above. The other gases concerned include helium, nitrous oxide, hydrogen, tetrene and various special gases and mixtures. Similarly, in the field of bulk gases, the supply conditions of other, less important gases, for instance nitrous oxide, were also affected by the agreements in question.

**(b) *The relevant geographic market***

- (64) The geographic market for supplying industrial gases is limited by the costly means of transport described under (a) above and can therefore be defined as local or regional in scope. In Case IV/M.926 Messer Griesheim/Hydrogas, in 1997, the Commission based its assessment on an effective transport range of 200 km.
- (65) Back in 1989, in the context of a case <sup>(14)</sup> examining the conditions applied by suppliers of industrial gases to their customers, the Commission established that simple liquid gases, such as oxygen and nitrogen, have an economic distribution radius of 300 to 400 km and the more costly argon a radius of 600 to 800 km. Atmospheric gases in cylinders are not usually transported beyond a range of 100 km, with the exception of the more expensive argon.
- (66) This estimation for cylinder gases was confirmed in the present case by Air Liquide, which, however, limited the effective radius for liquid oxygen and nitrogen to 150 km and for liquid argon to 400 km. Praxair and BOC, on the other hand, believe that the estimations of

distances made in the 1980s still hold true. ACP puts the effective radius for liquid CO<sub>2</sub> at 300 km.

- (67) By transport over water the radius, at least for sales between industrial gases groups, can be much greater: references in the file indicate that liquid argon is shipped from the Netherlands to Greece and that liquid CO<sub>2</sub> can be shipped from the Netherlands to Poland and Russia. For acetylene, which is only transported in cylinders, the effective radius is estimated at 300 to 400 km.
- (68) In 1997, in Case IV/M.926 Messer Griesheim/Hydrogas, the Commission considered the relevant geographic market for the joint venture in question to be local or regional because transportation over longer distances was so costly.
- (69) The fact that some gas companies, such as AGA for its liquid gases and BOC until December 1998, operate on a Benelux-wide level suggests that the relevant geographic market might be larger than the Netherlands. However, in reply to the Commission's queries, all suppliers of industrial gases in the Netherlands are of the opinion that the geographic market for cylinder gases is a national one. The main reason they mention is governmental regulation regarding cylinders, which makes it impossible to use 'Belgian' cylinders for sales in the Netherlands and vice versa; Germany too has standards of its own <sup>(15)</sup>. Cultural and language differences and the important service aspect involved in the supply of cylinder gases are also mentioned as arguments in favour of national markets.
- (70) For liquid gases the situation is less obvious. There are differences in regulations between Member States regarding bulk tanks, but once these are installed cross-border supply would not seem to constitute a barrier. However, most of the companies stated to the Commission that they consider markets for liquid gases to be national too. AGA, Praxair and ACP differed in that they believed the geographic market to depend more on the effective radius.
- (71) The Commission notes that the production and supply of industrial gases in the Community is dominated by a

<sup>(14)</sup> Case 30.869, see Commission press release IP(89) 426 dated 7 June 1989.

<sup>(15)</sup> Council Directive 99/36/EC on transportable pressure equipment was not adopted and published until May 1999 (OJ L 138, 1.6.1999). It was to be implemented by the Member States by July 2001 at the latest.



few large, multinational groups, which have national subsidiaries in most Member States. These subsidiaries supply bulk gases to local depot holders and to end-customers and cylinder gases to end-customers within that particular Member State only. These subsidiaries also set prices and other commercial conditions for supplies within that Member State.

- (72) An end-customer in one Member State will find it difficult to obtain supplies from subsidiaries of the multinational groups located in other Member States. This is not only because of the limited effective radius but because of the internal division of geographic responsibilities within the groups <sup>(16)</sup>. As a consequence, prices and conditions of sale for both bulk

and cylinder gases differ between Member States, a fact borne out by several documents in the file <sup>(17)</sup>.

- (73) Finally, the Commission notes that the structure of supply is different between Member States: Air Liquide is the clear market leader in France and Belgium, Messer and Linde are strong in Germany and Hoek Loos is the market leader in the Netherlands, followed by AGA.
- (74) The Commission therefore concludes that for the purposes of this Decision the relevant geographic markets for both cylinder gases and liquid gases is confined to the Netherlands <sup>(18)</sup>.

### (c) **Market structure**

- (75) Table 1 shows the overall size of each addressee of this Decision in 2001 and gives an estimation of its relative importance on the Netherlands market for industrial and medical gases (cylinders and bulk only) in 1996. The figures provided are based on the companies' responses to request for information and estimates of the Commission <sup>(19)</sup>.

Table 1

Undertaking	Total turnover of the addressees of the Decision for 2001 (EUR)	Turnover in cylinder and liquid gases in the Netherlands (EUR) and estimated market shares for 1996
NV Hoek Loos	[...]	[...]
AGA Gas BV <sup>(20)</sup>	[...] <sup>(21)</sup>	[...]
Air Products Nederland BV	[...]	[...]
Air Liquide BV	[...]	[...]
Messer Nederland BV	[...]	[...]
BOC Group plc	[...]	[...]
Westfalen Nederland BV	[...]	[...]

<sup>(20)</sup> Following the liquidation of AGA Gas BV in 2000 to 2001, AGA AB has accepted liability for the acts of its subsidiary and is the addressee of the Decision.

<sup>(21)</sup> 2000 is the last complete business year for which turnover figures are available for AGA Gas BV.

<sup>(16)</sup> For example, file AGA, p. 852; AL, p. 5609; HL, p. 2788.

<sup>(17)</sup> For example file AGA, pp. 290, 6755 and 1056.

<sup>(18)</sup> Also confirmed in merger decisions M.1630 Air Liquide/BOC and M.1641 Linde/AGA.

<sup>(19)</sup> The sales for the year 1996 are provided as an example. The relative importance of each undertaking's annual cylinder and bulk sales may have varied from year to year over the period of the infringement. The market share estimates are derived directly from the data submitted by the undertakings and are provided on a purely indicative basis. The market share estimates are based on the assumption that the companies in Table 1 together covered over 90 % of the Dutch market in 1996.

- (76) Total annual sales of the relevant industrial gases in the Netherlands in 1994 to 1996 are estimated as follows:

Table 2

Industrial oxygen in cylinders	approximately 7 million m <sup>3</sup>
Nitrogen in cylinders	approximately 2 million m <sup>3</sup>
Argon in cylinders	approximately 2,5 million m <sup>3</sup>
Argon mixtures in cylinders	approximately 5,3 million m <sup>3</sup>
Acetylene	approximately 2 million m <sup>3</sup>
CO <sub>2</sub> in cylinders	approximately 1,3 million m <sup>3</sup>
Liquid oxygen	approximately 100 000 tonnes
Liquid nitrogen	approximately 280 000 tonnes
Liquid argon	approximately 10 000 tonnes
Liquid CO <sub>2</sub>	approximately 120 000 tonnes

- (77) Tables 3 and 4 provide an indication of the market shares of the companies involved for each gas <sup>(22)</sup>, for cylinder deliveries and liquid deliveries, on the Netherlands market for 1996:

Table 3

**Cylinder gases**

(in %)

1996	Acetylene	Argon	Carbon dioxide	Argon mix	Nitrogen	Oxygen
Hoek Loos	[30 to 35]	[30 to 35]	[40 to 50]	[20 to 25]	[40 to 45]	[30 to 35]
AGA	[40 to 45]	[35 to 40]	[25 to 35]	[35 to 40]	[20 to 25]	[25 to 30]
Air Liquide	[5 to 10]	[0 to 10]	[0 to 5]	[5 to 10]	[5 to 10]	[5 to 10]
Air Products	[0 to 10]	[5 to 10]	[5 to 10]	[5 to 15]	[5 to 10]	[5 to 10]
Messer	[0 to 5]	[0 to 10]	[0 to 5]	[0 to 10]	[0 to 10]	[0 to 10]
Westfalen	[0 to 5]	[0 to 5]	[0 to 5]	[0 to 5]	[0 to 5]	[0 to 5]
BOC	[0 to 5]	[0 to 5]	[0 to 5]	[0 to 5]	[0 to 5]	[0 to 5]
NTG	[0 to 5]	[0 to 5]	[0 to 10]	[0 to 5]	[0 to 5]	[0 to 5]
TOTAL	93 %	92 %	94 %	87 %	92 %	88 %

<sup>(22)</sup> Based on their replies to the Commission's requests for information.

Table 4  
Liquid gases

(in %)

1996	Oxygen	Nitrogen	Argon	Carbon dioxide
Hoek Loos	[5 to 15]	[20 to 30]	[10 to 20]	[15 to 20]
AGA	[15 to 20]	[20 to 25]	[20 to 30]	[25 to 35]
Air Liquide	[20 to 30]	[10 to 20]	[25 to 35]	[25 to 30]
Air Products	[25 to 30]	[20 to 25]	[15 to 20]	[0 to 5]
Messer	[0 to 5]	[0 to 5]	[0 to 5]	[5 to 10]
Westfalen	[0 to 5]	[0 to 5]	[0 to 5]	[0 to 5]
BOC	[5 to 10]	[5 to 10]	[0 to 5]	[0 to 5]
NTG	[0 to 5]	[0 to 5]	[0 to 5]	[0 to 5]
TOTAL	91 %	91 %	87 %	80 %

- (78) The Commission notes that since the late-1980s a number of newcomers have entered the Dutch industrial gases market: Air Liquide, Messer, BOC and Westfalen and, in the CO<sub>2</sub> market, Hydrogas. In a mature market, where there is little prospect for growth over and above that of the economy as a whole, the arrival on the market of new players is likely to enhance competition. Newcomers will try to acquire a sufficient share of the market, whereas the established companies will defend their market shares. This enhanced competition for customers is likely to lead to lower average prices.
- (79) Data supplied by Hoek Loos, Air Products and AGA confirm that there was indeed a negative development in the price level of all major industrial gases since 1989, whether supplied in bulk or in cylinders. This development took place for gases facing declining general demand (such as acetylene) as well as for gases in more stable markets.
- (80) The Commission notes that, despite the entrance of newcomers the markets for cylinder gases in the Netherlands have remained highly concentrated. The Herfindahl-Hirschmann Index (HHI) <sup>(23)</sup> exceeded 1 800 for each of the cylinder gases in Table 3 in every one of the years 1993 to 1997, and the combined market share of the five larger undertakings AGA, Air Liquide, Air Products, Hoek Loos and Messer was never lower than 80 %. Variations in the market shares of each individual company were small.
- (81) The markets for the liquid gases oxygen, nitrogen, argon and carbon dioxide were also concentrated. With the exception of oxygen, the five leading companies together held a share of more than 80 % in each of the years 1993 to 1997. Their individual market shares were less stable than for cylinder gases, however. The HHI oscillated around 1 800.
- (82) It appears from the Commission's file that Air Liquide, Hoek Loos, Air Products and AGA tried to maintain their market shares by a policy of retaliation against each other or against third companies whenever one of their customers was taken over by a competitor <sup>(24)</sup>.

<sup>(23)</sup> Index calculated by adding the squares of market shares. An HHI below 1 000 indicates a dispersed market, an HHI between 1 000 and 1 800 indicates a moderately concentrated market, an HHI above 1 800 indicates a highly concentrated market.

<sup>(24)</sup> For example, file AGA, pp. 189 and 4960.

- (83) In this context it should be noted that gas suppliers are rather well informed about each other's clients. Because cylinders and gas tanks usually belong to the gas supplier and bear that company's markings, a salesman visiting a customer or a potential customer can easily see who the current supplier is. A supplier can therefore react immediately if a customer with which it has a contract starts buying from a competitor. The larger suppliers of industrial gases certainly maintain lists for each competitor detailing customers they have lost and won. These lists also indicate price concessions they had to accept because of competitive offers made by that particular competitor <sup>(25)</sup>. This knowledge, together with lists of that competitor's potentially interesting clients, allows the supplier in question to set up 'hit lists' for a retaliation campaign <sup>(26)</sup>. In AGA documents this retaliation policy is referred to as the 'balance of terror' <sup>(27)</sup>.
- (84) Retaliation campaigns need not be restricted to the same geographic market. Several documents in the Commission's file refer to cross-border retaliation, notably in order to hit an aggressive competitor on its home market, where suitable targets may be easier to find <sup>(28)</sup>. Other documents refer to campaigns at a Benelux level. Cross-border retaliation campaigns are usually organised or at least coordinated by the group to which the gas supplier in question belongs <sup>(29)</sup>.
- (85) It is common in the sector for prices and other supply conditions for cylinder and bulk gases to differ according to the customer. New customers are won by offering low prices and favourable supply conditions. These prices and conditions are increased on a yearly basis, usually at the beginning of each calendar year. Although each gas is a homogenous product and customers can easily switch between suppliers, studies made by some undertakings in the industrial gases sector show that there is nevertheless a high degree of loyalty among customers to 'their' supplier <sup>(30)</sup>. This can be explained by the service aspect of the industrial gas business, which includes speedy and reliable supply as well as good advice to customers on the use of the product in question. Consequently, customers tend to stick to their supplier despite the regular price increases they have to pay. Only when the difference between what they are paying and the much more favourable prices and conditions offered by competitors exceeds a certain level will customers contemplate switching. The current supplier must then either match the price offered or lose the customer. In both cases it is likely to retaliate by offering favourable conditions to one of its competitor's customers with a similar offtake.
- (86) Thus, two price levels can be distinguished for each supplier of industrial gases in cylinders, a variable level for existing customers and a minimum price used to attract new customers. A similar difference exists for prices of industrial gases in bulk.

## B. PROCEDURE

### 1. THE INSPECTIONS

- (87) On 11 and 12 December 1997 investigations pursuant to Article 14(3) of Regulation No 17 took place simultaneously and without prior warning at the premises of AGA, Air Liquide, Air Products and Hoek Loos.

<sup>(25)</sup> For example, file AL, pp. 2104 to 2111, 2152; AL, p. 2161; AGA, p. 368 and AP, pp. 1563 to 1565.

<sup>(26)</sup> For example, file AGA, p. 4938; BOC, p. 3614; MG, p. 7294 and AGA, p. 919.

<sup>(27)</sup> For example, file AGA, p. 4954.

<sup>(28)</sup> For example, file HL, pp. 2651 and 3041; BOC, pp. 3762 to 3772; AGA, pp. 867 and 877 and MG, p. 4814.

<sup>(29)</sup> For example, file AL, p. 2161; BOC, pp. 3762 to 3773; HL, p. 3041 and AP, pp. 1503 and 1508.

<sup>(30)</sup> For example, file AP, p. 1645 and AGA, p. 6557.

- (88) In the course of 1998 investigations pursuant to Article 14(2) of Regulation No 17 took place at BOC, Hydrogas, Messer and Westfalen.

## 2. REQUESTS FOR INFORMATION

- (89) On 24 July 1998 the Commission addressed requests for information pursuant to Article 11 of Regulation No 17 to AGA, Air Liquide, Air Products, Hoek Loos, NTG and Praxair.
- (90) Requests for information under Article 11 of Regulation No 17 were also addressed to ACP and IJsfabriek Strombeek on 14 September 1998, to Westfalen, BOC and Indugas on 12 October 1998, again to ACP on 13 October 1998, to Messer on 30 October 1998, to Hydrogas on 12 November 1998 and again to BOC on 22 December 1998.
- (91) Further requests under Article 11 of Regulation No 17 were sent to AGA, Air Liquide, Air Products, Hoek Loos and Messer on 7 April 1999 and to Hydrogas on 12 April 1999.
- (92) On 20 January 1998 a request for information pursuant to Article 11 of Regulation No 17 was addressed to the trade association VFIG.
- (93) The last requests for information pursuant to Article 11 of Regulation No 17 were addressed to AGA, Air Liquide, Air Products, Hoek Loos, Messer, Westfalen, BOC and NTG on 22 February 2002 and on 5 June 2002 to AGA, Air Liquide, Air Products, Hoek Loos, Messer, Westfalen and BOC.
- (94) In these requests for information, the undertakings were required to provide information on meetings with competitors, clarifications on documents found at their premises during inspections and data on their general increases in prices and in other supply conditions. They were also asked to give their views on the definition of the market, to estimate their market shares and the total value of the market and to provide additional data on their business activities.

## 3. THE ADMINISTRATIVE PROCEDURE

- (95) On 9 July 2001 the Commission initiated proceedings in the present case and adopted a statement of objections against the following eight undertakings active in the industrial and medical gases sector in the Netherlands. The addressees of the statement of objections were: AGA Gas BV, Air Liquide BV, Air Products Europe Inc., BOC Group plc, NV W.A. Hoek's Machine- en Zuurstoffabriek, Messer Nederland BV, Nederlandse Technische Gasmaatschappij BV and Westfalen Gassen Nederland BV.
- (96) All addressees of the statement of objections submitted written observations in response to the Commission's objections.
- (97) The undertakings had access to the Commission's file via a CD-ROM copy of the Commission's file, which was sent to them shortly after proceedings were opened.
- (98) An oral hearing was held on 10 January 2002. The following undertakings took part: AGA AB as successor of AGA Gas BV, Air Liquide BV, Air Products Europe Inc. on behalf of Air Products Nederland BV, BOC Group plc, NV Hoek Loos, Messer Nederland BV and Westfalen Gassen BV.

- (99) As they had done in their written replies, two of the companies concerned, Air Liquide and Westfalen, contested the facts as set out in the statement of objections and four companies, AGA, Hoek Loos, Air Products and Messer, said they did not substantially contest the facts. BOC made only a few minor comments in view of its minimal presence on the market at the time, and NTG did not attend the hearing.
- (100) Most of the undertakings present, whether contesting the facts or not, raised the issue of limitation. They alleged that there was a lack of documentary evidence in the Commission's file for the period 1992 to 1994, and that the alleged infringements before 1992 were therefore time-barred because the surprise inspections took place on 11 and 12 December 1997. This point will be addressed in Part II, section E.

### C. DETAILS OF THE INFRINGEMENTS

#### 1. INTRODUCTION

- (101) The Commission has evidence in its file that in the period 1989 to 1997 the leading undertakings supplying industrial gases in the Netherlands met regularly. At these meetings they:
- (a) discussed and fixed the percentage or the amount by which they intended to increase prices and other trading conditions for cylinder, and sometimes bulk, gases supplied to their existing customers in the following year;
  - (b) agreed not to deal with each other's existing customers for a period of two to five months every year in order to implement these price increases;
  - (c) agreed to respect minimum prices when offering gases in cylinders and in bulk to new customers; and
  - (d) agreed to respect other minimum trading conditions for supplies in cylinders and in bulk. These conditions notably concerned the rent and transportation cost charged to customers. They furthermore agreed to introduce a drop charge for supplies in bulk and a charge for safety and environment on supplies in cylinders.
- (102) Although these points are linked and had the common purpose of raising, or at least avoiding a deterioration of, the price level for industrial gases in the Netherlands, they will be described and analysed separately.
- (103) The Commission has evidence of regular meetings between the leading undertakings in the industrial gases sector in the Netherlands in the period 1989 to 1997. Some of these meetings were also attended by smaller competitors. At these meetings the participants discussed various issues of common interest. These meetings provided them with a regular opportunity to discuss and fix the setting and implementation of their price increases and trading conditions for bulk and cylinder gases. Bilateral contacts between various undertakings supplemented these anti-competitive meetings.
- (104) In the early years of the cartel, from 1989 on, suppliers of industrial gases attended 'safety meetings'. Such meetings took place in restaurants several times every year. They were sometimes combined with lunches and were organised by one of the undertakings in question. A draft agenda was distributed, which did not carry items relating to prices or other trading conditions. As will be

shown in the following reictals, items not mentioned on the agenda were nevertheless also discussed at these meetings. Union Carbide, Hoek Loos, AGA, Air Products and Air Liquide attended one or more safety meetings in the years 1989 to 1991. Air Products notes that its senior manager stopped participating in 1990 and that Union Carbide was not always present in the meetings he attended <sup>(31)</sup>.

- (105) Meetings of VFIG members later became the forum of choice for discussing and fixing prices and other supply conditions. The official VFIG meetings started in 1989 and usually took place in Utrecht, where the VFIG has its secretariat. The secretary invited the member companies to attend by sending them a draft agenda together with the draft minutes of the last meeting.
- (106) Further to a request for information under Article 11 of Regulation No 17, the VFIG provided the reports of the meetings that had been organised. Attendance of VFIG meetings is shown in the table below:

Table 5

VFIG meetings	Messer	Air Products	Hydro-gas	Indugas	West-falen	NTG	Hoek Loos	AGA	Air Liquide	BOC
11.10.1989		X				X	X	X	X	
14.3.1990		X				X	X	X	0	
19.9.1990*										
20.12.1990		0				X	X	X	X	
27.3.1991		0				0	X	X	X	
18.9.1991	0	X	0			0	X	X	X	0
12.12.1991*										
11.2.1992	X	X	0			X	X	X	0	0
23.9.1992*										
5.11.1992*	0	X	X			X	X	X	0	0
17.2.1993	0	X	X			0	X	X	X	0
15.6.1993	X	X	0			0	X	X	X	0
3.9.1993	X	X	0	X		X	X	X	X	0
16.9.1993 no information										
16.12.1993	X	X	X	0		0	X	X	X	0
17.3.1994	X	X	X	X		X	X	X	X	0
18.5.1994*										
23.6.1994	X	X	X	0		X	X	X	X	X
14.10.1994	X	X	X	0	X	X	X	X	X	X
18.11.1994	X	X	X	0	X	0	X	X	X	X
25.1.1995*										

<sup>(31)</sup> File AP, p. 5964 bis.

VFIG meetings	Messer	Air Products	Hydro-gas	Indugas	West-falen	NTG	Hoek Loos	AGA	Air Liquide	BOC
28.4.1995	X	X	X	X	X	X	X	X	X	X
26.9.1995	0	X	X	0	X	0	X	X	X	X
23.1.1996*										
14.3.1996	0	X	X	X	X	X	X	0	X	0
23.10.1996	0	X	X	0	X	0	X	X	X	0
14.3.1997	0	X	X	X	0	X	X	X	X	X
2.10.1997	0	X	X	0	X	0	X	X	X	0
5.2.1998	0	0	0	X	0	0	X	X	0	0
20.3.1998	X	0	X	0	X	X	X	X	X	X

\* = cancelled, 0 = absent, X = present.

- (107) From 1995 on, the larger undertakings in the sector, AGA, Air Liquide, Air Products, Hoek Loos and Messer, also started meeting informally outside the VFIG framework. These meetings were organised by each of the undertakings in turn at a restaurant in Breda and, in 1997, in Barendrecht too. There was no formal agenda for such meetings, nor were formal minutes taken. The meetings took place several times a year and they continued until at least the end of 1997 <sup>(32)</sup>. At these meetings the companies discussed and set prices and other supply conditions, as will be shown below.

- (108) The attendance of meetings of AGA, Air Liquide, Air Products, Hoek Loos and Messer at Breda or Barendrecht is shown in the table below and based on replies received from the companies:

Table 6

Breda/Barendrecht meetings	Air Products	AGA	Air Liquide	Messer	Hoek Loos
9.3.1995		X			
11.5.1995	X				
15.9.1995	X				
23.11.1995	X	X			
5.6.1996	X		X		
2.10.1996	X	X	X		
19.3.1997	X		X		
20.6.1997	X	X			
8.7.1997	X	X			
9.9.1997			X		

Note: Air Liquide: no data on 1995 available, Messer: no data available, Hoek Loos: no data available.  
X = dates which the Companies recal.  
blanks = no reply from the Company.

<sup>(32)</sup> File AGA, p. 5169; AP, p. 5965 and MG, p. 5280.



(109) Throughout the period 1989 to 1997 there were also bilateral contacts in the form of letters, fax messages and meetings. These served to convey what had been agreed in meetings to competitors which had not participated and to discuss the implementation of those agreements. In many of those contacts the prices and other supply conditions charged to particular customers were discussed and in some instances agreed <sup>(33)</sup>.

## 2. FIXING PRICE INCREASES

### (a) *Overview*

(110) The Commission has evidence in its file that from 1989 on, competitors regularly discussed and agreed the price increases they would apply the following year for their existing customers for cylinder, and in some instances liquid, gases. At least the following companies took part in these illicit practices: Hoek Loos, Air Products and AGA in the periods 1989 to 1991 and 1993 to 1997, Air Liquide and Messer in the periods 1990 to 1991 and 1993 to 1997, Westfalen and BOC in the period 1994 to 1995.

### (b) *Cartel meetings and collusive contacts*

(111) There was an agreement in force on 24 November 1989 between Hoek Loos, AGA and Air Products to raise the price level for their cylinder gases in 1990 by approximately 5 %.

(112) At AGA an internal memo dated 24 November 1989 was found concerning a 'safety meeting'. Written in English and marked 'confidential', it reads:

'All participants agree upon price increase cylinder gases of +/- 5 %.

HL 4,9 %, UC 5 %, AGA 5 %, AP 5 %.

This information will be passed on to AL by [...] of HL. We will ask AL for moratorium 4-5 months. Starting right from this moment. Same applies for HL, AGA, UC, AP. Meaning we should only deal with our own customers from now on.

All shall work out proposal for liquid price list.

Meeting is set for January 12<sup>th</sup> for final discussion and consensus on such a price list.

All will try to improve liquid prices at existing customers.

AFTER READING, PLEASE DESTROY.' <sup>(34)</sup>

(113) The joint agreement lifted the price increase for 1990 to a level higher than that AGA would have applied without the agreement. Only a month before the agreement AGA, according to an internal note dated 30 October 1989 (which was found at Messer), was contemplating increasing prices in 1990 by only 4 % <sup>(35)</sup>.

(114) That AGA implemented the agreement to increase prices by 5 % is shown by internal instructions of 28 November 1989 to focus on implementing the 5 % price increase with existing customers <sup>(36)</sup>, which read as follows:

'Re: price increase and filling addition

...

1. Prices cylinder gases/ rent and freight

These will be increased as from 1<sup>st</sup> January with 5 %.

This percentage also counts for freight. The rent tariff will be adjusted with 1 cent for loose cylinders and with 2 cents for cylinders in packages. The adjustment of the percentage is due to the new expectations concerning the developments in 1990.

2. ....

(115) Representatives of Hoek Loos, Air Products, AGA and Air Liquide met again on 22 November 1990 and agreed on a price increase of 5 to 7 % from 1 January 1991:

(116) At Air Liquide were found internal notes dated 22 November 1990 <sup>(37)</sup>, in which 'price increases' were one of the items discussed:

'1. Bulk — drop charge

2. Minimum prices — increase

3. Price increase 1.1.91 (5 to 7)

ad 1:

HL: all clients approached — starting 1.11.90. App. 30 reactions (few, therefore). DFL. 36,-

AP: letter sent 16.11. Integrally everyone starting 1.12. DFL. 36,-. Already oral/written reactions.

AGA: The large do not accept it (Nedstaal, AKZO), app. 50 % approached. Starting date 1.12.

<sup>(33)</sup> Examples: AL-AGA (File AL, p. 2159; AGA, p. 4987); AGA-HL (File AGA, pp. 4944, 4960, 4963 and 4972, 4988); AGA-MG (File AGA, pp. 4952 and 4961; MG, pp. 7247, 4814 and 4815) and AGA-AP (File AGA, p. 4979).

<sup>(34)</sup> File AGA, p. 782.

<sup>(35)</sup> File MG, p. 4816.

<sup>(36)</sup> File AGA, p. 5193.

<sup>(37)</sup> File AL, p. 2112 (own translation).

AL: Queue charge introduced. Drop charge per 1.1.  
Arguments: legislation on driving hours, queues, fuel,  
higher insurance cost, stricter regulations, training cost.  
Introduce as a rule in new contracts.  
...'

(117) Air Liquide was unable to tell the Commission in what framework this meeting took place and who attended on behalf of Air Liquide, apart from the sales manager [...], whose handwriting they identified <sup>(38)</sup>. In its reply to the statement of objections, Air Liquide stated that this document merely concerned personal notes made by [...] and was not proof of any binding commitment on its part <sup>(39)</sup>.

(118) The Commission does not find this reply to be credible since the notes clearly sum up what competitors were planning to do, and it appears from the notes that they were taken at a discussion.

(119) There was an agreement in force in 1990/1991 between at least AGA, Air Liquide, Air Products, Hoek Loos and Messer about price increases of 6 % for gas and services that were implemented between November 1990 and February 1991:

(120) An AGA internal memo (in English) dated 27 November 1991 <sup>(40)</sup> concerning Messer states:

'All gas companies incl. MG agreed on using bottom prices — rent and transport charges (see annex).  
In reality MG uses prices that are far below these prices: 20—30 %. This results in a lot of price decreases and/or lost customers.  
In the past years we created a service sensitive market.  
Competitors like MG educate the market only to discuss pricing.  
MG also agreed on price increases of 6 % on gas and services.  
MG also agreed on a cease fire during November — December — January and February, in order to be able to have negotiations on price increases with customers.  
All gas companies including AGA suffer a lot of the uncontrolled way MG is behaving in the market.  
I have two suggestions:  
Discuss this with Stephan Messer  
Prepare for retaliation on short term in Germany.'

(121) The above memo shows that Messer had now joined the group of undertakings holding anti-competitive meetings. The Commission notes that on one of the two copies of this document <sup>(41)</sup>, a representative of AGA wrote next to 'price increase of 6 %', But Messer has limited this to when possible'.

(122) In its reply to the statement of objections, Messer argued that the conclusion drawn regarding Messer's involvement in the agreements on the basis of the above AGA memo is too far-reaching. Messer argues that the internal memo only reflects the personal interpretation of AGA's view of Messer's attitude and shows that AGA was aware of the fact that Messer was following its own policy <sup>(42)</sup>.

(123) The Commission notes, however, that Messer must have communicated with its competitors in order to discuss its intentions as to the agreed price rise as the comment of AGA's representative referred to in recital 120 indicates.

(124) In addition to the above, the Commission knows that, possibly at the beginning of 1991, representatives of Air Liquide, Air Products, Hoek Loos and AGA met and discussed the success of the recent implementation of the 6 % price increase for 1991:

(125) A handwritten memo (in Dutch) on that meeting found at Air Liquide <sup>(43)</sup> states amongst other things:

'Price increase  
[...]: everything increased  
transport costs  
bulk BOC/Messer  
cyl. Westf./Messer/AL  
HL: about 6 % both bulk/cyl.  
Index shows 6 % growth  
AGA: only 20 % of the plan realised  
index shows 6 % growth  
...  
Drop charge bulk introduced by most ...'.

(126) In reply to the Commission's questions, Air Liquide dated the document to 'around 1990' and called them 'personal notes of [...], presumably made after a social contact' <sup>(44)</sup>. The representative of Air Products in this

<sup>(38)</sup> File AL, p. 5612.

<sup>(39)</sup> File AL, non-confidential reply to the statement of objections, p. 10, point 52.

<sup>(40)</sup> File AGA, pp. 867 and 877.

<sup>(41)</sup> File AGA p. 877.

<sup>(42)</sup> File MN, non-confidential reply to the statement of objections, p. 17, point 61 and p. 18 point 62.

<sup>(43)</sup> File AL, p. 2096 (own translation).

<sup>(44)</sup> File AL, p. 5612 (own translation).

meeting seems to have been the general manager [...].

- (127) Also at Air Liquide a handwritten note was found which this company dates to early-1991 <sup>(45)</sup>. It reads: 'AGA decreased level despite agreement to raise prices.' <sup>(46)</sup>

- (128) At the meeting of VFIG members on 16 December 1993, AGA, Air Liquide, Air Products, Hoek Loos and Messer agreed on a price increase as from 1 January 1994. Indugas, BOC and NTG were absent.

- (129) A handwritten memo on that meeting in Dutch found at Air Liquide <sup>(47)</sup> states among other things:

'Price increase.

HL per 1/1' 94 up by 4,5 %. — Also MG and AP will increase prices. Apparently agreement on price increase per 1/1 but not on percentage or minimum level.'

- (130) This is confirmed in handwritten notes submitted by AGA <sup>(48)</sup>:

'16.12.93 VFIG.

.....

Price increase:

H-L: Letter to customers begin January.'

- (131) It is also confirmed by handwritten comments in English found in Air Products concerning that same meeting:

'AGA 15 Jan

H/L most of contracts 1 January

Longer period 1 February

Go negotiation

Already negotiating with customers

Major customers have been sold [told?]

All major customers + 4,5 %

Sometimes have to negotiate less

.....

Moratorium until April 1' <sup>(49)</sup>.

- (132) In reply to the statement of objections, Air Liquide argued that the handwritten Air Liquide memo on the VFIG meeting of 16 December 1993 shows that the

author was only writing down what the others said (the word 'apparently') and does not prove that any commitment was made on Air Liquide's part. Air Liquide further argues that the date of mid-December does not seem realistic either for a binding promise to be made for implementation of a price increase by 1 January 1994 <sup>(50)</sup>.

- (133) The Commission notes that Air Liquide attended the above meeting and took careful notes of what its competitors said.

- (134) In reply to the statement of objections Messer argued that taking part in a meeting is not in itself sufficient to prove involvement in an agreement. It claims that the handwritten note found at the premises of Air Liquide refers only to the fact that Messer was planning to increase its prices <sup>(51)</sup>. Messer made no statement on the exact amount of the increase, and it is common practice to increase prices at that time of year to adjust them to inflation. Furthermore, the notes found at AGA and at Air Products do not mention Messer.

- (135) The Commission notes, however, that Messer attended the above meeting and stated its intentions as regards an element of its commercial policy, namely price increases.

- (136) A first discussion on price increases for cylinder gases regarding 1995 took place at the VFIG meeting held on 14 October 1994. This meeting was attended by AGA, Air Liquide, Air Products, BOC, Hoek Loos, Hydrogas, Messer, NTG and Westfalen:

- (137) Handwritten notes referring to this meeting were found at AGA. They include the words:

'Prices + 6 %

Bulk Contracts 4,5 % (HL index)

Energy + 6-8 %' <sup>(52)</sup>.

- (138) AGA also submitted handwritten notes dated 17 October 1994 made by another employee concerning that same meeting:

<sup>(45)</sup> File AL, p. 5612 (own translation).

<sup>(46)</sup> File AL, p. 2098 (own translation).

<sup>(47)</sup> File AL, pp. 2171 and 2172 (own translation).

<sup>(48)</sup> File AGA, p. 4964.

<sup>(49)</sup> File AP, pp. 1761 to 1762.

<sup>(50)</sup> File AL, non-confidential reply to the statement of objections, pp. 10 and 11, point 53.

<sup>(51)</sup> File MN, non-confidential reply to the statement of objections, p. 18, point 63.

<sup>(52)</sup> File AGA, p. 453.

'VFIG  
Price increase  
.....  
Gas price cylinders + 6 % + rent and transp.  
Bulk contracts + 4,5 %, Index formula?  
.....  
Moratorium: 1 December + 3-4 months' <sup>(53)</sup>.

(139) These price increases for cylinder gases for 1995 were worked out in detail by, AGA, Air Liquide, Air Products, BOC, Hoek Loos, Messer and Westfalen at the VFIG meeting held on 18 November 1994:

(140) A handwritten table was submitted by AGA <sup>(54)</sup>: The table was written by sales manager [...], who did not himself participate in the meeting. His notes were taken in an internal debriefing meeting on the agreements reached. The table refers to the VFIG meeting in question and lists for Hoek Loos, AGA, Messer, Air Liquide, Air Products, BOC and Westfalen the percentage of price increases for cylinder gases for 1995 as well as increases in rent and transportation charges. The table also indicates a moratorium period of two months in which those increases were to be implemented. There is furthermore a reference to price increases for liquid gases and tank rents.

(141) A second table, which was found in Air Products <sup>(55)</sup>, seems to refer to the same meeting, although not all items in the two tables are identical. Air Products at first believed that the table had been drawn up in a meeting with competitors held in 1995, but later agreed that it could be the result of the VFIG meeting held in November 1994 <sup>(56)</sup>. This table again shows increases for prices, transportation cost and rent, as well as the moratorium period for implementing those increases, for Hoek Loos, AGA, Messer, Westfalen, BOC, Air Liquide and Air Products.

(142) The general manager of BOC for the Benelux, in the light of the evidence, voluntarily made the following statement, which was recorded in the investigation report and signed by him:

'Mr Celis recalled that at the end of two meetings (VFIG) — in late-1994 and 1995 — the subject of prices in the year ahead had been raised by others, to his surprise.' <sup>(57)</sup>

(143) In its reply to the statement of objections <sup>(58)</sup>, BOC also emphasised that its general manager, Mr Celis, did not accept the 6 % figure proposed by the others at the meeting referred to in recital 139 but only indicated that its plans related to a 5 % increase.

(144) The Commission notes, however, that BOC was represented at the above meeting, its general manager volunteered information on BOC's planned price increases and at no time distanced himself from the discussions relating to an agreement on a price increase. The fact that Mr Celis was taken by surprise may highlight the fact that his role was not a very active one.

(145) In its reply to the statement of objections, Westfalen drew attention to the fact that it had never been an active participant in these meetings and that it had not been aware that such issues as price increases were being discussed as these topics were not mentioned on the agenda of the meetings <sup>(59)</sup>.

(146) The Commission notes that Westfalen attended the meeting referred to above and gave an indication to its competitors as to its intentions regarding an element of its commercial policy, namely price increases <sup>(60)</sup>.

(147) Handwritten comments found at Messer on the agenda of an internal meeting of directors held on 25 October 1994, i.e. before the VFIG meeting, state: 'VFIG! Price increase 95' <sup>(61)</sup>. Internal instructions were found at Messer regarding a moratorium in combination with price increases in January 1995 <sup>(62)</sup>, and the report on the first quarter of 1995 states that price increases were implemented without major difficulties as of 1 January 1995 and adds: 'we have received more or less identical news from our competitors' <sup>(63)</sup>.

(148) On 23 November 1995 AGA, Air Liquide, Air Products, Hoek Loos and Messer met and came to a collusive arrangement on price increases for the following year 1996.

<sup>(58)</sup> File BOC, non-confidential reply to the statement of objections, p. 9.

<sup>(59)</sup> File WF, non-confidential reply to the statement of objections, pp. 8 to 10, points 42 to 52.

<sup>(60)</sup> File AGA, p. 4990.

<sup>(61)</sup> File MG, p. 4786 (own translation).

<sup>(62)</sup> File MG, p. 4833 (own translation).

<sup>(63)</sup> File MG, p. 4782 (own translation).

<sup>(53)</sup> File AGA, p. 4983.

<sup>(54)</sup> File AGA, p. 4990.

<sup>(55)</sup> File AP, p. 1755.

<sup>(56)</sup> File AP, p. 6336.

<sup>(57)</sup> File BOC, p. 3576.

(149) A handwritten note found at Hoek Loos <sup>(64)</sup> and dated 23 November indicates price increases by certain competitors from 1 January 1996:

'AP increases per 1/1/96 4,75 % gas  
0,75 rent/month/cyl.  
1,50 rent special gases cyl.  
0,50 transport cylinder

AGA between 5 and 8 %  
product rent?  
freight?

MG large clients > 15 000 7,2 %  
0,90 freight  
0,02 rent  
4 turnover groups 7,2 % and 15 % small clients freight  
freight 0,90 and 2,50 per cylinder rent  
0,01 and 0,05/cyl.

1<sup>st</sup> half December letter with price increase 1/10  
fl. 12,50 → fl. 15,00 MVT mentioned on invoice  
Up to ± fl. 5 000 — minimum prices

AL 6-7,5 % product  
freight interest  
rent interest

...  
BOC would [to increase] prices by 5 %  
...'

(150) In reply to the Commission's questions Hoek Loos stated that it was unable to indicate the date, participants and framework of this meeting and even doubted whether it was a meeting report. It declared that it might concern information received from its own salesmen <sup>(65)</sup>.

(151) The Commission does not find Hoek Loos' interpretation credible. The very detailed information on the future behaviour of competitors and the reference to a letter which had not yet been sent, warrant the conclusion that the report concerns a meeting of AGA, Air Liquide, Air Products, Hoek Loos and Messer. The date shows that it was not a meeting on the fringes of a VFIG meeting. The Commission believes that it was one of several meetings which took place in 1995 to 1997 between AGA, Air Liquide, Air Products, Hoek Loos and Messer in Breda and Barendrecht. The Commission notes in this context that 23 November 1995 is indeed listed by both Air Products and AGA as the date of such a meeting in Breda.

(152) Although BOC is mentioned briefly in the report, this company did not, to the Commission's knowledge, participate in those Breda/Barendrecht meetings.

(153) Hoek Loos, Air Products, Air Liquide, AGA and Messer met in late-1996, possibly on 2 October 1996, and came to a collusive arrangement on price increase for cylinder gases for 1997:

(154) An undated and handwritten document found at Air Products <sup>(66)</sup>, which the company believes to have been written in late-1996, is another report on a meeting between competitors. After a discussion on the market between Hoek Loos, Air Products, Air Liquide and AGA, the note concludes that the VFIG will declare the following year (= 1997) the year of transportation and that transport will be included in the index: + 0,2 to 0,3 %. The Commission believes that this refers to the Hoek Loos index for bulk gases mentioned in previous documents <sup>(67)</sup>. For cylinder gases prices would increase by 4,5 % between November and March. There is also a reference to a 6 % to 8 % increase for Air Liquide.

(155) Both the period November to March and the 6 % to 8 % general price increase referred to above are also mentioned in a 'Proposal cylinder gases 1997' dated 28 September 1996 found at Hoek Loos <sup>(68)</sup>. The proposal found at Hoek Loos matches in every respect the handwritten notes found at both Air Products <sup>(69)</sup> and Messer <sup>(70)</sup>.

(156) In reply to the Commission's request for information, Hoek Loos claimed that this proposal, once adopted, was to be supplied to its own sales force and was therefore intended for internal use only <sup>(71)</sup>.

(157) In view of what is set out above, this statement is not credible: the modified prices were indeed announced to staff at Hoek Loos on 7 October 1996 <sup>(72)</sup> but there is very strong evidence that they were also discussed with competitors. The Commission believes that this discussion took place in Breda on 2 October 1996. That date was mentioned by Air Liquide, Air Products

<sup>(64)</sup> File HL, pp. 2904 and 2905 (own translation).

<sup>(65)</sup> File HL, p. 5551.

<sup>(66)</sup> File AP, pp. 1724 and 1725.

<sup>(67)</sup> File AGA, pp. 453 and 4983.

<sup>(68)</sup> File HL, p. 2653.

<sup>(69)</sup> File AP, pp. 1724 and 1725.

<sup>(70)</sup> File MG, p. 4834.

<sup>(71)</sup> File HL, p. 5549.

<sup>(72)</sup> File HL, p. 3532.

and AGA <sup>(73)</sup> and falls between the date on which Hoek Loos drafted its proposal and the date on which that proposal was announced to its own staff.

### 3. ANNUAL MORATORIA

#### (a) *Overview*

- (158) The same companies which met regularly from 1989 on and which agreed on annual price increases for their existing customers, as set out in section C.2, also agreed at those meetings to respect annual cease-fires lasting several months for the purpose of implementing the agreed price increases. The Commission has evidence in its files that the following companies took part in collusive arrangements concerning moratorium periods: Hoek Loos, Air Products and AGA in the periods 1989 to 1991 and from 1993 to 1997, Air Liquide and Messer in the periods 1990 to 1991 and 1993 to 1997 and Westfalen and BOC in the period 1994 to 1995. The moratorium from 1 November 1996 to 1 March 1997 applied to both bulk and cylinder customers. The earlier moratoria applied to cylinder customers only.

#### (b) *Cartel meetings and collusive contacts*

- (159) There was an agreement in force on 24 November 1989 between Hoek Loos, AGA and Air Products on price increases. In order to implement these increases they also agreed on a moratorium for four to five months.
- (160) Recital 112 cites a 'confidential' internal memo in English dated 24 November 1989 found at AGA concerning a 'safety meeting'. It reads:

'All participants agree upon price increase cylinder gases of +/- 5 %.  
HL 4,9 %, UC 5 %, AGA 5 %, AP 5 %.  
This information will be passed on to AL by [...] of HL.  
We will ask AL for moratorium 4—5 months. Starting right from this moment.  
Same applies for HL, AGA, UC, AP. Meaning we should only deal with our own customers from now on.  
(...)  
AFTER READING, PLEASE DESTROY.' <sup>(74)</sup>.

- (161) That AGA put the moratorium into effect is shown by the internal instructions it issued on 28 November 1989 (quoted in recital 114), to focus on implementing the 5 % price increase with existing customers and explaining that competitors could be expected to do the same. Were attacks by competitors nevertheless to lead to price concessions, such concessions should be reported to the management <sup>(75)</sup>.

- (162) An agreement was in force in 1990/1991 between at least AGA, Air Liquide, Air Products, Hoek Loos and Messer on a moratorium period for 1991 in combination with price increases:

- (163) In recital 120 an AGA internal memo (in English) dated 27 November 1991 <sup>(76)</sup> concerning Messer was quoted, which states:

'All gas companies incl. MG agreed on using bottom prices — rent and transport charges (see annex).  
In reality MG uses prices that are far below these prices: 20—30 %.  
This results in a lot of price decreases and/or lost customers.  
In the past years we created a service sensitive market.  
Competitors like MG educate the market only to discuss pricing.  
MG also agreed on price increases of 6 % on gas and services.  
MG also agreed on a cease-fire during November—December—January and February, in order to be able to have negotiations on price increases with customers.  
All gas companies including AGA suffer a lot of the uncontrolled way MG is behaving in the market.  
I have two suggestions:  
1. Discuss this with Stephan Messer  
2. Prepare for retaliation on short term in Germany.'

- (164) In its reply to the statement of objections Messer argued that the AGA memo of 27 November 1991 shows that AGA thought Messer did not live by the 'agreements' and strongly denied having been part in any agreement at all <sup>(77)</sup>.

<sup>(73)</sup> File AL, pp. 5642 and 5643; AP, p. 5965 and AGA, pp. 5169 and 5170.

<sup>(74)</sup> File AGA, p. 782.

<sup>(75)</sup> File AGA, p. 5193; see also p. 5196.

<sup>(76)</sup> File AGA, pp. 867 and 877.

<sup>(77)</sup> File MN, non-confidential reply to the statement of objections, p. 19, point 68.

(165) The Commission notes however that it must have been Messer's stated intention at the time to implement the moratorium, even if it might not have implemented it.

(166) There was an agreement between AGA, Air Liquide, Air Products, Hoek Loos, and Messer on a moratorium period in December 1993 until 1 April 1994 in connection with price increases:

(167) Handwritten comments in English already quoted in recital 131 found in Air Products state:

'AGA 15 Jan  
H/L most of contracts 1 January  
Longer period 1 February  
Go negotiation  
Already negotiating with customers  
Major customers have been sold [told?]  
All major customers + 4,5 %  
Sometimes have to negotiate less  
.....  
Moratorium until April 1' <sup>(78)</sup>.

(168) At the VFIG meetings of October and November 1994 price increases for 1995 were discussed and agreed between AGA, Hoek Loos, Air Liquide, Air Products, Messer, BOC and Westfalen in combination with a moratorium from 1 December 1994 to 31 January 1995:

(169) AGA submitted handwritten notes dated 17 October 1994 (already quoted in recital 138) made by another employee concerning the October meeting:

'VFIG  
Price increase  
.....  
Gas price cylinders + 6 % + rent and transp.  
Bulk contracts + 4,5 %, Index formula?  
.....  
Moratorium: 1 December + 3—4 months' <sup>(79)</sup>.

(170) AGA submitted a handwritten table concerning the VFIG meeting on 18 November 1994 (already quoted in recital 140) <sup>(80)</sup>: the table was written by sales manager [...], who did not himself participate in the meeting. His notes were taken at an internal debriefing meeting on the agreements reached. The table refers to the VFIG meeting in question and lists for Hoek Loos, AGA, Messer, Air Liquide, Air Products, BOC, and Westfalen

the percentage price increases for cylinder gases and increases in rent and transportation charges. The table also indicates a moratorium period of two months from 1 December 1994 to 31 January 1995 in which those increases were to be implemented.

(171) A second table (quoted in recital 141) <sup>(81)</sup> found at Air Products seems to refer to the same meeting, although not all items in the two tables are identical. Air Products at first believed that the table had been drawn up in a meeting with competitors in 1995 but later agreed that it could be the result of the VFIG meeting held in November 1994 <sup>(82)</sup>. This table shows increases for prices, transportation cost and rent, as well as the moratorium period for implementing those increases, for Hoek Loos, AGA, Messer, Westfalen, BOC, Air Liquide and Air Products.

(172) In its reply to the statement of objections, Westfalen argues that the Commission did not show that Westfalen by its own action entered into an agreement with its competitors on a moratorium period at the end of 1994 at the two VFIG meetings. Westfalen adds that there is no evidence of any behaviour that can be qualified as an agreement or a concerted practice <sup>(83)</sup>.

(173) The Commission, however, notes that Westfalen was present at the said meeting with competitors and took part in the discussion on price increases and the moratorium.

(174) Hoek Loos did in fact implement the moratorium period from 1 December 1994 until 31 January 1995:

(175) The annual moratorium is also referred to in an internal meeting report of 15 December 1994 found at Hoek Loos, which records the following in reply to a question:

'According to rumours a cease-fire will take place per 1.12.1994 between the various suppliers of industrial gases. HL will increase its prices. In December and January we will not approach customers of other suppliers. If someone attacks us, we will of course strike back.' <sup>(84)</sup>

<sup>(81)</sup> File AP, p. 1755.

<sup>(82)</sup> File AP, p. 6336.

<sup>(83)</sup> File WF, non-confidential reply to the statement of objections, pp. 10 and 11, points 53 to 60.

<sup>(84)</sup> File HL, p. 2984 (own translation).

<sup>(78)</sup> File AP, pp. 1761 and 1762.

<sup>(79)</sup> File AGA, p. 4983.

<sup>(80)</sup> File AGA, p. 4990.

- (176) Messer also implemented the moratorium period from 1 December 1994 until 31 January 1995:
- (177) Internal instructions were found in Messer regarding a moratorium in combination with price increases in January 1995:
- ‘Important information: Price increase market leader: 6 %.  
Moratorium December 1994 and January 1995.’<sup>(85)</sup>
- (178) A number of documents found at Messer also contain references to price increases, the VFIG and a moratorium. These documents include a handwritten report on the directors' meeting of 22 November, which reads ‘VFIG — ΔP, moratorium, “pressure”’<sup>(86)</sup>, and a note dated 26 January, which mentions ‘moratorium’ + /-? <sup>(87)</sup>. Messer's report for the first quarter of 1995 states that price increases were implemented without major difficulties as from 1 January 1995 and adds: ‘we have received more or less identical news from our competitors’<sup>(88)</sup>.
- (179) Air Liquide also implemented the moratorium period from 1 December 1994 to 31 January 1995:
- (180) Air Liquide submitted an internal note regarding the price increases for 1995 which instructs salesmen to focus on their own clients (with the effect of respecting the moratorium): ‘In the period 1 December till 31 January we will focus on the yearly agreements’ (gericht bezig houden met de jaarafspraken)<sup>(89)</sup>.
- (181) A moratorium was agreed from November 1996 to March 1997 between AGA, Air Liquide, Air Products, Hoek Loos and Messer. This agreement applies not only to cylinder customers but to bulk customers too:
- (182) References to a moratorium to implement the 1997 price increase were found in Messer: ‘mort. 1 Nov—1 March’<sup>(90)</sup>.
- (183) In different handwritten notes found in Messer<sup>(91)</sup> and dating from the same period<sup>(92)</sup> reference is made to Hoek Loos's proposal to increase prices, as well as to the period from 1 November till 1 March. This note also contains the words ‘bulk customers: stay away!’,
- which would seem to indicate that the moratorium period 1996/1997 would not only apply to cylinder customers but to bulk customers as well.
- (184) The Commission takes note of Messer's claim that this reference had nothing to do with a moratorium period and that the note was written in a meeting with Hoek Loos only<sup>(93)</sup>.
- (185) However, handwritten notes found at Air Products and made in a meeting with competitors which Air Products dates to the end of 1996 also state:
- ‘- stay away from each others' customers — bulk  
1 Nov—1 March’<sup>(94)</sup>.
- (186) In Air Liquide the minutes of an internal meeting of 8 November 1996 state with regard to price increases: ‘focus on higher prices with existing customers’<sup>(95)</sup>.
- (187) In its reply to the statement of objections, Air Liquide argues that the statement in the minutes of an internal Air Liquide meeting that Air Liquide would ‘focus on higher prices with existing customers’ is no more than an example of the behaviour of a supplier in a saturated market, weighing the advantages and disadvantages of ‘price level’ versus ‘market share’. This internal memo shows no more than autonomous behaviour<sup>(96)</sup>.
- (188) The Commission notes, however, that it is clear the different documents referred to at recitals 182 to 185 above and found at the premises of the above companies regarding the agreement on a moratorium refer to the same period of time.

#### 4. FIXING MINIMUM PRICES

##### (a) *Overview*

- (189) Successive lists of minimum prices for cylinder gases were agreed between competitors. In 1989/1990 a list

<sup>(85)</sup> File MG, p. 4833 (own translation).

<sup>(86)</sup> File MG, p. 4785 (own translation).

<sup>(87)</sup> File MG, p. 4783.

<sup>(88)</sup> File MG, p. 4782 (own translation).

<sup>(89)</sup> File AL, p. 2525 (own translation).

<sup>(90)</sup> File MG, p. 4836.

<sup>(91)</sup> File MG, p. 4834 (own translation).

<sup>(92)</sup> File MG, p. 5268.

<sup>(93)</sup> File MG, p. 5268.

<sup>(94)</sup> File AP, p. 1725.

<sup>(95)</sup> File AL, p. 2571.

<sup>(96)</sup> File AL, non-confidential reply to the statement of objections, p. 12, point 61.



of minimum prices for liquid gases was agreed upon between Air Liquide, AGA, Hoek Loos and Air Products. In 1990/1991 and 1994 to 1997 lists of minimum prices for cylinder gases were agreed between Hoek Loos, Air Liquide, Air Products and AGA. Messer joined them in the period 1994 to 1997 and Westfalen in 1994/1995. The main purpose of the lists was to set thresholds when competing for the same client.

(b) *Cartel meetings and collusive contacts*

(190) Minimum prices for liquid gases were the object of collusive contacts from end 1989 or beginning 1990 between Hoek Loos, AGA, Air Products and Air Liquide.

(191) A 'confidential' AGA internal memo of 24 November 1989 concerning a 'safety meeting' <sup>(97)</sup> has already been quoted in recitals 112 and 160. It includes the sentence:

'All shall work out proposal for liquid price list. Meeting is set for January 12th for final discussion and consensus on such a price list.'

(192) This price list was found in the investigation at Air Liquide <sup>(98)</sup>, printed on AGA headed paper and entitled 'Bulkassen — prijsstaffel gegevens' (bulk gases — price scales). For two items the list contains not a price but the words (in Dutch) 'Proposal Hoek Loos will follow'.

The list concerns the following gases: nitrogen, oxygen, argon and carbon dioxide, with different prices depending on the sector of use. The list also contains a price mechanism for the rent of tanks (see section C.6(e)).

(193) An AGA internal memo dated 26 June 1990 also mentioned the possibility of applying bottom prices for liquid gases. Such bottom prices would 'only be applicable in those cases where only the "old 5" compete' <sup>(99)</sup>.

(194) In October 1990 Hoek Loos, Air Liquide, AGA and Air Products came to an agreement on a system of bottom prices for cylinder gases:

(195) At Hoek Loos a letter was found addressed to Messer Griesheim in Frankfurt, written in English, signed by the chief executive officer and dated and sent by fax on 18 October 1990, it reads:

'Dear Mr. Willheim,

As per telephone conversation I herewith send you our pricing system for the coming six month's [sic].

All parties in our country accept [sic, should presumably be "except"] MG have confirmed that they will stick absolutely to the bottom prices as mentioned in the attached list.

For liquid supplies we will introduce a drop charge as explained in the pricelist. We should appreciate it if you would discuss this price system with Mr. Messer and let us know if MG is prepared to follow this guide line [sic "guideline"].

If there are any questions don't hesitate to contact me.

Kind regards,

J.P. Jager Bruining <sup>(100)</sup>

(196) Attached is an untitled and undated document in Dutch, as well as a list entitled (in Dutch) 'Price list per 1.10.1990 for cylinder gases.' It contains prices for varying quantities of the following gases (about 10 prices for every gas): acetylene, argon, oxygen, tetrene <sup>(101)</sup>, and nitrogen. It also contains prices of supply conditions: rent of cylinders and transport cost.

(197) The untitled and undated document reads as follows:

'From today on certain agreements are in force.

1. No prices and conditions below the attached minimum price list will be agreed with customers.
2. In the course of 1990 customers' prices and conditions which are below this level will be raised to this level or higher if the percentage in point 4 supersedes this level.
3. Per 1 January 1991 no prices and conditions below the attached minimum prices are possible.
4. Per 1 January 1991 customers' prices and conditions which are higher than the bottom price level will be raised by 5—7 %.
5. Running offers which do not respect the [conditions] above are no longer valid.

<sup>(97)</sup> File AGA, p. 782.

<sup>(98)</sup> File AL, pp. 2150 to 2151 (own translation).

<sup>(99)</sup> File AGA, pp. 1003 to 1005.

<sup>(100)</sup> File HL, pp. 2655 to 2660 (partly own translation).

<sup>(101)</sup> Tetrene is a welding gas sold by AL, AGA and others.

6. For supply of bulk gases and from today on: for new customers a drop charge of fl. 34,00 — 36,00. For existing customers this drop charge will be introduced in October 1990. This drop charge does not apply to so-called horticultural carbon dioxide.  
...  
Motivation drop charge: queues, energy, driving time legislation. Motivation price level: enormous erosion of prices has become unacceptable, especially in view of developments of cost.  
For shared clients the first [supplier who is] confronted will take the initiative for contact.  
Attached: price list.'
- (198) Copies of the same price list were found at the premises of AGA <sup>(102)</sup>, Air Liquide <sup>(103)</sup> and Air Products <sup>(104)</sup>. At the latter two companies it was found with the untitled and undated covering document quoted in recital 197.
- (199) The Commission also has evidence that AGA used the agreed minimum prices for cylinder gases in 1991 to measure the behaviour of competitors quoting prices to AGA customers <sup>(105)</sup>. In a confidential fax from AGA to Air Liquide dated 31 October 1990 AGA listed a number of cases where salesmen from Air Liquide had allegedly offered AGA clients prices below the minimum <sup>(106)</sup>.
- (200) Representatives of Hoek Loos, Air Products, AGA and Air Liquide met on 22 November 1990 and discussed, among other things, an increase in minimum prices:
- (201) Recital 116 quotes internal notes dated 22 November 1990 found at Air Liquide <sup>(107)</sup>. Among other items they discuss 'minimum prices':
- '1. Bulk — drop charge  
2. Minimum prices — increase  
3. Price increase 1.1.91 (5 to 7)  
...'
- (202) Confirmation that an agreement about the use of bottom prices was in force in 1990/91 between at least AGA, Air Liquide, Air Products, Hoek Loos, Messer can be found in an internal memo (in English) concerning Messer dated 27 November 1991 <sup>(108)</sup>. This internal
- memo, two copies of which were found at AGA, has already been quoted in recital 120. It states that:
- 'All gascompanies incl. MG agreed on using bottom prices — rent and transportcharges (see annex).  
In reality MG uses prices that are far below these prices: 20—30 %.  
This results in a lot of price decreases and/or lost customers.  
In the past years we created a service sensitive market. Competitors like MG educate the market only to discuss pricing.  
...  
All gascompanies including AGA suffer a lot of the uncontrolled way MG is behaving in the market.  
I have two suggestions:  
Discuss this with Stephan Messer  
Prepare for retaliation on short term in Germany.'
- (203) Handwritten comments on one of the copies of this memo state:
- '1) Talk to Messer [general manager of MG] to respect bottom prices. 2) If no joy talk to Wielands with [...] [AGA Gas GmbH]. Warn of our impending attack. 3) After 2 weeks max attack.'
- (204) This document also shows that failure to comply with the agreements concerning bottom prices could lead to retaliation and retaliatory measures were not necessarily confined to the Netherlands.
- (205) At the VFIG meetings of March and October 1994 'price scales' and 'minimum prices' for cylinder gases for small customers were discussed with a view to an agreement at least between AGA, Air Liquide, Hoek Loos, Air Products, Westfalen and Messer.
- (206) Handwritten notes found at AGA <sup>(109)</sup> mention that 'price scales' were again discussed in the VFIG meetings of March and October 1994 and that in the latter meeting Hoek Loos presented a price scale for cylinder gases. Handwritten notes dated 17 October 1994 made by a different person in AGA and submitted by that company confirm that 'min. prices' were discussed at the October meeting <sup>(110)</sup>.

<sup>(102)</sup> File AGA, pp. 868 to 870.

<sup>(103)</sup> File AL, pp. 2394 to 2397.

<sup>(104)</sup> File AP, pp. 1559 to 1562.

<sup>(105)</sup> File AGA, p. 887.

<sup>(106)</sup> File AL, pp. 2116 and 2117.

<sup>(107)</sup> File AL, p. 2112 (own translation).

<sup>(108)</sup> File AGA, pp. 867 and 877.

<sup>(109)</sup> File AGA, pp. 453 and 454.

<sup>(110)</sup> File AGA, p. 4983.

(207) According to explanations provided by AGA <sup>(111)</sup> the list of price scales for small cylinder customers was presented by Hoek Loos at the fringes of the VFIG meeting held in October 1994 referred to above. In its reply to the statement of objections, AGA emphasises that this list of price scales for 1994 'is not asserted, let alone substantiated to have been agreed upon' <sup>(112)</sup>. The Commission notes, however, that the list proposed by Hoek Loos was also found at the premises of three companies.

(208) One copy was found at Westfalen <sup>(113)</sup> in a file marked VFIG 1995. Another copy was found at Air Liquide <sup>(114)</sup> in a file marked VFIG 1994. A third copy was found at Messer <sup>(115)</sup>. All three feature an identical printed minimum price list dated October 1994 and entitled 'price list for small cylinder customers'. The list found at Messer also features a handwritten price list that was added in 1996 (see recital 234). The fact that these companies kept this proposal in their files for a number of years means that the list was important to them.

(209) That there was an agreement in 1995 is also confirmed by the fact that the internal list of minimum prices found at Air Liquide dated 10 March 1995 <sup>(116)</sup> matches the minimum prices implemented by AGA on 1 July 1995 <sup>(117)</sup>.

(210) In its reply to the statement of objections, Air Liquide points to the fact that the objectives for 1995 mentioned on its internal list are lower than the minimum prices also mentioned on that list. In this regard, Air Liquide also claims that the fact that its competitors wanted to inform it of their intentions cannot be held against it <sup>(118)</sup>.

(211) AGA points out, in its reply to its statement of objections <sup>(119)</sup>, that the small customers initiative relates to one segment of the cylinder gases market only and therefore differs from other attempts to set bottom prices. Since small customers were only a limited part of AGA's business, this considerably reduces the scope of

the infringement. AGA acknowledges <sup>(120)</sup> nevertheless that it introduced the agreed minimum prices for small customers as from 1 July 1995.

(212) In its reply to the statement of objections, Westfalen states that it does not know how the list came into its possession. It claims that it is extremely likely that it was handed out to Westfalen at the VFIG meeting of 14 October 1994 but that this fact does not imply Westfalen actually agreed on the prices mentioned on the list. Westfalen also claims that it believes that its uncooperative attitude in the context of the VFIG meetings led the larger undertakings to meet outside the VFIG circuit <sup>(121)</sup>.

(213) The Commission has evidence that meetings were indeed organised outside the VFIG circuit later on and that collusive arrangements on minimum prices for cylinder gases for small customers were made at Breda and Barendrecht from early-1995 until 1997 between AGA, Air Liquide, Air Products, Hoek Loos and Messer.

(214) In reply to the Commission's questions AGA stated the following:

'For early in 1995 a meeting was called, outside the VFIG, for the purpose of approving minimum prices. [...a senior representative of AGA] attended, and the meeting became his first of several meetings, in a more restricted group, at Breda. Present were Hoek Loos, Air Liquide, Air Products and Messer [and AGA]. Indugas may have been invited, but not been there. At that meeting, minimum prices for small customers were in fact agreed.' <sup>(122)</sup>

(215) AGA adds that there were two to three meetings a year in Breda, later in Barendrecht, depending on the year. There was no agenda and there were few notes. AGA believes that Indugas or Praxair (which they view as one company) participated once only, but that Indugas was always invited by the company organising the meetings. AGA also adds that its overall impression was that the agreed minimum prices were not accepted in the market and therefore did not work. At the

<sup>(111)</sup> File AGA, pp. 7011 and 7012.

<sup>(112)</sup> File AGA, non-confidential reply to the statement of objections, p. 12.

<sup>(113)</sup> File WF, p. 5224.

<sup>(114)</sup> File AL, p. 2183.

<sup>(115)</sup> File MG, p. 4779 (own translation).

<sup>(116)</sup> File AL, p. 2348.

<sup>(117)</sup> File AGA, pp. 369 and 370.

<sup>(118)</sup> File AL, non-confidential reply to the statement of objections, p. 14, points 69 and 70.

<sup>(119)</sup> File AGA, non-confidential reply to the statement of objections, p. 13.

<sup>(120)</sup> File AGA, p. 7013.

<sup>(121)</sup> File WF, non-confidential reply to the statement of objections, p. 13, points 76 and 77.

<sup>(122)</sup> File AGA, pp. 7011 and 7012.

Commission's request, AGA provided a list of meeting dates based on agendas, expense accounts and other available data <sup>(123)</sup>.

- (216) Air Products confirmed to the Commission that discussions took place on other dates than VFIG meetings, which could involve preparation or follow-up of VFIG meetings:

To the best of AP recollection, informal meetings where discussions of the last kind occurred took place two to three times a year. Attending these meetings, on a more or less regular basis, were, at least in the most recent years, representatives of AP, Hoek Loos, AGA, Messer Griesheim and Air Liquide. There was no formal agenda, matters discussed reflected the issues with which the industry was confronted and included topics like general evolution of the market, prices development and costs in the industry.'

According to Air Products, such meetings took place in Breda in the period 1995 to 1997. A list of meeting dates was provided <sup>(124)</sup>.

- (217) Indugas was also questioned on the meetings held in Breda and Barendrecht. Indugas confirmed that its representative in VFIG meetings had been orally invited to attend such meetings, but that he had never done so. Indugas also stated that it had been aware that minimum prices were being discussed, but that it had never been present at such discussions and hence did not know whether such minimum prices had indeed been decided <sup>(125)</sup>.
- (218) Hoek Loos was unable to confirm its participation in meetings with competitors held at Breda or Barendrecht. Neither the agendas nor the expense accounts of the responsible managers contained any useful information.
- (219) Messer did confirm its participation in meetings with competitors at the 'Mirabelle' restaurant in Breda in 1995 to 1997. Messer also provided the names of the senior managers of AGA, Air Liquide, Air Products, Hoek Loos and Messer who regularly participated in those meetings. According to Messer, trends in cost and prices of gases were discussed in those meetings, but Messer claimed that it had not participated in agreements on prices. Messer was unable to provide a list of meeting dates <sup>(126)</sup>.

- (220) Air Liquide confirmed that it had been invited to participate in meetings at Breda and Barendrecht in 1995 to 1997. Air Liquide itself never organised such meetings. Air Liquide provided names of its senior managers who participated in such meetings in 1996 and 1997, as well as the dates of those meetings. No data was available on 1995 because the manager then responsible had left the company. Air Liquide stated that the meetings in question were informal, without an agenda or minutes. According to Air Liquide, general questions were discussed regarding developments on the market and in the economy <sup>(127)</sup>.

- (221) Table 6 in recital 108 lists the dates of meetings of AGA, Air Liquide, Air Products, Hoek Loos and Messer based on the data and recollections of those companies. The differences between some of the dates indicated may be explained by the fact that the 'Mirabelle' in Breda is a popular place for all kinds of meetings and well situated for Dutch businessmen on their way to or from Belgium. Dates mentioned by two or three companies are 23 November 1995, 5 June 1996, 2 October 1996, 19 March 1997, 20 June 1997 and 8 July 1997.

- (222) Most of the companies that participated in those meetings stated that only general discussions took place. AGA and Air Products, however, acknowledge that minimum prices were a topic. Evidence shows that lists of minimum prices were indeed discussed and agreed upon between AGA, Air Liquide, Air Products, Hoek Loos and Messer.

- (223) There were also a number of bilateral contacts between suppliers of industrial gases, in which price levels of companies were compared. One example is a meeting on 16 June 1995, at which representatives of AGA and Messer, compared and exchanged lists of standard prices <sup>(128)</sup>.

- (224) The Commission has evidence that minimum prices for cylinder gases for small customers were agreed upon between AGA, Hoek Loos, Air Products, Air Liquide and Messer for 1996 and 1997.

<sup>(123)</sup> File AGA, pp. 5169 and 5170.

<sup>(124)</sup> File AP, pp. 6333 and 5965.

<sup>(125)</sup> File Indugas, p. 5717.

<sup>(126)</sup> File MG, p. 5280.

<sup>(127)</sup> File AL, pp. 5642 and 5643.

<sup>(128)</sup> File MG, pp. 7247, 7248 and 4806 to 4812.

- (225) Identical lists of minimum prices for 1996 and 1997 were found at Air Products<sup>(129)</sup>, AGA<sup>(130)</sup> and Messer<sup>(131)</sup>. The lists indicate printed minimum prices for cylinder gases applicable in 1996, as well as handwritten minimum prices for 1997; the handwriting is different, the updated prices are identical.
- (226) The Commission draws the conclusion that this updating of agreed price lists took place in a meeting between competitors. The Commission notes in this context that someone has written on the Air Products list 'AL no demolishers' (geen slopers) and 'HL nothing on paper' (niets op papier). This would seem to indicate that Air Liquide warned against undercutting these bottom prices, and Hoek Loos was anxious about not leaving written traces of the agreement.
- (227) According to AGA, the list was handed out in the autumn of 1996 at a meeting with Hoek Loos, Air Products, Air Liquide and Messer 'with a view to raising the minimum prices for small customers for the following year'<sup>(132)</sup>.
- (228) The Commission notes that a meeting of the companies in question took place on 2 October 1996, as depicted in Table 6 at recital 108.
- (229) Air Products told the Commission that it had received the list from AGA probably at the end of 1996 'in the framework of a discussion concerning price increases'<sup>(133)</sup>. Air Products believes that handwritten notes in the Commission's file were made at the same meeting<sup>(134)</sup>, and the Commission is of the opinion that handwritten notes found in Messer were also made at that meeting, which took place at the 'Mirabelle' restaurant in Breda<sup>(135)</sup>, presumably on 2 October 1996 as referred to at recital 228.
- (230) AGA itself included the minimum prices for 1996 and 1997 in its internal pricing policy note dated 30 October 1996<sup>(136)</sup>.
- (231) Air Liquide also implemented the minimum prices for 1997. At Air Liquide the minimum prices for 1997 referred to above were included as plans for 1997 in the minutes of its cylinder group meeting of 8 November 1996; only for CO<sub>2</sub> did Air Liquide plan to apply a higher price<sup>(137)</sup>.
- (232) The Commission has further evidence in its files of the existence of agreements on minimum prices for small customers between AGA, Hoek Loos, Air Products, Air Liquide and Messer for 1996 and 1997 and which was communicated to Westfalen in 1997.
- (233) The same minimum prices listed for 1996 were found in Hoek Loos on a printed proposal entitled 'Proposal Cylinder Gases 1997'<sup>(138)</sup>. The list also carries the proposal to raise the minimum charge for the cost of freight from NLG 10,00 to NLG 11,25. This proposal was in fact adopted according to the handwritten notes found in Air Products, AGA and Messer referred to above at recital 225. Hoek Loos' explanation that this was just an internal document<sup>(139)</sup> is therefore not credible. Its internal use furthermore shows that the bottom prices agreed with competitors were in fact passed on to the salesmen of this company.
- (234) The printed list of minimum prices for 1996 found in Hoek Loos<sup>(140)</sup> was also found in Messer in handwritten form on the printed 'price list for small cylinder customers' dated October 1994 already referred to in recital 208<sup>(141)</sup>.
- (235) At Air Products<sup>(142)</sup> an undated list of minimum prices found printed on a small card is identical to a list found on a card at Hoek Loos<sup>(143)</sup>. Air Products stated that the document was a Hoek Loos price list and that the list took the form of a plastic wallet card to be used by the sales force of Hoek Loos. Air Products had obtained this card from Hoek Loos during a meeting with competitors. Air Products dates the card to late-1996 or early-1997<sup>(144)</sup>.
- (236) Some of the minimum prices agreed between Hoek Loos, AGA, Air Liquide, Air Products and Messer were communicated to Westfalen during a bilateral meeting.
- (237) In a report on a meeting between Hoek Loos, Westfalen and Westfalen's mother company Westfalen Gase AG held on 27 March 1997, it is noted that 'for small

<sup>(129)</sup> File AP, p. 1723.

<sup>(130)</sup> File AGA, p. 292.

<sup>(131)</sup> File MG, p. 4835.

<sup>(132)</sup> File AGA, p. 6995.

<sup>(133)</sup> File AP, p. 5883.

<sup>(134)</sup> File AP, pp. 1724, 1725 and 5884.

<sup>(135)</sup> File MG, p. 4834.

<sup>(136)</sup> File AGA, p. 348.

<sup>(137)</sup> File AL, p. 2572.

<sup>(138)</sup> File HL, p. 2653.

<sup>(139)</sup> File HL, p. 5549.

<sup>(140)</sup> File HL, p. 2653.

<sup>(141)</sup> File MG, p. 4779 (own translation).

<sup>(142)</sup> File AP, p. 1820.

<sup>(143)</sup> File HL, p. 2906.

<sup>(144)</sup> File AP, p. 5886.

customers one should for O<sub>2</sub> not go below fl. 2,25 p/m<sup>3</sup> and for acetylene not below fl. 12,00. Rent fl. 0,25' <sup>(145)</sup>.

(238) In its reply to the statement of objections, Westfalen argued that the report on the visit by [...] and especially heading 3 of the document (quoted in recital 237) mentions prices, but they are not the prices Westfalen implemented or was supposed to implement. They merely refer to Hoek Loos' prices <sup>(146)</sup>.

(239) The Commission takes the view, however, that the language used in the report seems to imply that both parties are concerned by the discussion and does not just refer to Hoek Loos' policy. Furthermore it would be odd for Hoek Loos' director to take it upon himself to visit Westfalen's headquarters simply to expose his own company's pricing policy, especially as Hoek Loos had on several occasions been the company behind the proposals on minimum prices made to the other competitors (see recitals 195, 198, 206 and 207 above for example). It therefore seems more likely that Hoek Loos went to Westfalen's headquarters with a view to inform that company of the agreement reached between the other competitors. Nevertheless, the Commission will not draw any conclusions about Westfalen's behaviour on this point.

## 5. FIXING OTHER TRADING CONDITIONS

### (a) *Cylinder transport charges*

#### (i) **Overview**

(240) Minimum transport charges for cylinder gases were first agreed in 1990 between Hoek Loos, Air Products, Air Liquide and AGA. In 1994 Air Products, Air Liquide, AGA, Hoek Loos and BOC agreed to apply a minimum transport charge of NLG 10,00. Messer joined this agreement in 1996. An agreement on minimum transport charges was still in force in 1997 between AGA, Hoek Loos, Air Products, Air Liquide and Messer.

#### (ii) **Cartel meetings and collusive contacts**

(241) An agreement on transport charges for cylinder gases was in force on 18 October 1990 between Hoek Loos, Air Liquide, AGA and Air Products.

(242) The 1990 list of minimum prices for cylinder gases described in recitals 196 and 197 <sup>(147)</sup> included a minimum transportation cost of NLG 10,00 for direct deliveries by the gas company and NLG 15,00 for deliveries through a retailing depot.

(243) The minimum charge for transportation came up at a bilateral meeting between Messer and AGA on 15 March 1993. According to a Messer document, Messer's strategy is to increase its market shares. In doing so it would, however, in its tactics, respect certain minimum conditions, such as not supplying rent-free or without transportation cost <sup>(148)</sup>. This document also mentions a minimum daily rent of NLG 0,25 and a minimum transportation cost of NLG 10,00.

(244) Minimum transportation charges for cylinder gases were agreed on 23 June 1994 between AGA, Air Products, Air Liquide, Hoek Loos and BOC:

(245) According to handwritten notes found in AGA <sup>(149)</sup> it was decided at the VFIG meeting held on 23 June 1994 to fix the minimum transportation cost at NLG 10,00 for cylinder gases. According to these notes Messer did not accept this.

(246) Other handwritten notes submitted by AGA <sup>(150)</sup>, which concern the same meeting, mention that the minimum transportation price applies regardless of the means of transport and that: 'MG has reserved to apply lower transport prices because of wish for increased market share. All others have accepted, also WF and BOC.'

(247) Concerning Westfalen the Commission notes that the handwritten minutes concerning the VFIG meeting of 23 June 1994 submitted by AGA, referred to above do mention that Westfalen had accepted the NLG 10,00. However, Westfalen was not present at that meeting. According to handwritten notes made by the same person concerning the following VFIG meeting held on 14 October 1994, which was attended by Westfalen, the latter company claimed to be unaware of the agreement on transportation cost: 'WF was not informed? Not accepted??' <sup>(151)</sup>. This is also reflected in other internal notes found at AGA concerning the same meeting <sup>(152)</sup>.

<sup>(147)</sup> File HL, pp. 2655 to 2660 (partly own translation).

<sup>(148)</sup> File MG, pp. 4814 and 4815 (own translation).

<sup>(149)</sup> File AGA, p. 453.

<sup>(150)</sup> File AGA, p. 4977.

<sup>(151)</sup> File AGA, p. 4983.

<sup>(152)</sup> File AGA, p. 453.

<sup>(145)</sup> File WF, p. 7625 (own translation).

<sup>(146)</sup> File WF, non-confidential reply to the statement of objections, p. 13, point 78.

(248) In its reply to the statement of objections, BOC argued that the meeting on 23 June 1994 (all others have accepted, also WF and BOC) was its first ever VFIG meeting. At that meeting its representative confirmed that BOC was charging NLG 10,00 per cylinder at the time, not realising that the matter was being raised in the context of possible minimum charges for the future. This confirmation may have been subjectively interpreted by the AGA representative as an 'agreement' to apply this amount as a minimum <sup>(153)</sup>.

(249) Air Liquide, Hoek Loos and AGA implemented this agreement. The minimum price to be charged for transportation was included in Air Liquide's internal list of minimum prices for 1995 <sup>(154)</sup>. Hoek Loos also included the agreed minimum freight cost of NLG 10,00 in its commercial programme for 1994/1995 <sup>(155)</sup>.

(250) AGA too included the minimum freight charge of NLG 10,00 in an internal note dated 29 June 1995 <sup>(156)</sup> and in its instructions to sales staff, in a paragraph concerning new customers, dated 5 July 1995 <sup>(157)</sup>. The minimum charge is also referred to in handwritten notes made concerning meetings on 19 August and 13 October 1994 <sup>(158)</sup>. AGA points out that the report of the meeting on 13 October 1994 includes the initials '[...]', presumably [...] of Hoek Loos, therefore indicating a bilateral competitor contact on trading conditions <sup>(159)</sup>.

(251) That these minimum trading conditions were agreed upon is also confirmed by the fact that individual customers were discussed among competitors and that retaliation was a possible threat. Handwritten documents submitted by AGA which relate to a bilateral meeting between AGA and Air Products (represented by [...] and [...]) on 11 July 1994 <sup>(160)</sup> state that:

'[...] has understood that we want a compensation for GEP and Shell, but has not accepted this. He "believed" that this had been solved in accordance with our agreement on minimum rent and transport and refers to

latest meeting in Utrecht(?) <sup>(161)</sup>. He says that if we retaliate because of GEP and Shell, he will have to retaliate against us again.'

(252) Later, in 1996, Messer decided that it would also apply the agreed minimum transport price of NLG 10,00. According to the minutes of an internal meeting held on 7 June 1996, Messer did so that day. It is noted in the minutes that competitors will also be forced to apply this price <sup>(162)</sup>.

(253) Minimum transportation charges were agreed upon for 1996 and 1997 between AGA, Hoek Loos, Air Products, Air Liquide and Messer.

(254) According to handwritten notes found at Air Products <sup>(163)</sup> and in Messer <sup>(164)</sup>, which match a typed proposal found at Hoek Loos <sup>(165)</sup>, there were discussions on raising the minimum price for transportation cost to NLG 11,25 by the end of 1996.

(255) This was taken up in the identical lists of minimum prices for 1996 and 1997 found at Air Products <sup>(166)</sup>, AGA <sup>(167)</sup> and in Messer <sup>(168)</sup> (quoted in recital 225 above).

## (b) *Cylinder rent*

### (i) **Overview**

(256) In 1990 Hoek Loos, AGA, Air Liquide and Air Products agreed to respect a minimum level for cylinder rent. In 1994 Hoek Loos, Air Products, AGA, Air Liquide, Messer and BOC decided to apply a minimum daily rent of NLG 0,25 for every cylinder. This agreement was reconfirmed by Hoek Loos, AGA, Air Liquide, Air Products and Messer in the following years and was still in force in 1997. This minimum rent was also communicated to Westfalen in 1997.

<sup>(153)</sup> File BOC, non-confidential reply to the statement of objections, pp. 15 and 16, points 2.26 and 2.27.

<sup>(154)</sup> File AL, pp. 2348 and 2360.

<sup>(155)</sup> File HL, p. 2907.

<sup>(156)</sup> File AGA, pp. 369 and 370.

<sup>(157)</sup> File AGA, p. 363.

<sup>(158)</sup> File AGA, p. 4980, 4982.

<sup>(159)</sup> File AGA, non-confidential reply to the statement of objections, p. 6.

<sup>(160)</sup> File AGA, p. 4979 (own translation).

<sup>(161)</sup> Presumably the VFIG meeting of 23 June 1994, which took place in Utrecht and at which minimum rent and transportation prices were agreed.

<sup>(162)</sup> File MG, p. 4832.

<sup>(163)</sup> File AP, p. 1725.

<sup>(164)</sup> File MG, p. 4834.

<sup>(165)</sup> File HL, p. 2653.

<sup>(166)</sup> File AP, p. 1723.

<sup>(167)</sup> File AGA, p. 292.

<sup>(168)</sup> File MG, p. 4835.

(ii) **Cartel meetings and collusive contacts**

- (257) An agreement on a minimum rent for cylinders was in force on 18 October 1990 between Hoek Loos, Air Liquide, AGA and Air Products.
- (258) The 1990 list of minimum prices for cylinder gases already described in recital 196 and recital 242<sup>(169)</sup> prescribed a minimum rent of NLG 0,40 per cylinder per day and NLG 0,80 in the case of packages. The list did not allow for rent-free periods or cylinders.
- (259) The agreement on a minimum daily rent for cylinders came up again in 1993 in a discussion between AGA and Messer on 15 March 1993<sup>(170)</sup> (see in recital 243 above). Various matters were discussed, including the possibility of applying a minimum daily rent of NLG 0,25 for gas supplies in cylinders. The minutes of that meeting also state that 'HL has abolished rent-free days'.
- (260) Minimum rent for cylinders were agreed upon on 23 June 1994 between AGA, Air Products, Air Liquide, Hoek Loos, Messer and BOC.
- (261) It was decided at the VFIG meeting held on 23 June 1994 to fix the minimum rent per cylinder at NLG 0,25. The notes of AGA<sup>(171)</sup> specifically mention that Messer accepted this and specify that NLG 0,25 would be the minimum daily rent and that no rent-free days would be granted.
- (262) Hoek Loos and AGA also implemented this agreement. Hoek Loos included the agreed minimum rent of NLG 0,25 in its commercial programme for 1994/95<sup>(172)</sup>. Handwritten notes on discussions found in AGA and dated 19 August 1994 and 13 October 1994<sup>(173)</sup> refer to the minimum rent.
- (263) AGA also included the minimum rent in an internal note dated 29 June 1995<sup>(174)</sup> and in its instructions to sales staff (in a paragraph concerning new customers) dated 5 July 1995<sup>(175)</sup>.
- (264) In its reply to the statement of objections<sup>(176)</sup>, BOC points out that the AGA internal note makes no reference to any fixed rental charge by BOC's name and that the Air Products note<sup>(177)</sup> states '0,25', meaning that Mr Celis, BOC's then manager, was vague as regards his company's cylinder rent approach and that there was not any agreement on implementation.
- (265) The Commission notes that BOC was present at the said meeting and volunteered to share some commercially sensitive information with its competitors.
- (266) An agreement on a minimum rent for cylinders was in force on 9 January 1996 between Messer, AGA, Air Liquide, Hoek Loos and Air Products.
- (267) An internal note in Messer dated 9 January 1996 states: 'regrettable to note that both AGA and AL do not stick to the fl. 0,25'<sup>(178)</sup>.
- (268) An agreement on a minimum rent for cylinders was in force in 1997 between Messer, AGA, Air Liquide, Hoek Loos and Air Products and communicated to Westfalen that year:
- (269) In an internal meeting report dated 20 March 1997 found at Messer, someone claims that Messer is the only one still calculating a minimum rent of NLG 0,25, to which the general manager replies that this should not be possible, save in the case of Westfalen and BOC<sup>(179)</sup>.
- (270) This reply shows that the larger companies AGA, Air Liquide, Air Products, Hoek Loos and Messer had reconfirmed that they would respect the minimum rent of NLG 0,25.
- (271) As regards Westfalen's involvement, in a report on a meeting between Hoek Loos, Westfalen and Westfalen's mother company Westfalen Gase AG, held on 27 March 1997 and already quoted in recital 237, it is noted that 'for small customers one should for O<sub>2</sub> not go below fl. 2,25 p/m<sup>3</sup> and for acetylene not below fl. 12,00. Rent fl. 0,25'<sup>(180)</sup>.

<sup>(169)</sup> File HL, pp. 2655 to 2660 (partly own translation).<sup>(170)</sup> File MG, pp. 4814 and 4815.<sup>(171)</sup> File AGA, p. 453 and p. 4977.<sup>(172)</sup> File HL, p. 2907.<sup>(173)</sup> File AGA, pp. 4980 and 4982; see also recital 250.<sup>(174)</sup> File AGA, pp. 369 and 370.<sup>(175)</sup> File AGA, p. 363.<sup>(176)</sup> File BOC, non-confidential reply to the statement of objections, pp. 16 and 17.<sup>(177)</sup> File AP, p. 1755.<sup>(178)</sup> File MG, p. 7246.<sup>(179)</sup> File MG, p. 7273.<sup>(180)</sup> File WF, p. 7625 (own translation).



(272) In its reply to the statement of objections <sup>(181)</sup>, Westfalen argues that the underlying aim of this visit by [...] was to get acquainted and that the initiative for this meeting came from [...]. Westfalen denies having agreed in 1997, or at any other time of the period of investigation, on the application of a minimum level of rent per day of NLG 0,25 per cylinder. It claims that this is confirmed by the declaration made by the general director of Messer, which was taken up in the internal notes of Messer dated 20 March 1997 mentioned at recital 269 <sup>(182)</sup>. From this note it can be read that Westfalen did not agree on the minimum level of rent of NLG 0,25 per cylinder.

(273) The Commission notes that the internal notes of Messer referred to in recital 269 were dated before the bilateral meeting between Hoek Loos and Westfalen' headquarters took place on 27 March 1997. It could well be that Hoek Loos went to meet with Westfalen to communicate what had been agreed with the others, as already explained at recital 239 above. Furthermore, the arguments mentioned in recital 239 regarding the above bilateral meeting could be reiterated here. Nevertheless, the Commission will not draw any conclusions about Westfalen's behaviour on this point.

(274) That there was an agreement on a minimum rent for cylinders in force in 1997 between Messer, AGA, Air Liquide, Hoek Loos and Air Products is also shown by the following.

(275) In an internal meeting report of Messer dated 19 June 1997, it is said under the title 'competition':

'In the last months several competitors have laid down conditions that go against all agreements. For example Air Liquide lays down fl. 45,- rent per year. AGA fl. 0,15 per cylinder. Hoekloos has clearly laid down dumping prices with three customers.' <sup>(183)</sup>

(276) In a Messer internal meeting report dated 8 September 1997 more and more rent offers below NLG 0,25 are noted <sup>(184)</sup>. In a following meeting report dated 18 September 1997 salesmen are instructed to make a list of competitors which have offered rent below NLG 0,25 <sup>(185)</sup>.

(277) The existence of an agreement on a minimum rent for cylinders in the years 1996 and 1997 is also confirmed by the identical lists of minimum prices for 1996 and 1997 found at Air Products <sup>(186)</sup>, AGA <sup>(187)</sup> and Messer <sup>(188)</sup>, already quoted in recital 225, which also specify a minimum rent of NLG 0,25.

### (c) *Bulk drop charge*

#### (i) *Overview*

(278) Hoek Loos, AGA, Air Products and Air Liquide jointly decided to introduce a drop charge of NLG 36,00 for bulk deliveries in 1990. The drop charge has remained an element of their trading conditions and has since been adopted by other suppliers. The drop charge was discussed again in 1993 when a proposal was made to raise it.

#### (ii) *Cartel meetings and collusive contacts*

(279) Hoek Loos, Air Liquide, AGA and Air Products agreed on a drop charge in October 1990.

(280) At Hoek Loos a letter was found addressed to Messer Griesheim in Frankfurt, signed by the CEO and dated and sent by fax on 18 October 1990 <sup>(189)</sup>, quoted in section C.4 above, stating, amongst other things: 'for liquid supplies we will introduce a drop charge as explained in the price list.' The undated and untitled document attached to that letter, also described in section C.4(b) stated:

'For supply of bulk gases and from today on: for new customers a drop charge of fl. 34,00—36,00. For existing customers this drop charge will be introduced in October 1990. This drop charge does not apply to so-called horticultural carbon dioxide ...  
Motivation drop charge: queues, energy, driving time legislation.'

(281) Reference has also been made to a meeting of competitors held on 22 November 1990 <sup>(190)</sup> in which 'Bulk — drop charge' was one of the items discussed.

<sup>(181)</sup> File WF, non-confidential reply to the statement of objections, p. 11, points 62 to 64.

<sup>(182)</sup> File MG, p. 7273.

<sup>(183)</sup> File MG, p. 7211 (own translation).

<sup>(184)</sup> File MG, p. 7297.

<sup>(185)</sup> File MG, p. 7270.

<sup>(186)</sup> File AP, p. 1723.

<sup>(187)</sup> File AGA, p. 292.

<sup>(188)</sup> File MG, p. 4835.

<sup>(189)</sup> File HL, pp. 2655 to 2657.

<sup>(190)</sup> File AL, p. 2112 (own translation).

The internal notes in question state the following on the drop charge:

HL: all clients approached — starting 1.11.90. App. 30 reactions (few, therefore). DFL. 36,-.  
 AP: letter sent 16.11. Integrally everyone starting 1.12. DFL. 36,-. Already oral/written reactions.  
 AGA: The large do not accept it (Nedstaal, AKZO), app. 50 % approached. Starting date 1.12.  
 AL: Queue charge introduced. Dropcharge per 1.1.  
 Arguments: legislation on driving hours, queues, fuel, higher insurance cost, stricter regulations, training cost. Introduce as a rule in new contracts.  
 ...'

- (282) Possibly at the beginning of 1991 representatives of Air Liquide, Air Products, Hoek Loos and AGA met and discussed the success of the recent implementation of the drop charge on bulk for 1991. A handwritten memo on that meeting, in Dutch, found at Air Liquide <sup>(191)</sup> and already quoted in recital 125 states among other things:

'Price increase [...]: everything increased  
 transport costs  
 bulk BOC/Messer  
 cyl. Westf./Messer/AL  
 HL: percent of 6 both bulk/cyl.  
 Index shows 6 % growth  
 AGA: only 20 % of the plan realised  
 index shows 6 % growth  
 ...  
 Drop charge bulk introduced by most. ...'

- (283) In reply to the Commission's questions, Air Liquide dated the document to 'around 1990' and called them 'personal notes of [...], presumably made after a social contact' <sup>(192)</sup>. The representative of Air Products in this meeting seems to have been general manager [...].
- (284) The issue of the drop charge was discussed again on 3 September 1993, when it was proposed to raise it to NLG 55 to 65.
- (285) The drop charge was discussed in or around the VFIG meeting held on 3 September 1993. According to handwritten notes found at Air Products <sup>(193)</sup>, it was proposed at the meeting that the drop charge be raised to NLG 55 to 65.

- (286) In reply to the Commission's questions, Air Liquide states that it never introduced the drop charge <sup>(194)</sup>. Air Liquide confirmed this again in its reply to the statement of objections <sup>(195)</sup>.

- (287) Hoek Loos introduced the drop charge in October 1990 and raised it from NLG 36,00 to 56,00 as from 1 January 1995 for new customers and renewed contracts <sup>(196)</sup>.

- (288) AGA introduced it in December 1990 at NLG 36,00. As of 1 January 1994 this amount was gradually superseded by NLG 56,00 <sup>(197)</sup>.

#### (d) *Environmental and safety charge for cylinders*

##### (i) *Overview*

- (289) Hoek Loos, AGA, Air Products, Air Liquide and Messer decided in 1993 to jointly introduce an environmental and safety charge on supplies of gases in cylinders amounting to NLG 12,50.

##### (ii) *Cartel meetings and collusive contacts*

- (290) A safety and environment charge (VMT) of NLG 12,50 was agreed upon in 1993 between Hoek Loos, AGA, Air Products, Air Liquide and Messer.

- (291) In 1993 competitors discussed the possibility of introducing an additional charge on each delivery of cylinders for reasons of environment and safety (veiligheids- en milieutoeslag' or VMT). At first it was discussed within the VFIG whether the federation should inform customers of the need to include certain environmental and safety costs in prices. This is referred to in the official meeting report of the meeting of 15 June 1993 <sup>(198)</sup>. By letter dated 11 August 1993 Hoek Loos informed the VFIG that its legal advisors strongly advised against such information being sent by the VFIG. Hoek Loos preferred each company to inform its own clients, and its letter included a draft letter to customers announcing the introduction of a VMT of NLG 12,50 <sup>(199)</sup>. It was agreed at the VFIG meeting of 3 September 1993 (the chairman concluded) to take the

<sup>(194)</sup> File AL, p. 5615.

<sup>(195)</sup> File AL, non-confidential reply to the statement of objections, p. 15, point 78.

<sup>(196)</sup> File HL, p. 5554.

<sup>(197)</sup> File AGA, p. 7010.

<sup>(198)</sup> File VFIG, p. 4079.

<sup>(199)</sup> File VFIG, pp. 4082 and 4083; also in several other company files.

<sup>(191)</sup> File AL, p. 2096 (own translation).

<sup>(192)</sup> File AL, p. 5612 (own translation).

<sup>(193)</sup> File AP, pp. 1758 to 1760.

point off the agenda <sup>(200)</sup>. According to handwritten notes found at Air Products, someone (presumably the chairman) concluded: 'every co to send a letter to explain new sit.'. The notes also refer to doubts expressed by AGA that NLG 12,50 for the delivery of one cylinder to a small customer might be too much to ask <sup>(201)</sup>.

'It was decided in the last meeting in the VFIG that all the gas companies should also invoice safety charge to each other. However we accept to exclude the safety charge on your invoices in the future.' <sup>(206)</sup>

(292) All companies introduced the VMT of NLG 12,50 before the end of 1993. Westfalen, which was not a member of the VFIG at the time, also introduced the charge, but at a lower and variable level. It was also agreed that the VMT was also to be charged to competitors on inter-company supplies.

(297) Air Products, Air Liquide and Hoek Loos introduced a VMT of NLG 12,50 at the end of 1993.

(293) Another VFIG meeting took place on 16 December 1993. A handwritten memo found at Air Liquide <sup>(202)</sup> concerning that meeting states:

(298) At Hoek Loos were found a signed letter from Air Products <sup>(207)</sup> and a standard or draft letter from Air Liquide <sup>(208)</sup> to customers announcing the introduction of a VMT of NLG 12,50. Hoek Loos itself confirms that it introduced the VMT in November 1993 and explains the draft letters by pointing out that it was also a customer of those competitors <sup>(209)</sup>.

'Fl. 12,50 arrangement  
Fl. 12,50 also to be levied on inter company supplies.  
Everyone introduced, but Westfalen with variation between fl. 3,- and 12,-'

(299) According to handwritten notes found at AGA <sup>(210)</sup> the 'safety charge/environmental charge' was apparently discussed again at the VFIG meeting held on 17 March 1994.

(294) Handwritten notes submitted by AGA also mention the VFIG meeting held on 16 December 1993:

(300) In 1995 and 1996 the VMT was still charged by the companies to their customers.

'Safety charge: safety charge also to competitors.' <sup>(203)</sup>

(301) Air Liquide raised the VMT to NLG 15,00 on 1 January 1996 <sup>(211)</sup>. Messer raised it to NLG 15,00 on 1 October 1995. Although there are several indications in the file that Hoek Loos also intended to raise the VMT to NLG 15,00 in 1995, this never happened <sup>(212)</sup>. Nor did AGA increase the VMT <sup>(213)</sup>.

(295) Air Liquide introduced the VMT of NLG 12,50 on 1 December 1993. By letter dated 26 November 1993 Air Liquide informed AGA that the latter would have to pay an VMT of NLG 12,50 on each delivery from 1 December 1993 <sup>(204)</sup>. Air Liquide confirmed to the Commission that it introduced the VMT on 1 December 1993 <sup>(205)</sup>.

(302) In reply to the Commission's request Westfalen acknowledged that it had introduced an environmental charge as from 1 January 1994 at NLG 3,00 per cylinder brought or fetched and of NLG 12,50 for each supply of liquid gas. These amounts can differ between customers <sup>(214)</sup>.

(296) AGA introduced a VMT of NLG 12,50 from 15 November 1993. AGA started charging this sum on supplies to BOC from November 1993 on, to which BOC protested by letter dated 5 January 1994 (the motive being that AGA was not making deliveries but simply collecting BOC cylinders). On this letter the following handwritten comment of an AGA employee is added:

(303) In reply to the statement of objections, Westfalen denied having ever participated in an agreement with the sellers of industrial gases in the Netherlands on a VMT. Westfalen claimed that the fact it also imposed such a charge does not justify the conclusion that there was an agreement. It merely shows that the costs rose due to legal measures making the implementation of such a

<sup>(200)</sup> File VFIG, p. 4093.

<sup>(201)</sup> File AP, p. 1758.

<sup>(202)</sup> File AL, p. 2171 (own translation).

<sup>(203)</sup> File AGA, p. 4964.

<sup>(204)</sup> File AGA, p. 1059.

<sup>(205)</sup> File AL, p. 5615.

<sup>(206)</sup> File AGA, p. 1063.

<sup>(207)</sup> File HL, p. 2986.

<sup>(208)</sup> File HL, p. 2996.

<sup>(209)</sup> File HL, p. 5554.

<sup>(210)</sup> File AGA, p. 453.

<sup>(211)</sup> File AL, pp. 5614 and 5615.

<sup>(212)</sup> File HL, p. 5554.

<sup>(213)</sup> File AGA, p. 7009.

<sup>(214)</sup> File WF, p. 5250.

charge inevitable. The charge Westfalen imposed was much lower than that of its competitors. It was also of a varying level in contrast to the flat-rate charge imposed by competitors. Westfalen announced the introduction of this charge on 1 January 1994 and explained why it was doing so <sup>(215)</sup>.

(304) The Commission notes that Westfalen had not taken part in the VFIG meetings held in June and September 1993 referred to at recital 291, as Westfalen was not yet a member of the association.

(305) BOC was the only gas undertaking not to introduce a VMT in 1993/1994. It was not until the beginning of 1996 that BOC announced the introduction of such a charge to customers in both the Netherlands and Belgium <sup>(216)</sup>. The Commission notes in this context that BOC was not represented at the two critical meetings of the VFIG on this issue, held in June and September 1993.

#### (e) *Rent of bulk tanks*

##### (i) *Overview*

(306) The calculation of tank rental for liquid gas customers was repeatedly the subject of discussions between suppliers of industrial gases. An agreement on this was reached in 1990 between AGA, Air Liquide and Hoek Loos, and in 1996 a proposal with a view to an agreement was discussed between AGA, Air Liquide, Air Products, Hoek Loos and Messer for 1997.

##### (ii) *Cartel meetings and collusive contacts*

(307) From the end of 1989 or the beginning of 1990 Hoek Loos, AGA, Air Products and Air Liquide agreed on the rent of bulk tanks.

(308) Already quoted in sections C.2, C.3 and C.4 above, an internal memo in English dated 24 November 1989, marked 'confidential' and found at AGA concerning a 'safety meeting' <sup>(217)</sup> included the sentence: 'All shall work out proposal for liquid price list. Meeting is set for

January 12th for final discussion and consensus on such a price list.'

(309) This price list, already described in section C.4, was found in the investigation in Air Liquide <sup>(218)</sup> and printed on AGA paper and entitled 'Bulkassen — prijsstaffel gegevens' (bulk gases — price scales). The list also provides for tank rent.

(310) The Commission has evidence that tank rental was discussed on the VFIG meeting held on 14 October 1994. According to handwritten notes submitted by AGA on the VFIG meeting held on 14 October 1994, points that were discussed included tank rent, long term rental which should be evaluated and minimum prices <sup>(219)</sup>. Other handwritten notes found at AGA concerning the same meeting state that 'liquid will be the next subject' <sup>(220)</sup>. These notes also refer to minimum tank rental.

(311) A proposal with a view to an agreement on tank rent paid by liquid gas customers was made for 1997 and was to be discussed by AGA, Hoek Loos, Air Products, Air Liquide and Messer.

(312) Identical lists of minimum prices for 1996 and 1997, already described in section C.4, were found at Air Products <sup>(221)</sup>, AGA <sup>(222)</sup> and Messer <sup>(223)</sup>. These lists also contain explicit references to the rent of tanks, evaporators and mixers 'Huur tanks/verdampers/mixers ROI 10 %; ROI 15 %'. Initially the Commission considered that 'ROI' might have referred to an index to calculate increases in tank rent.

(313) In its reply to the statement of objections, Messer argued that the Commission concluded that there was an agreement on an index to increase the rent for tanks for the customers of liquid gas in 1996 on the grounds of only one sentence in a Messer document <sup>(224)</sup>. Messer denied that this sentence could lead to any such conclusion. Messer is of the opinion that 'ROI' stands for return on investment and that the rent prices mentioned were the ones needed for a return on investment of 10 to 15 %.

<sup>(215)</sup> File WF, non-confidential reply to the statement of objections, p. 12, points 67 to 71.

<sup>(216)</sup> File BOC, p. 6450.

<sup>(217)</sup> File AGA, p. 782.

<sup>(218)</sup> File AL, pp. 2150 and 2151 (own translation).

<sup>(219)</sup> File AGA, p. 4983.

<sup>(220)</sup> File AGA, p. 454.

<sup>(221)</sup> File AP, p. 1723.

<sup>(222)</sup> File AGA, p. 292.

<sup>(223)</sup> File MG, p. 4835.

<sup>(224)</sup> File MN, non-confidential reply to the statement of objections, p. 24.

(314) In its reply to the statement of objections, AGA denied that any agreement was reached on the tank rental index mentioned in the list of minimum prices for 1997 handed out by the AGA representative in Breda on 2 October 1996. As mentioned on the same printed pages, there was a proposal on small bulk, but AGA stressed that this was ignored and not touched upon. AGA argued that tank rental should not be treated differently from 'Kleine Bulk' for which the statement of objections recognised that no agreement was reached <sup>(225)</sup>.

(315) In its reply to the statement of objections <sup>(226)</sup>, Air Products did not deny that it had been party to an agreement on the calculation of the increase in tank rental for liquid gas in force in 1996 until end 1997, as alleged by the Commission in its statement of objections.

(316) The Commission takes the view that the lists mentioned in recital 312 show that there was at least a proposal for an agreement on tank rental in 1997 just as there was for minimum prices.

## PART II — LEGAL ASSESSMENT

### D. APPLICATION OF ARTICLE 81 OF THE TREATY

#### 1. ARTICLE 81(1) OF THE TREATY

(317) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

#### 2. AGREEMENTS AND CONCERTED PRACTICES

(318) An agreement can be said to exist when the parties adhere to a common plan, which limits or is likely to

limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties.

(319) In its judgment in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and Others v Commission* (PVC II) <sup>(227)</sup>, the Court of First Instance stated that 'it is well established in the case-law that for there to be an agreement within the meaning of Article 81(1) of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way'.

(320) Article 81 of the Treaty draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition laid down in that provision a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition <sup>(228)</sup>.

(321) The criteria of coordination and cooperation laid down by the case-law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market <sup>(229)</sup>.

(322) Thus conduct may fall within the scope of Article 81(1) of the Treaty as a 'concerted practice' even where the

<sup>(225)</sup> File AGA, non-confidential reply to the statement of objections, pp. 10 and 11, points 35 to 39.

<sup>(226)</sup> File AP, non-confidential reply to the statement of objections, p. 13.

<sup>(227)</sup> Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij. and Others v Commission* (PVC II) [1999] ECR II-931, paragraph 715.

<sup>(228)</sup> Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraph 64.

<sup>(229)</sup> Joined Cases 40-48/73 etc. *Suiker Unie and Others v Commission* [1975] ECR 1663.

parties have not explicitly subscribed to a common plan defining their action in the market, if they nevertheless knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour <sup>(230)</sup>.

(323) Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period <sup>(231)</sup>.

(324) It is not necessary, particularly in the case of a complex infringement of long duration, that the Commission characterises it as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible realistically to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to subdivide what is clearly a continuing common enterprise having one and the same overall objective into several discrete forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 lays down no specific category for a complex infringement of that type <sup>(232)</sup>.

(325) In PVC II, the Court of First Instance stated that 'in the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article 81 of the Treaty' <sup>(233)</sup>.

<sup>(230)</sup> See also Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 256.

<sup>(231)</sup> See Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 158 to 166.

<sup>(232)</sup> Case T-7/89 *Hercules Chemicals v Commission*, paragraph 264.

<sup>(233)</sup> Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij, and Others v Commission* (PVC II) [1999] ECR II-931, paragraph 696.

(326) An 'agreement' for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term 'agreement' can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose.

(327) As the Court of Justice (upholding the judgment of the Court of First Instance) has confirmed in Case C-49/92 P *Commission v Anic* <sup>(234)</sup>, it follows from the express terms of Article 81(1) of the Treaty that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.

(328) A complex cartel may thus properly be viewed as a single continuing infringement for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81(1) of the Treaty.

(329) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur, but will not prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.

(330) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not preclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is

<sup>(234)</sup> See the judgment of the Court of Justice in Case C-49/92 P *Commission v Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 81.

established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk <sup>(235)</sup>.

### 3. THE NATURE OF THE INFRINGEMENT IN THIS CASE

(331) The Commission collected evidence of collusion between competitors during the periods 1989 to 1991 and 1993 to 1997.

(332) The elements agreed upon in the meetings of competitors basically remained the same over the years. In 1989 Hoek Loos, AGA and Air Products agreed to raise prices for cylinder gases at the beginning of the following year and to observe a moratorium period to implement these rises. These two elements: price increases and a moratorium period to implement them, which are described in detail in Part I, section C of this Decision, were the regular subject of subsequent meetings of senior representatives of competitors until the Commission started its investigations in December 1997.

(333) The venue for the meetings varied. In the early years, starting 1989, they took place within the framework of so-called 'safety meetings'. Subsequently VFIG meetings became the forum of choice. From 1995 on Hoek Loos, Air Products, AGA, Air Liquide and Messer organised separate meetings outside of the VFIG. Bilateral contacts completed the anti-competitive network.

(334) The agenda and the minutes of the 'safety meetings' and VFIG meetings did not mention discussions or agreements relating to prices and other trading conditions with one exception: the introduction of an environmental and safety charge on cylinder sales in 1993. In its reply to the Commission's enquiries, the VFIG stated that the minutes reflected all of the topics that were discussed in the meetings <sup>(236)</sup>. Neither the draft agenda nor the minutes of VFIG meetings ever mentioned discussions or decisions concerning prices. With one exception concerning the introduction of an environmental and safety charge, which is described in detail in section C.5(d) of this Decision, agendas and minutes do not mention discussions or decisions concerning other supply conditions either. The supplementary meetings held by the larger companies from 1995 on did not have a formal agenda either.

(335) VFIG informed the Commission that its Secretariat had never been requested to leave meetings, or not to mention certain topics in the minutes. It was furthermore claimed that the Secretariat was not aware of any discussions on the margins of VFIG meetings <sup>(237)</sup>. 'Off the record' remarks were, however, found in an internal AGA note concerning the VFIG meeting of 17 February 1993 <sup>(238)</sup>.

(336) The Commission concludes that the collusive contacts in question took place on the fringe of these official meetings. No official minutes were drawn up of the anti-competitive contacts, although detailed price agreements were concluded during some of those meetings (e.g. the VFIG meeting held on 18 November 1994).

(337) That the undertakings concerned must have been aware of the illicit nature of their behaviour is confirmed by some of the documents quoted above (after reading please destroy, nothing on paper) many of which were also marked and treated as confidential.

(338) Several documents demonstrate that the undertakings in question did not just regularly use these occasions to exchange views on their respective intentions to increase prices and to concentrate their efforts on their existing customers in order to implement these increases, but actually concluded an agreement to do so. The undertakings expressed their common desire to conduct themselves on the market in a particular manner in regard to prices, that is to say, to act in such a way as to ensure that the prices agreed at the meetings in question would be achieved <sup>(239)</sup>. This is not altered by the fact that the price increases agreed upon could differ between the undertakings, as could the exact date of the implementation thereof.

(339) The AGA note on the agreement reached in 1989 uses the expression 'all participants agree upon price increase' and 'we will ask AL for moratorium 4—5 months' <sup>(240)</sup>. The AGA note of 1991 concerning Messer states that 'MG also agreed on price increases of 6 % on gas and services' and 'MG also agreed on a

<sup>(235)</sup> Case C-49/92 P *Commission v Anic* [1999] ECR I-4125, paragraph 83.

<sup>(236)</sup> File VFIG, p. 3798.

<sup>(237)</sup> File VFIG, pp. 3797 and 3798.

<sup>(238)</sup> File AGA, pp. 126 to 128.

<sup>(239)</sup> Judgment in Case T-141/94 *Thyssen v Commission* [1999] ECR II-347, paragraph 262.

<sup>(240)</sup> File AGA, p. 782.

cease-fire during November—December—January and February, in order to be able to have negotiations on price increases with customers' <sup>(241)</sup>. The Air Liquide note of 1993 states 'apparently agreement on price increase per 1/1 but not on percentage or minimum level' <sup>(242)</sup>. The Air Products note on the VFIG meeting of November 1994 describes Air Liquide's position that the moratorium period should last 'four months except for those companies that do not participate'. The same note describes how companies should act during the moratorium period: 'only deal with own customers' and 'one of colleague companies P/support' <sup>(243)</sup>. The latter remark shows that competitors should not just refrain from approaching each other's customers but give active support to the price increase when approached by such customers <sup>(244)</sup>. The internal Hoek Loos meeting report phrases it as follows: 'according to rumours a cease-fire will take place per 1.12.1994 between the various suppliers of industrial gases' <sup>(245)</sup>. The Air Products note from 1996 states 'stay away from each other's customers — bulk 1 Nov—1 March' <sup>(246)</sup>.

in Germany if such talks were unsuccessful <sup>(249)</sup>. Hoek Loos, AGA, Air Products, Air Liquide and Messer also agreed minimum prices for cylinder gases for small customers for 1995, 1996 and 1997.

(340) All these notes describe an agreement and not just an exchange of information. The fact that on some occasions producers may have wavered in their initial resolve and given concessions to certain customers, or created exceptions for certain categories of customers, does not preclude an unlawful agreement having been reached within the meaning of Article 81(1) of the Treaty.

(341) Agreements were also reached on minimum prices. A price list for liquid gases was to be worked out and a 'final discussion and consensus' <sup>(247)</sup> was to be reached in January 1990. Minimum prices for cylinder gases were also decided in 1990 and updated in later years, albeit not necessarily on an annual basis. Hoek Loos' letter to Messer of 1990 states that 'all parties in our country accept [sic] MG have confirmed that they will stick absolutely to the bottom prices as mentioned in the attached list' <sup>(248)</sup>. The AGA note on Messer of 1991 states that 'all gas companies incl. MG agreed on using bottom prices — rent and transport charges', to which was added the handwritten comment 'talk to Messer to respect bottom prices', and orders retaliation

(342) Other minimum trading conditions were also agreed over the years, both for cylinder gases and for bulk gases.

(343) Minimum transportation cost and minimum cylinder rent were included in the list of bottom prices which Hoek Loos sent to Messer in Frankfurt in 1990 and to which all parties in the Netherlands had confirmed that they would 'stick'. Further 'decisions' <sup>(250)</sup> were taken in 1994 on minimum transportation cost and minimum rent. These agreements were confirmed in the lists of minimum prices agreed for 1995, 1996 and 1997.

(344) The introduction of an environmental and safety charge on cylinders was decided at VFIG meetings, and it was initially thought that the VFIG should inform customers thereof. Further to legal advice, it was concluded that each undertaking would inform its own clients. This change in plans does not alter the fact that the environmental and safety charge was agreed by the undertakings in question.

(345) There are a number of references in the Commission's file alleging that this or that competitor had offered gases at prices and other trading conditions below what had been agreed. Some of these instances may have been acts of retaliation, others may have been carried out by over-zealous salesmen. Such differences regarding specific customers were discussed bilaterally. There are also records of instructions regarding price increases or bottom prices, which are not quite in line with what was agreed with competitors. Much more frequent, however, are instructions at the end of calendar years to implement the agreed price increases and to concentrate on implementing them rather than to approach the customers of competitors. The same goes for the necessity of respecting minimum prices and other minimum trading conditions.

<sup>(241)</sup> File AGA, p. 877.

<sup>(242)</sup> File AL, pp. 2171 and 2172 (own translation).

<sup>(243)</sup> File AP, p. 1755 (own translation).

<sup>(244)</sup> Active support is also referred to in file AGA, p. 4982 (bilateral meeting AGA-MG).

<sup>(245)</sup> File HL, p. 2984 (own translation).

<sup>(246)</sup> File AP, p. 1725.

<sup>(247)</sup> File AGA, p. 782.

<sup>(248)</sup> File HL, p. 2655.

<sup>(249)</sup> File AGA, p. 877.

<sup>(250)</sup> File AGA, p. 453.

(346) An example, in addition to those already quoted or referred to, is an Air Liquide internal instruction



concerning cylinder gases of 29 July 1993 <sup>(251)</sup>, which reminds sales staff: 'Some time ago it was agreed that only daily rent would be calculated, which means no longer any rent-free periods. These conditions must be respected. ... Freight (dropcharge): No deviations can be allowed regarding the cost of freight. Our prices are low already and the other conditions must therefore be maintained. Rent: Lately the daily rent offered seems to be declining, often to a level of 0,10. There is an agreement and a bottom price and this must be followed.'

(347) Although Air Liquide claims that the 'agreement' referred to was of an internal nature, the Commission is of the opinion that these instructions cannot be viewed in isolation from the agreements on bottom prices and other trading conditions reached with competitors in 1990 and 1993.

(348) In its reply to the statement of objections <sup>(252)</sup>, Air Liquide argues that the Commission comes to the completely unjustified conclusion that Air Liquide entered into anti-competitive agreements or concerted practices other than those concerning the environment and safety charge. It alleges that the documents used by the Commission actually highlight the fact that Air Liquide was a tough competitor on the market, acting independently and not wanting its policy to be influenced by agreements with competitors. Air Liquide also emphasises that the Commission bases its allegations largely on documents from Air Liquide's competitors.

(349) Air Liquide also repeatedly mentions the fact that it never implemented the alleged agreements, but that its commercial policy was the result of purely autonomous decisions. To substantiate its point, the company argues that its particular position on the market at the time warranted a policy of expanding its market share which led to prices lower than its competitors <sup>(253)</sup>.

(350) In its reply to the statement of objections <sup>(254)</sup>, Westfalen argues that it did not take part in anti-competitive agreements and that the Commission has not proved it did. Westfalen claims that it never implemented any agreement. Westfalen also insists that

it did not participate in any of the 'safety meetings' or the Breda/Barendrecht meetings, but that, on the contrary, it always pursued an aggressive commercial policy towards its competitors.

(351) The Commission notes that the fact that Air Liquide and Westfalen participated in several meetings, and that the object of these meetings was to restrict competition, is confirmed by the documentary evidence in the Commission's file. The finding that the behaviour described constitutes agreements within the meaning of Article 81(1) of the Treaty is not altered even if it is established that one or more participants had no intention to implement the joint intentions expressed by them. Having regard to the manifestly anti-competitive nature of the meetings at which intentions were expressed, the undertakings concerned, by taking part without publicly distancing themselves, gave the other participants the impression that they subscribed to what was discussed and would act in conformity with it. The notion of 'agreement' is objective in nature. The actual motives (and hidden intentions) which underlay the behaviour adopted are irrelevant <sup>(255)</sup>.

(352) Given the regularity of the meetings to discuss and agree on the different pricing and trading conditions described above and given the similarity of method of agreement for these different conditions, often included in the same meetings, the Commission considers that the conduct in question constituted a single continuous infringement of Article 81(1) of the Treaty for each of the periods identified at recital 331 above.

(353) NTG, which was a very small operator on the market concerned, has to be singled out from the above analysis for the following reasons. NTG never participated in any of the meetings regarding price increases, moratoria, minimum prices or other trading conditions except one, and can therefore not be considered as having participated in the same complex of agreements as the other companies to which this Decision is addressed. NTG participated in only one of the meetings (the VFIG meeting of September 1993), at which the environment and safety charge was touched upon and taken off the agenda. Contrary to what was said in the statement of objections, this company was not present at the meeting of June 1993, when the issue

<sup>(251)</sup> File AL, p. 2068 (own translation).

<sup>(252)</sup> File AL, non-confidential reply to the statement of objections, points IV and V.

<sup>(253)</sup> File AL, non-confidential reply to the statement of objections, for example, point 1.4.

<sup>(254)</sup> File WF, non-confidential reply to the statement of objections, pp. 3 and 4.

<sup>(255)</sup> Judgment in Case T-142/89 *Usines Gustave Boël* [1995] ECR II-867, paragraph 60. Most recently confirmed by the Court of Justice in Case C-199/92P *Hüls v Commission*, [1999] ECR I-4287, paragraphs 155 to 168.

of the safety and environment charge was first debated. Furthermore, NTG argues that it introduced the the safety and environment charge, which it did later than the other cartel participants, as a direct result of being invoiced for that charge by its supplier, for which it adduces evidence. Given the above, no infringement will be identified for NTG.

#### 4. RESTRICTION OF COMPETITION

(354) Article 81(1) of the Treaty expressly mentions as restrictive of competition agreements which:

(a) directly or indirectly fix selling prices or any other trading conditions;

(b) limit, or control production;

(c) share markets or sources of supply.

(355) In the complex of agreements and arrangements considered in the present case, the following elements can be identified as relevant in order to find an infringement of Article 81(1) of the Treaty:

(a) agreeing concerted price increases;

(b) agreeing moratoria to implement these price increases;

(c) agreeing minimum prices;

(d) agreeing other trading conditions;

(e) participating in regular meetings and having other contacts in order to agree on those restrictions and to implement and/or modify them as required.

(356) The basic purpose behind the regular meetings and the continuing collusion of the undertakings was to achieve a series of concerted increases as regards prices and other trading conditions. By planning common action on price initiatives with price increases and minimum prices and other trading conditions for an agreed period of time, the undertakings aimed to eliminate the risks involved in any unilateral attempt to increase prices, notably the risk of losing market share. Therefore, the agreements identified above have as their object the restriction of competition within the meaning of Article 81(1) of the Treaty. The restriction must be deemed to have been appreciable, in view of the manifestly anti-competitive nature of the agreements and of the strong position of the participating undertakings on the relevant market.

(357) These sorts of arrangements have as their object the restriction of competition within the meaning of Article 81(1) of the Treaty. Price being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the suppliers were all ultimately aimed at an inflation of the price (or at least to limit its decline) to their benefit and above the level which would be determined by conditions of free competition.

(358) In order to conclude that Article 81(1) of the Treaty applies, there is no need to consider the actual effects upon competition of an agreement once it is established that the agreements had the object of restricting competition.

(359) It appears that some of these agreements were more effective than others. The general erosion of average prices for bulk and cylinder gases between 1989 and 1997 could give the impression that the annual agreements to raise prices and the setting of minimum prices had produced no effect at all. It is likely, however, that the erosion would have developed more rapidly in the absence of those agreements. The mere fact that year after year companies continued to plan and agree their price increases together and to agree on a moratorium period shows that this activity was valuable to them. The repeated lists of bottom prices and other minimum supply conditions must also have been deemed important by at least those companies which updated those lists in their meetings. The remarkable stability in cylinder gas market shares over the years may also have been caused, at least in part, by the agreements on prices and moratorium periods.

(360) As regards the agreement to introduce an environmental and safety charge for sales of cylinder gases, this must be deemed to have been quite successful, given that the charge rapidly became an accepted feature of the market and remains so to this day. The introduction of a drop charge on bulk supply seems to have been accepted by most customers and must therefore also be rated a success.

#### 5. EFFECT UPON TRADE BETWEEN MEMBER STATES

(361) The continuous agreements/concerted practices between the producers as described in this Decision and relating to prices and other trading conditions in the Netherlands were capable of having/had an appreciable effect upon trade between Member States.

- (362) Article 81(1) of the Treaty prohibits certain agreements between undertakings and concerted practices, which may affect trade between Member States. Article 81(1) is aimed at agreements, which might harm the attainment of a single market between Member States, whether by partitioning national markets or by affecting the structure of competition within the common market.
- (363) It is settled case-law that, 'for an agreement between undertakings or a concerted practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market between the Member States' <sup>(256)</sup>.
- (364) The application of Article 81(1) of the Treaty to a cartel is not, however, limited to that part of the members' sales, which actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States <sup>(257)</sup>.
- (365) In the present case, it should be noted that industrial gases are traded between Member States. This is confirmed by the official statistics on trade between the Netherlands, Germany and the Belgium-Luxembourg Economic Union (BLEU).
- (366) Despite the limited effective economic radius for supplying industrial gases to the users thereof, trade statistics demonstrate that imports and exports of industrial gases to and from the Netherlands are considerable. These concern almost exclusively sales and swaps within industrial gases groups or between such groups.
- (367) Exports of argon (CN code 2804 21 00) from the Netherlands to Germany and the BLEU in 1994 to 1996 ranged from 12 000 to 21 000 tonnes and imports from 20 000 to 27 000 tonnes; exports of nitrogen (CN code 2804 30 00) ranged from 34 000 to 70 000 tonnes and imports from 28 000 to 72 000 tonnes; exports of oxygen (CN code 2804 40 00) ranged from 88 000 to 258 000 tonnes and imports from 212 000 to 268 000 tonnes; exports of carbon dioxide (CN code 2811 21 00) ranged from 201 000 to 207 000 tonnes and imports from 155 000 to 191 000 tonnes.
- (368) This trend was confirmed by the industrial gases undertakings in the Netherlands in reply to the Commission's requests for information pursuant to Article 11 of Regulation No 17. Some of them purchase their atmospheric gases nitrogen, oxygen and argon in bulk from sister companies or from competitors located in Belgium or Germany. Others, which operate an air separation unit in the Netherlands, sell part of their gases in bulk to sister companies in Belgium or in Germany, or to competitors. Gases purchased by the undertakings in bulk in other Member States are then filled into cylinders in the Netherlands or delivered in liquid form to customers in that country. Acetylene is often purchased on behalf of several sister companies under one contract.
- (369) These swap and back-up agreements between industrial gas companies in the Netherlands ensure that their supplies to customers are not interrupted by foreseen or unforeseen closure of plants. These agreements between suppliers often include gas sources in other Member States owned by the groups, to which the suppliers belong.
- (370) The effect of the infringements on trade between Member States is all the more appreciable where, as in the present case, all the undertakings which took part in the infringements are part of multinational groups which have production facilities for industrial and medical gases and sell those gases in several Member States, including Belgium and Germany.
- (371) This is because the multinational groups in question form an economic unit, which means that all changes in their competitive position in one Member State will have an effect on the position of the groups as a whole. Purely in terms of financial flows within a group, improvements in the profitability of its Dutch branch are likely to affect trade because of changes in dividend
- <sup>(256)</sup> Judgment of the Court of First Instance of 12 July 2001 in Joined Cases T-202/98, T-204/98 and T-207/98 *British Sugar and others v Commission*, paragraph 78.
- <sup>(257)</sup> Judgment in Case T-13/89, *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304.

payments or investment funds needed <sup>(258)</sup>. The sale of AGA's Belgian cylinder gas business to Air Liquide's Belgian branch in 1994 and the sale of Air Liquide's cylinder gas branch in Austria to AGA, in that same year demonstrate how the profitability of branches has implications for the group as a whole and therefore needs to be assessed in a European context. Other examples can be found in the instructions from group head-offices to their Dutch branches, which underline the strategic importance of supplies to important clients in the Netherlands for the situation of the groups as a whole. Indeed, some very large clients coordinate their purchases of liquid industrial gases on a European level.

(372) The multinational nature of the industrial gases groups is also important because, as has been shown in the analysis of the market structure in Part I section A.5(c) there is abundant information in the Commission's file that retaliation against competitors which 'steal' customers by undercutting prices is a normal feature in the industrial gases industry. There is also evidence that such retaliation is not necessarily confined to the Member State or region where the 'aggression' was committed. On the contrary, many undertakings consider such retaliation most effective if carried out on a broad basis, preferably on the home market of the 'aggressor' in question. Therefore, an undertaking in the industrial gases sector in the Netherlands which participated in the infringements and failed to respect the agreements depicted in this Decision risked retaliation not only in the Netherlands but in other Member States as well.

(373) In its reply to the statement of objections <sup>(259)</sup>, Air Liquide argues that the fact that the parties belong to multinational groups has no bearing on the effect of the alleged infringements on trade between Member States. The Commission therefore needs to prove that the alleged anti-competitive behaviour affected trade between Member States, which it fails to do. Furthermore, Air Liquide considers that the fact retaliation against competitors took place even in other national markets illustrates a competitive behaviour on the part of the companies concerned.

(374) The Commission has no obligation to demonstrate the effect of the agreements on trade between Member

States but rather must establish that the conduct is capable of having such an effect. The fact that industrial gases are traded between Member States, whether between competitors or between sister companies of the same group, has a direct bearing on the fact that anti-competitive behaviour on one market is capable of affecting trade between Member States.

(375) In addition to the arguments relating to the multinational character of the groups in question, the Commission also notes that the vast majority of the purchasers of industrial gases are themselves manufacturing companies, which either export their products or compete with imports within the Netherlands. They are active in sectors such as shipbuilding, food, chemicals, electronics, etc. Practically all manufacturing companies in the Netherlands which depend on industrial gases are likely to be injured by infringements such as those described in this Decision. This is because the undertakings participating in those infringements account for more than 80 % of supply of the gases in question in the Netherlands. Because these undertakings belong to multinational groups with national subsidiaries, even customers located in border regions in the Netherlands are unable to turn to suppliers in a neighbouring Member State belonging to the same groups. For those reasons the effect of the infringement on trade between the Netherlands and other Member States must also be deemed to extend to the sectors in which the purchasers of industrial gases are active.

(376) The Commission finally notes that two independent, smaller suppliers of industrial gases located in Belgium, ACP and IJsfabriek Strombeek, both sell small quantities of liquid and cylinder gases in the Netherlands competing with the undertakings to which this Decision is addressed <sup>(260)</sup>.

(377) For all those reasons it can be concluded that the infringements described in this Decision had or were capable of having an appreciable effect on trade between Member States and that the infringements concerned therefore fall under Article 81(1) of the Treaty.

#### E. APPLICABILITY OF LIMITATION PERIODS

(378) Pursuant to Article 1 of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation

<sup>(258)</sup> See in this context the judgment of the Court in Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 447, paragraph 48.

<sup>(259)</sup> File AL, non-confidential reply to the statement of objections, point V.4.

<sup>(260)</sup> See, for example, file AGA, p. 4934.

periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition <sup>(261)</sup>, the power of the Commission to impose fines or penalties for the type of infringements concerned in the present case is subject to a limitation period of five years. The period starts to run on the day the infringement is committed. For continuing infringements, the limitation period only begins to run on the day the infringement ceases.

(379) Pursuant to Article 2 of Regulation (EEC) No 2988/74 any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period. After each interruption time begins running afresh. The Commission proceedings started with the surprise investigations pursuant to Article 14(3) of Regulation No 17 on 11 December 1997.

(380) As has been shown in Part I of this Decision, the Commission has a body of documentary evidence for most of the companies concerned from 1989 until 1991 and from September 1993 until the inspections took place in December 1997.

(381) In their reply to the statement of objections, AGA, Hoek Loos, Air Products, Air Liquide and Messer submitted that the Commission lacked enough documentary evidence regarding the period between 1991 and 1992/93. As a consequence the alleged infringements which had taken place before December 1992 should be time-barred as they go back more than five years before the inspections took place.

(382) In particular, AGA contends <sup>(262)</sup> that prescription should not only apply to the 1990 list of minimum prices for bulk, as already accepted by the Commission in the statement of objections, but also to the 1990 tank rental for bulk, the 1990 minimum transport cost for cylinder gases, the 1990 agreement on cylinder rent, the initial agreement on minimum prices and the 1990, 1991 and 1992 agreements to increase prices.

(383) Hoek Loos claims <sup>(263)</sup> that there is a gap in evidence for the period 1992 to 1994 regarding the agreements on price increases, for the period 1991 to 1993 regarding the moratorium, for the period 1992 to 1994 regarding minimum cylinder prices, and for the period

1991 to 1993 regarding the other contractual conditions. Therefore Hoek Loos states that enforcement by the Commission is time-barred for the time prior to December 1992.

(384) Air Products also claims <sup>(264)</sup> that the Commission adduces no evidence that all the infringements took place and were continued over the entire period of 1989 to 1997. There is no evidence in the Commission's file demonstrating an involvement by Air Products in 1992 until end 1993. Generally there is again evidence as of December 1993. Therefore, Air Product also claims that in conformity with the statute of limitation, the Commission cannot impose a fine for the infringements of 1989 to 1991.

(385) Air Liquide agrees with the time bar the Commission accepted as far as the price list for liquid gases of 1990 is concerned. Air Liquide also points out <sup>(265)</sup> that there is a gap in the factual evidence in the period between June 1991 and June 1993.

(386) Messer claims <sup>(266)</sup> that a continuous infringement cannot be shown and that all separate infringements before 11 December 1992 are subject to prescription. The Commission therefore can only impose a fine as far as the period 1993 to 1997 is concerned.

(387) The Commission takes note of the arguments made by the parties as regards the limitation period. The Commission recognises that the limitation period applies in this particular case, as it does not have enough elements in its possession to establish the existence of one single continuous infringement from 1989 to 1997.

(388) Therefore, notwithstanding the fact that the Commission has identified an infringement for the period 1989 to 1991, the Commission will only take the infringement over the period September 1993 to December 1997 into consideration for the calculation of the fines.

#### F. DURATION OF THE INFRINGEMENT

(389) In view of the Commission's position on the issue of limitation periods in the present case, the Commission

<sup>(261)</sup> OJ L 319, 29.11.1974, p. 1.

<sup>(262)</sup> File AGA, non-confidential reply to the statement of objections, point V, pp. 15 to 24.

<sup>(263)</sup> File HL, non-confidential reply to the statement of objections, pp. 5 to 9.

<sup>(264)</sup> File AP, non-confidential reply to the statement of objections, pp. 20 to 21.

<sup>(265)</sup> File AL, non-confidential reply to the statement of objections, pp. 20 and 21.

<sup>(266)</sup> File MN, non-confidential reply to the statement of objections, p. 32.

will take September 1993 as the starting date of the infringement into consideration for the application of the fines.

(390) No date can be established for the end of the cartel, but the Commission has a strong body of documentary evidence up to the inspection in December 1997. Following the inspections, most undertakings assured the Commission that internal instructions had been given to bring an end to any infringements of Community competition law. For the purposes of assessing fines, the Commission will proceed on the assumption that the cartel ended in December 1997.

(391) The participation of each company separately in the infringement is therefore established as follows:

#### 1. HOEK LOOS, AGA, AIR LIQUIDE, AIR PRODUCTS AND MESSER

(392) Hoek Loos, AGA, Air Liquide, Air Products and Messer took part in the following agreements/concerted practices:

- (a) fixing price increases from December 1993 until December 1997, which is the end of the year for which the last price increases were to be implemented;
- (b) fixing moratorium periods from December 1993 until March 1997 in order to implement the above price increases;
- (c) fixing minimum prices from March 1994 until December 1997, which is the end of the year for which the last minimum prices were agreed upon;
- (d) fixing cylinder transport charges from June 1994 (Messer from January 1996) until December 1997, which is the end of the year for which the last cylinder transport charges were agreed upon;
- (e) fixing the minimum rent for cylinders from June 1994 until December 1997, which is the end of the year for which the last minimum rent for cylinders was agreed upon;
- (f) fixing an environmental and safety charge for cylinders from September 1993 until October 1995, that is the month in which the first company (Messer) independently raised the environmental and safety charge from the level agreed on in 1993 to a higher level;

- (g) collusive arrangements regarding the tank rent paid by liquid gas customers from January 1997 until December 1997, which is the end of the year for which the proposal for an agreement on tank rent was made.

#### 2. WESTFALEN

(393) Westfalen took part in the following agreements/concerted practices:

- (a) fixing price increases from October 1994 until December 1995, which is the end of the year for which the price increases were to be implemented;
- (b) fixing moratorium periods from October 1994 until January 1995 in order to implement the above price increases;
- (c) fixing minimum prices from March 1994 until December 1995, which is the end of the year for which the minimum prices were agreed upon.

#### 3. BOC

(394) BOC took part in the following agreements/concerted practices:

- (a) fixing price increases from October 1994 until December 1995, which is the end of the year for which the price increases were to be implemented;
- (b) fixing moratorium periods from October 1994 until January 1995 in order to implement the above price increases;
- (c) fixing cylinder transport charges from June 1994 until December 1994, which is the end of the year for which cylinder transport charges were agreed upon;
- (d) fixing the minimum rent for cylinders from June 1994 until December 1994, which is the end of the year in which BOC at least took part in the arrangement.

#### G. ADDRESSEES OF THE DECISION

(395) In order to identify the addressees of this Decision, it is necessary to determine the legal entities responsible for the infringement.

- (396) It is established by the facts as described in Part I that NV Hoek Loos, Air Liquide BV, Air Products Nederland BV, Messer Nederland BV and Westfalen Gassen Nederland BV have directly participated in the collusive arrangements regarding medical and industrial gases in the Netherlands. Consequently each company will bear responsibility for its respective infringements and is therefore an addressee of this Decision.
- (397) As regards Air Products Nederland BV, the Commission notes that the defence of the latter company was handled by Air Products Europe Inc, which had expressly requested to receive all correspondence in the present case and which also replied to the statement of objections and took part in the oral hearing on behalf of Air Products Nederland BV. Furthermore, by letter of 13 June 2002, Air Products Nederland BV formally renounced the dispatch of a statement of objections addressed to itself in the present case.
- (398) In the case of BOC, the BOC Group is held liable for the infringement of its subsidiaries in the BOC Gases Benelux undertaking, as identified in this Decision. The statement of objections had already been addressed to the BOC Group and this Decision is also addressed to the BOC Group.
- (399) In its reply to the statement of objections <sup>(267)</sup>, BOC submits that BOC Gases Benelux was the only undertaking within the BOC Group with responsibility for the production or sale of industrial gases in the Netherlands and that there is no evidence that the Group's headquarters in the United Kingdom were made aware of the alleged infringements at the time. BOC further submits that BOC Gases Benelux acted autonomously in the period 1989 to 1997 and that on this basis it would have been more appropriate for the statement of objections to have been addressed to Air Liquide, which acquired the BOC Group's gases operations in the Benelux in late-1998 and is therefore the successor to that undertaking.
- (400) At the oral hearing, Air Liquide pointed out that the Commission was right to have sent the statement of objections to BOC Group since the period under investigation predated the sale of BOC Gases Benelux to Air Liquide.
- (401) In this regard, it must be pointed out that at the material time BOC Gases Benelux and the companies forming the BOC Gases Benelux undertaking, as referred to in recitals 36 to 38, were wholly owned subsidiaries of the BOC Group. A representative of the BOC Group legal department was present on 24 March 1998 during when the Commission services carried out an inspection at BOC NV pursuant to Article 14(2) of Regulation No 17 <sup>(268)</sup> and all subsequent correspondence from the Commission services to BOC Gases Benelux was copied to that representative. When the General Manager of BOC Gases Benelux, Mr Celis, left his position, BOC Gases Benelux's external legal counsel informed the Commission services that Mr Celis was no longer responsible for BOC's Benelux operations and that all future correspondence regarding the investigation could be sent to that legal counsel. The latter counsel, who acted for BOC Gases Benelux during and after the Commission's inspection, also represented the BOC Group in order to reply to the statement of objections. Furthermore, the Commission notes that the same Mr Celis, who had personally attended some of the cartel meetings identified in this Decision, subsequently took up another position within the BOC Group of companies.
- (402) In addition, after the BOC Group's gases operations in the Benelux were sold to Air Liquide, the BOC Group remained the Commission's sole interlocutor concerning the alleged infringements of BOC Gases Benelux on the Dutch market <sup>(269)</sup>. The BOC Group also replied in substance to the Commission's objections as regards the behaviour of the BOC Group's subsidiaries at the material time.
- (403) On the basis of the above, the Commission finds that the BOC Group can be held responsible for the conduct of its subsidiaries throughout the infringement period.
- (404) As regards AGA, the Commission holds AGA Gas BV responsible for the infringements identified in this Decision and has addressed the statement of objections to that company. As explained under Part I, section A.2(b) above, AGA Gas BV has undergone a series of structural changes resulting in this company being first demerged in 2000 into two separate entities. Subsequently, the remainder of its Dutch activities were

<sup>(268)</sup> See recital 88 and File BOC, p. 3576.

<sup>(269)</sup> BOC's external legal counsel informed the Commission services of the completion of the sale of the BOC Group's gases operations in the Benelux to Air Liquide by letter of 20 January 1999, File BOC, p. 6487.

<sup>(267)</sup> File BOC, non-confidential reply to the statement of objections, p. 18.

acquired in 2001 by Hoek Loos for the liquid business and by Air Products for the cylinder business. The latter transaction was only completed in August 2001, after the dispatch of the statement of objections to the parties.

- (405) In view of the fact that AGA Gas BV had ceased to exist in law, AGA AB replied to the statement of objections in substance, on behalf of its then subsidiary. In its reply, AGA AB expressly stated its willingness to assume responsibility vis-à-vis the Commission for AGA Gas BV's infringements <sup>(270)</sup>, in view of the fact that AGA Gas BV's behaviour cannot remain unaccounted for. In the specific circumstances of this case, the Commission shares the approach taken by AGA AB. Furthermore, AGA AB, by letter dated 13 June 2002, formally renounced the dispatch of a statement of objections addressed to itself in the present case. This Decision is therefore addressed to AGA AB as successor of AGA Gas BV.

#### H. REMEDIES

##### 1. ARTICLE 3 OF REGULATION NO 17

- (406) Where the Commission finds an infringement of Article 81(1) of the Treaty it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.
- (407) While some undertakings have informed the Commission that steps have been taken to ensure that their representatives no longer attend anti-competitive meetings, it is not known whether such meetings or other collusion between firms have in fact ever ceased.
- (408) It is therefore the intention of the Commission not only to find that an infringement has been committed but also to require the undertakings to terminate the said infringement.

##### 2. ARTICLE 15(2) OF REGULATION NO 17

###### (a) *General considerations*

- (409) Under Article 15(2) of Regulation no 17, the Commission may by decision impose upon undertakings

finances from EUR 1 000 to EUR 1 million, or a sum in excess thereof not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the Treaty.

- (410) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly to the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation No 17.
- (411) The role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fine imposed any aggravating or mitigating circumstances and will apply, as appropriate, the Notice on the non-imposition or reduction of fines in cartel cases <sup>(271)</sup>.

###### (b) *The amount of the fines*

- (412) The cartel constituted a deliberate infringement of Article 81(1) of the Treaty. With full knowledge of the restrictive character of their actions and, moreover, of their illegality, the leading suppliers combined to agree on prices and a set of trading conditions in order to restrict competition in a significant industrial sector.

###### (i) *The basic amount*

- (413) The basic amount is determined according to the gravity and duration of the infringement.

###### *Gravity*

- (414) In its assessment of the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

###### *Nature of the infringement*

- (415) It follows from the facts described that the present infringement consisted in fixing price increases, minimum prices and other trading conditions, which

<sup>(270)</sup> File AGA, non-confidential reply to the statement of objections, p. 4.

<sup>(271)</sup> OJ C 207, 18.7.1996, p. 4.



are by their very nature the worst kind of infringements of Article 81(1) of the Treaty.

- (416) The cartel arrangements involved all major operators in the Dutch market and were conceived at senior level in each participating company. By its very nature, the implementation of a cartel agreement of the type described leads automatically to a significant distortion of competition, which is of exclusive benefit to producers participating in the cartel and is highly detrimental to customers and, ultimately, to the general public.
- (417) The Commission therefore considers that the present infringement constituted by its nature a very serious infringement of Article 81(1).

#### The actual impact of the infringement

- (418) In their replies to the statement of objections, AGA and Hoek Loos argue that there was an erosion of prices for cylinder and liquid gases in the Netherlands in the years 1990 to 1999 and submitted a study<sup>(272)</sup> which generally shows this trend. In addition, these companies argue that there has always been strong competition on the Dutch market, with fluctuating market shares for the existing players, as confirmed by the Dutch Competition authority, Nederlandse Mededingingsautoriteit, in its decision on Air Products/AGA transfer of 6 August 2001, annexed to the replies of AGA, Hoek Loos and Messer to the Commission's objections.
- (419) AGA and Hoek Loos further contend<sup>(273)</sup> that termination of their participation in anti-competitive activities had no influence on the development of prices and fluctuation of market shares, contrary to the Commission's assertions in the statement of objections, a fact which shows that the alleged anti-competitive behaviour had no effect on the market.
- (420) The Commission notes that there is no need to quantify in detail the extent to which prices differed from those

which might have been applied in the absence of these arrangements. Indeed, this cannot always be measured in a reliable manner, since a number of external factors may simultaneously have affected the price development of the product, thereby making it extremely difficult to draw conclusions on the relative importance of all possible causal factors.

- (421) The Commission concludes that it is inconceivable that the parties would have repeatedly agreed to meet in order to fix price increases, minimum prices and minimum trading conditions over such a long period, having regard to the risks involved, if they had perceived the cartel as having no impact or only a limited impact on the market for industrial and medical gases in the Netherlands.

#### The size of the relevant geographic market

- (422) The infringement was committed by undertakings, which during the material period covered on average over 90 % the Netherlands market for industrial and medical gases in cylinders and bulk. As they were confined to the Netherlands and to a sector of medium economic importance, however, the agreements produced their effect within a limited part of the common market only.
- (423) In the above circumstances (limited geographical scope of the market, and sector of medium economic importance), the Commission concludes that the agreements and/or concerted practices concerned by these proceedings constitute a serious infringement of the Community competition rules rather than a very serious infringement.
- (424) The situation in the present case is comparable to the situation in recent cases where the Commission decided to take the category 'serious' instead of 'very serious' in price fixing cartel cases with limited geographical scope. In the British Sugar case<sup>(274)</sup> the Commission accepted the limited geographic scope of the relevant market (Great Britain) as one possible argument to reduce the gravity of an infringement. The Commission decided similarly in the Greek Ferries case<sup>(275)</sup>, where it argued that the infringement produced its effects within a

<sup>(272)</sup> Market of analysis cylinder gases 1990 to 1999 in the Netherlands, Annex 14 of AGA's non-confidential reply.

<sup>(273)</sup> File AGA, non-confidential reply to the statement of objections, pp. 27 to 29 and File HL, non-confidential reply to the statement of objections, paragraphs 35 to 37.

<sup>(274)</sup> Commission Decision of 14 October 1998, OJ L 76, 22.3.1999, p. 1.

<sup>(275)</sup> Commission Decision of 9 December 1998, OJ L 109, 27.4.1999, p. 24.

market (all Greece-Italy Adriatic Sea routes) which was still small compared to other markets in the Community.

- (425) Nevertheless, it has to be noted that the Commission is under no obligation to deviate from the rule that a price cartel is by its very nature a 'very serious infringement' if the geographic scope of the relevant market is limited. In the SAS-Maersk case <sup>(276)</sup> the Commission saw an important difference to the Greek Ferries case in the fact that the SAS/Maersk Air market-sharing affected not only the three routes for which infringements were found but restricted competition on all routes to/from and within Denmark, including the routes between Denmark and the other Member States and the members of the EEA. Therefore the Commission assumed that the repercussions of the infringement were felt throughout the EEA and beyond, unlike the Greek Ferries case and unlike the present case.

- (426) In the Belgian Beers case <sup>(277)</sup> the Commission decided to maintain the category 'very serious' as well although the price fixing and market sharing cartel between Interbrew and Danone/Alken-Maes was limited to the Belgian beer sector. Amongst the special features in that case were the threats by Danone to retaliate against Interbrew in France (taken into account as aggravating circumstance) and the personal involvement of Interbrew's, Alken-Maes' and Danone's top managers at the time. The CEOs themselves and other top managers of the companies met regularly to initiate and monitor the illicit arrangements. This fact gives the case a more global relevance when considering that Interbrew is the number two brewer in the world and Alken-Maes' mother company Danone a leader in the world food industry. Unlike the above, in the present case the Commission assumes that the illicit arrangements between the companies were decided predominantly on the level of the Dutch subsidiaries of the relevant groups. Furthermore, the Belgian beer sector is economically much more significant (a final consumer product sector of a value several times that of the Dutch industrial gases market) than the relevant market in the present case, and all the segments of this sector were involved (all types of beer, horeca as well as distribution), through many competition parameters (price, promotions, investments, publicity, pricing structure and exchange of sales figures).

<sup>(276)</sup> Commission Decision of 18 July 2001, OJ L 265, 5.10.2001, p. 15.

<sup>(277)</sup> Commission Decision of 5 December 2001, not yet published.

- (427) Similarly, in the Austrian Banks case <sup>(278)</sup>, the cartel was described as 'very serious' although the price-fixing agreement between the eight Austrian banks ('Lombard Club') was limited to the Austrian bank sector. In its classification of that case the Commission was guided by the conviction that the banking sector is of outstanding importance for consumers, businesses and therefore for the economy as a whole. Furthermore, the cartel network was comprehensive as regards its contents, fixing interest rates for loans and savings, for private/household and for commercial customers as well as the fees customers had to pay for certain services, was highly institutionalised and covered the entire country down to the smallest village. Finally, the economic importance of the market concerned is even more significant in that case than in the Belgian Beers case mentioned above.

#### Commission's findings concerning the gravity of the infringement

- (428) In the above circumstances, the Commission concludes that the agreements and/or concerted practices concerned in this proceeding constitute a serious infringement of the Community competition rules.

#### Classification of cartel participants

- (429) In the circumstances of this case, which involves several undertakings, it will be necessary in setting the basic amount of the fines to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition. For this purpose the undertakings concerned can in principle be divided into four categories established according to their relative importance in the market concerned.
- (430) As the basis for the comparison of the relative importance of an undertaking in the market concerned, the Commission considers it appropriate to take in the present case the products' turnover in the Netherlands. This approach is supported by the fact that this cartel is limited to the Netherlands, the principal object of which was *inter alia* to agree concerted price increases, minimum prices and trading conditions for cylinder and liquid gases on that market. The comparison is made on the basis of the product turnovers in the Netherlands in 1996, which is the last complete year before the inspections took place. Table 1 in recital 75 provides the relevant figures.

<sup>(278)</sup> Commission Decision of 11 June 2002, not yet published.

(431) Hoek Loos and AGA are by far the two largest players on the markets concerned and will therefore be placed in the first category. Air Products and Air Liquide, which were medium-sized operators on the markets concerned, will constitute the second category. Messer and BOC, which are significantly smaller on the markets concerned, will be placed in the third category. Westfalen, which has an extremely small share of the markets concerned, will be placed in the fourth category.

(432) On that basis, the Commission sets the amount of the fines determined for gravity as follows:

- AGA EUR 10 million,
- Air Liquide EUR 2,6 million,
- Air Products EUR 2,6 million,
- BOC EUR 1,2 million,
- Hoek Loos EUR 10 million,
- Messer EUR 1,2 million,
- Westfalen EUR 0,45 million.

*Duration of the infringement*

(433) The Commission has found that Hoek Loos, AGA, Air Products, Air Liquide and Messer infringed Article 81(1) of the Treaty from September 1993 until December 1997. Westfalen from March 1994 until December 1995 and BOC from June 1994 until December 1995.

(434) The Commission concludes that the infringement was of medium duration (one to four years) for every undertaking involved.

*Participation for each individual company*

(435) Hoek Loos, AGA, Air Liquide, Air Products and Messer took part in the following agreements/concerted practices:

- (a) fixing price increases from December 1993 until December 1997;
- (b) fixing moratorium periods from December 1993 until March 1997;
- (c) fixing minimum prices from March 1994 until December 1997;
- (d) fixing cylinder transport charges from June 1994 (Messer from January 1996) until December 1997;

(e) fixing the minimum rent for cylinders from June 1994 until December 1997;

(f) fixing an environmental and safety charge for cylinders from September 1993 until October 1995;

(g) collusive arrangements regarding the tank rent paid by liquid gas customers from January 1997 until December 1997.

(436) Westfalen took part in the following agreements/concerted practices:

- (a) fixing price increases from October 1994 until December 1995;
- (b) fixing moratorium periods from October 1994 until January 1995;
- (c) fixing minimum prices from March 1994 until December 1995.

(437) BOC took part in the following agreements/concerted practices:

- (a) fixing price increases from October 1994 until December 1995;
- (b) fixing moratorium periods from October 1994 until January 1995;
- (c) fixing cylinder transport charges from June 1994 until December 1994;
- (d) fixing the minimum rent for cylinders from June 1994 until December 1994.

*Conclusion on the basic amounts*

(438) The Commission accordingly sets the basic amounts of the fines as follows:

- AGA EUR 14 million,
- Air Liquide EUR 3,64 million,
- Air Products EUR 3,64 million,
- BOC EUR 1,38 million,
- Hoek Loos EUR 14 million,
- Messer EUR 1,68 million,
- Westfalen EUR 0,51 million.

(ii) **Attenuating circumstances***Exclusively passive role in the infringement*

(439) BOC claims that it only had a passive involvement in the infringements and did not hold any bilateral meetings. In this regard, BOC Gases Benelux's manager at the material time, made a declaration that he had been taken by surprise at the meeting of October 1994 when the subject of price increases came up <sup>(279)</sup>.

(440) The Commission takes into account that BOC played an exclusively passive role in the infringement and that it did not participate in all the different aspects of the infringement. Therefore the Commission concludes that these attenuating circumstances justify a decrease of 15 % in the basic amount of the fine to be imposed on BOC.

(441) Westfalen argues that it had a passive role in the infringement only as it denies having known in advance that anti-competitive questions would be raised at the VFIG meetings of October and November 1994, as the proposed agendas did not mention these subjects. Westfalen argues that it did not take part actively in those discussions and that the fact it expressed its disbelief in coordination of prices at the VFIG meetings induced the main undertakings at the origin of the cartel to meet outside the VFIG framework. They did so as from the beginning of 1995.

(442) The Commission takes into account that Westfalen played an exclusively passive role in the infringements and did not participate in all the different aspects of the infringement. The Commission concludes that these attenuating circumstances justify a decrease of 15 % in the basic amount of the fine to be imposed on Westfalen.

*Non-implementation in practice of the offending agreements*

(443) In its reply to the statement of objections, Air Liquide argued that it followed an autonomous commercial policy on the market and was not influenced by agreements with its competitors, to which it never made any commitments. This company provided evidence that at several occasions it applied different prices/conditions than those agreed upon or did not respect the moratorium periods.

(444) Messer argued that since it was a newcomer at the time, it was under pressure from its competitors that it gave

them the impression of agreeing to certain anti-competitive practices <sup>(280)</sup>. Messer should therefore be considered a victim of circumstances. Furthermore, Messer never implemented the agreements and always pursued a very competitive autonomous policy in the market.

(445) BOC argued that there is no evidence that it implemented any of the alleged agreements and provides that BOC in fact applied different price increases/trading conditions than the ones discussed and did not respect the moratorium period in 1994/1995.

(446) Westfalen argued that it had always been a very competitive market player, that it was not interested in colluding with other players and that the announcements it made concerning its forthcoming price increases or minimum prices/trading conditions were not binding promises and were not implemented on the market.

(447) The Commission notes that the implementation of agreements on price increases or minimum prices/trade conditions does not necessarily require that these exact prices/conditions be applied. The fact that undertakings which have been proved to have participated in collusion on prices/trading conditions with their competitors did not behave on the market in the manner agreed with their competitors is not necessarily a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. Undertakings which despite colluding with their competitors follow a more or less independent policy on the market may simply be trying to exploit the cartel for their own benefits <sup>(281)</sup>.

(448) The Commission further notes that in Part I of this Decision, elements of proof were adduced that several agreements were in fact implemented by the cartel participants.

(iii) **Conclusion on the amounts of fines prior to any application of the Commission notice on the non-imposition or reduction of fines in cartel cases (the Leniency Notice)**

(449) The Commission accordingly sets the amounts of the fines prior to any application of the Leniency Notice as follows:

<sup>(280)</sup> File MN, non-confidential reply to the statement of objections, p. 30.

<sup>(281)</sup> Case T-308/94 *Cascades SA v Commission* [1998] ECR II-925, paragraph 230.

<sup>(279)</sup> See recital 142.

- AGA EUR 14 million,
- Air Liquide EUR 3,64 million,
- Air Products EUR 3,64 million,
- BOC EUR 1,17 million,
- Hoek Loos EUR 14 million,
- Messer EUR 1,68 million,
- Westfalen EUR 0,43 million.

from a non-imposition of a fine or a very substantial reduction in its amount. These conditions are not met in the present case as none of addressees of this Decision informed the Commission about the infringement before the Commission undertook an investigation of the enterprises involved.

(450) However, since the final amounts calculated according to that method may not in any case exceed 10 % of the worldwide turnover of the addressees (as laid down by Article 15(2) of Regulation No 17) <sup>(282)</sup>, the fines will be set as follows:

- AGA EUR 5,54 million,
- Air Liquide EUR 3,64 million,
- Air Products EUR 3,64 million,
- BOC EUR 1,17 million,
- Hoek Loos EUR 14 million,
- Messer EUR 1,12 million,
- Westfalen EUR 0,43 million.

(453) If an undertaking complies with all the conditions set out in Section C of the Leniency Notice it will benefit from a substantial reduction in a fine. These conditions are not met in the present case, as the investigation ordered by decision on the premises of the parties of the cartel has not failed to provide sufficient grounds for initiating the procedure leading to a decision.

#### *Significant reduction of a fine*

(454) Under Section D of the Leniency Notice an undertaking which does not comply with all the conditions set out in Sections B or C can still benefit from a significant reduction of 10 % to 50 % of the fine that would otherwise have been imposed if it had not cooperated where (for example):

- before a statement of objections is sent, it provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

#### **(iv) Application of the Commission's Leniency Notice**

- after receiving a statement of objections, it informs the Commission that it does not substantially contest the facts on which the Commission bases its objections.

(451) The addressees of this Decision have cooperated with the Commission at different stages of the investigation into the infringement for the purpose of receiving the favourable treatment described in the Commission's Leniency Notice. In order to meet the legitimate expectations of the undertakings concerned as to the non-imposition or reduction of the fines on the basis of their cooperation, the Commission examines in the following section whether the parties concerned satisfied the conditions set out in the notice.

(455) In addition to strictly replying to the Commission's requests for information, AGA provided evidence originating from the period of time to which the infringement pertains and admitted that one of its executives attended meetings with competitors in Breda and Barendrecht <sup>(283)</sup> before the statement of objections was dispatched.

#### *Non-applicability of Sections B and C of the Notice*

(452) If an undertaking complies with all the conditions set out in Section B of the Leniency Notice it will benefit

(456) Air Products also provided comprehensive explanations on the documents taken at the Commission's inspection and admitted that inappropriate contacts had taken place between competitors on the Dutch market <sup>(284)</sup> before the statement of objections was dispatched.

<sup>(282)</sup> As AGA AB is held liable for its former subsidiary AGA Gas BV, the amount has been reduced to 10 % of the last turnover of the subsidiary, see footnote 20.

<sup>(283)</sup> File AGA, pp. 6987 to 7014.

<sup>(284)</sup> See AP's letter of 24.4.1998, File AP, p. 5818.

(457) Furthermore, after receiving the Commission's statement of objections, AGA, Air Products, Hoek Loos and Messer pleaded for a significant reduction in fines for not contesting the facts.

(458) Those considerations justify a reduction of the fines by 25 % for AGA and Air Products and by 10 % for Hoek Loos and Messer.

*Conclusion on the application of the Leniency Notice*

(459) In conclusion, with regard to the nature of their cooperation and in the light of the conditions set out in the Leniency Notice, the Commission will grant to the addressees of this Decision the following reductions to their respective fines:

- AGA a reduction of 25 %
- Air Products a reduction of 25 %
- Hoek Loos a reduction of 10 %
- Messer a reduction of 10 %.

**(v) The final amounts of the fines imposed in the present proceedings**

(460) In conclusion, the fines to be imposed, pursuant to Article 15(2) of Regulation No 17, are as follows:

- AGA EUR 4,15 million,
- Air Liquide EUR 3,64 million,
- Air Products EUR 2,73 million,
- BOC EUR 1,17 million,
- Hoek Loos EUR 12,6 million,
- Messer EUR 1 million,
- Westfalen EUR 0,43 million.

HAS DECIDED AS FOLLOWS:

*Article 1*

AGA AB, Air Liquide BV, Air Products Nederland BV, BOC Group plc, Messer Nederland BV, NV Hoek Loos, Westfalen

Gassen Nederland BV have infringed Article 81(1) of the Treaty by participating in a continuing agreement and/or concerted practice in the sector of industrial and medical gases in the Netherlands.

The duration of the infringement was as follows:

- |                                 |  |
|---------------------------------|--|
| — AGA AB                        | from September 1993 until December 1997, |
| — Air Liquide BV                | from September 1993 until December 1997, |
| — Air Products Nederland BV     | from September 1993 until December 1997, |
| — BOC Group plc                 | from June 1994 until December 1995,      |
| — Messer Nederland BV           | from September 1993 until December 1997, |
| — NV Hoek Loos                  | from September 1993 until December 1997, |
| — Westfalen Gassen Nederland BV | from March 1994 until December 1995.     |

*Article 2*

The undertakings named in Article 1 shall immediately bring to an end the infringement referred to in Article 1, in so far as they have not already done so. They shall refrain from any act or conduct which, in object or effect, is the same as the infringement or equivalent thereto.

*Article 3*

For the infringement referred to in Article 1, the following fines are imposed:

- |                                 |                   |
|---------------------------------|-------------------|
| — AGA AB                        | EUR 4,15 million, |
| — Air Liquide BV                | EUR 3,64 million, |
| — Air Products Nederland BV     | EUR 2,73 million, |
| — BOC Group plc                 | EUR 1,17 million, |
| — Messer Nederland BV           | EUR 1 million,    |
| — NV Hoek Loos                  | EUR 12,6 million, |
| — Westfalen Gassen Nederland BV | EUR 0,43 million. |

*Article 4*

The fines laid down in Article 3 shall be paid, within three months of the date of notification of this Decision, into Bank Account No 642-0029000-95 (Code SWIFT: BBVABEBB — code IBAN BE76 6420 0290 0095) of the European Commission with Banco Bilbao Vizcaya Argentaria (BBVA) SA, Avenue des Arts/Kunstlaan, 43, B-1040 Bruxelles/Brussels.

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 6,75 %.

*Article 5*

This Decision is addressed to:

AGA AB  
S-181-81 Lidingö

Air Liquide BV  
De Witbogt 1  
5652 AG Eindhoven  
The Netherlands

Air Products Nederland BV  
Klaprozenweg 101  
Noordpoort 1033 NN  
Amsterdam  
The Netherlands

BOC Group plc  
Chertsey Road  
Windlesham  
GU20 6HJ  
Surrey  
United Kingdom

Messer Nederland BV  
Middenweg 17  
4782 PM Moerdijk  
The Netherlands

NV Hoek Loos  
Havenstraat 1  
Postbus 78  
3100 AB Schiedam  
The Netherlands

Westfalen Gassen Nederland BV  
Rigastraat 20  
7415 EW Deventer  
The Netherlands.

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 24 July 2002.

*For the Commission*

Mario MONTI

*Member of the Commission*

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