CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

RESOLUTION (CASE S/0091/08 VINOS FINOS DE JEREZ)

(Non-official Text)

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The Council of the National Competition Commission (Comisión Nacional de la Competencia — CNC), composed of the members indicated above and with Councillor Ms. Pilar Sánchez Núñez acting as Rapporteur, has issued this resolution in enforcement proceeding S/0091/08 VINOS FINOS DE JEREZ, which was initiated with the application for leniency filed by one of the companies involved in what the leniency applicant defines as a cartel. The leniency application gave rise to the opening by the Investigations Division (DI) of this proceeding against *BODEGAS WILLIAMS & HUMBERT S.A.,* BODEGAS GONZÁLEZ BYASS, S.A., BODEGAS LUSTAU S.A., COMPLEJO BODEGUERO BELLAVISTA S.L.U. and ZOILO RUIZ MATEOS, S.L., BODEGAS JOSÉ ESTÉVEZ, S.A., BODEGAS BARBADILLO, S.L., FEDERACIÓN DE BODEGAS DEL MARCO DE JEREZ (FEDEJEREZ), BODEGAS PEDRO ROMERO, BODEGAS CAYDSA, BODEGAS J. FERRIS and the CONSEJO REGULADOR DE LAS DENOMINACIONES DE ORIGEN "JEREZ-XÉRÈS-SHERRY" Y "MANZANILLA SANLÚCAR DE BARRAMEDA, on 15 July 2008 for presumed anti-competitive practices prohibited by article 1 of the Spanish Competition Act 15/2007 of 3 July 2007 (Ley de Defensa de la Competencia — LDC) and article 101 (ex 81) of the Treaty on the Functioning of the European Union (hereinafter, TFEU), in accordance with the aforesaid LDC and the Competition Regulation approved by Royal Decree 261/2008 of 22 February 2008 (hereinafter, RDC).

BACKGROUND FACTS

1. On 28 February 2008 an application was filed with the CNC for exemption from payment of fines by COMPLEJO BODEGUERO BELLAVISTA, S.L.U. and ZOILO RUIZ MATEOS, S.L. (hereinafter, BELLAVISTA and ZRM) (f 1 to 66 of the case record of reference), according to which BELLAVISTA and ZRM together with BODEGAS WILLIAMS & HUMBERT S.A. (hereinafter, WH), BODEGAS GONZÁLEZ BYASS S.A. (hereinafter, GB), BODEGAS JOSÉ ESTÉVEZ, S.A. (hereinafter, ESTÉVEZ), BODEGAS EMILIO LUSTAU S.A. of the Caballero Group (hereinafter,

LUSTAU), BODEGAS ANTONIO BARBADILLO S.A. (hereinafter, BARBADILLO) and FEDERACIÓN DE BODEGAS DEL MARCO DE JEREZ (FEDEJEREZ), have participated in a cartel in relation to the Jerez sherry bottled under a private label, termed BOB ("Buyer Own Brand"), for export to the United Kingdom, Germany, Netherlands and Belgium.

2. On 22 April 2008 a brief was received from BELLAVISTA and ZRM requesting verbatim "that all documentation presented in the framework of the administrative inquiry opened in the CNC Investigations Division in reference to preliminary proceeding DP010/08 BOB be declared to have been withdrawn to give way to subsequent filing of two new differentiated applications for exemption and/or reduction of the fine, one in the name of COMPLEJO BODEGUERO BELLAVISTA S.L.U. and the other for ZOILO RUIZ MATEOS, S.L." (f 171*bis*, *ter* and *quater*).

3. On 22 April 2008 COMPLEJO BODEGUERO BELLAVISTA S.L.U. submitted to the CNC an application for exemption from payment of the fine (f 172 to 313) and ZOILO RUIZ MATEOS, S.L. filed an application for reduction of the fine with the CNC (f 314 a 455).

4. On July 2008 the DI, taking into account that the requirements established in article 65.1.a) of the LDC were met and in accordance with the terms of article 47.1 of the RDC, granted conditional exemption from payment of the fine to BELLAVISTA and ZRM, given that they formed part of the same corporate group belonging to […] in relation to the exemption application filed on 28/02/2008.

5. On 15 July 2008 the DI, pursuant to article 49.1 of the LDC, agreed to open enforcement proceedings for anti-competitive practices prohibited by article 1 of the LDC and article 81 of the Treaty establishing the European Community (TEC), against BODEGAS WILLIAMS & HUMBERT, S.A., BODEGAS GONZÁLEZ BYASS, S.A., BODEGAS LUSTAU S.A., COMPLEJO BODEGUERO BELLAVISTA S.L.U. and ZOILO RUIZ MATEOS, S.L., BODEGAS JOSÉ ESTÉVEZ, S.A., BODEGAS ANTONIO BARBADILLO, S.A. and FEDERACIÓN DE BODEGAS DEL MARCO DE JEREZ (FEDEJEREZ) (f 611 to 646).

6. On 16 July 2008, in accordance with article 40 of the LDC and taking into account criteria of administrative effectiveness, the CNC carried out simultaneous inspections in the offices of WH, GB, LUSTAU and FEDEJEREZ, giving said companies and the association notice at that time of the opening of formal proceeding S/0091/08 Vinos Finos de Jerez. On that same date notice was sent to the rest of the companies targeted by inquiry but not inspected of the resolution to open proceeding S/0091/08 Vinos Finos de Jerez.

7. On 18 July 2008 GB filed an application with the CNC for reduction of fines in case S/0091/08 Vinos Finos de Jerez brought for anti-competitive practices prohibited by article 1 of the LDC and article 81 of the TEC (f 1483 to 1489).

8. From 28 July 2008 to 8 June 2009 the companies involved have submitted numerous briefs in relation to time frames, requests for confidentiality, return of documents and replies to the requests for information issued by the DI. All of these are amply detailed in paragraphs (15) to (89) of the Statement of Objections (SO)

that is included in the Proposed Resolution (PR) brought before the Council by the DI.

9. On 30 March 2009 the DI agreed to expand the 15 July 2008 resolution to open the inquiry to include the companies BODEGAS CAYDSA (hereinafter, CAYDSA), BODEGAS J. FERRIS (hereinafter, FERRIS) and BODEGAS PEDRO ROMERO (hereinafter, P. ROMERO), with notice of this inclusion being notified to the new investigated companies and to the rest of the companies investigated in the case (f 3065 to 3127).

10. On 27 April 2009 the CNC received an appeal from GB against the DI decision of 17 April not to maintain the confidentiality of certain information provided in a statement made in relation to the request filed by that company for a reduction of fines (f 3923 to 3934). The filing of this appeal was notified on 4 May to the rest of the companies under investigation, likewise informing them of the stopping of the clock for resolving the proceeding (f 3943 to 3992). The background information of the case and the DI's report were submitted to the CNC Council on 8 May 2009.

11. On 25 May 2009 the Investigations Division received the CNC Council decision of 22 May declining to admit the aforesaid appeal filed by GB (f 4221 to 4300). After this CNC Council decision was notified to the DI, in accordance with the provisions of article 12.2 and 12.3 of the RDC, on 27 May 2009 the DI notified the investigated companies of the resolution whereby the limitation period began to run again (f 4302 to 4341).

12. On 15 June 2009 the DI resolved to expand the 15 July 2008 resolution opening the investigation to include the CONSEJO REGULADOR DE LAS DENOMINACIONES DE ORIGEN “JEREZ-XÉRÈS-SHERRY”, “MANZANILLA SANLÚCAR DE BARRAMEDA” y “VINAGRE DE JEREZ” (the Regulatory Board for the "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda" wines and "Vinagre de Jerez" vinegar designations of origin; hereinafter, CR or Regulatory Board), and gave notice of the CR's inclusion in the inquiry to the CR itself and to the rest of the companies targeted by the investigation (f 4381 to 4448).

13. On 18 June 2009 the DI approved and gave notice of the Statement of Objections (SO), concluding that the conduct of the accused constituted a violation of article 1.1 of the LDC and article 81 of the TEC, and that the two applicants for the leniency programme fulfilled, in principle, the legal requirements for applying that programme.

14. On 18 June, pursuant to what was indicated in the SO and in accordance with the provisions of article 5.4 of Act 1/2002 of 21 February 2002, and article 33.2 of the RDC, the DI requested that the Andalusian competition authority (the Agencia de Defensa de la Competencia de Andalucía) to issue the legally prescribed non-binding report on the conducts investigated in the case, given that those conducts mainly took place in the Autonomous Community of Andalusia. On 24 July 2009, after an extension of the stipulated time limit, the DI received the prescribed report.

15. The report of the Competition Council de Andalusia (hereinafter, DCA Council) makes a series of points which may have bearing on the application of article 1 of the LDC and article 81 of the TEC.

- The DCA Council states its agreement with the content of the SO, in that the investigated companies engaged in alleged anti-competitive practices prohibited by article 1 of the LDC and by article 81 of the TEC when they adopted the agreements described in the SO. Nevertheless, the report includes a series of observations regarding the Jerez sherry market and on the concept of necessary collaborator. It basically underscores the crisis suffered by the sector and that in the BOB market of private or distributor brands, exports account for an important share of sales, as indicated in the SO (38.2% of total sales).

- The DCA Council cites the changes at work in the international wine market, namely a "process of substitution" of the wines consumed by the population marked by a higher demand for young wines with lower alcohol content; by a competitive situation for Jerez sherry in the international wine market that does not favour its development; and by overcapacity and inelastic demand.

  The DCA Council therefore concludes that there is a situation of plummeting demand and rigid supply that is deepening the overcapacity.

  In this situation, the DCA Council states, operators are relying increasingly each year on sales of wines in the BOB market, which may drive prices down below the normal profitability thresholds on a structural basis. This issue of the profitability associated with the agreements that determine price levels in relation to costs, the DCA Council argues, must be closely studied to establish the exact facts, citing the documentation submitted by the parties.

- The DCA Council also refers to the European Commission Decision of 1994 in case IV/M.400—Allied Lyons/HWE-Pedro Domecq, which applied a narrow definition of the market comprised of the fortified wines produced in the region of Jerez with DO. The European Commission held that Jerez sherry could not compete with sherry-style wines from other regions due to circumstances such as the origin of the product, price gaps and consumer habits. According to the DCA Council, this question must be studied to determine the dimension and characteristics of the market affected by the agreements, in order to assess the attendant responsibilities appropriately.

- The DCA Council report concludes, in the light of the documents in the case record and the gravity of the facts evidenced in the SO, by sharing the DI's view that the investigated companies entered into agreements that fall within the scope of application of article 1 of the LDC and article 81 of the TEC. It also points out that the crisis confronted by the sector is no justification for entering into prohibited agreements, as there are other possibilities for addressing these problems and which are allowed by the applicable laws and regulations, such as individual exemptions from the European Commission based on competition rules or on agriculture rules. Lastly, it states that the penalties will not on their own resolve the sector's structural problems and these will remain in place after this proceeding has been concluded. That is why it advocates considering the possibility of an arbitration proceeding, under article 24.f) of the LDC, and offers to participate in such proceeding, given the special impact it would have inside the Autonomous Community of Andalusia.

16. The replies to the SO were received by the DI from 30 June 2009 to 20 July 2009, and all of them were considered and answered by the DI in the Proposed Resolution (PR).

17. In accordance with article 33.1 of the RDC, on 30 July 2009 the investigation phase of the proceeding was closed, and the interested parties notified thereof on that same date (f 6403 to 6456).

18. On 31 July 2009 the Proposed Resolution was issued, and notified to the accused on 4 August 2009, with the following content:

"In view of the case record, in accordance with article 50.4 of the LDC, it is hereby PROPOSED:

- ***One**. That there be declared to exist collusive conduct under article 1 of the LDC and article 81 of the ECT, in the form of an agreement on prices, limitation of output offered to the market, compensatory system in the supply of products and distribution of customers.*
- ***Two**. That said collusion be classed, for purposes of determining the sanction to be levied, as a very serious violation of article 62.4.a) of the LDC.*
- ***Three**. That the following parties be declared liable for said violation: COMPLEJO BODEGUERO BELLAVISTA, S.L.U. and ZOILO RUIZ MATEOS S.L., BODEGAS GONZÁLEZ BYASS S.A., BODEGAS JOSÉ ESTÉVEZ, S.A., BODEGAS WILLIAMS & HUMBERT S.A., BODEGAS EMILIO LUSTAU, S.A., BODEGAS BARBADILLO, S.L., CAYDSA, BODEGAS J. FERRIS M. C.B., BODEGAS PEDRO ROMERO, FEDERACIÓN DE BODEGAS DEL MARCO DE JEREZ and the CONSEJO REGULADOR DE LAS DENOMINACIONES DE ORIGEN "JEREZ-XÉRÈS-SHERRY" "MANZANILLA SANLÚCAR DE BARRAMEDA", in accordance with article 61 of the LDC.*
- ***Four**. That there be levied the sanction provided for in article 63.1.c) of the LDC for very serious infringements, with a fine of up to 10% of the aggregate turnover of the infringing enterprises in the year immediately preceding the year the fine is levied, taking into account the sentencing criteria established in article 64 of the LDC.*

In addition, pursuant to the LDC and RDC provisions on the leniency programme, and in the light of the case record, it is PROPOSED:

a) That COMPLEJO BODEGUERO BELLAVISTA, S.L.U. and ZOILO RUIZ MATEOS S.L. be exempted from payment of the fine, in accordance with the conditional exemption granted by the DI under article 65.1.a) of the LDC and article 47.1 of the RDC, as said enterprise was the first to submit evidence which, in the DI's opinion, allowed it to order the pursuit of an inspection on the terms established in article 40 of the LDC in relation to the cartel described in the said exemption application, in the market for foreign sale of wines with designation of origin "Jerez-Xérès-Sherry" (Jerez) and "Manzanilla Sanlúcar de Barrameda" (Manzanilla), specifically in the marketing of exclusive-supply wines. Therefore, if at the conclusion of these proceedings COMPLEJO BODEGUERO

BELLAVISTA, S.L.U. and ZOILO RUIZ MATEOS S.L. have complied with the requirements established in article 65.2 of the LDC, the CNC Council, in accordance with the DI proposal, will grant them an exemption from payment of such fine as would be applicable to them.

b) *That the amount of the sanction on BODEGAS GONZÁLEZ BYASS S.A. not be reduced, in accordance with what is provided in article 66 of the LDC and in article 50.6 of the RDC, because, even though after examining the information and evidence presented by the company, the DI concluded that such evidence did contribute significant added value and enhanced the DI's capacity to demonstrate the relevant facts, the DI believes that BODEGAS GONZÁLEZ BYASS S.A. has not complied with the requirement established in article 65.2.a) of the LDC for obtaining a reduction in the amount of the fine.*

Pursuant to article 50.4 of the LDC, this Proposed Resolution shall be served on the interested parties so that they can submit the pleadings they deem fit, within fifteen days, further notifying them that such submissions should contain, if applicable, their proposals as regard the evidence to be considered and complementary actions before the CNC Council, as well as any request for a hearing to be held".

19. On 31 July 2009, after the request for a hearing, the legal representatives of WH and GB were provided with the pleadings submitted by the investigated entities.

20. On 13 August 2009 the CNC received submissions from **BARBADILLO.** The submission asserts that the DI has not refuted its arguments regarding the SO; that the DI has analysed neither the market nor the effects of the conducts examined; that there is no evidence of effects on prices of the BOB wine; and that there is no empirical analysis whatsoever.

According to their assessment, the acts examined do not constitute a continuing offence, so prosecution for the 2001/2004 agreement is time-barred. And with respect to the second period, there is no evidence implicating BARBADILLO in the second part. According to the submission, there is no evidence of BARBADILLO having participated in any anti-competitive arrangement and, in fact, it was expelled from FEDEJEREZ. Nor did it engage in any agreement to boycott GARVEY/RUMASA at the meeting of 23 June 2008.

With respect to the possible aggravating and mitigating factors for calculating the sanction, BARBADILLO alleges legitimate expectation, that it broke the agreement in 2004 and thereby contributed to its dissolution, that there is no illicit gain, that it did not belong to the "hard core" and that BARBADILLO has cooperated with the DI beyond what is required by the LDC.

Lastly, it alleges the "double jeopardy" principle, since 2005, because the differentiated quota and the BOB table are two manifestations of an agreement that has already been sanctioned.

21. On 18 August 2009 the CNC received the arguments submitted against the proposed resolution by **GONZALEZ BYASS.**

The first part of their arguments focus on rebutting the DI's grounds for withdrawing the conditional reduction initially granted in the SO. It argues that GB satisfies the cumulative requirements established in articles 66.1 and 65.2, because it is not true that, according to article 52 of the RDC, GB has not fully cooperated with the DI. Article 52 of the RDC specifies the exact criteria for a finding of lack of cooperation, none of which is incurred in by GB. The DI argues that the duty to collaborate has been breached because the arguments against the SO contradict its leniency statement, which GB denies, claiming there is no contradiction and, if there were, it would not be captured by article 52. Lastly, it asserts that the DI confuses the duty to cooperate with the CNC, with a duty of "adherence", that the reasons expounded by the DI are requirements beyond the scope of article 52 and go beyond the regulated powers of the CNC, and that a duty of "adherence" violates the right of due process.

This implies violation of articles 9.3, 24.1 and 25.1 of the Spanish Constitution and entails, in practice, a veiled equating with no legal basis of the national leniency rules to the European Union rules on settlement of cases.

In relation to the alleged conduct, GB argues that the demonstrated severe crisis of the Sherry-producing District (Marco de Jerez), has triggered a significant drop of GB's sales in the relevant market, a factor which should be taken into account when calculating the base amount of any possible fine. In addition, this is not a single continuing offence, so the statute of limitations applies as regards the violation relating to the first table.

GB's unilateral conduct during the transitional reflection period can in no way be considered to restrain competition, and the actions carried out by GB in the framework of the second BOB table do not constitute an anti-competitive arrangement prohibited by article 1 of the Competition Act 16/1989 and by article 1 of the LDC, and by article 101 of the EC Treaty. As from the breakup of the first BOB table in March 2004, GB's conduct has produced no anti-competitive effects in the market.

It requests a hearing before the CNC Council.

22. On 20 August 2009 the CNC received the arguments submitted by **PEDRO ROMERO.**

According to P. ROMERO, its allegations regarding the SO were not assessed in the PR and its proposed evidence has not been entered in the case file; there is not sufficient evidence to accuse and sanction ROMERO; the company is placed in the diabolical situation of being considered culpable until it demonstrates the contrary. The DI has inverted the constitutional presumption of innocence when it says that "there is no record of P. ROMERO distancing itself from or voicing its opposition to the cartel". In statements by other accused parties it is said that *"P. ROMERO does not attend and, what is more, does not consider itself part of the agreement"*, but the DI maintains its accusation nonetheless. In any event P. ROMERO's participation would not have been significant.

It alleges the existence of a crisis in the sector, as declared by the DCA Council. Levying a fine on P. ROMERO would mean the end of the company and dismissal of its employees.

It proposes that the case be resolved via a termination by commitments, given that sanctions do not resolve the structural problem. It requests an arbitration proceeding (point 38 PR suggested by the DCA Council under article 24.f LDC), and offers to participate, as fines will not contribute to solving the sector's problems.

It requests a hearing before the CNC Council.

23. The **REGULATORY BOARD** submitted its reply to the PR to the DI on 31 August 2009, with the content describe here. The CR argues that actions prior to June 2005 are statute-barred. There is no infringement after 2004 — the contacts that took place do not indicate the existence of an agreement or concerted practice, but actually the absence thereof, as these contacts were frustrated attempts to reach an agreement. That is why there is no continuing offence. The CR's actions in 2005 and 2006 cannot be considered a continuation of the supposed contacts between companies in the period 2000-2004, because they involve different companies and pursue different objectives.

In its opinion, charging the CR is wrong. Its participation was limited and confined to its representative role. It is not an economic operator and has not played its own role, and cannot be considered an infringing party because the LDC does not prohibit “aiding” or “collaborating”. It does not satisfy the requirements of the Treuhand judgment for consideration as a necessary collaborator. Its actions were limited to its functions as professional association organised under public law to represent the economic-sectoral interests of all of the sectors registered in its registers.

As subsidiary argument, it cited the lack of intentionality by CR. It participated in good faith to support its companies in the context of the sector crisis. Its role in 2005 and 2006 was based on the need for renewal of the sector plan.

There is an infringement of the principle of *non bis in idem* (double jeopardy). The CR's role in 2005 and 2006 was already sanctioned in S/2779/07.

The CR claims there is an absence of effects, as the PR has not demonstrated that any existed. The analysis for 2000-2004 is insufficient, and for 2005 and 2006 non-existent. Lastly, the CR argues that there has been no recidivism, no wrongful enrichment and that competition rules do not apply, because it acted under the EU's organisation of the common market in wine (CMO wine), which takes precedence over competition rules.

24. On 31 August 2009 the CNC received a submission from **FERRIS.**

It claims that it did not belong to the cartel; that it only attended three meetings up to May 2004, all called by the CR, without knowing the business to be dealt with. Afterwards, it only attended the meeting of 30 May 2006 called by the CR, whereas the resolution was approved at the meeting of 22 May, which FERRIS did not attend. As for the meeting of 23 June 2008, FERRIS has no record of having attended. It

argues that its presence is based on a statement by CAYDSA, now in the BELLAVISTA and ZRM group, with clear interests in the accusation. At the 10 December 2007 meeting there was talk of agreeing minimum prices but FERRIS did not join in that agreement; nor did it sign the "Gentlemen's Agreement" of May 2006, nor participate in meetings during the "reflection" period.

As subsidiary argument, it claims the non-continuing infringement is time barred, because it lasted until March 2004. There was no agreement, as no e-mails were exchanged; there is no exchange of information; it does not belong to FEDEJEREZ, and could therefore not exchange information with that association. It was neither an active nor a passive participant in the exchange of information and never abided by the minimum price agreement, as demonstrated by its invoices.

As regards mitigating factors, it argues that its non-observance of the minimum prices means there was no effective implementation of the prohibited conducts.

25. On 1 September 2009 there were received the arguments submitted by **BELLAVISTA and ZRM** in relation to the DI's Proposed Resolution:

On the alleged non-fulfilment of the conditions of the programme for exemption from sanctions claimed by other parties investigated in this case. (ESTEVEZ, WH and BARBADILLO). This is based on the little or null evidentiary value of the statements, on the use of coercion to force companies to participate in the infringement and on the non-existence of a corporate group, wherefore BELLAVISTA and ZRM ratify what they have already stated and was assessed by the DI in its response to their positions on the SO which were included in the PR. They are a corporate group, and they have complied rigorously with the requirements established in the LDC and RDC for applicants for exemptions from fines.

On the report issued by the DCA Council, like CAYDSA, they argue that the relevant market should not be defined more broadly, but as it has been defined by the DI in the PR. As for the legal status of the CR and the accusation that it has violated the LDC, they agree with the argument put forth by the DI in the PR on the role of necessary collaborator played by FEDEJEREZ and by the CR. Regarding application of the arbitration proceeding under article 24.f) as suggested by the DCA Council, they do not agree that it is feasible in this case.

On the crisis in the sector, although it is known and admitted by all, it cannot serve as a legal shield for the conducts investigated in this case. The LDC is clear, there is only legal protection under article 4.1, and if this were applicable there would have to also be applied article 101 TFEU. They cite the judgment of the European Court of Justice (ECJ) of 20 November 2008 in the case Beef Industry Development Society Ltd., as follows: *"In fact, to determine whether an agreement comes within the prohibition laid down in Article 81(1) EC, close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain". In that regard, even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that provision. Indeed, an agreement may be regarded as having a*

restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives".

They share the DI's view as to the existence of a single continuing offence, because even though the life of a cartel may have different cycles and "ups and downs", this does not impede or hinder its continuance, above all taking into account that is purpose does not change significantly from one period to another.

With respect to violation of the double jeopardy principle claimed by several of the accused, the three cumulative conditions required by Spanish and Community case-law are not met, namely, that the cases involve the same protected legal interest, the same acts and the same perpetrators. In this case, the acts are not the same, because case 2779/07 solely dealt with three quota agreements and not with the cartel of companies from 2000 to 2008. Nor are the same infringing parties involved.

They are surprised by the investigation and accusation of FERRIS, CAYDSA and P. ROMERO, as they are small operators and the cartel actually sought to take customers away from them.

26. On 1 September 2009 **CAYDSA** submitted the following observations to the CNC in response to the PR:

As with its response to the SO, the company reaffirms its denial of having participated in the meeting of 1 December, although it was in another sector meeting which may have caused the confusion. It asserts that there is no evidence of its attendance, and the allegation is based solely on the word of GB, which in its summary of the minute said that CAYDSA attended.

As for the second meeting, held in June 2008, it argues that it was invited there in order to convey to BELLAVISTA and ZRM the position of the other winemakers in the cartel with respect to the marketing policy. Actually, the meeting was not called to discuss the District, but to use CAYDSA as a channel for transmitting the threats and reprisals which some of the winemakers sought to make against BELLAVISTA and ZRM. Given the close commercial relationship between CAYDSA and BELLAVISTA and ZRM, it is not reasonable to believe that CAYDSA would have attended had it known of the content of the meeting beforehand.

There are no Proven Facts demonstrating that CAYDSA engaged in anti-competitive practices. There was neither explicit nor implied consent. There is no evidence that CAYDSA exchanged information at the only meeting it attended, nor that it entered into agreements. There is no evidence that CAYDSA's commercial policy was not defined independently, all the more so when it was CAYDSA which brought the complaint before the CNC regarding the CR quota circulars.

The impact of the infringement would, as the DI itself acknowledges, have been limited, and, what is more, there are mitigating circumstances. CAYDSA would be the least infringing party of the accused, so if a fine is levied it should be a very small or token sanction. Having regard to the criteria of article 64 LDC, it does not agree with the DCA Council's assertion that the relevant market should be broader than the Jerez sherries with DO for the BOB market; the key characteristics of the sector are the existing capacity, the crisis and demandside inelasticity; negligible role of

CAYDSA in the BOB market, which it entered in 2004; it took a passive stance with limited and sporadic participation; the duration was as from 23 June 2008 and hence only 22 days; or of barely seven months according to the DI's accusation; absence of effects on consumers and economic operators; CAYDSA did not apply minimum prices and thus there are no illicit gains, and there are mitigating factors such as having notified the affected party of the practices carried out against it, CAYDSA's non-engagement in the prohibited conducts, and its active collaboration with the DI. In addition, it requested that the CNC obtain and admit evidence indicating the production figures during 2004, 2005, 2006, 2007 and 2008 and the sale passes for the benefit of the wineries in the Nueva Rumasa Group.

It requests a hearing before the CNC Council.

27. On 1 September 2009 the CNC received a submission from **WH**, with the following content:

The PR does not give sufficient consideration to the arguments submitted on the SO and contains deficient justification. The DI has not acted lawfully in not considering the arguments submitted in reply to the SO. This is probably due to the little time between receipt of the submissions and the time the PR was issued. There is no continuing offence and, therefore, the statute has expired for the 2001/2002 agreement, which, at the most, would have run until March 2004.

WH's right of defence was violated because the DI's office inspection exceeded the bounds established in the Investigation Order and in its Authorisation.

This is not a single continuing offence. The DI makes a forced interpretation of single continuing practice. There are two periods, the first is the agreement that begins in 2001 and breaks off in 2003, and after that there is only a series of contacts that did not yield any agreement, and if any unlawful conduct contrary to the LDC took place, it would have already been sanctioned by the CNC in relation to the CR quotas. In its opinion, the criteria of the Spanish Supreme Court (30 November 2004 Legal Foundation 5) for existence of a single continuing offence are not satisfied, namely that: (i) the persons responsible for the conduct are the same for the various acts attributed to them; (ii) the actions are sufficiently proximate in time; and (ii) there is a preconceived plan or continuing wilful misconduct that extended to both of the actions charged, as part of the same psychological and material process; the repetition of conducts that violate the same law is not sufficient to support the existence of a continuing offence. The DI itself asserts in page 167 *et seq.* that the content of the agreement differed substantially between the two periods.

The 2001-2003/2004 conduct would be time-barred. The content of the contacts was different in the two periods. The leniency applicants themselves have declared that the agreement was only applied in 2001/2002, or that it lasted until 2004 but was followed irregularly by the members. There is even an official date when the agreement was broken off, in March 2004. The facts since 2004 do not demonstrate the existence of an agreement. The case-law requires that there be a meeting of minds, in which an assessment must be made of the real intent of the parties, whether they share the same anti-competitive objective, the strategy and the

behaviours followed by the parties. There are only unilateral conducts, proposals and talks that never materialized into any agreement.

In essence, WH says that the main reason for concluding there is no continuity in the violation "is the long delay between the two conducts" and, what is more, that "neither the participating companies nor the basic elements of the infringement were the same".

As regards the amount of the fine, WH recalls that, as has been pointed out by the DCA Council, penalties will not solve this sector's problems and there are reasons why the fine should not be levied or should be minimal: small market, WH's small share of the European BOB wines market (less than 1%); nil impact given that there have been no effects in the domestic market, as these are export wines, and in the export market the demandside bargaining power cancels out any potential effects of the alleged conducts. Duration: it is incomprehensible why it would begin in May of 2001 for GB and WH and in November 2001 for the rest. The first period would be time-barred and for the second there is no evidence of any agreement prior to 10 December 2007; nor have the rights and legitimate interests of consumers and other economic operators been affected. The difficult situation faced by the sector makes attainment of illicit gains impossible. There have been no aggravating circumstances; whereas there have been mitigating factors, such as the fact that WH ended its involvement long before the proceedings were opened (January 2008). They also claim to have actively collaborated with the DI and cite the grave situation of the sector. Principle of legitimate expectation and absence of culpability in uncertain judicial context. WH is losing money.

It is improper to grant BELLAVISTA and ZRM an exemption from payment of the fine because they do not belong to the same corporate group; they have not presented all of the information and evidence they possess; what they have submitted allowed the inspections to be undertaken but did not demonstrate the existence of an illicit agreement; there are contradictions in their statements: at times they say the agreement reached in 2001 referred to the 2002/2003 marketing year, and at other times to 2001/2002; the two meetings declared by BELLAVISTA and ZRM with WH were for a different purpose than declared. The one on 10 May 2006 was to explain to them the functioning of the sales quota system approved by the CR on 30 May, because since they were not in the FEDEJEREZ they did not know how the quotas worked. As for the 25 April 2007 meeting, the leniency applicants do not clarify the content of the meeting and the trust is that it dealt with Garvey's potential acquisition of certain WH assets and stocks.

First they declare that they were not willing to participate in any manifestly illegal agreement, to then go on to declare that […] in an illegal agreement provided it be done their chosen terms.

A reduction of the fine for GB is not appropriate, according to the DI, but for different reasons, because in its opinion what are not met are the requirements of article 66.1(a), as they have not added value, but there is no contradiction between their declarations and their replies to the SO.

They ask that there be incorporated into the case file the information they attach on the average prices of BOG brands and products in 2004-2008.

They request a hearing before the CNC Council.

28. On 2 September 2009 **LUSTAU** submitted its arguments concerning the DI's Proposed Resolution. The content of those submissions is summarised below:

LUSTAU has not participated in any arrangement to distribute customers or fix prices with the other wineries, and LUSTAU has neither exchanged nor received significant information that may have served to diminish the uncertainty as regards competitive strategies in the market.

A violation is being committed of the principle of "double jeopardy". Liability would rest with the associations, as the supposed practices have been carried out inside those organisations. The CR's actions and regulation gave an appearance of legality to the meetings in which LUSTAU participated; therefore, LUSTAU is not culpable in this respect.

In any event, the practices have had and have no effect on the domestic market nor on intra-community trade. The duration would have been shorter than charged by the DI, and there are mitigating factors which must be taken into account.

They request a hearing before the CNC Council.

29. On 3 September 2009 the CNC received a brief from **COMPLEJO BODEGUERO BELLAVISTA and ZOILO RUIZ MATEOS** (f 7696) informing the DI that the latter is finalizing the purchase by that group of all shares of CAYDSA.

30. On 4 September 2009, the DI submitted its Proposed Report to the CNC Council together with the case file, in accordance with article 50.5 of the LDC.

31. On 7 September 2009 the CNC received the arguments submitted by **ESTÉVEZ** on 2 September.

The submission claims that the meetings with competitors only agreed on the intention not to sell below costs in the context of a structural crisis and large demandside bargaining power. The idea was to reach an agreement that was good for the entire sector; hence the presence of FEDEJEREZ and the CR and with them the appearance of legality and the principle of legitimate expectation.

In the second period no agreement was reached not to sell at a loss, given that some of the operators had a pressing need to sell, even at a loss. This is the case of Garvey, whose approval was absolutely necessary given its importance in the market. If there is no agreement then, in legal terms, there is no practice contrary to article 1 of the LDC and article and 101 TFEU.

From September 2003 to April 2007, ESTÉVEZ did not attend any meetings; there would be no continuing offence and, therefore, the conducts from the first period must be considered to have lapsed.

The DCA Council report, which shares the DI's assessment of infringement of articles 1 and 81, does not give the reason why it concludes an agreement was reached between the accused, an indispensable condition according to consistent

case-law precedents, although it does emphasise the crisis in the sector, which was not denied by the DI.

As for the definition of the relevant market, it must be determined appropriately, and so too the affected market. The same goes for the operators that are present and their position, because at the present time most of the BOB market has gone over to Garvey. Selling at a loss is inefficient in terms of competition, because the companies who do so compete on financial capacity, not on efficiency. There is demandside substitutability with Port, Madeira, Montilla and Marsala, and the geographical market is the EU.

The current structural crisis should be taken into account when quantifying the sanction. It is the sector's crisis that has led to the need for an agreement not to sell at a loss.

There is no single continuing offence. All of the accused, except for BELLAVISTA and ZRM, take the same position on this point. ESTEVEZ does not even accept that there was an agreement in the first period, as do Barbadillo and GB; it admits to attending meetings but claims it did not give its consent, and there is record that at the 24 January 2003 meeting it declined to compensate customers. Therefore, had an infringement existed, it would have come to an end on that day. There was no “real and certain” consent.

As for the concept of agreement, for a single continuing practice ESTEVEZ recalls the concept established in EU case-law with respect to how it should be assessed from the standpoint of competition: the establishment of an agreement requires a meeting of minds, and it is up to the DI to prove it. The participants in the meeting had no intention of going against competition law. There was an intention to agree not to sell at a loss, but this was not effectively achieved. In the second period no agreement could be reached because Garvey was indispensable for achieving one. This involved a potential agreement not a real act. There is no aptness for infringement, according to the former Competition Tribunal (TDC) itself, when the impact on the market is negligible, when there is no fulfilment of the agreement, when the duration is minimal or when the market's structure does not accommodate it, as is the case here given the large demandside bargaining power. The conduct must be assessed as non-collusive and of minor importance.

The DI mixes and confuses the quota meetings with the BOB meetings. They are radically different.

The principle of double jeopardy is being violated. In relation to the sales quota ESTEVEZ only complied with what was regulated by the CR, pursuant to the Regulation approved by the Government of Andalusia.

There was the appearance of a valid right and we are immersed in a long-term structural crisis without precedent. The charges regarding the sales quota should not be mixed in with the others. The appearance of lawfulness and legitimate expectation with respect to the sales quota is unquestionable, as they are backed by the new wording of article 32.1 of the wine regulation.

Breach of the leniency programmes. They endorse the arguments put forth by BARBADILLO, WH and LUSTAU. BELLAVISTA and ZRM do not provide documentation for the first period.

The motivation for BELLAVISTA and ZRM in their leniency application is to eliminate competition, pursuing a sanction against their competitors that will drive them out of the market. They have submitted contradictory declarations: first they say the first agreement was broken before 2003 and then they say it was only one agreement with ups and downs.

32. On 7 September 2009 the CNC received the arguments submitted by **FEDEJEREZ** in response to the PR.

FEDEJEREZ is not liable as it has not played an independent role in implementing the agreement. The DI says that it does not form part of the cartel per se, but acted as an abettor, recognising that the association has neither adopted any decision as an association of companies nor issued any collective recommendation. According to EU case-law, (GC in Cement Makers III), the association will not be liable if (1) its behaviour is indistinguishable from that of its members and (2) it has not played an independent role in implementing the agreement.

Its principal argument is that FEDEJEREZ has not played an independent role and therefore bears no liability in the offence. Nor, as a subsidiary argument, can it be considered an abettor, because it does not meet the requirements established by the General Court (Court of First Instance or GC) in the Treuhand judgment. Nor did FEDEJEREZ perform secretarial functions for the cartel. Given its actions (it attended only 40% of the meetings and did not call 80% of them), it cannot be considered, the same as Treuhand, to have been the party that made the agreement possible. Nor did it act as intermediary, nor try to reach agreements on customers or prices, and it did not inform the companies of instances of non-compliance with the agreement or act as arbitrator.

In any event, they argue that FEDEJEREZ's participation in an alleged anti-competitive agreement would have been very limited in time, from May 2006 to February 2008. They assert that a definition of the affected market is needed. And in relation to calculating the penalty, they recall the criteria of article 64.1 and the fine levied in the Treuhand case.

Lastly, they claim there is a failure to meet the requirements for obtaining the leniency programme in the case of the Bellavista Zoilo Ruiz Mateo Group, basically the non-fulfilment of the duty of loyal cooperation that rests with a leniency applicant.

33. On 23 October 2009, the Council ruled on the questions of confidentiality, evidence and hearings requested by the accused in their submissions in response to the PR, as well as on the stopping of the clock on the investigation.

34. On 3 November 2009 the CNC received new submissions from FEDEJEREZ.

35. On 13 November 2009 the CNC received GONZALEZ BYASS' submissions in response to the Council resolution of 23 October in which the Council decided to

have certain evidence entered into the case record and denied the request for a hearing. They repeat that the key document for the DI on which the continuity is based was not drafted in 2005, without the DI replying to this point. This and other facts that have been ignored by the DI regarding the interruption of the conduct help show that the DI has not guaranteed GB's right of contradiction and right of defence, as the Council claims for denying the hearing. It reiterates the request.

36. On 9 December 2009 the Council issued a confidentiality Resolution in which it maintained the tolling of the limitation period for the eventual ruling.

37. On 23 December the CNC received a brief from P. ROMERO, from GB and from ESTEVEZ making certain points on that Resolution.

38. On 29 January 2010 a confidentiality Resolution was issued, along with a new request for information and the suspension of the limitation period for deciding on the case was maintained.

39. On 8 February 2010 a Resolution was issued for assessment of the evidence.

40. On 17 February 2010 a Resolution was issued lifting the confidentiality.

41. On 19 February 2009 the CNC received a brief from P. ROMERO in response to the assessment of the evidence once again arguing that the unjustified denial of the proposed evidence rendered them defenceless, and repeating their arguments concerning the SO.

42. On 22 February 2010 the CNC received a brief from P. ROMERO making certain points in relation to the CNC Resolution of 8/2/10.

43. On 24 February 2010, CAYDSA presented a brief evaluating the evidence in which it ratified its reply to the SO and concluded that the evidence admitted at CAYDSA's initiative shows the intense commercial relation maintained by the companies in the BELLAVISTA and ZRM group with CAYDSA. The fact is that the larger part of CAYDSA's output over the years 2004 to 2008 was intensely acquired by the BELLAVISTA and ZRM Group, due to the isolation suffered by CAYDSA with respect to the rest of the companies in the sector. For this reason, the only purpose of the invitation to the 23 June 2008 meeting was to be used to convey to the BELLAVISTA and ZRM group the majority's position against them and the actions that could be taken against the BELLAVISTA and ZRM group. At that meeting no anti-competitive agreement was reached, and that is the only one that CAYDSA admits to having attended.

44. On 24 February 20010 BELLAVISTA and ZRM filed, in their assessment of the evidence, a series of arguments mainly focused on replying to the arguments submitted by other accused companies on the PR, more than on assessing the evidence. It again argues that the infringement examined in this case is a cartel and as such is an infringement by object, and therefore, competition authorities are not obliged to demonstrate the existence of effects to show that there is a punishable offence. Regarding the allegations of crisis, it argues that existence of the crisis does not suspend the application of competition rules, and recalls that the unanimous administrative and court praxis, both in Spain and at the EU level, is not to exempt

so-called “crisis cartels” from sanctions. Nor does it believe that delimitation of the relevant market is needed in order to apply 101 TFEU, as the latter only requires that the practices “be found to affect trade between Member States”. It believes that the cartel had the duration charged by the DI, even though there were periods of lack of agreement. As for the role of FEDEJEREZ, it argues that the association was an active promoter of the cartel, and not just an abettor, and notes that article 61 LDC provides that a charge of anti-competitive conducts be brought not just against “undertakings” but also against the persons who run them, and that the conduct could also be regarded as a collective recommendation by FEDEJEREZ. It therefore believes that when weighing the sanction, the role of instigator played by FEDEJEREZ and by its Director General should be viewed as an aggravating factor. And lastly, it focuses on claiming that BELLAVISTA and ZRM had wholly complied with all of the legal requirements to be eligible for the leniency programme, as proposed by the DI, and for the same reasons, recalling that it is article 65.1(a) that applies here, and not 65.1(b).

45. On 24 February 2010 LUSTAU, in its turn to assess the evidence, argued that none of the evidence brought before the Council demonstrated any violation of competition rules by Emilio Lustau, and reiterated the arguments submitted in response to the PR to support its view that there was no infringement and, therefore, that not sanction was in order.

46. On 25 February 2010, in its assessment of the evidence, GB submitted the following arguments. In view of the evidence admitted into the record, BELLAVISTA and ZRM have committed a clear and grave breach of the duty to cooperate established in article 65.2 of the LDC and article 52 of the RDC, which was precisely the object of the evidence proposed by FEDEJEREZ and accepted by the CNC Council. The evidence shows that two persons who worked for the Garvey group from 2001 to 2004 continued, at the time of this investigation, to have ties to the corporate group that applies for exemption under the leniency programme. Therefore, the leniency applicant did have the means to cooperate with the DI in clarifying the facts in the period 2001 to 2004 that were being investigated. The leniency applicant has denied this, claiming that it does not have information from that period, given the corporate changes undergone by the group in recent years. In order to avoid breach of article 65.2(a) the group could have provided interviews with and statements by those two person in regard to that period, given that they discharged functions of responsibility in the export market targeted by this inquiry.

47. On 25 February 2009 FEDEJEREZ submitted its brief assessing the evidence, which was received in the CNC on 1 March 2009, with the same argument as made by GB, explaining that BELLAVISTA and ZRM had breached the requirements of the exemption request. It added that the leniency applicant incurred in contradictions and omissions in the information provided to the DI. In relation to the breach of the duty to collaborate, it adds that BELLAVISTA and ZRM provided a misleading and incomplete response to the CNC's request for information of 5 November 2009, because, contrary to the reply, one of the two persons of reference continued to have ties to the leniency applicants, even though he was on early retirement. They were also inexact, to say the least, in their reply to the requests for information when

they told the DI, in their submission of 13 March 2009, that no company in the group, except for VALDIVIA, had been called to the meetings organised by FEDEJEREZ, when in their very own leniency application they acknowledge having been called to and attended the 22 October meeting at the FEDEJEREZ offices. They have failed to provide the full, continuous and diligent cooperation specifically owed to the CNC by a leniency applicant.

48. On 25 February 2010 WH filed its assessment of evidence, although its actual content does not mention the evidence admitted into the case file but instead repeats that granting an exemption from payment of the fine to BELLAVISTA and ZRM is improper, due to the failure to fulfil the indispensable requirements of collaboration and the need to provide truthful information and not conceal any information. Its second argument focused on the limited value as evidence of the leniency declarations and asserts that the DI's accusations are based exclusively on those statements, without the DI having obtained other evidence to support those declarations. The September 2005 meeting was therefore not evidenced, as it is based on a CR document of that date, and there is nothing to support the conclusion that it was presented to the companies in a meeting at that time, except for the link made by the DI when it relates it to a supposed meeting which the leniency applicant claims was held in the Autumn of 2005. As for the meeting in October 2005, the only evidence consists of the declarations by the leniency applicant. The same may be said of the bilateral meetings of 10 May and 25 October 2006 and 25 April 2007 with WH that were testified to by the leniency applicant.

49. On 9 March 2010 the CR submitted its assessment of the evidence. It reiterates its disagreement with the charge made by the DI and argues that the CNC bears the burden of proving all elements of the alleged infringement beyond all reasonable doubt, which has not been done in this case because there is no evidence of infringement subsequent to 2004, as the contacts after that date were nothing but frustrated attempts to achieve an agreement that was never reached; the CR did not participate in most of those contacts; in the acts of September 2005 and May 2006 the CR acted in favour of promoting and developing the sector; there is no continuing offence, nor intentionality nor effects and, what is more, there has been a failure to take into account the characteristics of the sector. Lastly, it claims that neither the allegations of the other interested parties nor the introduction of additional evidence have made up for the paucity of evidence obtained in the investigation.

50. On 10 March 2010 an Order was issued lifting the suspension of the limitation period.

51. Due to the discontinuation of Mr. Emilio Conde Fernández-Oliva as member of the Council, according to Royal Decree 316/2010 published in the Official State Gazette (BOE) of 16 March 2010, the CNC Council, at its meeting of 17 March, appointed Ms. Pilar Sánchez Núñez as Rapporteur for this case.

52. The Council deliberated and ruled on this case at its sessions of 7 and 21 July 2010.

53. The interested parties are:

- BODEGAS WILLIAMS & HUMBERT *S.A.*
- BODEGAS GONZÁLEZ BYASS, S.A.,
- BODEGAS LUSTAU S.A.
- COMPLEJO BODEGUERO BELLAVISTA S.L.U. and ZOILO RUIZ MATEOS, S.L.
- BODEGAS JOSÉ ESTÉVEZ, S.A.
- BODEGAS BARBADILLO, S.L.
- FEDERACIÓN DE BODEGAS DEL MARCO DE JEREZ (FEDEJEREZ)
- BODEGAS PEDRO ROMERO
- BODEGAS CAYDSA,
- BODEGAS J. FERRIS,
- CONSEJO REGULADOR DE LAS DENOMINACIONES DE ORIGEN "JEREZ-XÉRÈS-SHERRY" Y "MANZANILLA SANLÚCAR DE BARRAMEDA".

FINDINGS IN FACT

This proceeding was initiated with a leniency application by one of the companies involved in what the leniency applicant defines as a cartel. The leniency application gave rise to an inquiry by the DI which has produced, together with the documents describing the sector in which the conducts examined took place and its situation, evidence of the existence of numerous contacts between the competitor companies eventually charged, either in the form of meetings or by other means of communications, such as e-mail, as well as other documents that have established the following facts:

1. PRODUCT INVOLVED IN THE ALLEGED CONDUCTS

The actions analysed in this inquiry are the wines with the designation of origin "Jerez-Xérès-Sherry" (Jerez) and "Manzanilla Sanlúcar de Barrameda" (Manzanilla), specifically the wines supplied exclusively for export under the distributor's brand. These are wines that are not marketed under the brands of the winemaker but under the brands of the final distributor, who acquires the product to sell it in countries that include Germany, United Kingdom, Belgium, Netherlands. The Regulatory Board defines this as the BOB market (Buyers Own Brand), and identifies it in the following terms (f 2565):

"Different criteria for identifying a BOB or private label:

- *Ownership of the brand by the customer/retailer*
- *Exclusivity in use of the brand by the customer/retailer*
- *Relative on-shelf price level*
- *Auction of contracts and occasional change of supplier*
- *Customer control of part of the production process*
- *Existence of a range"*

2. STRUCTURAL CHARACTERISTICS OF THE SECTOR

In its PR the DI gives a description of the sector involved

2.1. Description of the Product

"A preliminary distinction is made between wines with the Jerez and Manzanilla designation of origin (hereinafter, Jerez and Manzanilla DO) by grape growing zone (where the grapevines are located) and wine production zone (where the winemaking facilities are located).

With respect to the grape production zone of these Jerez and Manzanilla DO wines, it is basically located in the province of Cádiz, with some land in the province of Sevilla.

The wines covered by the "Jerez-Xérès-Sherry" designation of origin are basically the following:

a) "Generous" wines: Fino, amontillado, oloroso, palo cortado and raya.

b) "Generous" liqueur wines: dry, medium, pale cream and cream.

c) Natural sweet wine: Pedro Ximénez and Moscatel.

The types of wines covered by the "Manzanilla Sanlúcar de Barrameda" designation of origin, characterised by the microclimate of Sanlúcar de Barrameda, where the wineries must necessarily be located, and the particular aging process for this type of wine (under flor), are the following:

a) Manzanilla fina

b) Manzanilla Pasada

c) Manzanilla Olorosa.

The wine production zone for these Jerez and Manzanilla DO wines is the Sherry-producing District, which includes various towns in the province of Cádiz (Jerez de la Frontera, Puerto de Santa María, Sanlúcar de Barrameda, Trebujena, Chipiona, Rota, Puerto Real and Chiclana de la Frontera), and some land in the town of Lebrija, in the province of Sevilla. The climatological characteristics and composition of the soil in this area are a decisive factor for the maturation of the grape.

The zone forms part, in turn, of the wine producing area of the Autonomous Community of Andalusia, where approximately of 70% of vineyards come under one designation of origin or another (there are a total of six), with a significant portion of the land area occupied by the production of Jerez and Manzanilla wines and Vinagre de Jerez vinegar, with 10,078 hectares (around 38% of the total vineyards in the Andalusia region).

Most of the wineries analysed in the course of this inquiry export BOB products with the Jerez and Manzanilla DO, although out of the total exported, Manzanilla's share is less than 5% in all cases.

The traditional system for making Jerez and Manzanilla wines is "criaderas y soleras", which consists in methodically blending ("rotating") wines with different levels of aging with the aim of perpetuating certain characteristics in the wine that is eventually taken to

market, that is, the system is based on the "rotation" of the stock of wines in the crianza stage carried out each marketing year by the winemakers registered in the DO. Depending on the aging that each winemaker wants to give to its range of wines, a different rotation of its crianza stocks will be required. Therefore, the winemakers size their stocks according to what is required by their respective range of products, although they must observe the minimum aging required by the rules governing the Jerez and Manzanilla DO, that is, three years of aging in wood before being marketed.

According to the system of winemaking described here, the process is as follows: the wine is stored ("aged") in "botas" (butts), which are casks made of American oak with capacity of 600 litres and filled five-sixths full. Each "butt" therefore holds 500 litres of wine. The butts are arranged in rows, on top of each other, with each horizontal row traditionally called a "scale". Butts in the same scale contain wine of similar characteristics and with the same degree of aging. The first scale, closest to the ground, is called "solera" and contains the oldest wine. Wine is periodically taken from the solera and bottled, in a process called "saca" (removal), leaving the container between two-thirds and three-fourths full. The solera is refilled with wine from the second scale, or "criadera", which, in turn, is replenished with wine from the third scale, and so on successively until the last scale, also called "añada", which contains the fresh wine from the year's harvest.

This "running the scales" process requires that the amount of wine being aged of these Jerez and Manzanilla DO wines must be approximately three times as large as the volume taken to market. This is called the "law of the third" and required by the Regulation of the DO as a requisite for authenticity.

2.2. Supply

Since the decade of the 1980s the Spanish market for Jerez and Manzanilla DO wines has undergone a period of restructuring and crisis due to falling demand for those wines, especially in the export segment, which accounts for a majority of total sales (fundamentally to the United Kingdom, Netherlands, Germany and United States, which absorb over 90% of the exports).

This drop in demand glutted the market and the sector has tried to adapt to this situation at the initiative of various authorities, including the Government of Andalusia and the Regulatory Board.

Various structural plans were thus established, such as the 4-year Restructuring Plan from September 1991 to September 1994.

The amount of vineyard has remained practically stable since then at 11,000 hectares. Nevertheless, though output has not grown, from that time until now supply has continued to exceed demand, as exports have been gradually declining since the 1980s, mainly due to changing consumer habits as foreign customers have been switching to other types of wines.

Supply of Jerez and Manzanilla DO wines comes mainly from the following types of bodegas or wineries:

- *"Winemaking" bodegas or "lagares": these wineries are registered with the Regulatory Board for the Jerez, Manzanilla and Vinagre de Jerez DOs, located in the production zones, they press the grapes harvested from the registered vineyards and store the must during its vinification.*

- *"Crianza and dispatch" bodegas or "exporters": these bodegas make wine and market it bottled, with authorisation from the Regulatory Board to offer the wine to consumers. In general, these wineries have a larger production and storage capacity than the "crianza and storage" bodegas or "warehousers" (analysed next) and are more numerous, consisting at present of 64 wineries, most of which are located in the "Upper Jerez Zone", mainly in Jerez de la Frontera (Cádiz)* where 60% of the total land area of the Sherry-producing District is located*. The winemakers investigated in this proceeding belong to this group of wineries.* They can also sell wine to each other.

- *"Crianza and storage" bodegas or "warehousers": these wineries age the wine with the crianza process but they do not sell it bottled. They sell their wines in the internal market. These are smaller in size than the "dispatch" bodegas and fewer in number (14). Most are located in the "Upper Jerez Zone" of Sanlúcar de Barrameda* where 12% of the total land area of the Sherry-producing District is located.

- *Production bodegas: this fourth category of wineries has a lower production volume than the preceding ones, and are located in the production zone, but outside the crianza zone. Their main activity is to obtain wines suitable for crianza and later aging in bodegas in the crianza zone. These producers, registered in their specific Register, often sell their wines directly in the local market and are not subject to quotas, so a winery can sell all of its production in a single campaign.*

The largest volume of Jerez and Manzanilla DO wine stocks are stored in the "crianza and dispatch" bodegas (478,313 butts, that is, 95% of the total stocks at the start of the 2008/09 season), whereas the "crianza and storage" producers have a much smaller volume of crianza stocks (around 25,000 butts, that is, 5%).

In the decade 1991-2001, the total stocks in crianza of these Jerez and Manzanilla DO wines declined 40.3%, as a result of the sector restructuring plan undertaken in 1991. Since then, the volume of stocks stored at crianza bodegas has been slowly declining, and at the beginning of the 2008/09 season (1 September 2008) stood at 503,487 butts, or, what amounts to the same thing, 2,517,435 hectolitres. This is slightly higher than the amount stored at the beginning of the 2007/08 marketing year.

Total sales of Jerez and Manzanilla DO wines amounted to 50,540,694 litres in 2008, some 65% of which were exported to EU countries, led by United Kingdom, which absorbed 28.1% of the total litres exported. Nevertheless, in the last year (2008/09) exports dropped 10%.

White label products (BOB) now account for approximately 60% of the total sales in the sector and most of that goes to the export market (according to the data provided by BELLAVISTA and ZRM, that segment draws around 2,400,000 of the 9-litre cases sold in international markets). Exports currently represent more than 76% of the Jerez and Manzanilla DO wine sector's business.

According to the information in the case record, the wineries in the cartel account for more than 90% of BOB product exports.

2.3. Demand

Recent years have been seeing a change in the consumer habits of the foreign customers of brand wines as they increasingly opt for white label products. This pinches the profits made by companies, given that unbranded wines are less expensive than brand wines.

The demand for these BOB products mainly comes from foreign customers, as the domestic Spanish market is still brand oriented. Those foreign customers consist of large accounts, mainly supermarket chains that wield great bargaining power. The dispatching bodegas, once the wines have been sold to a major retail chain, have little or no say in how they are presented, distributed or promoted, as all of this is left in the hands of the distributor.

The main destination countries for BOB exports are the United Kingdom, Netherlands and Germany and, to a lesser extent, Belgium.

3. ECONOMIC SITUATION OF THE SECTOR

As stated by different operators in the sector, this is a product characterised by oversupply due to sustained lag in demand in recent decades. The CR described the situation as follows in a document from 2005 (f 2564):

"Problems in the BOB segment

- *Continuous FOB price deterioration as a result of:*
  - *i. Excess supply at source*
  - *ii. Absence of entry barriers*
  - *iii. Pressure of retail sector*

(only a small part of the drop in the BOB price is carried forward to the retail selling price)

- *A segment in clear regression (10-12% annual), as a consequence of:*
  - *Lower demand*
  - *Lost sales in retail sector*
  - *Delistings (loss of weight for the category)*
- *Additional problems:*
  - *Segment with no investment in marketing*
  - *Deterioration in the quality offered*
  - *Deterioration in the overall image of the category"*

4. REGULATORY FRAMEWORK

The regulatory framework described in the PR is as follows:

European Community

At the time of the acts investigated here, the product referred to by this proceeding was regulated by Council Regulation (EC) 1493/1999 of 17 May 1999 on the common organisation of the market in wine. Article 41.1 provided that:

> *"In order to improve the operation of the market in quality wines psr [quality wines produced in specified regions] and table wines described by means of a geographical indication, producer Member States, particularly in implementing decisions taken by sectoral organisations, may lay down marketing rules to regulate supply on first marketing, provided that such rules relate to the retention and/or gradual release of produce, to the exclusion of any other concerted practice such as:*
>
> *- price fixing, even for guidance or by way of recommendation,*
>
> *- rendering unavailable an excessive proportion of the vintage that would normally be available and, in general, any abnormal operation to curtail supply,*
>
> *- refusing to issue the national and/or Community attestations needed for the circulation and marketing of wine products where such marketing is in accordance with those rules".*

This Regulation was repealed by Regulation (EC) 479/2008 of 29 April 2008 on the common organisation of the market in wine, which indicates that, to facilitate future incorporation into the Single CMO Regulation (Regulation (EC) 1234/2007 establishing a common organisation of agricultural markets), the provisions of that Regulation should be aligned as much as possible on those contained in the Single CMO Regulation (Whereas 8 of Regulation (EC) 479/2008 of 29 April 2008). In this regard, it should be noted that article 175 of the said Regulation (EC) 1234/2007 establishing a common organisation of agricultural markets provides as follows:

> *"Save as otherwise provided for in this Regulation, Articles 81 to 86 of the Treaty and the implementation provisions thereof shall, subject to Article 176 of this Regulation, apply to all agreements, decisions and practices referred to in Articles 81(1) and 82 of the Treaty which relate to the production of or trade in the products referred to in points (a) to (h), point (k) and points (m) to (u) of Article 1(1) and in Article 1(3) of this Regulation".*

Spain

At the state-wide level there applies the Vine and Wine Act 24/2003 of 10 July 2003, which is the basic regulatory text for vine and wine, within the framework of European Union law, and for their designation, presentation, promotion and advertising. This law spans general aspects of viticulture and viniculture, the protection of wine origins and quality, enforcement provisions and the Consejo Español de Vitivinicultura (Spanish Viticulture and Winemaking Council).

Andalusia

At the regional level, pursuant to the powers conferred upon the government of Andalusia in matters of designation of origin and protection of the quality of wines from that region in the Andalusian Statute of Devolution, on 17 March 2008 there came into

force Law 10/2007 of 26 November 2007 on the Protection of the Origin and the Quality of Wines of Andalusia, which has as its purpose, as stated in article 1:

a) *Regulate, within the framework of the laws of the European Union and the Spanish State, the protection of the origin and quality of Andalusian wines and their indications and designations.*

b) *Promote the quality of Andalusian wines, especially of the quality wines produced in a specified region.*

c) *Regulate the information and promotion of the wines carried on by the Administration of the Government of Andalusia, in accordance with the applicable laws and regulations.*

d) *Regulate the bodies responsible for managing and controlling the wines of Andalusia.*

e) *Establishing the enforcement rules in this area.*

Article 15.4 of the Law provides that management of the designation of origin must be entrusted to a Regulatory Board (Consejo Regulador) in the manner determined in Chapter IV of Title II of the Law.

Lastly, there should be taken into account the Agriculture Ministry Order of 2 May 1977, approving the Regulation of the "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda" Designations of Origin, article 32.1 of which was amended by the Order of 19 February 2007 of the Department of Agriculture and Fisheries of the Government of Andalusia, which came into effect on 8 March 2007. The Regulation of the "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda" DOs establishes the definitions of those designations of origin, the grape varieties, the products covered, production zones, etc.

5. DESCRIPTION OF THE ACCUSED

The description of the accused given in the PR was as follows:

COMPLEJO BODEGUERO BELLAVISTA, S.L.U. and ZOILO RUIZ MATEOS, S.L.

Both companies, owners of "crianza and dispatch" bodegas, on record in the Register of "Crianza and Dispatch" Bodegas of the "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda" Designations of Origin, are part of what has come to be called the Beverages Division of the New Rumasa.

Although these two producers have different core shareholders, the first being 100% owned by ALINDA FINANCE, BV and the second by CALDEN TRADING LTD, they have the same official representatives, as can be seen from the Companies Registry information (f 104 to 134), and according to what was said when the fine exemption application was filed, both are ultimately managed and run by the Ruiz Mateos family.

As stated by the fine exemption application (f 520), the aforesaid companies form part of a single corporate group that follows a single policy in the market, acting

systematically in concert at the economic and commercial level, and the effective control and ultimate decision making power over which rests with […]. In this proceeding, the references to this group of undertakings will be made to BELLAVISTA and ZRM.

On 7 March 2002 BELLAVISTA carried out a merger by takeover with "Garvey Wines S.L.", "Garvey Solera, S.L.", and "Distribuciones Garvey S.A." (BODEGAS GARVEY). At present GARVEY is one of the brands and the trade name of BELLAVISTA, and produces and sells Jerez wines, brandy and other spirits. The brands marketed by BELLAVISTA notably include "Fino San Patricio", "Manzanilla Juncal", "Brandy Espléndido", "Ponche Soto" and "Licor Calisay".

*ZRM was incorporated in 1987 but did not trade until its acquisition on 1 July 2004 of assets (vineyards and facilities) in Jerez de la Frontera from SANDEMAN (*ZRM did not acquire the SANDEMAN brand, so it entered into a charter manufacturing agreement whereby part of the wine produced by ZRM is marketed by SANDEMAN JEREZ under that brand). *ZRM only produces Jerez wines, has its own brands and, what is more, supplies other bodegas with "Jerez-Xérès-Sherry" DO wines. The company owns its own bodegas and vineyards in Jerez de la Frontera, and a group of vineyard-farms that grow grapes specifically for Jerez wine and Brandy.*

NUEVA RUMASA, S.A., incorporated in 1986, takes part in the work of coordination, consultancy and management of the beverages division, which includes, amongst others, the aforesaid winemaking companies. Another member of this group is VINÍCOLA SOTO, which markets its own brands of Jerez wine, although it does not sell white label wine.

The annual sales of BELLAVISTA and ZRM topped 12 million litres, some 70% of which were Jerez wines and the other 30% brandy (f 406 and 407). The percentage weighting of its stocks relative to total output of the Sherry-producing District stood at 13.9% in the 2005/06 season. This corporate group is one of the leading makers of Jerez wine, as it has some 45 million litres of Jerez stock and sold around 670,000 cases in 2007.

This group of undertakings is not a member of FEDEJEREZ. Nevertheless, Bodegas Valdivia did belong to FEDEJEREZ at the time of its acquisition in January 2008 by the Nueva Rumasa Group, although it has not been formally called to the Federation's meetings since 2008. (Bodegas Valdivia was acquired in January 2008 by the group after Nueva Rumasa had purchased the entire Villa del Duque complex, which includes the bodegas themselves and a hotel by the same name, from the Intermonte Group).

BODEGAS JOSÉ ESTÉVEZ, S.A.

Bodegas José Estévez, S.A. (ESTÉVEZ), registered in the Register of Crianza and Dispatch Bodegas of the Regulatory Board, elaborates and ages Jerez wines and brandy, and owns the Félix Ruiz y Ruiz, Marqués del Real Tesoro de 1879, Valdespino, M. Gil Luque and Rainiera Pérez Marín wineries. Bodegas José Estévez S.A. is wholly owned by the Estévez family since 1974.

According to the Regulatory Board for the Jerez, Manzanilla and Vinagre de Jerez Designations of Origin, ESTÉVEZ is the third largest producer of Jerez wines and one of the leading makers of brandy, with aging capacity of 45,000 five-hundred litre butts.

The wine brands marketed by Bodegas Estévez are: Tío Mateo, La Guita (manzanilla), Inocente, Tío Diego and El Candado. It also prepares wine that is later bottled under a distributor's brand or with secondary brands, both for the Spanish market and abroad, in particular, for the Netherlands (DOÑA brand), United Kingdom (with the TESCO, ASDA, WAILTROSE, SPAR and MEDAL brands) and Germany (TIO TOTO brand).

Bodegas Estévez produces wine with the Jerez DO and Manzanilla DO (f 2466) and has been a member of FEDEJEREZ since 28 March 2008 (f 2465).

BODEGAS WILLIAMS & HUMBERT, S.A.

BODEGAS WILLIAMS & HUMBERT, S.A. (WH) was founded in 1877 and registered in the Register of Crianza and Dispatch Bodegas of the Regulatory Board. According to the Regulatory Board for the Jerez, Manzanilla and Vinagre de Jerez Designations of Origin, this is the largest winery in Europe, and produces, ages and markets wine, brandy, vinegar and liquors. It is currently one of the most important ones for Jerez both in the domestic market and internationally, with sales in more than 80 countries.

In 1979 the Netherlands distribution group Ahold acquired a 50% stake in Luis Páez S.A., which in 1995 acquired control of Bodegas Williams & Humbert, S.A. In May 2005, Ahold sold its interest to a company controlled by […] (José Medina y Cía.), which owned the other 50%. Its only current shareholder is Medina AC Portfolio S.L., which is wholly owned by […].

The own wine brands marketed by WH are as follows: Canasta Dry Sack, Dos Cortados, Jalifa, Don Guido, Alegría, Medina Selección and Don Zoilo.

WH also makes wine that is later bottled with distributor labels or secondary brands for Spain and for the international market as well, in particular, the Netherlands (with the brands 887, EUROSHOPPER, CONQUENOR, SOLERA 54, DON Nº1, GALLARDO, HEMA, STEFANO, JM DÍAZ, LOS CISNES, REY DE ORO, ROBERO and BLOEM) and United Kingdom (brands SAINSBURY, ST MITCHEL, REGENCY, LAS CUARENTA).

BODEGAS GONZÁLEZ BYASS, S.A.

BODEGAS GONZÁLEZ BYASS, S.A. (GB) was founded in Jerez de la Frontera in 1835, and is owned by the Jerez family of […]. It makes and markets the following product categories: Jerez wines (Finos, Manzanillas, Olorosos, Amontillados, Pedro Ximénez); other wines (Rioja, Cava, wines from La Mancha, wines from Chile); brandy from Jerez; Chinchón, fruit liquors, creams, etc. At present is sole shareholder is GB Company Limited.

GB has several bodegas that make Jerez wines, such as Wisdom & Water and Croft (acquired in 2001), registered in the Register of Crianza and Dispatch Bodegas of the Regulatory Board for the Jerez, Manzanilla and Vinagre de Jerez Designations of Origin. According to the Regulatory Board, its best known "fino" wine, Tío Pepe, makes it the world's leading winery.

GB markets the following own brand wines: Tío Pepe, Croft Original, Alfonso, Solera 1847, Del Duque VORS, Matusalem VORS and Apóstoles VORS.

GB also makes wine that is later bottled with distributor labels or secondary brands for Spain and for the international market as well, in particular, Belgium (MIGUEL LUQUE), Netherlands (ARANJUEZ, DON AGUSTÍN, DON DIEGO, ESTEBAN, PASADA, EVORA, SOLANA, V. ROMERO, EL COCHERO and PEDRO DIEGO) and United Kingdom (SAINSBURY, MORRISON, DON RAMOS, THE WINE SOCIETY).

BODEGAS EMILIO LUSTAU, S.A.

BODEGAS EMILIO LUSTAU, S.A. (LUSTAU), registered in the Register of Crianza and Dispatch Bodegas of the Regulatory Board, was founded in 1896 and acquired by the Caballero Group in 1990 (the group of companies will hereinafter be referred to as LUSTAU).

The Caballero Group originated in El Puerto de Santa María and Jerez de la Frontera and is mainly involved in making wine (from Rioja, Rueda, Toro, Jerez brandy from Jerez), spirits (for example, Ponche and Crema Caballero, Mangaroca), complemented by real estate and agricultural activities.

The wine and spirits activities accounted for 99.7% of the Caballero Group's total volume of sales in 2005. For Jerez wines, the Caballero Group has two bodegas: LUSTAU (Bodegas Los Arcos) and Luis Caballero (Bodegas San Francisco). LUSTAU owns the following Jerez wine brands: Papirusa, Puerto Fino, Los Arcos, Emperatriz Eugenia, Almacenista Pata de Gallina, East India, Emilín and San Emilio. LUSTAU also produces distributor brands.

BODEGAS ANTONIO BARBADILLO, S.A. (Bodegas BARBADILLO, S.L., as specified by the company itself)

Bodegas Antonio Barbadillo, S.A. (BARBADILLO), registered in the Regulatory Board's Register of Crianza and Dispatch Bodegas, makes wines, brandy and Jerez sherry vinegars. BARBADILLO markets the following own brands: Manzanilla Solear, Oloroso Seco VORS, Manzanilla Saca Primavera, Manzanilla Saca Verano and Manzanilla Saca Otoño. BARBADILLO also makes wine that is latter bottled with distributor labels for international markets, in particular, in Germany (La Caridad), Belgium (Rodiaz and Solana) and Netherlands (PAARDEKOP, COPIAS, SANLUCAR, GLEZ. TABLA, VAROSSIO and DON BENIGNO).

BARBADILLO was one of the wineries in Sanlúcar with the largest sales of fino sherry before the Regulatory Board for the Jerez, Manzanilla and Vinagre de Jerez Designations of Origin approved the latest reform of the Regulation of the "Jerez-Xères-Sherry" and "Manzanilla de Sanlúcar de Barrameda" Designations of Origin, which amended article 15 of that Regulation to exclude Sanlúcar as a crianza zone for fino sherry.

BARBADILLO is a historical member of the ASOCIACIÓN DE ARTESANOS DEL JEREZ Y LA MANZANILLA (JEREZ AND MANZANILLA ARTISANS ASSOCIATION — ARJEMAN), which joined FEDEJEREZ in the second half of 2005. At that time BARBADILLO became part of the FEDEJEREZ Executive Committee until 26 July 2007, when it was expelled from the governing bodies of FEDEJEREZ and from the position it held in the Regulatory Board for the Jerez, Manzanilla and Vinagre de Jerez Designations of Origin. According to BARBADILLO (f 2354), the ARJEMAN association

is no longer part of FEDEJEREZ, although FEDEJEREZ insists that the association is still a member of the Federation.

CAYDSA

The company CRIADORES, ALMACENISTAS Y DISTRIBUIDORES DE VINOS DE JEREZ, S.A. (CAYDSA) is a "crianza and dispatch" winery for the "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda" Designations of Origin. CAYDSA's sole shareholder with 100% of its capital is the "COOPERATIVA DEL CAMPO VIRGEN DE LA CARIDAD", headquartered in Sanlúcar de Barrameda. The said Cooperative has 563 active members and 1,843 inactive ones, covering a cultivated land area at present of 891.45 hectares, with output in 2006 of 9,209,080 kg of grape, the equivalent of 14,812.50 hectolitres. It accounted for 2.80% of the total stocks of the Sherry-producing District in 2006. Some 94% of CAYDSA's business is the production of wines with the "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda" designations of origin, approximately 65% of which it sells under distributor brands.

According to what it told the DI, CAYDSA has not been an active member of FEDEJEREZ since 1998, although it is a "member in good standing". According to FEDEJEREZ, it has not had contact with this winery since around the year 2000, and it does not pay its dues to the Federation. Therefore, even though it has not actually requested withdrawal from the Federation, the winery cannot be considered a member of FEDEJEREZ.

BODEGAS J. FERRIS M.C.B.

Bodegas J. Ferris M., C.B. (FERRIS) was founded in 1975 by […] and markets wines with the "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda" designations of origin. It has facilities in Sanlúcar de Barrameda and in Puerto de Santamaría. According to the information available to the DI, FERRIS is organised as a joint-ownership civil partnership (comunidade de bienes) in the hands of the […] family.

According to the information available to the DI, since FERRIS belonged to the Asociación de Artesanos del Jerez y la Manzanilla (ARJEMAN) and the latter joined FEDEJEREZ in 27 October 2005, FERRIS thus became a member of FEDEJEREZ, even though it voted against ARJEMAN joining FEDEJEREZ and, as recognised by the Federation, has not paid its dues since the beginning of 2008.

BODEGAS PEDRO ROMERO

Bodegas Pedro Romero (P. ROMERO) was founded in 1860 and is 100% owned by the […] family. It makes and markets wines with the "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda" designations of origin. Its facilities are located in Sanlúcar de Barrameda.

This winery has not been a member of FEDEJEREZ since 2 July 2007.

FEDERACIÒN DE BODEGAS DEL MARCO DE JEREZ (FEDEJEREZ)

FEDEJEREZ is a sector association of companies comprised of 25 bodegas in the Sherry-producing District that make sherry brandy, wines and vinegars from Jerez. In particular, this association includes a majority of the Dispatch Bodegas of the

Regulatory Board for the Jerez, Manzanilla and Vinagre de Jerez Designations of Origin, and includes the sherry exporters association, Asociación de Exportadores de Sherry (ACES) (f 7), to which there belong the greater part of the participants in the cartel examined in this proceeding.

The wineries involved in this inquiry that were members of FEDEJEREZ in July 2008, the date the proceeding was opened, are Bodegas Valdivia, WH, CAYDSA, LUSTAU, GB, Estévez and Luis Caballero (owner of LUSTAU) (f 727 to 729). By September 2007 BARBADILLO had withdrawn and around June 2008, according to FEDEJEREZ, FERRIS also left.

According to its Bylaws, FEDEJEREZ is a non-profit federation with its own legal personality and capacity to contract in pursuit of its aims and exercise of its functions (articles 2 and 3 of the Bylaws). The Federation's objectives include, according to article 1 of its Bylaws, managing and defending the interests of its members (f738). According to the FEDEJEREZ Bylaws, the organisation is structured in a Presidency (mainly with representative functions), a General Manager (who represents the association and defends the interests of its members, calls meetings of the association in the name of the President, reports on legal and regulatory changes that may affect the member companies and enforces the decisions of the Executive Committee), the Executive Committee, which meets 12 times a year and a General Assembly, which is called to meet once a year.

In July 2008, the date this formal proceeding was initiated, the executive bodies of the Federation, according to the information provided by FEDEJEREZ (f 726), were as follows:

a) *President: […]*

b) *Director General: […]*

c) *Executive Committee:*

FIRM	***OWNERS***
Beam Global España	*[…]*
Bodegas 501	*[…]*
Bodegas Hidalgo La Gitana	*[…]*
Bodegas Osborne, S.A.	*[…]*
Bodegas Páez Morilla	*[…]*
Bodegas Tradición	*[…]*
Bodegas Williams & Humbert, S.L.	*[…]*
Delgado Zuleta	*[…]*
LUSTAU	*[…]*
GB	*[…]*
Estévez Group	*[…]*
Sandeman Jerez(*)	*[…]*

FIRM	*OWNERS*
Sánchez Romate	*[…]*
FEDEJEREZ	*[…]*

(*) Sandeman Jerez continues to exist as an independent company, although its vineyards and assets were purchased by ZRM.

The Associations registered in FEDEJEREZ as at July 2008 were (f 730):

Associations registered in FEDEJEREZ	
ACES	*Asociación de Criadores y Exportadores de Sherry*
ADUAVI	*Asociación de Destiladores Usuarios de Aguardientes de Vino*
AFEBE	*Asociación de Fabricantes Elaboradores de Bebidas Espirituosas*
ARJEMAN	*Asociación de Artesanos de Vinos de Jerez y Manzanilla*
ASALMA	*Asociación de Empresas de Elaboración y Crianza de Vinos del Marco de Jerez*
ASEGRE	*Asociación de Empresas de Elaboración, Crianza y Exportación de Vinagre de Jerez*
FEVIÑAS	*Federación de Empresas Viñistas del Marco de Jerez*

CONSEJO REGULADOR DE LAS DENOMINACIONES DE ORIGEN "JEREZ-XÉRÈS-SHERRY" Y "MANZANILLA SANLÚCAR DE BARRAMEDA" (CONSEJO REGULADOR)

The Consejo Regular de las Denominaciones de Origen "Jerez-Xérès-Sherry" y "Manzanilla Sanlúcar de Barrameda" (REGULATORY BOARD or CR) is an entity incorporated under public law that represents the interests of all professional sectors on record in its registers: bodega operators, bottlers, warehousers, independent winegrowers and members of cooperatives. It is governed by the Regulation of the "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda" Designations of Origin, approved by the Agriculture Ministry Order of 2 May 1977 (this Order was amended, in article 32.1, by the 19 February 2007 Order of the Department of Agriculture and Fisheries of the Government of Andalusia, which entered into force on 8 March 2007. At present, a Bill is being drafted for a new Regulation of the "Jerez-Xérès-Sherry" and "Manzanilla Sanlúcar de Barrameda" Designations of Origin, as well as for the REGULATORY BOARD, to adapt them to the provisions of Law 10/2007 of 26 November 2007 on the Protection of the Origin and the Quality of Wines of Andalusia).

The fundamental representative and decision-making body of the REGULATORY BOARD is its 21-member Plenum: the President, the General Secretary, a representative of the Department of Agriculture and Fisheries of the Government of Andalusia, nine members representing producers (winegrowers or cooperatives) and nine members representing sellers (all of whom are members of FEDEJEREZ, and

eight of which are from "crianza and dispatch bodegas" and one from a "crianza and storage" bodega).

The Plenum is renewed every four years through a vote by the registered operators,[1] the present members having been appointed in the elections of 2 December 2005, which concluded with the formation of the new Plenum on 17 December of that year.[2]

6. ACTIONS CARRIED OUT BY THE ACCUSED ENTERPRISES

This section gives a chronological account of the different actions carried out by the accused that have been demonstrated during the investigation conducted by the DI.

1992

(6.1) On 8 January 1992, representatives of WH, BARBADILLO and ESTEVEZ, and two other enterprises that did not participate in any of the acts established in this inquiry, met in Jerez de la Frontera and drew up a Certificate of the agreement they had arrived at (f 1104) to permit a recovery of the BOB export prices. The document was obtained in the inspection of WH. As indicated in the PR:

The agreement reached between all of the wineries indicated above was as follows:

a) Fix prices higher and review them at the end of the first agreement period.

b) Exchange information on customers and on the offers presented to them.

c) Monitor the agreements.

As stated verbatim in that certificate:

> *"- Recommend an increase in the BOB market prices of no less than 22%, with a minimum per case of 12 bottles of (…) 1800 pesetas, (…), for the period from 1 January to 31 August 1992.*
>
> *- Freedom to sell and do business.*
>
> *- If any customer of the signatories to this agreement notifies its supplier that another signatory enterprise has made them an offer in breach of what is recommended here, the usual supplier may request from the other enterprise, which shall be obliged to comply, a letter with the terms of the offer, and if the latter is less than the recommended level it will undertake to contact the customer and modify the offer.*
>
> *- The signatories undertake to revise the recommended minimum price of 1800 pesetas next 30 August for the period from 1 September to 31 December 1992.*
>
> *- With the aim of monitoring these agreements, they undertake to meet the first Monday of each month and schedule the next meeting for 3 February 1992 (…)".*

[1] On record in the Registers of article 16 of the 1977 Order that is maintained by the REGULATORY BOARD.

[2] The 22 June 2005 Order of the Department of Agriculture and Fisheries of the Government of Andalusia lays down the rules for renewing the Regulatory Boards of the Designations of Origin Specific to Andalusia. The 2 December 2005 elections were carried out pursuant to that Order.

2000

(6.2) On 15 May 2000 a meeting was held of officers from GB, LUSTAU (CABALLERO GROUP), SÁNCHEZ ROMATE and FEDEJEREZ. The content of the meeting was set out in a document, submitted by GB as part of its leniency application, called "BOB working group. Summary of the 15 May 2000 Meeting" (f 1488), which stated that:

- The said group will work and present the results of its meetings to the rest of the companies in the FEDEJEREZ/Brands Group for the relevant purposes.
- All those present (GB, LUSTAU, SÁNCHEZ ROMATE and FEDEJEREZ) agree that:
  - BOB is 55.5 % of the total sales of 8.3 million cases.
  - The main markets are Holland and Germany.
  - The problem is at its worst for the last 20 years.
  - Creation of an OIA would help, but it is difficult to break the production/sale parity, which does not represent the sherry-producing district.
  - Given current sales levels, stocks should be reduced by 120,000-150,000 butts, accepting a quota of 40%.
  - The debate remains open as to adjusting the quota % to the previous marketing year's sales volume.

2001

In 2001 the CR sent certain operators information on the BOB market of the rest of the operators, thus managing the exchange of information needed to make the calculations that would give rise to the agreed distribution of quotas. In this regard, the following facts have been established:

(6.3) On 23 April 2001 the CR faxed sensitive commercial documentation, which was obtained during the inspection of the WH offices (f 996 to 1000). It is entitled "BOB Project. JE Data" (in reference to the José Estévez winery) and includes four annexes containing:

- Total export sales of brand and BOB products in the triennium 1998-2000 for 5 bodegas (A: Barbadillo, B: WH; C: GARVEY; D: GB and E: RT-Estévez) in the United Kingdom, Holland, Germany and Belgium. The sales of the sixth winery can also be identified.
- The total average sales (not just for export) and BOB sales; the stocks at 1/09/00 (butts). A BOB sales/Total sales ratio is obtained for each winery. The ratio is applied to the total stocks to obtain the quantity that each may sell in the BOB market; this is the 2000/2001 quota (total and BOB).

- The quota thus obtained is the reduced equally for all of them under an agreement to curtail supply (87.9%).
- Annex 4 contains the final quotas and possible adjustments which would be approved by "the four houses".

(6.4) The case record contains various documents discussing the basic parameters of the agreement finally signed in November 2001 by GB, WH, BARBADILLO, ESTEVEZ, FERRIS and GARVEY; specifically, the following documents:

- First type of document dealing with the agreement of 2001. Two copies were obtained during the inspection carried out in WH (f 842 to 845 and 114 to 1116). It is titled "Agreement to regulate the BOB market", dated 2001, and contains the quotas agreed by BARBADILLO, WILLIAMS&HUMBERT, GARVEY/SOTO, GONZALEZ BYASS/CROFT and JOSE ESTEVEZ, later joined by JOSE FERRIS. In aggregate, there were to be 2,759,000 cases for the six, out of a total of 3,088,000 (although the distribution envisaged for only five wineries had more cases for each) (f 844 and 1116). The content is as follows:

  "1. Ensure the supply of BOB Jerez wines in the United Kingdom, Netherlands, Germany and Belgium markets during each marketing year, by means of an absolute volume quota assigned to each house, so that the amount of wine of this type brought to market does not exceed the amount the market can absorb.

  2. Within the limitations established by the volume quota, the wineries undertake not to supply below certain benchmark prices, in order to assure a fair return for each part of the production chain.

  3. For the 2001/2002 marketing year (September to August), the agreed volume quotas and benchmark price are set out in Annex 1. In the ensuring years, both the volume quotas and benchmark prices will be modified by agreement amongst the parties in accordance with the changing market circumstances.

  4. It is agreed to set up two monitoring bodies, which shall meet as often as necessary and with at least the minimum frequency indicated below:

  – Executive Committee: composed of the undersigned person or others of similar standing in each of the wineries. It will meet at least on a bimonthly basis.

  – Commercial Committee: composed of the commercial officers of each signatory winery. It will meet at least once a month.

  Both committees will be supported by a secretary, who will not belong to any of the firms, and who will compile information, do coordination work and, if necessary, arbitrate between the parties.[3]

  5. (…) In order to achieve total transparency between the parties, as an indispensable element for the agreement to be properly monitored, the wineries undertake to share all relevant information of any kind. Specifically, before the start of the 2001/2002 marketing year, the wineries will send the following information to the secretary:

  – Detailed list of BOB labels supplied to the markets covered by the agreement.

[3] Taking into account the functions assumed after the signing of this agreement by the General Secretary of the REGULATORY BOARD, it has been established by the DI that the secretary of the said committees was the General Secretary of the REGULATORY BOARD.

– Detailed list of the supply commitments in effect at the date of the agreement, with information on customers, number of cases, selling price and approximate expiry date of each contract.

6. The undersigned undertake to work to achieve similar agreements in other areas of their commercial activities, with other products and markets of like importance for the respective wineries."

- Second type of document dealing with the agreement. Two copies were obtained during the inspection carried out in WH (f 839 to 841 and 1117 to 1119). It is titled "The Disagreement" and consists of a detailed description by WH of how the agreement was reached and its implications for them. The record shows that in November 2001 a disagreement was reached by the six: GB, RT, BARBADILLO, G, JF and WH. It says that "*the quota assigned to each house is a percentage of the total BOB controlled by the six wineries"; "For the 2001/2002 marketing year, the total BOC "pie" to be carved up and the quotas per winery were as follows:*

HOUSE	***QUOTA %***	***QUOTA CASES***
WH	*35.9 %*	*858,498*
GB	*20.9 %*	*499,794*
GARVEY/SOTO	*9.4 %*	*224,788*
B (BARBADILLO)	*13.8 %*	*330,008*
JOSÉ ESTÉVEZ	*16.1 %*	*385,009*
JF (FERRIS)	*3.9 %*	*93,263*
TOTAL	***100%***	***2,759,000***

Notable in the description given by WH are two significant developments prior to the agreement: GB walked away from the table during the time it was in acquiring Croft, and JOSE FERRIS joined after the initial agreement of five had been reached. WH would have had to forego some 360,000 cases in the allocation had it not suffered the loss of a major customer equivalent to its excess cases.

- Third type of document dealing with the agreement: e-mail and document. A copy of both was submitted by GB in its leniency application (f 1489 and 1491 to 1494). The e-mail titled summary BOB table meeting of 9.11.01 (f 1489) shows that the meeting was held at the CR offices, attended by CR, GB, WH, BARBADILLO, GARVEY/SOTO and ESTEVEZ, and that an agreement was reached on allotment of cases, although not all agreed that it needed to be signed. The document is titled "BOB AGREEMENT". The allotment of cases agrees with the distribution amongst five also contained in one of the versions found in WH. It also contains the following agreement guidelines:

"1. Establishment of the BOB quota in which a quota was assigned to each company for the 2001/02 marketing year in the Netherlands, United Kingdom, Germany and Belgium, based on an assumption of a shrinking market and with the companies to the agreement committing themselves to the volume assigned to them for the said markets.

2. Control of outflows, setting up a monitoring committee that would meet on a monthly basis.

3. For the period prior to 1 September 2001, commitments were established until the marketing year began in September.

4. Control mechanism: a system is established of guarantees enforceable at the time the outflows of any of the companies participating in the agreement exceed their assigned BOB quota.

5. FOB benchmark price: 2,800 pesetas per 9-litre case".[4]

- Fourth type of document. There is a document dated 14 May 2001 obtained in the WH inspection (f 1098) and titled "BOB Project" that sets out in seven points the basic elements of an agreement between competitors, although it does not on its own demonstrate the parties to the agreement:

"1. Establishment of volume quotas for the 2001/02 marketing year.

2. Distribution of customers according to the quota.

3. Definition of the brands of each house that are subject to the quota.

4. Agreement with other Sherry-producing District suppliers.

5. Rationale to use with customers.

6. Monitoring: documentation of files, monitoring committee and operating procedures.

7. Revisions by marketing year:

- Revision of quotas according to evolution of market

- Exchange of quota

- Evolution of customers, etc."

The SO also evidences data on the allotment of the 2002/2003 quotas (f 972).

- Fifth type of document: The document obtained in the inspection of WH (f 1103) contains the sales figures for each of the six wineries (…) in each of the four markets (United Kingdom, Netherlands, Germany and Belgium) at 31 March and what that represents as a percentage of the 2000/01 marketing year.

BOB sales at 31 March 2001						
	United Kingdom	**Netherlands**	**Germany**	**Belgium**	**TOTAL**	***% QUOTA***
Williams&Humbert	80,678	515,674	106,439	770	703,561	*71.07%*
González Byass	96,337	146,837	64,341	17,896	325,411	*56.40%*
Garvey/Soto	12,928	14,123	18,731	12,093	57,875	*22.26%*
Barbadillo	7,300	86,071	55,632	15,180	164,183	*43.21%*
José Estévez	191,972	91,430	0	0	283,402	*63.69%*
J. Ferris	3,947	0	68,525	0	72,472	*67.73%*

[4] The free on board price means the seller takes on all expenses of taking the good to the place of shipment, with the buyer assuming the costs from that point.

Subtotal sales 31/3/2001	**393,162**	**854,135**	**313,668**	**45,939**	**1,606,904**	***58.24%***
% of BOB projected at 31/8	*58.42%*	*64.12%*	*49.09%*	*39.95%*	*58.24%*	
BOB projected Table at 31/8	*673,000*	*1,332,000*	*639,000*	*115,000*	*2,759,000*	
Estimate total BOB at 31/8	*950,000*	*1,340,000*	*645,000*	*150,000*	*3,085,000*	
Total exports at 31/3	*1,587,567*	*1,146,400*	*648,218*	*89,372*	*3,471,557*	
% of sales for 00/01 marketing year	*71.06%*	*56.01%*	*67.21%*	*55.00%*	*64.20%*	

2002

(6.5) On 15 January 2002, according to a summary memorandum titled "Last meeting Regulatory Board 15.1.02" obtained in the WH inspection (f 1102), it is established that a meeting was held in the CR attended by representatives of the CR and officers from WH, BARBADILLO, GARVEY and GB, with discussion of customer relations, prices and compensations, in the following terms:

> *"(...) - Rewe direct Ferris at Ptas. 2,400. Markant below 2,400.*
>
> *- Call […] a […] in November.*
>
> *- […] speaks with […] from ACES, ex Argüeso, on Argüeso offer to Edeka at 1.19 through […] and […]. Wisdom still has to serve 80,000 cases of six. Barbadillo also supplied 30,000 extra 6-cases before September 2001. Real Tesoro has given Lidll.30.*
>
> *- Aldi Germany. Barbadillo has to supply until July and W&H up to April. We also understand that Aldi had the Jerez at 5.99 DM, that is, €3.06. Now they have left it at €2.99.*
>
> *- Superunie has sent letters to Barbadillo and to W&H.*
>
> *- GARVEY and Wisdom have the Norma.*
>
> *- Barbadillo says it wants to grow in England and in the future it aspires to return to or acquire other quality customers in that market.*
>
> *- Evaluation and compensations will be discussed with the management of the companies that are seated.*
>
> *- Dansk Supermarket from 70 cl. to 75 cl. (…)"*

(6.6) On 1 February 2002 a meeting was held on which handwritten notes were taken by WH and obtained in the inspection (f 1095 and 1096). The meeting discussed issues relating to compensations between the companies participating in the cartel (as a function of the excess quota in some of the cartel companies), the customers of each company and the possibility of allowing other companies to join the cartel, specifically LUSTAU, in relation

to which a significant active role was played by the CR General Secretary, as expressly indicated in the said notes:

> *"(…) - Def. customers and brands per market (role of […] each company (…)*
>
> *- Compensation mechanism.*
>
> *- Rationale to use with buyers.*
>
> *- LUSTAU. […] has spoken with […] (...)".*

(6.7) On 2 January 2002, GB and WH meet and prepared a document titled "Summary possible conclusions, Meeting GB-GGB", to send to everyone. This document was obtained in the inspection of GB (f 2659 and 2660), from which the following summary may be extracted:

1. THE SECTOR HAS A SUPPLY-DEMAND IMBALANCE DUE TO
   i. Excess stocks in bodegas
   ii. Lack of spending in communication to curb the drop in demand
2. THE BOB TABLE HAS BEEN THE RIGHT MEASURE TO IMPROVE RETURNS, but
   i. It hangs by a thread
   ii. Impossible to avoid entry by others
3. NEW MEASURES HAVE TO BE APPLIED in the production sector and in sales sector

It concludes that meetings will once again be needed in order to move forward with these measures and study their implementation.

(6.8) In an internal GB mail submitted in its statement (f 2129), there is reference to the meeting of 25 September 2002, called meeting of commercial reps 25/09, in the CR offices. The meeting provided information on the final figures for the preceding marketing year, 2001/2002. The meeting, attended by WH, ESTÉVEZ, GB, GARVEY and BARBADILLO, studied the final figures for the preceding marketing year in terms of the total sales of each company in relation to the assigned quotas, and referred to a future meeting of the "Executive" for 30 September, which "*will first of all take up an analysis of these data and decided how to divide up the pie for the current 02/03 marketing year"*.

A detailed report on this meeting was reflected in the document "Report of the Commercial Table. Regulatory Board of 25 September 2002", obtained in the inspection of WH (f 1107 to 1109). The companies discussed one by one the behaviour of each in relation to prices and customers taking into account the agreements that had been reached. The report says verbatim*:*

> *"The pricing agreement practically begins (with some delay) with the farm year (1 September 2001-31 August 2002) GARVEY, Barbadillo, and Ferris started with low prices. Some of their customers remain low and, in fact, continue being low, as is the case of Barbadillo…*
>
> *We are talking about two price levels and, in a way, about two speeds, depending on the offering winery, the customer and the market:*
>
> *Euros 1.377 to 1.40*

Euros 1.45 to 1.50. (…)".

FERRIS did not attend this meeting, even though it was notified, and its opinion was entered in the record through the CR General Secretary CR (f 1107 and 1008).

(6.9) On 26 September 2002, the CR faxed WH (obtained in the inspection of WH (f 1110)), information on the sales recorded by the six wineries in the four BOB markets, sensitive commercial information that was indispensable for being able to carry out, not just the monitoring, but the compensations as well.

(6.10) On 11 December 2002 the CR General Secretary called a meeting of the BOB Executive Committee, according to an internal GB e-mail submitted in the leniency declaration (f 2123). It was attended by *officers from GB, WH, BARBADILLO, FERRIS and ESTÉVEZ, but not from LUSTAU. The CR as well.* The content was recounted in GB internal mail of the same day obtained in the inspection of GB (f1320), as follows:

"(…)[…] it has not appeared and postpones joining until the next meeting.

• No agreement has been reached on the allotment of quotas. […] presented a table with the projections prepared by each company and another summary chart based on those projections. (I am sending a copy via internal mail) We are practically squared. WH and GARVEY come up short and Barbadillo, Ferris and, above all, Estévez went over.

• There is broad debate. […] recalls that the philosophy and basis of the Table is that each one will trim its sales, giving up cases if necessary and compensating minor deviations. […] does not want to waive cases so as not to share customers (Tesco) and […] wants cases and not compensation. Eventually we agreed that […] will draw up a new chart based on projections and real data for the last two years and we will meet again.

• Compensation. In view of the preceding paragraph, the majority agrees that the compensation should be set as soon as possible so that everyone can do their books. There is broad debate and the proposal is made for study and approval the next day of 75,000 ptas per butt for a deviation of up to 10% of the quota and the rest at 300 ptas per case above the quota. (…)

• Next meeting, initially scheduled for 7 January 2003 at 5.30 (confirm OK)."

2003

(6.11) On 24 January 2003 a meeting was held at the CR offices, attended by officers from GB, FERRIS, ESTÉVEZ, WH and the President of the CR. According to the summary of that meeting ((f2117 to 2122) submitted by GB in the leniency application, the points on the agenda were:

- Exchange of information on sales, cases, quotas and real sales and projections for the following year of each of the companies participating in the cartel.
- Withdrawal of the Rewe offer by FERRIS, and its expectation that the Table would act accordingly. It was remarked that the cases lots there have been lost by the Table.
- Need to maintain the stipulated prices and the famous escape prices (…)".

- The main subject of the meeting was assignment of cases to WH by ESTÉVEZ because it had gone over. It refuses to cede cases although it admits compensation is in order. ESTEVEZ does not share the Table's philosophy, and WH therefore threatens to quit, which is not accepted, because it says it is only in the Table so that its customers will be respected, and it does not want to share those customers.

(6.12) On 18 February 2003 a meeting was held at the CR offices, attended by officers from BARBADILLO, WH, FERRIS, ESTÉVEZ and the CR General Secretary. According to the summary of this meeting (f 2109, 2110, 2666 and 2667) submitted by GB in the leniency application, and obtained during the CNC inspection of the GB offices, the matters dealt with were:

- sharing the BOB market, as well as compensations between the companies participating in the cartel.
- the problems posed by not having all competitors in the cartel, because there are companies outside the cartel that are taking customers away from them. Specifically, Argüeso, for which actions to pressure it are proposed, with some thought even of bringing it into the cartel.
- modifications in the regulation of the Designation of Origin if necessary, such as immediate extension/modification (FEDEJEREZ) of article 32.1.
- precaution when touching a DOMEQ customer who has requested price quotes. BARBADILLO says it has been called. It is agreed that BARBADILLO will be the one to offer the same price as DOMEQ and the rest offer it the escape price. WH and ESTEVEZ say they too have been called.
- A new meeting of the executive committee is called for 20 March.

(6.13) On 10 April 2003, in a GB internal mail with regard to “BOB Table March” (f 102), submitted in the GB leniency application, the following topics are discussed:

- Exchange of information. Figures were handed out on what has been sold through 31 March of the 2002/2003 marketing year in the United Kingdom, Netherlands, Germany and Belgium by each of the following companies: WH, GB, GS (GARVEY/SOTO), BB, JE and JF.
- There will always be a latent threat of the table being broken up by other operators. The goal is to have the cases that we control be sold at the “right price”.
- The idea is examined of raising the price for the upcoming contracts, but “the brand” prices would also have to be increased in order to avoid creating tensions in the market.

(6.14) On 13 May 2003 a GB internal mail (f 2106) submitted with the GB leniency application dealt with the following issues:

- The sales of all “components of the table” have dropped with respect to the past year.

- The prices held firm and they can be raised beginning in September when the contracts are renewed.
- The philosophy behind the table is to sell at the right prices.

(6.15) On 23 July 2003 a meeting was held and attended by BARBADILLO, WH, ESTÉVEZ and GB. According to the summary of that meeting sent via a GB internal e-mail (f 2089 and 2091), and in a handwritten note (f 2088) submitted by GB in the leniency application, the matters dealt with were:

- L. Caballero (LUSTAU) could join in the next marketing year.
- Projections through August for each of them were exchanged. They distributed figures on what had been sold through 30 June of the 2002/2003 marketing year in the United Kingdom, Netherlands, Germany and Belgium by each of the following companies: WH, GB, GS (GARVEY/SOTO Group), BODEGAS BARBADILLO, J. ESTEVEZ and J. FERRIS.
- FERRIS complies with its quota, and ESTÉVEZ must compensate the rest, to which end WH and BARBADILLO request that it assigns cased to them. It declines and a meeting is called for 9 September to allocate the quotas for the 2003/2004 marketing year.
- Threat of the table breaking up, which is in nobody's interest. If ESTEVEZ does not cede ground, the issue is complicated.
- The BOB price level in the four markets has risen. It is feared that the BOB market may continue to decline.
- Everyone believes that a non-aggression pact should be achieved between the brands.

Apart from this meeting, there is evidence of a subsequent conversation between GB and WH to discuss the refusal to cede cases. WH announces that it could to recover the 400,000 cases it has ceded to the table if an agreement is not reached at the 9 September meeting. *"We have to analyse various options to avoid breakup of the table ……this would be disastrous for the sector"*.

(6.16) On 20 August 2003 a meeting was held and attended by officers from BARBADILLO, WH and GB. According to the summary of the meeting in handwritten notes taken by GB (f 2081 and 2082) and submitted by GB in the leniency application, the matters dealt with were:

- Exchange of impression on the BOB table, created by the attitude of RT (Real Tesoro is in the Estévez group).
- Define the stance for the 9 September meeting.
- The table should not break up because that would man a loss of profits, of credibility and of image and the fall of the Jerez sector; RT will not cede cases because they are in a strong position; and continue another year and see the cost of compensation.

(6.17) On 8 September 2008 a meeting had been held between ESTÉVEZ and GB and another one on 28 August between BARBADILLO and ESTÉVEZ, according to a handwritten note (f 2077) submitted by GB in the leniency application. The message is that ESTÉVEZ was saying that the agreement was for only a year and that it will not cede customers.

(6.18) On 9 September 2003 a meeting was held at the CR offices, attended by officers from BARBADILLO, WH, ESTÉVEZ, GB and CR. According to the summary of the meeting sent in an internal GB e-mail (f 2070) and the handwritten notes (f 2071 to 2074) submitted by GB in the leniency application, the matters dealt with were:

- ESTÉVEZ's refusal to give up customers. The results of the price increases and success of the BOB table were viewed positively; the quantities have been controlled and prices relatively.
- WH casts doubts on the benefits for them, as they have relinquished cases and now find there are problems in complying with the agreement, although they admit the mutual benefit of the agreement and their intention to continue, but only if all comply.
- Exchange of information on figures for 2002/2003 and customers.
- Drop of 13% from the first year's quota.

(6.19) On 29 September 2003 a meeting was held by officers from BARBADILLO, GB, FERRIS, WH and the REGULATORY BOARD. According to the summary seen in handwritten notes (f 2066 and 2081) submitted by GB in the leniency application, the meeting dealt with the following matters:

- The external threat from other wineries.
- Pressure ESTEVEZ to reach an agreement: WH was to talk with ESTÉVEZ to tell them that their stance would break up the table.

(6.20) On 14 October 2003 a meeting was held in the CR by GB, FEDEJEREZ and WH, according to a summary sent by internal e-mail in GB (f 2064 and 2065) and submitted by GB in the leniency application, the matters dealt with were:

- That ESTÉVEZ has effectively walked out of the BOB TABLE, by refusing to cede the excess cases it sold (60,000) in the previous marketing year and "compensate" the affected companies (Medina Group) in the current marketing year.
- That its present objective is not to make offers to our customers provided we do not touch theirs.
- GB proposed to continue in the Table, although with one less company, and “everyone said they remained united.”

(6.21) On 1 December 2003 a meeting was held at the WH offices attended by officers from BARBADILLO, WH, and GB. According to the summary seen in handwritten notes (f 2054 and 2058) submitted by GB in the leniency application, the meeting dealt with the following matters:

- A loss of cases was found to exist, possibly due to entry by CAYDSA and VH/ARGUESO. The price increase has to be postponed.
- This was foreseeable, because “the more prices rise, the greater the appetite to jump in by other operators not in the BOB table”. “It is logical, impossible to stop”.
- “The table shouldn't get nervous because it controls a high percentage of BOB”.
- The price offered by other houses is 2,300 Ptas.
- The prices can be raised because there are no potential operators with sufficient supply capacity
- Act on the Wine CR Regulation for the upcoming marketing year.
- Maintain prices in the Netherlands and Germany.
- Try to raise brand prices so that the BOB market can recover.

(6.22) On 22 December 2003 a meeting was held of the BOB Table Executive Committee, according to a summary document obtained in the CNC inspection of the GB offices (f 2668), and in documents and e-mails submitted by GB in its leniency application (f 2049 to 2053. The meeting, held at the GB facilities, was attended by officers from BARBADILLO, WH, GARVEY, GB and the President and General Secretary of the CR, and adopted the following resolutions:

1. “Ratify the intention to continue the BOB table of all of the Houses present, at least until the end of the Strategic Plan (2006).

2. Maintain philosophy of allotting cases according to percentages agreed in the past and with the stipulated compensations.

3. Need to “control” supply of cases to the market: volume and price.

3.1. Control of possible bulk outflows for export and bottling in house (key role of the CR and actions through FEDEJEREZ, Arjeman).

3.2. -Control quotas for operators (bodegas) outside the table and who do not sell BOB. (…)

3.3. Need to amend articles in the New Regulation to be presented to the Board.

4. From the perspective of the CR, J.P. recommends that the table give consideration to:

4.1. Pressuring, informing the associations: FEDEJEREZ and Arjeman so that they convey our proposals to the strategic plan monitoring committee, including the following amongst others:

- *No bulk sale for export during the strategic plan,*
- *Reduce quota by 35% and keep it there throughout the entire Plan (…)*
- *Apply right now the modification of article 32.1 that will be set out in the new Regulation of the Governing Board.”*

(6.23) On 31 December 2003 there is record of telephone conversations being held by GB with BARBADILLO and with WH, respectively. The content of those talks, according to handwritten notes (f 2046 and 2047) submitted by GB in the leniency application, was as follows:

- Tense 22 December meeting with CAYDSA. Threat not to buy their must if they sell at 1.30, so they must withdraw the offer. CAYDSA does not commit.
- BARBADILLO asks CAYDSA to offer at 1.50, and the latter says it cannot sell at those prices.
- BARBADILLO asks GB to talk to CAYDSA for it to withdraw the offer.
- BARBADILLO wants the BOB table to authorise it to lower prices to recover a BOB customer in Belgium that P. ROMER took away from it.
- WH will not do anything that is outside the table.
- Concern because they cannot keep losing cases.
- Agree not to lower prices.
- Wait until the upcoming BOB table meeting in GB on 9 January.

2004

(6.24) On 8 January 2004 there is a handwritten note, submitted by GB in its leniency application (f 2044-2045), titled "SITUATION BOB TABLE (January 04)", and which gives a summary of the following:

- Three important customers (600,000 cases) are managing purchases for 2004 from suppliers not in the BOB table (No B/WH/GB) Yes Argueso/Mariscal/Caydsa
- Retail selling price less than table's
- Stances:
    - o GB. Stick with it; don't drop, if anything increase.
    - o WH. Cannot shed cases, so lower price. The BOB table is falling, with prices, etc.
    - o BARBADILLO. Eclectic position. Cannot keep losing, but willing to stick it out….?
- Conclusions:
    1. Bulk: Talk with CR to see how to do this.
    2. Article 32.1 amendment of Regulation.
    3. Inhibition of cooperatives.

(6.25) For 9 January 2004 there is a handwritten note, submitted by GB in its leniency application (f 2043-2045), on BOB table meeting with presence of GARVEY (JA), WH, BARBADILLO and GB, with discussion of:

1. Review of BOB table issue
2. Visit to CAYDSA
3. BOB table, day 19 GB.

(6.26) On 12 January 2004, in an internal mail in the GB group, submitted by GB in its leniency application (f 2041), there is a brief update of the BOB situation for 2004, after the decision to continue in the table on 15-10-2003. The basic points of the summary are that the increase in BOB prices has caused:

1. Presence of new operators, with offers at prices below the table's.
2. Impossible to control those operations because the CR Regulation does not prohibit them. The JA does not accept that the CR can consider prohibiting bulk exports or modifications of the current Regulation that can control the sales of these new operators, amongst them cooperatives.
3. That cases may continue to be lost.
4. BARBADILLO, WH and GARVEY defend continuing the table.

(6.27) On 13 January 2004, in an internal mail of the GB group, submitted by GB in its leniency application (f 2038), GB states that the loss of customers has been much larger than imagined due to the entry of other operators, including a cooperative subsidised with government money in the market, and that WH, GB and BARBADILLO are meeting daily. It also says: *"(…) The sector, in my opinion, must react energetically and break with the strategic plan because it was unviable from the very start; but unfortunately this is election time and the politicians will not want to do much. (..)*

(6.28) On 15 January 2004, in a handwritten note submitted by GB in its leniency application (f 2031-2032), the following assessment is made under the title "Current BOB Setting": (…)

1. Higher BOB prices thanks to the table and to the strategic plan.

2. Presence of new OPERATORS at prices that undercut the table

3. OPERATORS

3.1. Bodegas with stocks

3.2. " without"

3.3. Cooperatives

3.4. Bulk export

CONCLUSIONS/PROPOSALS

1. Keep table until the last minute, sector image and future strategic plan, but emphasising break with strategic plan

2. Keep pressing the CR/FEDEJEREZ after the elections have passed

(…)

6.29) On 19 January 2004 a meeting took place between WH, BARBADILLO and GB, as indicated in e-mails (f 2028 and 2029) submitted by GB in its leniency application. The meeting analysed the situation of the sector and BARBADILLO and WH's conditions for remaining in the BOB Table:

"(…) WH and Barbadillo hold that they cannot lose cases and therefore in order to continue in the table they propose changing the current objective and strategy of raising prices even though less

cases are sold to one of regaining cases at whatever price. This immediately generates a price war in the market (…) of unforeseeable consequences (…).”

“(…) It is not GB's intention to break up the table, which would in turn break off the Strategic Plan and would push BOB prices down very much, even to the pre-table prices (2,300 Ptas. for example), but to wait a few weeks to assess the loss of cases and of money, movements by buyers, ….

“If the majority decided to undertake this new objective. The proposal would be for us to leave the table … if we have to go to war, do it as an independent company…

(6.30) On 20 January 2004, according to the case record (f 2028) the GB general manager received from his team the proposal to propose to the “*to assure the largest possible number of bases and keep the situation until August 04”*, but without getting into a price war. In his reply, apart from this agreement, he told them as follows:

“*I have spoken with (…) and (…) (president and general secretary of the CR) … the message has been given to them clearly, including the possible end of the sector plan (…) he emphasises that they will block bulk sales and the implementation of article 32. Both ask for greater openness to the cooperatives and that the wineries at least commit to studying the purchase of 10,500 butts of wine held by the cooperatives (…)”.*

(6.31) On 2 February 2004, in an internal GB e-mail submitted in its leniency application (2016), it is indicated that one of their customers in the Netherlands, Laurus, “*(…) confirmed to us that the deal was already awarded and it was LUSTAU. I could not believe it, because this company has sat at the table with us, even though it has not participated in all of the meetings, but we have reached an agreement for several of their customers (Sainsbury and the UK Coop) and they have not been in the BOB market in the last 10/15 years” (…) I called the LUSTAU GM (…) he confirmed that they had accepted the contract because they need many cases. My answer was blunt (…) I asked him to withdraw their offer immediately or we would go to outright war with them. (…).”*

(6.32) On 12 February 2004, in a meeting with BARBADILLO, WH and GB, according to an e-mail (f 2006) submitted by GB in its leniency application, the executive table decided to maintain the table and offer customers not in the table any price to attain cases; don't discuss the reduction of quotas or the question of compensation until 31 August and try during that time to incorporate structural measures into the current Strategic Plan to get it on the right path again; a climate of rupture for nearly everyone.

(6.33) In that same e-mail, with respect to the commercial table a summary was given of a meeting on 24 February 2004 during which ESTÉVEZ called to report that WH was making offers to its customer in the UK (Tesco), which made it think that the “war has begun”. It was also reported that LUSTAU took an important customer in the Netherlands (Laurus) away from GB; that the Manchester cooperative is asking for a price quote and since it is a LUSTAU customer outside the table everyone wants to present offers with lower prices. GB will also be there and the war will have started. In the same e-mail GB poses to its GM the strategy to be pursued on their part.

(6.34) In documentation obtained during the CC inspection of the WH offices (f 2993-2996) there is a document titled Table Situation at 11/2/04". The following can be read there:

"(…) *the prospects for this marketing year are not very promising (…). Of special concern is the entry of cooperatives through Caydsa, due to its sales potential .(…) the table is going to lose several contracts in this year (…). Total of 552,000 [cases]. (…) we know that Mariscal has purchased 1,500 butts from CAYDSA/Caridad ready for bottling and that they are in talks with potential bottlers. (…) there are other wineries that have not entered thus far but could do so at any time (…).*

In the following marketing year, 2004/2005, the table would do around 1,150 thousand cases.(…)

Measures are being considered to try to limit the supply capacity of those wineries with low stocks that are grabbing contracts by lowering prices. Specifically, these measures refer to the ban on bulk exports and modification of article 32.1 so that no winery can sell, between its own quota (now 36%) and the quota purchased from crianza and storage bodegas, more than 50% of its total stocks.

First of all, there is the question of whether these measures can be implemented and with what timing. Second is to what extent will these measures resolve the problems in question.(…)

Another question to consider is the situation with the brand prices. In the Netherlands and Germany, the rise in BOB prices is limited by the prices of the brands (OSBORNE) that do not increase their prices. In the UK, where BOB is sold at a higher price than in the preceding markets, the prices of Harveys and, above all, of Croft (between the two they have a Nielsen of 51%) are making BOB lose share and sales (the market is not growing).

What alternatives can be considered in the current situation, as described above? In theory, two: 1) Implementation of measures that limit the capacity of certain operators in order to maintain the BOB price agreement, or 2) free competition between wineries.

What are the implications of each of these scenarios?

1. *Implementation of measures to limit the capacity of certain operators.*
The only measure that would have real effect on supply would be the quota limitation, so that the overall quota for the sector does not exceed total demand.
And article 32.1 of the Regulation would have to be amended as described earlier. There would be two ways of doing this: one, limit the quota of wineries to 25% and the other, a quota that discriminates between (e.g., based on average sales over last three years) so that the aggregate quota of all wineries does not exceed demand, 25% of the sector's total stocks. (…)

Another drawback of this measure is that wineries such as DOMECQ would be completely against it, with the consequent difficulty of seeing it through.

The differentiated quota would be the best measure for WH as well as for the other major wineries.

In addition to the quota measures, the brands would have to be brought into agreement to raise prices.

2. *Free competition.*
In the scenario of free competition for the BOB market, there will be wineries that have entered recently because the prices are interesting and who will pull out of this business when prices fall below a certain level. But others will defend their businesses and be ready to sell at prices equal to (or who knows if below) their variable cost (to give one specific example, before the BOB

agreement the lowest BOB prices were around €14.28 per case and dropping). The short/medium-term effect of this scenario is a sector-wide decline in BOB prices.

(…)"

(6.35) On 26 February 2004, according to an e-mail submitted by GB in its leniency application (f 2005), LUSTAU approaches GB to inform the latter it will not participate in agreements whose parameters are unknown to it and will not accept threats of dumping. (See preceding paragraph from 2 February).

(6.36) On 9 March 2004 a meeting was held by GB, WH and BARBADILLO, according to e-mails obtained during the CNC inspection of the GB offices (f 1305 and 1306) and submitted by GB in its leniency application (f 1995). In its summary of the meeting, GB concludes that the situation is untenable; that GB has been left alone with GARVEY defending continuation of the table; WH advocates a new strategy of going for cases at whatever price and making no compensation, a philosophy contrary to the table; BARBADILLO follows it in this strategy; it seems that it has been making offers to a customer (Sainsbury) at 1.20, which is disclosed to PR (initials of Pedro Romero???); new meeting of the entire table scheduled for 1 April; "it is possible that WH may plan to lower prices; the table is practically broken and the only thing missing is a "death certificate"" (…)

(6.37) On 15 March 2004, according to documentation obtained during the CNC inspection of the GB offices (f 1307-1312) and submitted by GB in its leniency application (1988-1992), GB assumes that WH and BARBADILLO are going for all of the UK customers and that anything may happen. As a result, various scenarios of individual action are considered.

(6.38) The inspection carried out by the CNC in GB located the July 2004 document "Strategic Plan Change of Course", (f2675-2677). The basic points of this presentation were:

- Production
  - Abandonment and compensation
  - Shared economic effects of all subsectors
- Unstable sector S > D Fall in prices
- Structural mismatch: excess stocks in bodegas
- Reduce stocks (to balance)
  - Through lowered input of grape/must
  - Through system outflows (distillation, vinegar, …)
- Sales quota differentiated by winery
- Quota = average sales of last two marketing years, during the entire plan until the final quota has been trimmed 40% (yrs 2008-2010)

- Raise BOB to 2003 prices to reach 3000 Ptas/case in 3 years.

(6.39) BARBADILLO's submissions include an e-mail dated 24 September 2004 addressed to it by the CR asking it if it is true that it is selling 6-bottle cases at 4 euros, and informing it that the last news the CR had on the market was 12 euros for a case of 12. Then it says: "(…) *we are thinking about calling a meeting of the table to talk about BOB and once again try to sow the possibility of establishing a forum for debate about this very worrisome issue. I would like to know if you would like to participate in this first meeting. Initially, I want to tell Medina [WH], González-Byass, GARVEY, Argüeso, Ferris, E.M. Hidalgo, Hidalgo-La Gitana, Caballero [LUSTAU], Real Tesoro [ESTEVEZ] and I am toying with the idea of Caydsa" (…)*

(6.40) November 2004. Revision Strategic Plan (f 1365-1373). This was a presentation signed by FEDEJEREZ with objectives and measures to be taken, the most important being:

- Reorganise Supply and Demand in the market
- Freeze sales per winery
- Individualised quota differentiated by winery
- 40% quota
- Regulate article 32.1 at 40% stocks
- Measures to limit commercial speculation

(6.41) Dated 1 December 2004 there is a document titled "RESTRUCTURING S.P.", (f 2678-2679), found in the GB offices, and which provides a commentary on the previous document prepared by FEDEJEREZ. The key points are:

- Freeze sales by wineries: differentiated quota.
  "From now on we should never talk about quota, but rather of a percentage of sales assigned to each winery".
- Separation of brands and BOB… This would hinder a comprehensive agreement. It does not seem easy or convenient to open an internal front in wineries.
- Number of marketing years to take into account and the role of stocks in the final formula. "This point must be dealt with jointly and directly with CS from the CR".

(6.42) The CNC inspection of the WH offices found the following document: December 2004. "Proposal of producer sector for Revision Strategic Plan for the Sherry-producing District." (f 979-995). This is a presentation, with the format normally used by the CR for presenting its documents, with proposals for the sector's regulation. The most important points were:

- Elimination of Surplus (not rating or de-rating grape)
- S&D adjustment
- Elimination of stocks in bodegas
- Exact quantification of the wine stocks per winery, by type of wine and age
- Compensate for declassifications

- Remove production limits and establish a production quota for each producer as a function of its land area
- Establish prices that are sufficiently remunerative so that the grape is profitable
- Various measures to ensure quality and origin (Register of unique additions)

(6.43) The inspection of LUSTAU obtained two internal e-mails from 1 December 2004, (f 2400) titled "Second Point of the 29-11-04 Board. The content of the first is transcribed below:

> *"Reference is made to the contacts taking place in the Agriculture Delegation of the Government of Andalusia to reach a sector agreement that resolves both the problems of the cooperatives with their excess and those of the wineries faced with unfair competition.*
> *In this regard, FEDEJEREZ has designed rules to implement that would require a consensus amongst all members of the Sector, including the following:*
>
> • *A cap on annual exports of 40% of the stocks at 1 September of each year, even where purchases are made externally to complete the quota.*
> • *Grub up 3,500 hectares of vineyard to be paid for by the winegrowers and buyers of the must made from those vines.*
> • *Pro rata sales quota system by winery. This proposal will require consensus amongst the different sectors of the winegrowing trade and approval from the Agriculture Delegation of the Government of Andalusia.*
> • *Hold grape and must prices steady with a maximum increase of the real CPI for several years.*
> • *Conduct sales promotion campaigns paid for by all parts of the sector".*

And the second e-mail says:

> *"Below I convey information on the consensus agreement reached in FEDEJEREZ on the "Revision Jerez Strategic Plan".*
> *"FEDEJEREZ has prepared and agreed with all its members a revision of the Jerez Strategic Plan, that basically consists of:*
> *1. Quota system per firm, with the following exceptions requested by us:*
> *a. no limitation on branded business*
> *b. no limitation for institutional BOB customers of each firm*
> *c. no option for increase in BOB*
> *Also, article 32.1 of the current Regulation will be modified, limiting the total outflows from each firm, including its own quota and quota acquired from other wineries, to 40% of the stocks as at the start of each marketing year.*
> *2. Grubbing-up/permanent abandonment of 3,500 hectares of vineyards paid for by:*
> *a. Remaining winegrowers*
> *b. Must buyers*
> *3. Stability in grape/must price relation over next 5 years or cap prices rises at CPI.*
> *4. Greater contributions 3 subsectors plus Administration for "product promotion".*
> *This FEDEJEREZ proposal will require a cross-sector consensus amongst the rest of the subsectors".*

2005

(6.44) On 11 July 2005 an e-mail from CR to FEDEJEREZ, obtained in the CNC inspection at the FEDEJEREZ offices (f 2560), in reference to "REVISION SECTOR PLAN OR RULES FOR MARKETING YEAR" contains the following:

> *"Dear […],*

… in these lines I give you a summary of the topic of reference that I had the opportunity to discuss with GB this past Thursday.

Marketing
… economic improvement can only come via margins, … the most stable measure is price increases. To raise prices the supply of wine to the market has to be curtailed and the solution is a DIFFERENTIATED QUOTA per winery,…. In parallel to this, a marketing table will be set up with room for all companies (if possible all that operate in the BOB market). The differentiated quota would not affect the pure warehousers, who could sell a quota of 35% or similar.
…

Stocks
The previous plan does not reduce stocks, so the ROA can only be improved by shutting off the inflow tap, both own and input from outside sources.

Control of inputs
… reduce the rating level to 8,500 kgs. …
…promote registration inside the Board of vineyards that want to devote themselves to raw materials for producing must concentrate. There can only be interest in this if there is an incentive based on kg of grape and for those who do not replace grape or must, based on passing wine from stocks or quota. This premium should have an end date and when the plan is over those in this segment will have to wake up). …. In my opinion the price would be around 55 Pts. per kg, in line with the average production costs and to allow the vineyard and its asset value to be maintained. A higher price could perhaps force some BOB operators to raise their price or quit, but it has already been seen that they would invent other means for continuing.
….
The idea would be to approve a set of rules for the marketing year in July with a commitment to a revision of the sector plan that would include the differentiated quota and begin to be applied on 1 September 2005."

(6.45) On 11 July 2005, a second e-mail from FEDEJEREZ to CR obtained in the CNC inspection at the FEDEJEREZ offices (f 2562) announced that the upcoming extraordinary meeting of the executive would discuss possible approval of the Sector Plan, and if an agreement is finally reached on the production end, then "the establishment of measures in the marketing part" would be next on the agenda. In this regard, the text of the message says:

"(…) *I understand that this issue along with the BOB table was included in your proposal of points to deal with at our meeting of Thursday at 9:00am, but we would first have to know what work you have done in this field so that we could take up the issue at the extraordinary meeting and eventually make it possible to sign the Plan. The production end is aware of the need to support these measures, but the system has to be known and approved by the wineries".*

(6.46) Together with the previous e-mail another document dated September 2005 was obtained (f 2563-2570). It is a presentation titled "GENERAL POINTS ON THE ESTABLISHMENT OF A JEREZ MARKETING TABLE", prepared by the CR, and summarising the problems in the BOB segment, with a definition of that segment (products, markets and operators), possible avenues for regulation and control and the measures proposed for the marketing end of the business, as well as some considerations. In relation to the proposed measures, it indicated the following (f 2567 to 2569):

"(…) Proposed measures

1. Limitation of supply: Establishment of a maximum quota for volume sales for crianza and dispatch bodegas equal to the average sales of the last three years or to fifty percent of the own stocks (the lowest of these two volumes) (…)

3. Control of dispatches:

- *Register of "supply contracts", with pre-clearance of the labels and of product samples and subsequent monitoring of shipments (…)*
- *Declaration to the Board of the export prices, in order to avoid dumping policies (…).*

5. Other considerations:

- *Need for a table that:*
  - *pacts a "status quo" amongst the main operators*
  - *coordinates the sector response to retailer bids and to the offers of operators outside the table*
  - *monitors the evolution of the BOB segment (prices and volumes)*
- *Need for better documentation and reports to the Board of shipments:*
  - *by brands / types*
  - *including export prices (…)".*

The presentation also included other considerations, making reference to additional difficulties (f 2569):

"5. Other considerations (II)

- *Additional difficulties:*
  - *illegal nature of anti-competitive practices*
  - *discredit of the sector after the recent failure of the previous table*
  - *widening use of Internet bids (anonymous)*
  - *general distrust amongst operators".*

The presentation identifies the participating wineries, taking as criterion those wineries that could supply a contract of 30,000 cases and, amongst this group, the following companies were given specific priority: BARBADILLO, FERRIS, WH, GARVEY, LUSTAU/CABALLERO, GB, EMILIO HIDALGO and ESTÉVEZ (f 2570).

(6.47) On 26 September 2005, a meeting was held of the FEDEJEREZ Executive Committee, composed of representatives from DOMECQ, GB, ESTEVEZ, LUSTAU, OSBORNE, SANCHEZ ROMATE, SANDEMAN WH, HR PEREZ MARIN and the president and general secretary of FEDEJEREZ, the minutes (f 2573) for which record discussion of the following topics:

"3. SECTOR PLAN.-

…it is resolved,
To approve the Sector Agreement with Arjeman and Aecovi and ask the President of the Board that it be included for endorsement on the agenda of the next Plenum of the Board.
3.2 In relation to the Global Plan approved by FEDEJEREZ, the Secretary recalls that once the production area has been addressed, discussion must be resumed on the state and future of the

marketing end, with special emphasis on the sector's current situation, which counsels that the debate and approval process be done with the utmost speed so that, with the current configuration of the Board Plenum we can obtain, under the Agreement cited in the preceding point, the support of the cooperatives, something which is not at all guaranteed as from December given the announced political battle for power in the cooperative sector".

6. REFORM CMO.-
In relation to the reform of the CMO Wine, the Secretary reports:
That the meetings held with the Agro DG suggest that the main enemy is the Commission itself. At this point doubt is cast not just on the aid to distillation but on the very need for a CMO Wine. The only notable positive news was FEDEJEREZ's consolidation as counterpart for the Wine Unit, …"

(6.48) On 17 October 2005 an extraordinary meeting was held of the FEDEJEREZ Executive Committee, composed of representatives from DOMEQ, GB, ESTEVEZ, LUSTAU EMILIO HIDALGO, OSBORNE SANDEMAN WH, and the president and general secretary of FEDEJEREZ, the minutes (f 2571) for which reflect discussion of the following topics:

"1. GLOBAL PLAN. FEDEJEREZ November 2004.-
In relation to the Global Plan approved by FEDEJEREZ, the Secretary recalls the core lines of the Plan approved by the Executive last November. Of all the measures outlined there, to date we have not managed to develop proposals that allow us to take up differentiation of the quota, a quota system for sales or coordinated stances on the BOB market and its continuous fall in prices which is weighing down the potential of the brands and the profitability of Jerez as a whole.
… brief account of the measures adopted in the past, which serve as basis for the debate, after which it is established that, irrespective of other measures that absolutely need to be adopted, the priority should be to agree to a formula for differentiating the quota (freeze on sales).
The Secretary argues the need to demystify the various possibilities that exist for establishing the formula, which include:

.-Establishing a fixed quota for each winery
.-Establishing a range of historical years as benchmark for determining the quota
.-Establishing the time frame for applying the formulas
.-Establishing a correction factor based on sales and/or stocks
The analysis of the situation counsels obtaining exact and transparent knowledge of a series of data (real quota of the sector, FEDEJEREZ quota, ARJEMAN quota, BOB and brands quota, real excess of stocks, etc.), for which purpose the Secretary is authorised to request the data from the Regulatory Board, with a new meeting to be scheduled.

The President takes the floor to stress the importance of the matter, the only responsibility for which rests with this table, and which must be approached with an open mind and the necessary enthusiasm to take up formulas to improve the profitability of Jerez wine, asking the companies to adopt a proactive and encouraging attitude".

(6.49) Similarly, the record contains the oral statements of the first applicant for the leniency programme (f 460-465) that in Autumn of 2005 and October 2005 they met with competitor companies. The first meeting was called by FEDEJEREZ and attended by representatives from WH, GB, BARBADILLO, ESTÉVEZ and GARVEY (the *[…]* had only attended to talk about recovering the past agreement on the marketing table). The GARVEY representative says that although they were interested in reaching an agreement, they did not agree with the rest of the participants on the terms of the accord. There was talk about the pricing behaviour of certain wineries and of the

success of the previous marketing table until it was broken off by ESTÉVEZ. The meeting discussed starting a new table, to which the leniency applicant says it gave its approval provided the agreement was based on stocks and on advertising spending. It declared that the second meeting was held at the GB offices and attended by GARVEY (attending on this occasion were the *[…]* and the *[…]*), GB, WH, and BARBADILLO, but not by ESTEVEZ. The content of the meeting was to reach an agreement to allocate customers and the number of cases amongst the main operators, as well as an agreement to fix prices. The larger groups wanted to retain their customers, ceding none of them; what was sought then was a pricing agreement and a non-aggression pact, with which the leniency applicant declared it did not agree, because they needed to grow, so they proposed distributing customers. The others did not agree and the meeting ended.

These meetings had been confirmed by the *[…]*, who declares (f 466) he arrived in Jerez in October of 2005 and that he and *[…]* met with several wineries to try to resume the 2001 price agreement, but the rest of the wineries had a different approach because they did not want to divide up the market based on stocks and advertising spending, but to instead have each stay with the number of cases they had at the time, as those cases would bring a higher margin. He declares that one of the several meetings of Autumn of 2005 was held in the GB offices, with the absence of E. He talked about a third meeting, which would have been attended by *[…]*.

(6.50) On 22 November 2005 an extraordinary meeting was held of the FEDEJEREZ Executive Committee, composed of representatives from DOMECQ, GB, ESTEVEZ, LUSTAU, EMILIO HIDALGO, OSBORNE SANDEMAN WH, HR PEREZ MARIN and the president and general secretary of FEDEJEREZ, the minutes (f 2579) for which reflect discussion of the following topics:

> *1. "FEDEJEREZ GLOBAL PLAN: DIFFERENTIATED QUOTA*
>
> *In relation to the marketing measures established in FEDEREJEZ's Global Plan (November 04) and having heard the President's report and the Secretary's presentation, it is resolved:*
>
> *1.1. To approve implementation of the differentiated quota with effect for the 05/06 marketing year.*
> *1.2. After closing the aspects regarding the production end, develop the agreements established in the Global Plan giving them the utmost priority with the commitment to concretise them as soon as possible and with the utmost urgency.*
> *There are some aspects that need to be concretised, including the following:*
>
> 1. *Maximum possible volume brought to market*
> 2. *Time range for applying measures for purposes of fixing the quota.*
> 3. *Correction factors:*
>   a. *Aid to brands*
>   b. *Reduction of stocks: formulas that allow overall reduction (maintaining quota fixed over initial stocks), aggregate of individual reductions.*
>   c. *Reduction of sales: Necessary cuts that contemplate lowering sales in ensuring marketing years*
> 4. *Profitability threshold €? quota? 40%?*
> 5. *Possibilities in marketing:*
>   a. *Minimum quota*
>   b. *Maximum quota*

6. *Time period for applying differentiated quota: number of years, target at 3 years and 1 for exit.*
7. *Need for backing from Junta (regional government) to allow funds for diversification.*
8. *Deadline for quick decision*
9. *Request for data from Board:*
   a. *data on each marketing year*
   b. *average last 5 years (outflow 132,000 butts)*
   c. *outflow last year (122,725 butts)*
   d. *overall reduction of 10% to apply in each individualised quota".*

(6.51) On 30 November 2005 FEDEJEREZ sent an e-mail to LUSTAU (f 2402 and 2403), obtained in the CNC inspection at the LUSTAU offices. In relation to the differentiated quota, the e-mail says that:

> *"I continue preparing possible solutions so that the quota can be discussed and approved as urgently as possible. I am counting on you to check the data that you think are needed to discuss the matter in depth; so I would appreciate it if you could make a list of that information."*

(6.52) On 2 December 2005 LUSTAU sent FEDEJEREZ its reply to the preceding e-mail (f2402) obtained in the CNC inspection at the LUSTAU offices, with the following content:

> *"In my reply the information is divided up into several sections:*
>
> *A. Situation by firms:*
> *We need to have the following information per firm:*
> - *Stocks at the start of each marketing year that we will use for the average*
> - *Overall sales in each of the years by firm*
> - *Breakdown between brand and BOB, overall and by country and by firm*
> - *Cost per case of 12 x 75 cl. (to be provided by the firms), in order to calculate the average.*
>
> *B. The 5 most important operators in each country, distinguishing between:*
> - *Brand*
> - *BOB*
>
> *C. Stocks held by*
> - *Operators that belong to FEDEJEREZ and*
> - *Not in FEDEJEREZ*
> - *Quota in both cases*
>
> *D. Sales by country and operator according to C) above*
> E. *Study of the shelf price and the equivalent FOB price. On this point I can help you with respect to the British market. Medina for the Dutch market and Sandemán for Germany".*

2006

(6.53) On 12 January 2006 FEDEJEREZ wrote a note to its members asking them for authorisation so that the REGULATORY BOARD could give them the data needed by the Executive Committee according to point 9 of the 22 November meeting documented above (2696):

> *"The grave difficulties being faced by Vino de Jerez have convinced us that some kind of measure needs to be implemented to boost margins, limiting the supply of wine to the market to permit the right conditions for a recovery of prices.*

The General Secretariat of FEDEJEREZ would like to carry out a detailed study of the sector's situation, with special attention to the evolution of stocks and sales. Toward this end, in this circular we are requesting the permission of all members to request the following data from the Regulatory Board:

1. *Outflows in the last 5 marketing years.*
2. *Evolution of stocks in that period. With a breakdown of stocks held by FEDEJEREZ-member operators*
3. *Current quota of FEDEJEREZ-member operators.*
4. *Breakdown by firm of the sales for each year*
5. *Outflows by country and list of operators ordered by size in the biggest markets*

In addition to the above data in the possession of the Regulatory Board, we believe the following data are needed for each company:

A) Breakdown by brand and BOB, global, by country and by firm
B) Cost per case of 12 x 75 cl. in order to calculate the average.
C) Study of the shelf price and the equivalent FOB price, to be provided by the top operators in the main markets: Spain, UK, Germany, Belgium and Netherlands.

We are awaiting the authorisation and information of each member individually, and ask that it be sent within 10 days, with assurances that the information will be treated confidentially in the study phase. It is possible that as a consequence of the analysis of the information, the data may have to be treated internally in an ad hoc committee, in which case, the General Secretariat will guarantee their transparency, dissemination and proper handling."

(6.54) That same 13 January 2006, in an e-mail obtained in the GB offices during the CNC inspection (f 2695), the GB representative on the ad hoc committee set up for these tasks wrote to GB officers to send them the FEDEJEREZ note and tell them:

"I attach confidential data requested by FEDEJEREZ in order to formulate a strategy for the sherry district that allows a recovery in BOB prices by propitiating measures to regulate sales as a function of:

- *Stocks and sales of the last 5 years.*

I ask for your analysis and that you tell me if you see any drawback to sending this information; (we —GB—) will be on the ad hoc committee mentioned at the end).

As you can see, the 10-day period is from 12 January 06, so I ask that you send it to me as soon as possible. Thanks".

(6.55) Together with the above documentation, the inspection in FEDEJEREZ turned up a document signed by "Coordination CR-FEDEJEREZ" with the title "PRIORITIES 2006" (f 2581-2588), that sets out as objectives:

- *Improve coordination*
- *Undertake the projects jointly*
- *Defend joint positions*
- *Avoid duplication*
- *Streamline formalities*

The priorities include the Sector Plan and the legal framework. The sector plan includes the differentiated quota and the Marketing Tables, and the legal framework includes the

Regulation. The document, prepared in presentation format, ends with a work plan that includes "work meetings for the strategic plan at least every 15 days".

(6.56) On 20 February 2006, an extraordinary meeting was held of the FEDEJEREZ Executive Committee, composed of representatives from BARBADILLO, DOMECQ, DELGADO ZULUETA, GB, ESTEVEZ, LUSTAU/CABALLERO, HEIR DE ARGÇÚESO, HIDALGO-LA GITANA, OSBORNE, SANCHEZ ROMATE, SANDEMAN, VALDIVIA, WH, HR PEREZ MARIN and the president and general secretary of FEDEJEREZ. The minutes (f 1063), obtained in the inspection of WH, indicate the following matters were dealt with:

> ***"1. SALES QUOTA BY BODEGA.-***
> *In relation to the sales quota and the various formulas presented by the Secretary, it is resolved to:*
> *Establish the following as general principles for establishing the formula for freezing sales:*
> *1.- Freeze sales by keeping the overall sector sales at the overall figure from the preceding marketing year, by establishing a quota per winery.*
> *2.- The horizon considered is 5 years, with a projected decline in sales of 4%.*
> *3.- The formula should include a weighting of stocks and will include the objective of giving some type of reward for their reduction, either during the course of the plan or when it ends. It is estimated that the annual reduction should be on the order of 40,000 butts, and incentives must provided for this through the reduction of production area and yields.*
> *4.- It should also include a mechanism that allows annual adjustments.*
> *5.- The 40% quota goal cannot be renounced.*
> *6.- In addition, the procedure for trading rights from winery to winery will have to be specified, establishing a formula for exit from the plan and promoting the quota allocation system of article 32.1.*
> *7.- It is understood that the formula's application cannot be made homogenous and it must therefore contemplate the existing singularities.*
> *8.- As for the implementation calendar, maximum priority will be given to the talks so that once an agreement is reached the possibilities of its immediate application can be contemplated".*

(6.57) On 20 March 2006, in an e-mail obtained in the inspection (f 1054), FEDEJEREZ sends LA GUITA, WH, GB, B, ESTÉVEZ and LUSTAU the following information:

> *"Thanks to […] I have the pleasure of enclosing the quota calculations that were presented to us last Tuesday as a function of different variables. I ask that you please analyse it for next Tuesday's meeting.*
>
> *In addition to the above formulas, I am sending you a formula we have prepared from the results of the committee's work, the variables for which are: 1. Use of the moving average of three years.*
> *2. Consideration of the quota at 36% for year 1 with increases of 1 point per year until reaching 40%, according to the document approved by the Executive.*
> *3. Decreasing weight of factor 1: average sales, with weighting of 80% in the year and growing weight in the formula of factor 2: quota, weighting of 20% in year 1.*
> *4. Linear correction, based on the difference between the 36% quota prevailing in year 1 and the real quota of the preceding year (22% in year 0); therefore, in year 1, 36%-22%=14%, that is, a correction factor of 0.86.*
> *5. A novelty is introduced with an "adjustment premium", that takes into account the evolution of stocks and sales; so as to reward alignment of stocks with the sales trend and vice versa: (Evol.Stocks./Evol.Sales)/100.*
> *In line with the above, the resulting quotas are capped at 40% above, with a floor of 22%.*

The result of applying this gives a sector quota for year 1 of 130,100 butts, with an exporter purchasing requirement shortfall of 9,343 butts, which would be fully covered by the quota available to warehousers (10,198 butts).

Given the absence of […] I have considered including WH in the Committee. After meeting with its officers this past Thursday, we arranged they would send us the formulation for analysis before the meeting scheduled for next Tuesday".

(6.58) On 6 April 2006, in an e-mail obtained in the inspection of WH (f 962), FEDEJEREZ sent LA GUITA, WH, GB, ESTÉVEZ, LUSTAU and BARBADILLO the proposal submitted by WH for a differentiated quota, and the result of the differences seen during the previous Tuesday's quota meeting (4 April) regarding trimming supply to demand; 5 were in favour and 1 opposed; regarding fixing the legal quota at 37%, 5 in favour and one opposed; regarding the 80/20 weighting of stocks, 5 for and 1 against; and regarding the average sales of last 5 years and a correction ratio of 93%, 5 in favour and 1 against; regarding:

"5) GIVING CONSIDERATION TO SINGULARITIES OF CERTAIN PRODUCER-WAREHOUSER GROUPS
YES=2
NO=3
EXPORTERS WHO SELL LITTLE (AND WHO MOVE IN A RANGE OF BETWEEN 6% AND 10%)
YES=4
NO=2
EXPORTERS WHO HAVE ADJUSTED AND SELL ALL OF THEIR QUOTA
YES=3 (HERE THE POSSIBILITY IS INTRODUCED OF TYING THEM TO THE BRAND)
NO=3
6) MOBILITY OF THE FORMULA
YES=4
NO=2
7) ESTABLISH UPPER
LIMITS
YES=6
NO=0
LOWER LIMITS
YES=1
NO=5"

(6.59) On 7 April 2006 the inspection of WH obtained information (f 1024) on the quotas meeting 7/4/06, between LUSTAU, BARBADILLO, WH and ESTEVEZ.

(6.60) On 24 April 2006 a meeting was held of the FEDEJEREZ executive committee, composed of representatives from BARBADILLO, DOMECQ, DELGADO ZULUETA, GB, ESTEVEZ, LUSTAU/CABALLERO, HIDALGO-LA GITANA, OSBORNE, P. ROMERO, SANCHEZ ROMATE, SANDEMAN, VALDIVIA, WH, HR PEREZ MARIN and the president and general secretary of FEDEJEREZ, the minutes (f 2589) of which, obtained in the FEDEJEREZ inspection, indicate the following matters were dealt with:

"[…] recalls the main lines of the presentation of the Master Plan, dwelling on the aspects that bear relation to the meeting agenda, specifically;
2.1 Impart greater dynamism so the issues do not go on forever.

2.2 Reaffirm the executive nature of this Committee
2.3 Strengthen and optimise Affiliates-Federations and Federation-Affiliates relations
2.4 Redefine the Committees
2.5 Strengthen Associations

3. REDEFINITION OF COMMITTEES
Pursuant to the terms of the Master Plan and in relation to the necessary adaptation and optimisation of the Federation's work committees, it is resolved to:
3.1. Approve a new work system proposed by the Director, so that proposals be brought before the Executive for a decision, after the individualised issues have been analysed in ad hoc committees
3.2. Authorise the Director to define the composition of the new committees and appoint a Chairman for each of them, who will be responsible for reporting to and informing the Executive Committee and the committee members.
3.3. Approve the appointment of Sandeman and Domecq to chair the Technical Committee Economic Committee, respectively.

4. SECTOR PLAN. FEDEJEREZ STRATEGIC PLAN
In relation to the development of the Sector Plan, the Director reports:
4.1 In relation to the price agreements reached for 05/06, a summary of the conditions and key aspects and congratulations for the magnificent agreement reached.
4.2 Contacts have been established with the production end to place them in a different framework, aimed at shortening the time frame and raising awareness that though consensus building is desirable, it cannot be what sets the pace of a sector of the economy.
FEDEJEREZ has won a position of consolidated leadership with the integration and the elections to the Board, and is ready to exercise that leadership.
4.3 A report was also given on the main lines of the Strategic Plan approved by FEDEJEREZ in November 2004, recalling that it is the basis for all sector negotiations, both on the production and on the marketing end.
4.4 As indicated in the preceding point, and as a result of the meetings of the quota study committee held over the last four months, the Director sets out the conclusions reached (average sales of last five marketing years, capped above —37%— and below —this opens several possibilities that need to be concretises— accept some differentiation for storage bodegas, etc.). Once the committee's work is done, a formula will be proposed for discussion in the Executive in order that it be processed immediately by the Regulatory Board, although its projected entry into force would be 1 September 2006.
4.5 In addition to the above, it is important that FEDEJEREZ set the pace for the reform of the DO Regulation. The Director proposes the creation of an ad hoc study committee that can analyse the available documents; Version Revised in FEDEJEREZ and reformed version proposed by the study committee to the Board.

(6.61) On 2 May 2006, a meeting was held by WH, GB, LUSTAU, LA GUITA and BARBADILLO, according to e-mails obtained in the inspection of GB and of WH (f 960 and 961 and 2699). At the meeting there was discussion:

- in relation to the quota, of the formula, the caps and floors, of the correction factor and of the criteria, and of the support for each of the concepts shown by the persons in attendance.

And the e-mail sent on 3 May added one more topic: the fact that one of the parties in the group was making offers to Estévez customers in the United Kingdom at €0.76 per bottle for three years, as a result of which Estévez stated its intention of not sitting down

at the table again to talk about supplyside restrictions. The FEDEJEREZ Director General expressed his total rejection of this situation and the uneasiness caused given the work carried out during more than a year and a half to help boost the companies' profitability. He says that the situation has been reported to the President and to the REGULATORY BOARD.

(6.62) On 3 May 2006, in an internal GB internal mail obtained in the inspection (f 2699), the following was reported:

> "*1.- For your information, I ask that you take a close look at the e-mail from […] It seems certain that the company that made a very low-priced agreement for 3 years is Barbadillo ([…]).[…] denied in a small study committee that it was him, despite the complaint by […] who did not attend that meeting as a result.*
> *This has now become more entangled because a quota agreement seemed necessary before "the BOB table" could be formed and this situation will make it hard to reach agreements.*
> *We nevertheless keep working for the approval of what is indicated by […] below and has a quotas meeting scheduled for the 16th to conclude the formula to present in the Executive Committee meeting of 22-6-86.*
> *2.-I am mailing you confidential information on the Jerez companies that we are using with their sales data for the last 5 years and stocks at 31-8-85.*
> *3.- […] on 6-Jun-06 there is an opportunity in Paris (through the ICEX—Spanish Foreign Trade Institute) to promote our vinegar. I ask that you contact […] if we are interested in being there that day.*
> *Cheers"*

(6.63) On 10 May 2006, according to statements of the first leniency applicant, BELLAVISTA and ZRM met with WH at their offices to negotiate how to arrive at an agreement (f 464).

(6.64) On 15 May 2006, in an e-mail sent by FEDEJEREZ and obtained in the inspection of WH (f 970), to GB (f 1327, 2702 and 2703) regarding "Situation of BOB sector and quotas", one can read:

> *"Forward to the meeting of this past Thursday, and thanking all of you once again for your presence there, supplemented by talks on both sides in recent days, we would like to propose a gentlemen's agreement amongst the 5 companies to whom this e-mail is addressed; this would involve:*
> *1.- Sitting down in a marketing table to deal with the sector's situation, effective immediately*
> *2.- While it is being put together, establishing a truce in the fight for customers*
> *3.- Not making any offers at below cost*
> *4.- Not making any offers with a term of more than one year*
> *5.- Having regard to the situation of the markets (UK, Netherlands and Germany) and the situation and evolution of the prices there, establishing benchmark prices that should be higher than 1.25, 1.10 and 1.10, respectively.*
> *6.- Joint discussion of the formulas to balance supply and demand by means of the allocation of quotas and in the form of an inter-professional agreement, which should be approved as soon as possible and no later than the next Ordinary Plenum of the Board scheduled for this coming Tuesday 30 May.*
> *…*
> *Today I had the opportunity to talk with most of you and I only need confirmation and a go-ahead for the principles set out above from two of you. I am awaiting your confirmation through whatever channel you find most convenient."*

(6.65) On 18 May 2006, according to an e-mail obtained in the inspection of WH (f 956), FEDEJEREZ sent WH the following message:

> *"I just finished the meeting with […] (Before going to eat … things are crazy!) and since I called but could not reach you, I'll tell you the latest here:*
> *1. […] is up for the gentlemen's pact and for sitting down at a table to talk about BOB*
> *2. With respect to the quota, the strategy has been coordinated and will be taken to the Executive for discussion and approval (although it will take some effort). On this point, I am making the rounds to avoid surprises and seeing everyone who is not in the committee (Pedro Romero, La Gitana, Delgado Zuleta, Valdivia, Emilio Hidalgo...). And tomorrow afternoon I have arranged to see Ferris to discuss the situation.*
> *We have to foresee the positions against or with some modifications in the Executive from La Guita and La Gitana (they need more quota and have stocks), Pedro Romero (similar but with a brand/BOB mix) and Delgado Zuleta. And we are still waiting to hear from GARVEY and Ferris.*
> *3.- I hope and am optimistic that we will get the approval on Monday.*
> *4.- As for moving up the Board Plenum and after the meeting with […], and knowing that […] would still be travelling, we have sounded out the availability of the Junta and of the possible quorum and the reply did not give us enough assurances to risk the matter not getting the thumbs up at the plenum (be careful, some of the possible detractors on the Executive also sit on the Plenum and unless we make sure, we could find ourselves without enough support there).*
> *So we have come up with what I think is the optimum procedure;*
> *The FEDEJEREZ Executive approves the development of a formula, with a similar text to what I sent you this morning for consideration by the members.*
> *The FEDEJEREZ request for its inclusion on the agenda of the next Plenum is processed urgently on that same Monday.*
> *Agreements are closed with Asaja and Aecovi for support in the Board (fairly advanced but pending closing on Monday).*
> *A press release is issued that FEDEJEREZ is proposing to the Board a limitation of the overall supply of wine to the market. This press release is very important to let people know through the media that the deal is done and will see the light of day soon, which would no doubt reach customers and, above all, suppliers who will then know what to go by.*
> *On Tuesday the 30th it is approved in the Plenum.*
>
> *Meanwhile I am awaiting confirmation of the final date for the Tesco auction (I keep my fingers crossed for a delay). If the date eventually falls before the Plenum approval, preparations to invite the BOB wineries to a setup with 5 computers (or 7) in a hotel"*

He sees problems for the "Board Plenum" to support a reduction of the quota.

A second e-mail (f 2701) regarding "Gentlemen's Agreement" adds:

> *"To update on these lines, in addition to the 5 wineries to which this e-mail is addressed, G and P.R. have confirmed to me, like you, their acceptance of the terms of the gentlemen's agreement.*
> *In addition to the 7 of you who are already in, tomorrow I am seeing F, and I am hoping they can join also.*
> *The Executive meeting is Monday and we have to go all-out there to get the thumbs up for the quota. I am counting on your support".*

In a third message, GB clarifies some of the acronyms of the preceding one (f 701):

> *Clarification to the preceding e-mail, which is attached:*
> *"G= GARVEY*
> *PR= […]*
> *F= Ferrys"*

And the fourth internal mail to GB on record from that date (f 1326 and 970), obtained in the inspection of WH, which says to GB:

> *"[…], to fully clarify what was said I am including below some points of the "gentlemen's agreement" to which as I told you yesterday we agreed to add:*
> *1.- do not participate in the Tesco Internet auction*
> *2. - withdraw offers that were below the reference*
> *The order would be as follows for all of the wineries (if it all works out well):*
> *1. Gentlemen's agreement*
> *2. Agreement on sales quota (average last 5 marketing years reduced by a % to adjust to current sales), for us any one of the proposed formulas gives us a greater quota than what we sold in the last marketing year, that is, the agreement is good for GB*
> *3. Approval of this quota agreement in the Reg. Bd. Plenum of 30-5-06*
> *4. Set up BOB table*
> *5. Study and implementation of systems to limit "entries" by means of diversification of vineyards to align supply/demand".*

(6.66) On 20 May 2006, according to an e-mail obtained in the inspection of GB, (f 2704), the following may be read with respect to the agreement:

> *"Thank you for your information.*
> *As we have said earlier, sector agreements can talk about the future but not about the past, and what we cannot agree is to withdraw firm offers to a customer that have been given in writing with a set term of duration.*
> *All the more so for a customer such as Tesco that buys close to 100,000 cases of brand product from us.*
> *As we have said by phone, I am sending you the situation with this customer.*
> *Three week ago we made them an offer that was valid for three months for their entire JEREZ range at an ex works JEREZ price of 1 euro per bottle in the standard line and 1.4 for premium. This offer will stand until the term expires.*
> *They then asked us to participate in an Internet auction and we told them that the GB company policy was not to take part in auctions.*
> *They later told us that they have cancelled the auction.*
> *They then asked us for separate quotes for the ranges and we gave them €1.25 for the standard and €1.4 for premium. These prices are within the agreement.*
> *With respect to W&W, we have not outstanding offer at this time so this poses no problem.*
> *We'll keep in touch*
> *[…]"*

(6.67) On 22 May 2005 a meeting was held of the FEDEJEREZ Executive Committee, after which it was decided to draft and distribute the following press release (f 1325 and 2707):

> *"After the extraordinary Executive Committee meeting held today, we attach the Press Release that we are sending for publication".*
>
> *"FEDEJEREZ, aware of the need to make quality the central avenue for gaining new markets and consumers and of the problems that have for years been hampering the Sherry-producing District, and that the Strategic Plan now coming to its end, has, though a good tool, not been able to halt the steady erosion of profits in the markets where the buyer's own brand (BOB) segment is significant, has resolved in today's Executive Committee to propose for approval by the Plenum of the Regulatory Board scheduled for 30 May 2006, a drastic reduction in the amount of wine to be marketed (sales quota), which will go from the current levels (380/0) to scarcely the same level as*

the sales of recent years. Reaffirming the centenary tradition and quality of Vinos de Jerez and prior to the imminent reform of the DO Regulation, the wineries are making a major commitment to improve margins and bolster the prestige and quality of Jerez.
This measure, which is expected to be approved with a broad consensus in the coming Plenum, will be the first of a broad array of others that have already been agreed with rest of the sector's organisations, after the signing of the recent revision of the sector agreement, and which are aimed at aligning, inasmuch as possible, supply with demand in the entire supply chain of Jerez and Manzanilla DO wines from the grape through to dispatch to markets, in a new effort to ensure the profitability of all operators in the chain, from winery to vinegrower".

(6.68) A GB internal e-mail (f1324 and 2706) of 22 May 2006 discusses the executive meeting in the following terms:

"I am attaching the press release that will be issued after today's meeting. This agreement was reached before the setting up of the BOB table with the presence of the Commercial Managers (International) scheduled for Tuesday 30-5-06 at 10am in the Regulatory Board offices (since non-FEDEJEREZ operators such as GARVEY and Ferrys (surely) will also participate).
Tomorrow in Otero we should talk 5 minutes about the Tesco/Estévez strategy because, as you know […] the latter has made its presence in the table conditional on the prices it quoted to Tesco (1.35 according to them) being respected, and it will stay with Tesco in any event because they say they have closed an agreement to accept a price 10 or 20% lower than the lowest price received by Tesco.
Apparently, this deal was closed on 24-5-06 and if we go lower we run the risk of ending up without the customers and without achieving a BOB table, but this is what I would like to discuss with you tomorrow.
Cheers"

(6.69) On 26 May 2006 the CR approached GB (f 2708), according to information obtained in the inspection of GB, in an e-mail with subject line Marketing Table, and the following content:

"several wineries have expressed an interest in setting up the table of reference here, so I am writing to tell you there will be a meeting on 30 May at 10:00am in the Board offices to launch the table. As you know, for the Board it is crucial that the issue of the quotas and special labelling rules be dealt with at the same time, so I am attaching a draft we have prepared".

(6.70) On 30 May 2006 a meeting was held at the CR offices, according to documents obtained during the inspection at the GB offices, with the presence of WH, GB, LUSTAU, BELLAVISTA and ZRM, BARBADILLO, FERRIS, P. ROMERO, FEDEJEREZ and REGULATORY BOARD. The meeting declared the establishment of the marketing table (f 706, 826, 1322, 1328, 2716 and 2717), on the following terms:

*"**MARKETING TABLE:***
Initial conditions:
1. Quota allocation of the total supply of Jerez wine
2. Limitation on purchase of quota from others (article 32.1)
3. Establishment of controls and limits on labelling (BOB sub-register)
4. Formation of a table with all possible players, at two levels: commercial and managerial
***Objectives**:*
- *Maintain status quo*
- *Progressive appreciation in value of the BOB business*

Functions of the Marketing Table
- *Reach consensus on what the status quo is*
- *Establish target prices by market*
- *Coordinate response to bids*

- *Track market evolution*

***Proposed steps and timetable**:*

1. *Acceptance of criteria established*
2. *Information on current contracts: customers, prices, duration and any other information of relevance.*
3. *Presentation of the BOB "map" at the sector level: volumes, prices, distribution of customers by winery, contract end dates, etc.*
4. *Meeting of commercial reps and agreement on "road map" for achieving higher prices*
5. *Proposal for the managers table and resolution on actions".*

(6.71) On 1 June 2006 the CR issued circular 7/2006 "Definitive sales quota for the 2005/2006 marketing year and quota agreement for 2006/2007". The first draft (f 918) reads:

"…the sales quota for this marketing year at 38% of stocks… for the coming years (2006/07)… according to the average sales of the last five years … not to exceed 37% of the stocks at the start of the marketing year.

…sales quotas… for 2006/2007 will be set as follows:

1. *corresponding to the average sales of the last five years"*

(6.72) The content of the 30 May meeting was covered in detail in the local press, which on 5 June 2006 led the CR to send BARBADILLO, FERRIS, P. ROMERO, WH and LUSTAU, FEDEJEREZ, GARVEY and GB the following e-mail with subject "Marketing and promotion committee":

"Dear all:
We have started this week with a breach of the confidentiality that you had requested of everyone with respect to the subject of reference. The reporter for the […] Diario de Jerez speaks in specific details of the goals of the table, and even gives the name we defined for it in the last meeting. I am aware of the importance of setting up the committee, but in the face of this evidence of lack of confidentiality amongst those of us in the table, I think the best thing would be to suspend the meeting scheduled for day 8 at 9:00am in the Board.
I remain at your disposal for anything you deem fit. Cheers"

(6.73) On 15 June 2006 the CR sent a letter to the Government of Andalusia (f 912), obtained in the inspection of WH, in which it encloses the board circular 7/2006 approved at the past May plenum (14 votes for and 3 abstentions) and "which involves a regulatory change that requires your approval. Below I describe the rationale for the circular in order to facilitate an understanding and analysis of the issue".

To the attention of Mr. […]
Subject: Our meeting of 14 June 2006

Dear Director General:
I greatly appreciate the meeting of this past 14 June and, above all, how clarifying and productive it turned out to be. As we arranged, I will summarise below the questions that were left pending more information:

Sales quota 2006/07
Attached find circular 7/2006, "Definitive sales quota for the 2005/2006 marketing year and quota agreement for 2006/2007", which was approved at the recent plenum in May (14 votes for and 3

abstentions) and which involves a regulatory change that requires your approval. Below I describe the rationale for the circular in order to facilitate an understanding and analysis of the issue.
As indicated in the preamble to the circular, article 32.1 of our Regulation as it currently stands allows the Regulatory Board, upon prior report from the interested sectors, to establish a maximum sales figure as a percentage of the stocks of wine in crianza at each winery at the start of each marketing year, provided this does not exceed an upper limit of 40%."

(6.74) On 15 June 2006 (f 2719) a GB internal mail discusses the prices for TESCO for the 2001/2002 year and adds: It was the lowest price of all contracts in England at that time, according to information that was put on the table. (emphasis added).

(6.75) On 20 June 2006 a GB internal mail (f 2980) obtained in the inspection of GB says:

"[…]
1.- BOB table: they gave me a new article […] which I am copying to you and which again reports information from the meeting. Independently of this, today I have spoken (at the end of the meeting on the Sector Plan) with […] and […] who confirmed to me their intention to continue having us meet even if we are only these three companies. […] tells me that GARVEY "for now has said not until the "quota agreement question is cleared up" and […] trusts they will be able to join.
We still do not know who is leaking information to […].
Next week we have a meeting of the Executive Committee (to deal with the integration of Arjeman) and will try to arrange a meeting with MED+BAR+GAR and GB."

(6.76) The 21 June 2006 reply to the preceding e-mail reads (f2982):

"With respect to Tesco, they are going to stay with Estevez; they give us the Finest of Fino manzanilla and oloroso of 10,000 to 15,000 cases."

(6.77) On 13 July 2006, in a document obtained in the inspection of WH (f 923), FEDEJEREZ sent the sector committee of FEDEJEREZ (Beam Global-previously Domecq, OSBORNE, GB, LUSTAU, WH, BARBADILLO, ESTEVEZ) an e-mail in reference to "Annual quota revision", informing them that:

"On 12/07/2006, at 2:07 pm, the Director of FEDEJEREZ wrote:
[…],
I cannot attend the meeting tomorrow. The meeting has two objectives:
1) Establish the scope of the formula for warehousers
2) Determine the parameters to be taken into account for the revision;
a) Evolution of stocks during the Plan — increase and decrease
b) Possibility of raising the quota in accordance with the preceding point (in the case of an increase, if it can be shown that selling prices have risen, and in the case of decrease, due to the rationalisation of the purchases of grape and must, promoting the necessary alignment of stocks in the sector)
c) Guarantee of possibility of increasing the quota for the brand

This leaves pending the study of the Plan exit formula, especially to avoid speculations. Cheers and good luck,
[…]

(6.78) Folios 924 and 925 of the case file contain the minutes of the sector committee meeting of 13 July 2006, attended by BARBADILLO, BEAM GLOBAL, GB, LUSTAU, ESTEVEZ,

OSBORNE, WH and FEDEJEREZ, which discussed the revision of the quota formula and resolved as follows:

> *"In FEDEJEREZ, at 9:30am, the FEDEJEREZ Sector Committee met, attended by the persons indicated above.*
>
> *1. REVISION QUOTA FORMULA.-*
> *In relation to the first point, the objective is set to agree a formula in the month of July for revision of the quota, taking as starting point the initial hypotheses that have already been approved, in accordance with Circular 7/2006 of the Regulatory Board, which are as follows:*
> *1. Quota 06-07 for 4 years revisable (8, 9, 10)*
> *2. Already fixed for 06-07*
> *3. For 06-07, maximum 37% and minimum 22%, according to 2005 stocks*
> *After intense study and debate, the Sector Committee approved the following RESOLUTION:*
>
> *1. The quota for marketing years 07-08 to 09-10, will be obtained by multiplying the 06-07 quota by a correction factor to be revised annually according to:*
> *a) % variation in sector sales with respect to previous year*
> *2. The correction factor defined in point 1 will be adjusted according to the effectiveness of the global agreement on the market.*
>
> *The following Resolutions were also adopted:*
> *1. The individual stocks of each winery will not take into account the factor, but the resulting quota will never be higher than 37% of the stocks at the start of the year.*
> *2. Before the agreement ends, depending on the results obtained, new agreements on these matters will be studied.*
> *And at 12 noon, the meeting was adjourned".*

(…) The individual stocks of each winery will not take into account the factor [correction factor that applied], but the resulting quota will never be higher.

(6.79) On 27 July 2006, in an e-mail obtained in the inspection of GB (f 2723) with subject marketing meeting (TABLE) BOB, we can read:

> *"[…], after the meeting of the FEDEJEREZ Executive Committee, I arranged with […] (Barbadillo) and […] (W&H) to meet the last week of August on the BOB issue. As we have already discussed with you, they also think that three is better than none and we will see at that meeting if it is advisable to bring in others that can be trusted (that it not come out in the press afterwards...).*
> *The meeting will not be held in the CR and more progress might perhaps be made if we say that it should be attended now by the Commercial Managers or persons who know international markets well in order to begin to talk about price levels, agreement conditions, etc...*
> *At an upcoming meeting with Director General after the holidays (pending a single-issue meeting on "stocks strategy in Jerez, sales quotas" and implications for sales), I will discuss with him details of relations through FEDEJEREZ, Regulatory Board, etc... in which this relationship is framed and begin to inform him on a routine basis of the changes that arise.*
> *[…], please let me know if you some day of that last week in August so I can propose dates. Thanks.*

(6.80) On 23 August 2006, in an e-mail obtained in the inspection of GB (f 2724) and addressed to BARBADILLO and WH with subject line BOB marketing meeting, we can read:

> *BOB MARKETING MEETING*
> *High*

Finally meeting on 4-Sep-06 at 9am. According to what we told her, the heads of the Commercial Departments should attend and it should be a first meeting to establish the basic lines on:
-whether or not to bring in other companies
-urgent actions aimed at resolving current problems
The place, initially at Bodega González Byass, and if this changes we will contact you sufficiently in advance.
Please pencil this date into your calendars given the importance of the meeting. Cordial greetings to all.

(6.81) The 23 August 2006 internal e-mail obtained in the inspection of GB (f 2725), with subject line BOB marketing meeting, confirmed that the meeting would be held on the date scheduled.

(6.82) The 1 September 2006 internal e-mail obtained in the inspection of GB (f 2726), with subject line BOB minimum prices, reads:

BOB minimum prices.
Just to remind you that the minimum prices proposed for BOB, were:
UK: 1.25 euros per bottle.
Rest of Europe: 1.10 euros per bottle.
I will bring the information to the meeting.
Warm regards.
[…].

(6.83) From 4 September 2006 there is a handwritten note (f 1357) on a meeting between B, WH and GB that discussed market information of each company and prices in different markets.

(6.84) From 11 September 2006 there is a handwritten note obtained in the inspection of GB (f 1358) on a meeting between GB, WH and BARBADILLO, that refers to the "*importance of raising prices and not focusing on growing volume. GARVEY= does not have volume. Agreement on ¿prices? With large volume. Garvey will let [...] know its stance*"

(6.85) The 17 November 2006 internal e-mail obtained in the inspection of GB (f 2725), with subject line Lunch *[...]*, reads:

"Yesterday we had yet another meeting of the sector table and […] came and insisted that his father wanted to eat with me …(…) I accepted for 19 November, which is the day we meet with B&M."

(6.86) Between 5 October 2006 and 29 November 2006, the first leniency applicant declares it held five bilateral meetings: one with WH, two with GB and another two with FEDEJEREZ to reach a BOB REVISE agreement.

2007

(6.87) On 5 March 2007, according to a document seized in the inspection of GB (f 2729), FEDEJEREZ wrote an e-mail with the following content:

Dear all:
I am copying this e-mail to all interested parties (4), who need not respond, as this is solely for your information.
It has been some time since we last discussed the situation of the talks on BOB…
To date, the four operators with capacity to supply the FEDEJEREZ market have expressed your decision and intention to sit down at a table and reach and agreement.
I think I can summarise everyone's intention as being: to raise prices on the basis of respecting customer bases.

… the situation now depends on the fifth operator (G)…

Not participating in this approach are two operators with some supply capacity: PR, with whom there are contacts, and C, with whom I sincerely believe it is impossible to talk".

(6.88) On 14 March 2007, according to a document seized in the inspection of GB (f 2730 and 2733), FEDEJEREZ reported to GB on the content of the meeting held with BELLAVISTA and ZRM. According to that e-mail, after meeting four hours BELLAVISTA and ZRM told FEDEJEREZ they were willing to meet and raise prices, although they will first study their position after implementation of the quota formula. It goes on to add *"(…) to buttress the possible and expected agreement or meetings between the five, which will require skill and patience, I, as I had committed to, will take care of P.R. (and of CAYDSA through the Board), whom, after the initial challenges with respect to G. are met, I have already asked for a meeting, which I expect will be held this week or next".*

(6.89) On 18 March 2007, according to a document seized in the inspection of GB (f 2733), FEDEJEREZ sent an e-mail to GB, WH, BARBADILLO and ESTEVEZ on "Meeting of the table" with the following content:

"…, pursuant to your mandate everything that can be done in unilateral meetings has been done and the time has come to meet as a Table.
The call will be limited to the five operators well known to all.
… I suggest you consider the suggestion that each company send to the meeting the persons who can contribute to this cause. That is what I have requested from G.

… please take note of next Monday 26… or Tuesday 27, as suggested dates.

(6.90) On 21 March 2007, according to a document seized in the inspection of GB (f2731), GB gave an internal report on the content of the meal with officers from BELLAVISTA and ZRM to GB (Subject: Lunch *[...]*). According to this e-mail:

"(…) Just wanted to report that today I had lunch with […] and […] (GM Wine Division of Nueva Rumasa).

The lunch was proposed after several meetings of […] /[…] (President and Director General of FEDEJEREZ, respectively) with them on the sector… The former called me to tell me they were interested in reaching an agreement but need volume … I told them that at GB we are also interested but that they have just taken Edeka away from us, with 90,000 cases, and that we have dropped from 500,000 cases to 200,000 cases, and that, naturally, we are not going to give them cases, which they understood (…)

They have arranged to meet with […] on Tuesday of next week and will call me afterwards (…)

We agree that the system of quotas is not sufficient to balance supply and demand (…).” (the underlining is not in the e-mail and is only added for purposes of identifying the persons alluded to).

(6.91) On 24 March 2007, according to a document seized in the inspection of GB (f2733), FEDEJEREZ sent an e-mail with the subject line "Meeting of the Table" to GB, WH, BARBADILLO, ESTEVEZ and LUSTAU (CABALLERO), saying the following:

> *“As for the dates, and to repeat what I told you the other day, the meeting depends on you (all 5 of you) and my role is merely to facilitate. Apparently, on Tuesday there is a meeting of two where I hope it will be decided to call the table. I continue to insist that it must happen now, as soon as possible.”*

(6.92) On 10 April 2007, according to a document seized in the inspection of LUSTAU (f 2404), an internal e-mail mail reads as follows:

> *“(…) I inform you that tomorrow we have a BOB Table meeting in FEDEJEREZ. Attending will be GB, ZRM, Barb., RT and us (…)”.*

(6.93) On 11 April 2007, according to a document seized in the inspection of GB (f 2734), an internal e-mail reports that a sector meeting was attended by FEDEJEREZ, WH, BARBADILLO, ESTEVEZ, LUSTAU (CABALLERO), GARVEY and GB. At the meeting each firm reported the cases it had, that the BOB market totals some 2,350,000 cases and that the attending companies have 1,800,000 cases; with CAYDSA, P. ROMERO and FERRIS left out; the agreement spans the period 2007-31/08/08; the minimum price 1.1, and they agreed to reply to FEDEJEREZ two days later.

(6.94) On 20 April 2007, according to a document seized in the inspection of GB (f 2735), FEDEJEREZ wrote to the following to WH, BARBADILLO, ESTEVEZ, LUSTAU (CABALLERO) and GB:

> *“All those copied above have confirmed in the name of your companies the desire to endorse the terms of the agreement proposed at the meeting of this past Wednesday, the 11th. Yesterday afternoon I had a very interesting conversation with GARVEY in the person of […]. What he told me was this:*
> ***.-** The day after the meeting he conveyed the message faithfully both to […] and to […]*
> ***.-** The response on their part was to analyse the proposal and give an answer.*
> ***. -** Certain personal/family developments this week will almost certainly delay the reply.*
> ***. -** I sensed no negative tone or any pessimism in the conservation with Rafael, so right now I am still optimistic.*
>
> *In view of the above, I propose:*
> ***1.-** Wait for GARVEY's response. We arranged to talk again this afternoon (since we have been waiting until now, it won't hurt anyone to keep waiting a bit more)*
> ***2.-** By "wait" I am referring to validating the terms of the agreement. I will not understand if low offers are being made to customers being negotiated at this time, regardless of the customer or of the winery involved. I would feel especially disappointed, but that is only a state of mind.*
>
> *As for concrete actions, I want to let you know that if there is a breach of the above, I in particular would feel released from my responsibilities to the non-complying winery, a responsibility that I have assumed in this field with all the risks, optimism and efforts for more than a year now, for each and every one of you for the sake of advancing the general interests of our sector”.*

(6.95) On 25 April 2007, according to statements made by the applicant for exemption from payment of the fine (f 464), a meeting was held with WH to assess the BOB agreement and the manner in which BELLAVISTA and ZRM could adhere to it with the conditions of the rest, and information was exchanged on one of WH's customers in Germany, which could supposedly switch to BELLAVISTA and ZRM if it agreed to sit down at the table in the way the other companies participating in the cartel wanted.

(6.96) On 1 May 2007, according to an e-mail sent to WH, BARBADILLO, ESTEVEZ, LUSTAU (CABALLERO) and GB by FEDEJEREZ (f 2736), and obtained in the inspection of GB, a meeting was held between BELLAVISTA and ZRM on one side and FEDEJEREZ on the other. According to that document:

> *"Yesterday, the first of the month, I had the opportunity to meet with […]. I returned to the arguments already stated, about the need to reach an agreement, their position in the BOB market with respect to the other operators, the strategic nature of this moment, the levels of trust in different operators, the time frames of the agreement and its terms and conditions.*
> *He replied that he agreed with the assumptions and approach but conveyed to me their need to make it compatible with 50,000 more cases. By speaking in terms of a year and a half I explained to him that it was a matter of planning out the coming marketing year, given that the current one was lost and that what is being negotiated now is 2008. In view of this, the agreement cannot pose a risk for their strategic projection; failure to reach an agreement would indeed expose their cases to the wild swings of price wars with which you are all familiar.*
> *Faced with this, we agreed to meet this coming Monday with […] in Jerez. As I have already said, he appears to be the one holding the key to the situation and the one most opposed to a price agreement without cases".*

(6.97) On 20 June 2007 FEDEJEREZ wrote to GB, in a document obtained in the inspection of GB (f2737), postponing the scheduled meeting because, although recently consideration was being given to a scenario that did not include G [GARVEY], there were recent developments, such as a *"direct call with the patriarch's interest",* that could change that scenario. It is therefore considered advisable to wait until confirmation is received of either their refusal or "*their willingness to form part of the agreement*".

(6.98) On an undetermined day in July 2007 a meeting was held between the Director General of FEDEJEREZ and officers from BELLAVISTA and ZRM. That meeting and the matters discussed there are set out in a letter dated 19 July 2007 from the FEDEJEREZ Director General to the exemption applicant, who submitted it with its leniency application, with the following verbatim content (f 491):

> *"(…) Since there were many matters to deal with and that could perhaps contribute to somewhat confusing the proposal I wanted to convey to you, I am attaching the following proposal that gives an open and practical explanation of the situation, in the hope that it will serve to be able to adopt decisions (…).*
>
> *The minimums formula I am proposing does not entail making serious commitments or running grave risks; developing the agreements only requires willingness and a limited amount of time.*
>
> *I await your reply and hope it will be favourable".*

The annex to the said letter contains the proposal cited there, and indicates the following in relation to the formulas (f 492 a 503):

"FORMULAS.

- THERE ARE TWO PROPOSALS ON THE TABLE:

1. OPORTO FORMULA:

This consists in an equal distribution of customers. It implies that whoever has a customer will put them on the table to be allocated amongst all.

SUPPORTING: 1 (GARVEY)

2. MINIMUMS FORMULA: A formula that seeks to reach a possible agreement that is beneficial to all of the parties; maintenance of the current status quo, and to work from there to improve and widen margins.

OBJECTIVE: Boost margins 20%

TIME FRAME: 1 year and a half, renewable for like periods.

SUPPORTING: 5, that is, the rest of the operators with supply capacity."

(6.99) In October 2007 there were numerous contacts between the operators involved in the activities examined in the proceeding. Initial evidence of those contacts is provided by two e-mails from 5 October 2007, obtained in the inspection of GB and of WH, and which FEDEJEREZ sent first to GB, WH, LUSTAU and ESTÉVEZ (f 2738, 2740, 2741 and 2795) and later to BELLAVISTA and ZRM (f 490), as declared in its leniency application statement.

The first, with subject "*BOB meeting?*", *says that "efforts are being made to schedule a meeting on the matter" and that this e-mail does not include BARBADILLO:*

> *"as per its own decision, when they told me last Thursday that given the pressing need for Reform of the DO Regulation they did not want any intermediating by me. Once the date has been set, we'll see how the call of meeting is sent to it (…)".*

The second, addressed to BELLAVISTA and ZRM and with subject line "*BOB meeting?*", reads: "I thing it would be very interesting to take this up again, and, if appropriate, set up a meeting with the rest of the companies involved".

(6.100) On that same 5 October 2007, in an internal e-mail obtained in the inspection of GB (f 2739), GB writes to its officers to inform them of that call and tell them that since they have decided to pull out of the BOB business, it would be best to let FEDEJEREZ know and not take part in the meetings.

(6.101) On 11 October 2007, according to information obtained in the inspection of GB (f2740), FEDEJEREZ pursuant to its e-mail of 5 October 2007 tells them that BELLAVISTA and ZRM "*is willing to meet on the basis of maintaining the customer status quo and agreeing to raise prices in the table" (…) "I ask that you please answer through this channel and thus be able to confirm as soon as possible the date between us, later with GARVEY and later call Barbadillo."* Once the meeting (the 22 October one) was agreed on 17 October.

(6.102) On 17 October 2007, according to information obtained in the inspection of GB and WH (f 2741 and 2795), FEDEJEREZ calls the meeting, giving the choice of several dates, and lets the others know that ARM will not be able to attend and will send someone in

their name, and that they have confirmed what was already expressed in the previous e-mail.

(6.103) On 19 October 2007, in information obtained in the inspection of GB (f 2742), the meeting was finally called for 22 October.

(6.104) On 22 October 2007, according to information submitted by the first leniency applicant (f 51, 52, 483, 484 and 2742) and obtained in the inspection of GB and WH (f 2738, 2740, 2741, 2795 to fix a date, which was eventually 22 October and 3740 with the content), the meeting was held. Its content has been evidenced by different sources:

First, in the summary made by a member of GB in an internal e-mail with the following content:

> *"Good news.*
> *As I told you, yesterday afternoon I met with FEDEJEREZ to discuss the BOB issue.*
> *There were present […] from FEDEJEREZ, […],[…] from W&H, […] from Caballero, […] was ill and couldn't make it but sent a representative, and me for GB.*
> *The main points of the agreement are:*
> *• Limitation in time*
> *• Respect for customer status quo*
> *• Increase in prices*
> *To these three conditions there was added the question of limiting the quota to sales, a position advocated for some time now by W&H and GB. All in attendance agreed to defend that position. This means lowering the quota from 137 thousand butts at present to 112 thousand, which are the sales, reduce the current quotas to 82%. […] will do the numbers.*
> *Remember that we have been in these talks for more than a year.*
> *We finally decided to reach an agreement, Real Tesoro + W&H + Caballero + GB, amongst ourselves regardless of whether the others sign up or not. The agreement will have the same duration as the quotas agreement, which runs until September 2010.*
> *GARVEY said they did not have capacity to make a decision, that they would discuss it with […] and that he would reply today, the 23rd.*
> *Barbadillo did not come to the table, due to the Fino - Manzanilla situation, and […] said he would speak with them to see if they join the agreement. He will let us know.*
> *Although partial, I think it is a good agreement, whether or not we are in BOB. I believe that with this agreement we will be able to hold on with some of our customers, especially with Sainsbury, while raising their prices.*
>
> *I understand that, like the last time, somebody has to be appointed to coordinate all the commercial questions, because from now on the commercial managers of each firm will call to bring us into agreement with the customers. I understand that the person to do this is […], as he has experience in these matters".*

Second, according to the statements made in the first leniency application, as summarised in the PR: "*there was new discussion of the possibility of reaching a BOB agreement, taking into account the benefits obtained by the signatories with the previous BOB table, and the need to come up with a new agreement. A non-aggression pact in private-label exports was thus proposed such that the participants would not lower prices and each winery would keep its customers. The idea was also to get customers of the small distributors by means of agreements between them for the offers to customers of small suppliers (if the small operate offers him €0.85, one of the majors will offer them a slightly higher price, for example €1, and the rest a higher price, say*

1.15 or 1.30), so that the customer would choose one of the majors because he would place more trust in the quality of its product (f 483 and 484).

Third, there are handwritten notes by the GB executive who attended said meeting (f 3740) and which were obtained in the inspection of GB:

"- Limitation in time.

- Status quo.

-. Δ revenue.

- Means of coordinating auctions.

- Differences between markets.

- There have been movements:

- *MRT= has doubts about viability, seems they now believe*
- *JMRM = believes in this*
- *Vino Blanco= had no objection later on, conflict kept them from sitting at table. Would be willing to do so if they do not lose revenue*
- *P. Romero = Will not leave BOB although they said they would go to 3 years 0.69*
- *CAYDSA and Ferris*

- Quota, reduce it to 100%

- Time Sept. 2010

- Sales 112 quota 137 – 82% (…)".

These notes were developed in the e-mails sent by that executive to other officers in the company, informing them of the decision adopted at that meeting (folios 1375 and 2743):

"(…) The main points of the agreement are:

- *Limitation in time*
- *Respect for customer status quo*
- *Increase in prices.*

To these three conditions there was added the question of limiting the quota to sales, a position advocated for some time now by W&H and GB. All in attendance agreed to defend that position. This means lowering the quota from 137 thousand butts at present to 112 thousand which are the sales, reduce the current quotas to 82%. […] will do the numbers.

Remember that we have been in these talks for more than a year.

We finally decided to reach an agreement, Real Tesoro + W&H + Caballero + GB, amongst ourselves regardless of whether the others sign up or not. The agreement will have the same duration as the quotas agreement, which runs until September 2010.

GARVEY said they did not have capacity to make a decision, that they would discuss it with […] and that he would reply today, the 23rd.

Barbadillo did not come to the table, due to the Fino - Manzanilla situation, and […] said he would speak with them to see if they join the agreement. He will let us know.

Although partial, I think it is a good agreement, whether or not we are in BOB. I believe that with this agreement we will be able to hold on with some of our customers, especially with Sainsbury, while raising their prices.

I understand that, like the last time, somebody has to be appointed to coordinate all the commercial questions, because from now on the commercial managers of each firm will call to bring us into agreement with the customers.

(…) Undoubtedly, we must emphasis the confidential nature of this information".

(6.105) On 26 October 2007, the information provided by the first leniency applicant and obtained in the inspection of GB and WH (f 53-55, 2744, 2796 and 2798) contains an e-mail from FEDEJEREZ to WH, GB, ESTEVEZ, LUSTAU and BELLAVISTA and ZRM with the subject line "Follow up to BOB meeting of Monday the 22nd" and message:

"Forward to last Monday's meeting, I have not heard from GARVEY on its commitment and do not know if they have contacted you directly as […] suggested in GARVEY's name.
Hoping that […] has recovered, I take the liberty of sending this e-mail with copy to all involved, for the sole purpose of refreshing the matter and knowing the degree of involvement and commitment of each and every one of you.
The objective: try (to reach) a broad, stable and lasting agreement that will have positive effects for all of you".

(6.106) On 26 October 2007, according to information obtained in the inspection of WH (f 2797), ESTEVEZ answered the previous e-mail with copy to all, with the following message:

"Many thanks for your interest in this matter that is so beneficial to all.
To a certain extent, and recalling the history, I understand your doubts and applaud your interest in having all of us live up to the word we have given in this transcendentally important agreement, so on this occasion I am not annoyed by your misgivings.
For my part, the agreement is a reality and we are already applying it, which you can check by speaking to certain people. I doubt that the companies and persons who, like me, voiced their support "including with gestures that are rather uncommon these days", will change their mind.
Therefore, and so it is clear to you and to everyone, I reiterate the serious commitment acquired by JESA and I hope that we will soon have a positive response from […], just as he promised you in the past".

(6.107) On 26 October 2007, according to information obtained in the inspection of WH (f 2797), WH answered the previous e-mail with a copy to all, with the following message:

"I endorse everything said by […] and ratify all that was said last Monday. But you will permit me to say that I do feel annoyed; it seems like a frivolity to me that after so many talks and when it appeared (at least it appeared to me because that is how it was told to me by […]) that we were all agreed on the fundamentals, someone now says they are going to the meeting just to listen and that as of today we still have not heard anything. Cheers"

(6.108) On 2 November 2007, in information obtained in the inspection of GB (f 2745), an internal e-mail reads as follows:

"I have just spoken with […] from Williams &Humbert about the Sainsbury issue.
The situation is as follows:
• On 12 September we sent a letter to Sainsbury with an increase of 12%. They said they understood but would look for another supplier.
• On 22 October we reached an agreement to respect each other for three years between Real Tesoro, Williams & Humbert, Caballero and GB. That still leaves GARVEY and Barbadillo to join, but they have not said anything thus far.
• Real Tesoro called to tell me they were withdrawing their Sainsbury offer

• I called W&H and Caballero, the current suppliers to Sainsbury along with us, for them to withdraw their offer.
• […] told me that they had already given them Fino (24,000 C. 91). And for our Pale Dry (20,000 C. 9 L) and Amontillado (55,000 C. 9 L), they have sent samples and an offer and are awaiting a response.
• […] from Caballero told me the same thing and said he had our letter saying we were not in BOB. I told him that the letter was for Germany and not for the UK.

According to […] understands that the Amontillado will be taken Caballero.

He told me that they cannot withdraw the offer, and that the only way out is for us not to go back on Sainsbury and cancel the price increase and maintain the volume, and later the three of us can increase the price on a coordinated basis, indicating we should wait a year for that. At present they have the same price we had plus a promotion of 0.24 pennies.

I will call him on Monday to define our stance. In short, we may have already lost the Sainsbury BOB volume of 100,000 cases, but we already knew that when we made the decision and the only way of salvaging something is by sticking to the prices and seeing if we can do a coordinated increase in the future. The other alternative is to continue with our plan and drop out of BOB in the face of the uncertainties on price hikes and work on reducing production costs".

(6.109) On 5 November 2007, in information obtained in the inspection of WH (f 2799), there is an e-mail from FEDEJEREZ to WH, GB, ESTEVEZ, and LUSTAU regarding "BOB meeting" with the following text:

"At the request of one of you, we are calling the next table for this coming Thursday the 8th at 10:30am in FEDEJEREZ. I have left another message at bodega GARVEY, but have still not heard anything. I am trying to find a new avenue with Barbadillo".

(6.110) On 23 November 2007, in information obtained in the inspection of WH (f 2800), there is an e-mail from FEDEJEREZ to the Sector Committee of FEDEJEREZ on which there sat WH, GB, ESTEVEZ, and LUSTAU and four other wineries, with subject "Sector Committee proposal to the Executive" and with the document "Premises Allotment-Quota 07-08" attached. The said premises approved by the Executive Committee include:

- *Recalculate the formula including 06/07 sales and eliminating 00/01, keeping the maximum at 37%; recalculate the adjustment coefficient; eliminate the 22% minimum and replace it with some other mechanism;….. and*
- *In the section "Other business" the following was approved: (…) The Board's circular should include some anchorage that allows the exception for the brand (…) The limit on purchases is kept at 40% of the stocks at the start of the " (…)*

(6.111) On 27 November 2007, in information obtained in the inspection of WH (f 2998), there is an e-mail from FEDEJEREZ to WH, in reply to a consultation made by the latter, and stating:

(…) 1.-The brand exception can only be used when all of the assigned quota has been consumed and, naturally, provided the rest of the requirements are met. 2.- The purchase ceilings are unlimited. Only if we manage to get the Junta's approval now (to what it opposed earlier), the purchases for the BOB market will be 50% of the stocks at the start of the marketing year.

(6.112) On 11 December 2007, in information obtained in the inspection of GB (f 1374 and 2988), there is an internal GB e-mail that confirms the meeting of 10 December, attended by ESTEVEZ, WH and BARBADILLO and also CAYDSA, FERRIS and PEDRO ROMERO, with the following content:

> *"As I told you, yesterday I had a meeting of the BOB table.*
> *Nobody came from FEDEJEREZ or from the CR, due to the current problems with Barbadillo over the Fino from Sanlúcar.*
> *In attendance: Estévez, Medina, Lustau, Barbadillo, Ferris, Pedro Romero, Caydsa.*
> *GARVEY did not come, and Hidalgo and Arguello were not notified because they are minor BOB suppliers.*
> *Everyone agreed to sign a non-aggression pact until 31 September 2010. It consists in not making offers to customers of the wineries that are seated at the table.*
> *The purpose of this agreement is to raise prices, each will do what they can with their customers, although there was talk of a minimum of 1.2 euros per bottle. At present the low ones are at 0.90.*
> *GB said that at present it had lost all of its customers, especially Sainsbury, and that it was joining the agreement because even though now it is difficult to remedy the issue, it felt that the situation had to be resolved in the future. [...] offered to work this; […] was quieter although they accepted it. This gives us the chance in the future to recover Sainsbury if, indeed, we are interested in that(?) and if we are interested staying right with the sector.*
> *There was talk about the quota approved in the CR: Based on sales from the years 02/03 to 06/07 – reduction coefficient of 88% - elimination of 22% minimum - warehousers can sell quota at 37% with no limit Maximum Quota 37 % - exception for brands and based on stocks 1 September 07.*
> *Barbadillo said it would appeal, we asked that it challenge the formation of the board but not that specific measure. They said they would study it.*
> *This measure will limit sector outflow to sales of 112,000 butts plus the warehousers.*
> *Discussion of the value of the QUOTA for companies that move less than their quota.*
> *It was also agreed that QUOTA would be offered to the table before being sold to GARVEY."*

(6.113) The leniency statements include a declaration by the first applicant that the key meeting is the one on 22 October (22/10), although prior to that, in July, *[...]* FEDEJEREZ called him to ask for a meeting with his father to discuss the BOB issue. That meeting was held in mid-June, and afterwards *[...]* he sent a certificate to his father with a document with data on BOB. After the summer *[...]* called them to a meeting at FEDEJEREZ on 22 October 2007, to which the same data document was submitted. Before that they met with BT on 4 October. The 22 October 2007 meeting was not attended by *[...]* but it was attended by *[...]*, both from GARVEY. It was a tense meeting in which GB, ESTÉVEZ, WH and LUSTAU reached an agreement. Our representatives did not ratify the agreement until they spoke to us. On 26 October FEDEJEREZ wrote an e-mail to all reminding them of each one's commitment and involvement and saying there was nothing new from GARVEY. ESTÉVEZ and WH answer to confirm their participation in the agreement, GARVEY no longer answers because the matter was taking on a completely unlawful inclination. On 5 December the board's circular was approved, at FEDEJEREZ's proposal, changing the quota for the wineries to the detriment of GARVEY, and the CR informed GARVEY of this on 7 January, once the regional government had already ratified it with retroactive effect. In view of these facts, we asked FEDEJEREZ for a meeting, which was finally held in Madrid with JRM on 24 February. FEDEJEREZ defended the measure as good for the sector. JRM asks for the breakdown of the group's costs and sets a price of €15 to sell the group's cases, with no

commitment with third parties implied, as there was no prior agreement. That price of €15 is later communicated to FEDEJEREZ and to WH at the "Feria de Abril" fair.

The third person to declare in the first leniency application is *[...]*, who states he took part in summer or autumn of 2006 in meetings with GB, BARBADILLO, WH in GB, without the presence of FEDEJEREZ or ESTÉVEZ. The meeting discussed recovering the previous marketing table agreement with the aim of dividing up customers and cases but without discussing figures. Two months before October, he was called to a meeting in FEDEJEREZ along with GB, WH, BARBADILLO, LUSTAU and ESTÉVEZ. That meeting went into more specifics for raising the BOB price. But they criticised GARVEY for increasing stocks, and when GARVEY asked that customers be released and divided up as a function of stocks and investments, the reply was no. It seems they had already discussed everything. They agreed to hold another meeting on 22 October 2007 at the FEDEJEREZ offices.

The 22 October 2007 meeting was called by the FEDEJEREZ secretary and attended by ESTÉVEZ, GB, WH, LUSTAU (and not by BARBADILLO because it has been expelled from FEDEJEREZ). At that meeting, which was tense, it seemed they had arrived at a preliminary agreement. GARVEY repeated its conditions for reaching an agreement, distribution of customers, arguing the same line as always. They wanted to maintain the status quo with their customers and that the others not make offers just to their customers, and that we would divide up the new ones. The others ratified the agreement.

2008

(6.114) On 14 January 2008 ESTÉVEZ, WH, LUSTAU and GB met at the ESTÉVEZ offices, according to information obtained at the GB offices (f 1407 and 2753).

> *"Attached I am sending you a short summary of the BOB meeting I held last Monday.*
> *Attending were, […] (Chairman of Estévez). [...] (GM W&H), […] (GM Lustau) and me, at the Real Tesoro facilities. The reason for the meeting was JRE's panic over presenting a price hike to TESCO. He told them that their price would go up in the month of March but not by how much. Dan Jago has sent them a letter indicating that they have a supplier (GARVEY) that has offered them 0.91 euros per bottle for BOB and 1.19 for Finest. They were told the BOB quality is similar and that the Finest is less but that it does not make up for the price difference.*
> *Real Tesoro is currently selling BOB at 1 euro and Finest at 1.38.*
> *I said that at present we are selling them the Finest at 1.47 and have told them the price would go up to 1.93 euros. I also told them that in Somerfield we are selling at 1.66 and have announced an increase to 1.75.*
> *We all agreed that the minimum price in the UK would have to be €1.35.*
> *JRE said after much discussion that it would quote 1.30 in March and 1.50 in September.*
> *In Waitrose they are selling at €1.60.*
> *In the middle of the meeting […] called saying he had talked to […], who had told him they were going to sue the Board for the decision to delimit the quotas and that they were going to go for Tesco. The reason for their anger is that with the new quotas they do not have stocks to sell.*
> *Today I saw in the press that CAYDSA has challenged the quotas. That cooperative has a quota to sell 3,000 butts. JRE said they would call them to see if they could buy the quota from them to keep GARVEY from buying it.*
> *In summary, there is a serious effort to raise the price but with the problem of GARVEY".*

(6.115) On 6 February 2008, according to statements from the first leniency applicant (f 64 and 65), BELLAVISTA and ZRM met with FEDEJEREZ at the FEDEJEREZ offices at the initiative of the former. The content of the meeting is reflected in the e-mails exchanged between the participants, submitted with the declaration, and from which the following extracts are taken:

> *"(…) As promised, I summarise here what was discussed and what is pending from yesterday's meeting; (…)*
>
> *2) Quota situation for the current marketing year*
>
> *[…]: Very unfortunately, confirm the filing of appeals to intermediate courts and to the commercial court of Cádiz, announcing that they may be withdrawn at any time.*
>
> *(…) For now there has been ruled out a complaint to competition authorities due to the harm it could cause to the image of the D.O.*
>
> *(…)*
>
> *I can confirm to you that our legal counsel sees clear and flagrant signs that they are contrary to the free market with respect to the new quotas notified in the last circular received. We have therefore filed a challenge with the competent body. The lack of will to remedy this issue has forced us our hand, given the enormous harm we are suffering and the possibly irreparable consequences for the company*
>
> *4) Market policy:*
>
> *[…]: Our proposal has not been taken into account.*
>
> *[…] The position is isolated from the majority. It does not seem possible.*
>
> *[…] We want more volume and a shared distribution.*
>
> *[…] One year ago, you talked about 40,000 cases and you have increased nearly threefold. And now you are still talking about more volume. It does not seem consistent with your initial proposal and is therefore rejectable (…)".*
>
> *6) Future plan:*
>
> *[…] (…) formulas that allow, under the CMO cloak, the structural maladjustment in Jerez to be corrected and adaptation to the markets and alignment of supply and demand, with a view to their immediate application.*

(6.116) On 24 February 2008, according to the second declarations made on 27 June 2008 by the applicant for exemption from payment of the fine, the applicant met with the FEDEJEREZ Director General in Madrid to assess the agreement that had been reached by the rest of the companies participating in the cartel. The exemption applicant notified the FEDEJEREZ Director General of its intention to put the cases at €15, in order to improve the margin with certain customers, without making an agreement with the rest of the companies in the cartel.

(6.117) On 28 February 2008 BELLAVISTA and ZRM filed an application for the leniency programme with the CNC. In the application, they recount a series of meetings and their content or purpose, as summarised below:

- In 2006, they attended a meeting in the GB offices with representatives from B, GB and WH, but the applicants declined to participate in the agreement proposed there for solving the sector's problems.

- In 2007 they participated at an initial meeting attended by the same companies as the previous one plus FEDEJEREZ and ESTEVEZ. There was talk of beginning to move positions closer. After FEDEJEREZ called the 22 October meeting there was open talk of reaching an agreement for the BOB market: No price decreases; each company holds on to its customers; non-aggression in the export market; and take customers from the smaller players, with one of them offering a bit higher than the small supplier and the others much higher. That way the customer, faced with a choice between the small cheaper supplier, and a large supplier only a little more expensive but cheaper than the other majors, would choose the large supplier with the lowest price.

  The applicant believes that everything was already in place between the wineries that belonged to FEDEJEREZ and the attempt to include BELLAVISTA and ZRM in the agreement is because their large volume of stocks might allow them to exert much competitive pressure. They all said they would abide by the agreement, and the applicant's representative said he would not ratify it until he could speak with his superiors. ESTÉVEZ told him if they did not accept it "they would have a war".

- The leniency applicants declared their disagreement with engaging in any manifestly illegal practice and that their refusal to participate in the agreement led to the issuance of CR circular 1/2008 to regulate the 2007/08 quotas. That circular, the object of a complaint filed with the CNC on 6 February 2008, is a mechanism to avert the competitive pressure the applicant could exert on the market given its large volume of stocks.

- Spurred by the above actions, FEDEJEREZ called them to a meeting on 6 February 2008 which is later summarised in an e-mail of 7 February 2008, the content of which is rejected by the applicant, because they had never proposed dividing up the market.

- They also report a series of agreements and meetings alleged to have taken place, with their participation, in 2002/2003, but that would have ended in 2003 and lasted less than a year.

(6.118) The 7 March 2008 internal e-mail obtained in the inspection of GB (f 2725), with subject line Barbadillo, indicates that WH has already spoken with Barbadillo, and the latter told him "*that I shouldn't worry. They are going to tell them that they do not have wine".*

(6.119) The 25 March 2008 e-mail obtained in the inspection of FEDEJEREZ (f 2608) refers to a notice sent by FEDEJEREZ to ESTEVEZ, WH and BELLAVISTA and ZRM to confirm that the meeting that was pending would be held on Tuesday, 1 April, at the FEDEJEREZ offices.

(6.120) On 14 April 2008 FEDEJEREZ sent a call of meeting for that same day to ESTEVEZ and WH, as seen in an e-mail obtained in the inspection of FEDEJEREZ (f 677), with the following content:

> *"On Friday [11 April] I met with […], who, in turn, was accompanied by […] (…). Their interest in meeting is clear. What I have conveyed and tried to convince in these last few months is the need*

for you to "generate trust" amongst all of you and, with it, the right climate of understanding. We must go step by step.

Their objectives for the meeting are:

1. Convey their commitment of €15 (perhaps there you need to go into more detail differentiating by country)
2. Seek a solution to their current circumstances; enormous stocks of wine aged or in process, change of rules in the middle of the game (elimination of the 22%); need to move wine from the financial standpoint.
The first thing they requested was a return to the 22%, something which, to my understanding, is unlikely right now.
My proposal was to defend not the 22%, but rather the possibility of interpreting the circular so that at least the sales from the previous year could be guaranteed.
Reserved explanation: GARVEY's appeal in the commercial courts (which was upheld, although an appeal is being filed) obliges CR to suspend the quota circular that you are all familiar with. Without this, what we have is the previous decision of the Plenum, that is, the one provisionally adopted in November; 75% of the quota that applied last year. This solution is no doubt worse than construing the current circular (appealed and subject to interim suspension) as being able to guarantee at least the sales from the previous year. In addition, and according to what […] told me, if a solution could be found, his father would find it very reasonable to withdraw the two appeals (to the higher court and the commercial court) and before the CNC.

….

4. It would be good to talk to them about resolving the crisis as a possible solution, apart from their stocks and about the support we could give them there from the federation."(…)

(6.121) On 28 April 2008, in an e-mail obtained in the inspection of FEDEJEREZ (f 766 and 767), LUSTAU wrote to a FEDEJEREZ on the subject "SHERRY Quota", forwarding to it an e-mail received from one of their customers telling them that the quota they have established may be anti-competitive and suggesting that the OFT (the UK competition authority) could take action on the matter. The reason is that LUSTAU declined to fill a certain order alleging that the new allotment quota left it without capacity to supply the quantity requested by the customer. FEDEJEREZ's response was not to answer until it had consulted with its legal services.

(6.122) On 18 June 2008, according to what was found in the inspection of GB, FEDEJEREZ sent an e-mail to GB (f 2754) with a summary of the meeting held with Rafael Veras (BARBADILLO and ZRM) on same day. After telling them that "FEDEJEREZ defends a policy and a vision of the sector" and that "The affiliated companies defend that vision and belonging to FEDEJEREZ means sharing that vision", it goes on to say that "The important thing is to know whether they will sign the FEDEJEREZ PLAN", and that they should demonstrate their commitment. The underlying issue is the continued membership in FEDEJEREZ of Bodegas Valdivia, recently acquired by the BARBADILLO group and ZRM.

(6.123) On 23 June 2008 a document submitted by the first leniency applicant (f 600) provides evidence of a meeting between ESTEVEZ, BARBADILLO, LUSTAU, FERRIS, and CAYDSA, with GB, WH and P. ROMERO having excused their absence due to other travel plans. The summary of the meeting reads as follows:

- *"Need to act as one to defend against the actions of Nueva Rumasa which could end up with all of BOB*
- *Give them a small quota and do not sell them quota*
- *CR would adopt measures to prevent the transfer of stocks to warehousing bodegas*
- *Legislate in a new regulation measures to hinder the development of BOB sales*
- *Forge a common front to not even sell them must"*

FOUNDATIONS IN LAW

ONE.- Applicable laws and regulations

The conduct charged in the PR submitted to the Council began in the year 2001 and ran until 2008, when this infringement proceeding was brought. It therefore began while the Competition Act 16/1989 of 17 July 1989 was in force and continued after it was repealed by the new Competition Act 15/2007 of 3 July 2007. The conduct for which a sanction is sought here is regulated in exactly the same way under both laws, so for purposes of the conduct's legal assessment, application of either Act would produce the same result. Therefore, it is irrelevant whether one or the other is applied for the period after repeal of the 1989 Act. As for the procedural questions, the case involves application of the leniency programme, so the 2007 Competition Act will apply when analysing the conditions for applying that programme, along with the regulations on the benefits entailed by said programme. These considerations support the decision to apply Competition Act 15/2007, unless this would be detrimental to the interests of one of the accused, in which case Act 16/1989 would be applied to avoid that harm. This does not appear to be the case here, so the law to be applied will be Act 15/2007.

Article 1 of the LDC regulates the same infringement as article 101 of the TFEU, with the aim of maintaining a single market between the Member States. If the conduct examined in this proceeding is an anti-competitive conduct affecting trade between the Member States, as is the case, the provisions of article 101 of the TFEU will apply. The product involved is intended to be marketed in Germany, the Netherlands, Belgium and the United Kingdom, all Member States of the EU, so intra-community trade is affected and article 101 of the TFEU is therefore fully applicable.

TWO.- Object of the proposed resolution

The purpose of this resolution is to assess whether, as proposed by the DI, the acts established by the investigation constitute a conduct prohibited by article 1 LDC and article 101 (ex 81) of the TFEU, such that it would therefore have to be sanctioned as provided in the LDC.

In its proposed resolution, the DI finds that the agreements adopted by the accused companies are of an anti-competitive nature, as the conduct reflects the joint intention to behave in a given manner on the market, after having maintained numerous contacts with each other in which they mutually expressed that intention. Specifically, they have reached agreements to limit the supply they were willing to offer to their customers, to divide up that final quantity amongst themselves, to establish a minimum price for that supply and to establish compensation mechanisms that would be applied a posteriori.

The market targeted by these agreements was foreign marketing of wines with the designation of origin *"Jerez-Xérès-Sherry" (Jerez) and "Manzanilla Sanlúcar de Barrameda" (Manzanilla), specifically, the marketing of exclusive-supply wines, also known as private, white or distributor brands or buyer-own-brand products (BOB), regardless of whether those brands are registered by the wineries or by the customer*, the characteristics of which are detailed in FF (Findings in Fact 1).

The conduct evidenced here consists, in the opinion of the DI, in the creation of a cartel that has spanned different time periods and comprised different participants, and in which different types of agreements have been reached, all closely interrelated. It points out that in addition to the agreements adopted for marketing BOB products, the object of this proceeding, others were reached intended to limit the final quantity the Jerez winemakers could market each year, the so-called quota agreements. This group of agreements reached inside the CR by the companies that sat on its governing bodies was sanctioned by the CNC Council in resolution *RCNC 2779/07 of 4 June 2009, Regulatory Board for the designation of origin Vinos de Jerez and Manzanilla de Sanlúcar*, because the CNC Council found, as proposed by the DI, that the CR did not confine itself to establishing annual allocations as a function of the stocks of each winery, as provided in the DO Regulation for the purpose of ensuring a level of quality in keeping with the DO, but had limited the quantities that could be sold not just to stocks but to wine aged in previous years, thus interfering in the market in a way that resulted in an unjustified restriction of production. These actions entailed a regulation of supply for which the CR did not have authority.

The DI finds that the group of agreements reached by the cartel have been developed over different time periods and have evolved in a different way. It explains in the PR that, for ease of understanding, it presents the facts grouped into two different time periods, which though consecutive are differentiated by the disagreements that arose between some members of the cartel during its development. Thus, the agreements that were adopted and implemented as from 2001 were, by 2004, no longer being entirely complied with by some of the members. Specifically, one of them refused to make the agreed compensation it was bound to for having sold more cases of product than it had been allotted in the quota system. These instances of non-compliance by one of the members do not mean that the rest of the covenanted terms of the agreements were not fulfilled. These disagreements destabilised the overall agreement, and in mid-2005 contacts were resumed between the leading cartel members in an effort to stabilise it again. They were joined by other smaller operators, supported by the participation not just of the CR, which had already taken part in that first stage, but also with FEDEJEREZ, the federation for the sector.

The DI has found proof that the sector cartel had reached previous agreements, as evidenced by minutes dated 1992, in which a series of companies had agreed to raise prices in the BOB market by at least 22%, while arranging other instruments needed for the agreement to be successful, such as mechanisms to detect and correct possible breaches in the form of supplies at below the agreed minimum price. Nevertheless, the time span between that agreement and the ones evidenced in this proceeding, and the heterogeneous mix of participants in other meetings held in 2000 and early 2001, led the DI to place the start of these agreements in May and November 2001, depending on

the participation evidenced in each case. It has dated the end of the infringement, in general, at the time this infringement proceeding was brought.

It has been shown that in November 2001 (FF 6.4) WH, GB, BARBADILLO, GARVEY and ESTEVEZ, first, and later with FERRIS as well, within the framework of the REGULATORY BOARD (FF 6.3 and 6.4), agreed to (1) establish the BOB quota system (the number of cases which each company could export with the customer's brand) per company, in which a quota was assigned to each company and for each market in the Netherlands, United Kingdom, Germany and Belgium for the 2001/02 marketing year. The aggregate quota was established taking account the expected drop in demand (a total of 2,759,999 cases, with 35.9% for WH, 20.9% for GB, 9.4% for Garvey/Soto, 13.8% for Barbadillo, 16.1% for Estévez and 3.9% for Ferris; (2) Set up a monitoring committee that would meet monthly, and which eventually became two committees, the executive one, composed of the persons who made the agreement and had to meet every two months, and the commercial committee, composed of the commercial directors of each member; (3) Establish commitments up to the beginning of the marketing year in September, for the period prior to 1 September 2001[ ]; (4) Create a control mechanism, with the establishment of a system of guarantees that could be enforced the moment any of the companies participating in the arrangement exceeded their BOB quota. For example, they agreed to send to the secretary (of the CR) a detailed list of the labels they supply to the markets covered by the agreement, and a detailed list of the supply commitments in force at the date November the agreement, with information on the customer, number of cases, selling price, expiry date of the contract, ...; and (5) Fix a BOB benchmark price of 2,800 pesetas per 9-litre case (with an equivalent euro value of 16.8 €/case).

This agreement was maintained without significant incident until the end of 2003, at which time certain disputes arise that lead to specific instances of partial non-compliance during 2004. The main characteristics of this set of agreements in this period are grouped by the DI into the following categories: establishment of the calculation of the BOB quotas and their revision; pricing agreements; exchange of information on customers and prices and dividing up the market and customers; compensation system; and monitoring. All of this was carried out over the course of 19 meetings that are evidenced in the SO, and diverse e-mails dealing with those meetings.

The multilateral meetings between the companies resumed, after a transitional period of reflection, in the summer of 2005, giving rise in May of 2006 to a concrete agreement proposed by FEDEJEREZ that was called a “gentlemen's agreement”. The production cutback, a basic element of the agreement, was communicated to the press by FEDEJEREZ as a means of launching a message to the entire sector. One week later the so-called BOB Table was set up, the next step to be taken by the cartel. The objectives of this second BOB table were: a quota allocation of all supply of Jerez wine (quota, referred to as "*cupo*"); cap on purchase of quotas from others (art.32.1); establishment of controls and limitations on labelling (BOB sub-register); and formation of a table with all possible players, at two levels: commercial and managerial. On this occasion the limits affected not only the BOB market, but all marketable output. All of this was done to be able to maintain the status quo, in relation to maintenance of

customers and then boost the BOB business through price increases. As indicated in the press article published at that time with access to information on the meeting, according to the e-mail of FF 6.72: "*Jerez has revitalised a sector table that has been called the "marketing committee" and which is, without euphemisms, the old BOB table (…)"*. The objectives are the same, the players are the same, plus a new one, and the instruments of the same nature. This first agreement was followed by others: in June, July and September of 2006; in April, May, July and November of 2007; on the time frame; on the non-aggression pact; on the price increase; on limits to the sales quota and amounts; and on exchange of information on customers and prices. All of this was carried out through the 25 meetings evidenced in the SO and in the related e-mails.

All of these proven facts have been classified by the DI as a series of agreements captured by article 1, both of the previous and of the current Competition Act (LDC). It therefore involves a continuing offence, in which, as provided in article 1.2 LDC, all of the acts carried out are absolutely null, just as they are under article 101.2 (ex 81.2) of the TFEU. This is a continuing offence, in which the role of each of the participating companies has changed; some took part during the entire period evidenced (WH and GB), others were in disagreement at specific times (E and B), others entered later on (LUSTAO), others were only in the second part (FERRIS/PR/CAY), others only in the first period (B-ZRM), and others acted to aid and abet (the REGULATORY BOARD and FEDEJEREZ).

The purpose of the cartel was to adopt a secret agreement amongst the companies (all 9), at different times, in relation to BOB exports, to carry out a coordinated increase in the price of BOB products. Consequently, they coordinated actions to eliminate competition between them and eventually set up the BOB Table.

The DI believes the effect on community trade is obvious, as the market involved consists of exports to countries in the EU. Jurisdiction to hear the case rests with the CNC, because even though the production assets are in Andalusia, the effects of the agreement extend to entire European Community market, and in this context the authority best positioned in accordance with Regulation 1/2003, as ruled by the DI, is the CNC.

The characteristics of this conduct lead the DI to underscore its markedly anti-competitive nature given the relinquishing of the independence with which operators must act in the market; and there is no need for the agreement to be explicit, it being sufficient that its spirit has conditioned the behaviour of the parties. There has been a "meeting of minds", which has translated into a dividing up of the market subsequent to an agreement to curtail output. The cartel violation is very serious, and the record shows there was awareness of its illegality. The cartel was composed of the main operators in the market, information was exchanged and the arrangement was long-lived.

With respect to the liability of the companies that participated in the cartel, although the cartel is complex, with bilateral and multilateral meetings, and disputes, which make it more difficult to specify the timing of its members' entry and exit, the DI has established that WH and GB were liable as from May of 2001; BELLAVISTA and ZRM (Garvey), BARBADILLO, ESTEVEZ and the CR, from November 2001; FERRIS from September

2002; FEDEJEREZ from July 2005; LUSTAU from September 2005; P. ROMERO from May 2006; and CAYDSA from December 2007. The infringement is deemed to have ended at the time infringement proceedings were brought, except for BELLAVISTA and ZRM, for which the end was tied to the grant of the conditional exemption, and for the CR, whose liability ends in June 2006, because, as already stated, the CR was sanctioned by the CNC for its conduct with respect to the quota circulars, very closely intertwined with the conduct investigated in this case, since June 2006.

All of the accused in the SO have filed submissions, which have been assessed and answered by the DI in the proposed resolution (PR). The PR, in turn, was the object of new submissions that have been summarised in the background facts of this resolution. From reading them there may be gathered a series of arguments that are common to several of the accused, so in the following sections they will be assessed jointly, before then going on to evaluate the rest of the specific arguments submitted by each of them. Before taking up the arguments regarding the assessment of the conduct, we will answer those relating to questions of procedure.

THREE.- Questions of procedure

Several of the accused, namely BARBADILLO, P. ROMERO and WH, state that the DI has reasserted the conclusions of the SO, neither including the arguments they presented in the body of its analysis nor refuting them, but merely confining itself to rejecting them. A simple reading of the PR is in itself sufficient to reject this unfounded allegation. Over a third of the volume of the PR engages in giving them an answer, but it is not just a quantitative question — the DI has answered all of them one by one, grouping the allegations together as common or individual. Quite another matter is that its evaluation has not served to change the conclusions previously reached in the SO, but that is no basis for simply concluding that the DI did not carry out that function. These parties have ignored the assessment made by the DI, because it did not fulfil their expectations, and have therefore re-submitted many of the same arguments to the Council. Consequently, the Council will not reiterate the assessments in which it agrees with the DI, and will thus mainly focus on the pleadings submitted in reply to the PR which are actually based on arguments not previously rebutted by the DI in reply to the allegations on the SO.

By way of example, take the first argument submitted to the Council against the PR by WH, which reproduces the whole of what it already presented to the DI in reply to the SO: that the DI's inspection of the offices had overstepped the purpose set out in the Investigation Order and Authorisation, thereby violating their right of defence. Reproducing here the arguments set out by the DI in sections 243 to 251 of the PR would not give them any greater force, and, since we share those arguments, here we will only cite them by reference in order to ensure that this resolution only be enlarged if such increase actually adds weight to the grounds and foundations on which it is based.

P. ROMERO alleges that the failure to enter the proposed evidence into the record and lack of *ratio decidendi* render the PR null, because there is an absolute lack of evidence for considering the presumed conducts to have been proven. They say that what the PR requires of them is a “diabolical test”.

The accusations against P. ROMERO in the cartel are evidenced by its presence at the meeting of 30 May 2006 in the CR offices, and its presence at the meeting held on 11 December 2007. Both meetings approved basic elements of the cartel, such as signing a non-aggression agreement and an attempt to raise prices and fix a minimum for them. The evidence proposed in reply to the PR, the presence of its GM at another location on 30 May, and a series of interviews cannot refute the fact that both the CR and GB place P. ROMERO at the meetings cited above, regardless of what individuals represented it there; what is more, for the 10 December meeting, the individuals are not named but only identified by the group they represent. Therefore, the evidence proposed is not sufficient — the proven and irrefutable fact is that the other members of the cartel say P. ROMERO was present at their meetings, sent them the calls of meeting by e-mail and later reported their attendance to the others.

P. ROMERO also raises the possibility suggested by the CDCA of having reached a termination of the infringement proceeding by commitments or of having opened the arbitration proceeding envisaged in article 24, and does so because in its opinion the possible penalties that may be imposed by the Council will not contribute to resolving the grave problems faced by the sector. First, the arbitration proceeding of article 24.f does not apply in a proceeding brought for an infringement of the LDC, and, as for the argument that a sanction would not fix the sector's problems, it must be recalled that the purpose of LDC infringement proceedings is not to remedy a sector's structural problems or crisis, but to put an end to anti-competitive conducts that may exist and deter future pursuit of those conducts.

With respect to the holding of a hearing, a point that has been insisted on by some of the accused after the decision issued by this Council on the evidence and holding of hearings, we refer once again to the reasons set out in the said Resolution of 23 October 2009.

FOUR.- Sector context of the conduct

This was a long-lasting conduct in which there participated different operators, of different size and with presence in different markets. It also involved other sector institutions, some of them with regulatory and oversight powers, and with both a public and private component. Intermingled with the conducts analysed here are other acts of government industrial intervention which the parties attempt to confuse with the anti-competitive conducts prohibited by article 1 of the LDC and article 101 of the TFEU. It is therefore considered useful, in order to place the conducts in their real context, to give a brief summary of that setting.

The Jerez wine sector examined in this proceeding is divided into two basic subsectors: production (independent winegrowers and cooperatives) and marketing (bottler and warehousing bodegas). This is the framework for the Regulation of the “Jerez-Xérès-Sherry” and “Manzanilla Sanlúcar de Barrameda” Designations of Origin” (hereinafter the Regulation), which was approved by the 2 May 1977 Order of the Ministry of Agriculture, and which regulates, with the aim of guaranteeing the origin and quality, the amount of wine from that DO that can be brought to market as a function of the stocks (article 32.1). A broad explanation can be seen in the SO of this case and in the above-

cited Resolution RCNC 2779/07. Protection of both designations of origin is entrusted to the CONSEJO REGULADOR DE LAS DENOMINACIONES DE ORIGEN “JEREZ-XÉRÈS-SHERRY” Y “MANZANILLA SANLÚCAR DE BARRAMEDA” (CR or REGULATORY BOARD). The REGULATORY BOARD represents each and every one of the professional sectors involved in the Designation of Origin: bottling bodegas, warehousers, independent vinegrowers and members of cooperatives.

Both subsectors, production and marketing, are likewise brought together in the federation FEDERACIÓN DE BODEGAS DEL MARCO DE JEREZ (FEDEJEREZ), as its six member associations include not just bodegas, but also vinegrowers and exporters. FEDEJEREZ also includes 50 companies that are in turn affiliated to the six member associations, according to the latest version of their website. The member associations of FEDEJEREZ include the Asociación de Criadores y Exportadores de Sherry (ACES), to which there belong most of the companies participating in the cartel analyses in this case. ACES has 24 wine marketing companies and between them they account for 80% of the total of 100 million bottles of Sherry consumed in more than 120 markets (FEDEJEREZ website). Also part of FEDEJEREZ is the FEVIÑAS federation, which consists of 14 vinegrowing companies that have 3,100 hectares of the 10,400 hectares now in production.

The sector saw its fastest growth in the 1970s and since then a series of factors, mainly involving a decline in demand, have generated excess supply and a non-alignment of supply and demand during recent decades. This oversupply begins with the amount of wine grapevine cultivated for production of fino and manzanilla Jerez wines.

As has occurred in many other industries, governments have carried out diverse plans to restructure the sector, with the aim of finding solutions to a crisis of a markedly structural nature. The case record shows that since the 1990s there have been a series of Restructuring Plans that have led to a notable reduction in the area of vineyard classified for these DO.

But it seems that those plans have not brought the sector to a situation in keeping with the expectations of the different agents involved — basically, to remain in the sector with margins that are impossible in a situation such as the current one with falling demand. This prompted certain operators who were unsatisfied with the results to take a leading role in designing new measures and actions for the sector to maintain their status quo, quite different than what would come about if they allowed the development of what one of the accused defined as “ecological regulation of the sector, natural but savage”, which is what they believe would occur in the absence of a sector agreement (Doc. of GB, Nov. 2000, f 2647).

The analyses carried out in the investigation phase of this case lead to the conclusion that there is excess supply in every step of the process: in the production of grape and must (qualified for Jerez fino and manzanilla), in stocks (the number of butts containing the must in the crianza ageing process — three times what can be drawn off each to be marketed according to the "law of the third" quality standard), and in cases (product already bottled and ready to be marketed).

With the aim of reducing that oversupply, over the course of the drawn out crisis of recent decades, different measures have been designed that affect the various

subsectors, some inspired in the CAP (common agricultural policy) procedures for regulating surplus demand in other agricultural sectors (grubbing-up, distillation, ...), others inspired in classic supply-side restrictions contrary to the LDC (limitations on supply and partitioning the market between competitors), and other demandside stimuli (promoting exports, advertising to buttress demand, …).

Insofar as concerns this case, the marketing end of the business, the oversupply was channelled through stepped-up development of the BOB market. This was a way of moving excess stocks without lowering the price of the established brands, because by shifting part of the output to the BOB market the price could be lowered without harming the image of the brand. The data submitted by the first leniency applicant show that in 1980 the BOB market accounted for 30% of the total Jerez fino market, in 2002 this had risen to 38.2%, with a reduction in the weight of the leading brands (-5.5%) and of the standard ranges (-3.2%) (They cite a CR source).

As a result of this siphoning off to the BOB market, the competition for this segment drove prices down, which probably prompted the reaction of the operators that was set out in the document in the case record dated 8 January 1992 in Jerez de la Frontera (f 1104 found in the inspection of WH), in which WH, BARBADILLO and ESTEVEZ, together with others, reached an agreement to raise prices in the BOB market at least 22%, stating that application of the Jerez Restructuring Plan had not “allowed a recovery of the BOB export prices”. This is the earliest act demonstrated in the case record of a series of conducts that would be carried on over the years and which are prohibited by article 1 of the LDC and article 101 of the TFEU.

The 2000 documents contain references to other restructuring plans, such as the one for 1992-95, in which the right actions (according to the document, which was from GB) to reduce vineyard (from 18,000 hectares to 10,700, or -40%) and stocks (reduction from 1,000,000 butts to 680,000, or -32%), but with no actions on the markets (f 2643).

The preceding document also cited the “sector accord of 1997-2000” where agreement had been reached on (1) grape and must prices; (2) creating a promotional fund with a contribution of 4 ptas/kg, which had funded a “timid promotional campaign of 500 million” and (3) a quota of 35% (this may be understood as referring to stocks and therefore legally admissible, as the law accepts up to 40%, a bit more than the 33% suggested by the law of the third for quality reasons).

The result is that by 2000 the various plans had managed to achieve strong earnings for vinegrowers and cooperatives (in the judgment of GB) but weak margins for the wineries.

FIVE.- The conduct contrary to articles LDC and 101 TFEU

Taking as starting point the context described in the preceding Foundation in Law, the Council believes the conducts evidenced in the case record were part of a comprehensive agreement typical of a cartel, and that each of those conducts can be classified into one of the following categories:

(i) Limitations of production by arranging restrictions on supply that have limited the sales volume. Assignment of a quota to each company and reviews of those quotas. During the first years, the limits on output were agreed by the members of the cartel, but during the ensuing years the production limits were imposed on the rest of the operators in the sector, not just in the BOB segment, through the CR circulars, which gave rise to infringement proceeding 2779/07, CONSEJO REGULADOR DE DENOMINACIÓN DE ORIGEN VINOS DE JEREZ Y MANZANILLA DE SANLÚCAR. The quota system was completed by a compensation mechanism between companies with sales above their assigned quota and those who did not reach theirs.

(ii) Partitioning the market. After putting a limit on the marketable output, that final quantity was distributed by dividing up the customers.

(iii) Establishment of minimum prices and revisions of those prices.

(iv) Exchange of information on prices, customers and amounts sold.

(v) Control and monitoring mechanisms. At first the monitoring was done amongst all of the participants at their periodic meetings. Second phase involved a register of supply contracts, a statement to the CR of export prices to avoid dumping and the creation of a coordinating table.

All of these actions were implemented over the course of the more than 100 contacts descried in FF 6. The contacts involved different companies in the sector and two sector institutions, FEDEJEREZ and the CR. The presence of FEDEJEREZ was already evidenced in the meeting of 15 May 2001 (FF 6.2) and the CR's involvement began when it sent WH sensitive commercial information that was indispensable for establishing the marketing limit and for dividing up that volume (FF 6.3). There is no further evidence of FEDEJEREZ's presence until 2004. It has been shown that the BOB table functioned since at least 2001, as a cartel composed of the main wineries, WH, GB, G, BARBADILLO, ESTÉVEZ and FERRIS for the purpose of recovering BOB pricing levels without losing clientele. This overarching objective required the implementation of various instruments, all of them amply described by the DI in its PR: limit the total amount the six wineries were willing to market; that amount was tied to the expected demand as a means of bringing supply and demand into line, and avoiding a drop in prices; divide up that “pie”, as the six wineries themselves referred to it; agree not to make offers below a benchmark price (2,800 ptas; €16.9 for a 9-bottle case); set up two monitoring bodies; and commit to sharing any significant information so that there would “*exist total transparency between the parties*” (FF 6.4).

During 2002, in documents in the case record (FF 6.7), the members of the table recognise that the BOB table has been an adequate measure for improving margins, but that it is “hanging by a thread” and it is “impossible to avert entry by others”, such that new measures needed to be applied in the production and marketing ends of the business. Other documents from 2002 attest to the control and monitoring of that BOB table they carried on (FF 6.8, 6.9 and 6.10).

In 2003 several control and monitoring meetings took place. Special attention should be called to the meeting of 18 February 2003 (FF 6.12) given how the situation was evaluated there. It is noted in the meeting that the fact that not all producers are in the cartel poses a problem, because those other operators offer lower prices to capture customers, so there is talk about either bringing them into the cartel or exerting pressure on them. Some are of the opinion that dividing up the market will be difficult if there are more and that others will continue to step forward. The conclusion that follows is that an immediate application/amendment of article 32.1 of the wine regulation is needed. It is important to emphasise that this meeting is held in the CR offices with the presence of its General Secretary and of BARBADILLO, WH, FERRIS and ESTEVEZ and that a summary of the meeting was obtained by the DI at the GB offices. The modification of the aforesaid article is necessary if they want the CR to be able to establish, by means of circulars, limits on marketing based not just on the stocks of each winery, but also on past sales. In other words, as will be seen further ahead, the breakup of that table shows that it is not enough to limit production for the BOB market amongst the six who were doing so up to that time, because there was more production outside the table's control that exerted competitive pressure and entered the BOB market, driving down prices. Now then, to be able to ease that competitive pressure they had to reduce the quantity of wine that could be marketed and was not controlled by the table. The means of attaining that reduction for all operators was through a CR circular that put a cap on what each operator could market, because a circular was binding on all of them. This is an authority conferred upon the CR by the wine regulation, by virtue of which every year the CR can establish the percentage which each operator may market having regard to its stocks, and in no case may the limit be greater than 40% of those stocks. But this was not sufficient to restrict the overall supply in the market, because an operator who acquired more stocks could increase the amount to be marketed, or an operator who bought bottled wine from another winery that complied with its allotment could increase its supply to the market, so that operator would continue exerting competitive pressure and driving down prices. The plan, as was finally done, and sanctioned by the CNC, was to amend that article 32.1 so that the limits established by the CR did not have to be annual, but multi-year caps, and that the marketing limits be based not just on stocks but on the sales recorded by each operator in the preceding years.

The documents on the 2004 meetings up until March were submitted by the fine-reduction applicant, GB, and their content point to an intensification of the differences that arose between them and the eventual breakup (FF 6.32, 6.36 and 6.37).

The case records shows evidence, however, of the intention to continue working to implement some of the measures that had been proposed in several of the BOB meetings documented above. The internal GB document (FF 6.38) shows how GB was contemplating the following measures to introduce into the Strategic Plan:

- *“Sales quota differentiated by winery*
- *Quota = average sales of last two marketing years, during the entire plan until the final quota has been trimmed 40% (yrs 2008-2010)*
- *Raise BOB to 2003 prices to reach 3000 Ptas/case in 3 years.*

These GB measures are fully in line with those contained in the FEDEJEREZ document of November 2004 "Revision of the Strategic Plan" (FF 6.40), which contains the following:

- "*Freeze sales by wineries*
- *Individualised quota differentiated by winery*
- *40% quota*
- *Regulate article 32.1 at 40% stocks*
- *Measures to limit commercial speculation*

And the collaboration between GB and FEDEJEREZ is evidenced by the document "Tasks to be carried out in relation to the Reconversion of the Strategic Plan (1.12.04)" that was located in the GB offices (FF 6.41) and which contains comments such as the following:

- *Freeze sales by wineries: differentiated quota.*
  "From now on we should never talk about quota, but rather of a percentage of sales assigned to each winery".
- *Separation of brands and BOB… This would hinder a comprehensive agreement. It does not seem easy or convenient to open an internal front in wineries.*
- *Number of marketing years to take into account and the role of stocks in the final formula. "This point must be dealt with jointly and directly with CS from the CR.*

At the same time, and unequivocally, the CR examines the possibility of resuming the BOB table mechanism, and says in an e-mail of 24 September 2004 to BARBADILLO that (FF 6.39): *we are thinking about calling a meeting of the table to talk about BOB and once again try to sow the possibility of establishing a forum for debate about this very worrisome issue. I would like to know if you would like to participate in this first meeting. Initially, I want to tell Medina [WH], González-Byass, GARVEY, Argüeso, Ferris, E.M. Hidalgo, Hidalgo-La Gitana, Caballero [LUSTAU], Real Tesoro [ESTEVEZ] and I am juggling the idea of Caydsa" (…)*

Intervention in the matter along these same lines by the CR and FEDEJEREZ is also seen in the e-mail of December 2004, from LUSTAU, which contains a summary of the "2nd Point of Board meeting 29 11 04" and reads (FF 6.43): "*Reference is made to the contacts taking place in the Agriculture Delegation of the Government of Andalusia to reach a sector agreement that resolves both the problems of the cooperatives with their excess and those of the wineries faced with unfair competition.*

> *In this regard, FEDEJEREZ has designed rules to implement that would require a consensus amongst all members of the Sector, including the following:*
>
> • *A cap on annual exports of 40% of the stocks at 1 September of each year, even where purchases are made externally to complete the quota.*
> • *Grub up 3,500 hectares of vineyard to be paid for by the winegrowers and buyers of the must made from those vines.*

- *Pro rata sales quota system by winery. This proposal will require consensus amongst the different sectors of the winegrowing trade and approval from the Agriculture Delegation of the Government of Andalusia.*
- *Hold grape and must prices steady with a maximum increase of the real CPI for several years.*

- *Conduct sales promotion campaigns paid for by all parts of the sector".*

The second one reads as follows:

"Below I convey information on the consensus agreement reached in FEDEJEREZ on the "Revision Jerez Strategic Plan".
"FEDEJEREZ has prepared and agreed with all its members a revision of the Jerez Strategic Plan, that basically consists of:
5. Quota system per firm, with the following exceptions requested by us:
a. no limitation on branded business
b. no limitation for institutional BOB customers of each firm
c. no option for increase in BOB
Also, article 32.1 of the current Regulation will be modified, limiting the total outflows from each firm, including its own quota and quota acquired from other wineries, to 40% of the stocks as at the start of each marketing year.

(…)

Further evidence of FEDEJEREZ and the CR's involvement with the companies is seen in the e-mail of 11 July 2005 (FF 6.44) in which the CR tells FEDEJEREZ:
"*… in these lines I give you a summary of the topic of reference that I had the opportunity to discuss with GB this past Thursday.*

Marketing

… economic improvement can only come via margins, … the most stable measure is price increases. To raise prices the supply of wine to the market has to be curtailed and the solution is a DIFFERENTIATED QUOTA per winery,…. In parallel to this, a marketing table will be set up with room for all companies (if possible all that operate in the BOB market). The differentiated quota would not affect the pure warehousers, who could sell a quota of 35% or similar. (…)"

The CR prepared a document in September 2005, obtained in the inspection of the FEDEJEREZ offices (FF 6.46), in which one can read an exhaustive analysis of the sector, along with certain proposed measures for solving its problems. Some of those measures once again include the instruments already used in the previous BOB table and discussed in the preceding months, such as establishing a cap on sales per winery as a function of past sales or stocks (the lower of the two), but there are also new measures such as registering the supply contracts with prior approval of the labels and product samples, or declaring the export prices to the CR. There is more talk about the need for a table that monitors those measures, like the previous one. Notably, in that same document the CR warns that the difficulties include the "illegal nature of anti-competitive practices".

The evidence continues in the case record of FEDEJEREZ executive committee meetings with the participation of the committee members, amongst them several of the main companies in the cartel (FF 6.47). The meetings continued discussing marketing measures, specifically at the 17 October 2005 meeting (FF 6.48) it was said "*irrespective of other measures that absolutely need to be adopted, the priority should be to agree to a formula for differentiating the quota (freeze on sales).*

The Secretary argues the need to demystify the various possibilities that exist for establishing the formula, which include:

.-Establishing a fixed quota for each winery
.-Establishing a range of historical years as benchmark for determining the quota
.-Establishing the time frame for applying the formulas
.-Establishing a correction factor based on sales and/or stocks"

The analysis of the situation counsels obtaining exact and transparent knowledge of a series of data (real quota of the sector, FEDEJEREZ quota, ARJEMAN quota, BOB and brands quota, real excess of stocks, etc.), for which purpose the Secretary is authorised to request the data from the Regulatory Board, with a new meeting to be scheduled".

There were contacts between FEDEJEREZ and the various companies dealing with the quota, the BOB table or the need for information on each company in order to be able to draw up differentiated quotas during 2005 (FF 6.50, 6.51 and 6.52) and during 2006 (FF 6.53, 6.54, 6.56, 6.57, 6.58, …). This groundwork, which included introducing the idea of a "gentlemen's pact", went on through the spring of 2006, when after several meetings there was set up on 30 May 2006 (FF 6.70) the "Marketing Table", where the initial conditions, objectives (maintain the status quo and gradually increase the value of the BOB business), the functions of the table, and the proposed steps and timetable were all defined. The following day there was issued the first of the CR circulars that were later sanctioned by the CNC in the aforecited RCNC 2779/07 of 4 June 2009. Nevertheless, prior meetings such as the one on 2 May show that certain types of agreement were already in place, such as not making offers below a certain minimum (FF 6.61). The Findings in Fact (FF) detail each of the following meetings of 2006, 2007 and 2008, which need not be repeated here, except perhaps for the meetings of 22 October 2007 and 10 December 2007, because they explicitly include the various agreements that were being decided at those gatherings. The fact that agreements were accepted at different meetings has been relied upon by some of the accused as evidence that there was no cartel, because if various agreements were being reached it is because there was no agreement. But the facts are quite different than what is pretended with that argument. This was, as has been repeated countless times, a cartel that required different elements to achieve a single overriding objective.

SIX.- Single continuing offence

The Council agrees with the DI's view that the infringement described in the preceding Foundation in Law is a single continuing offence, namely that during a lengthy and continuous period from 2001 until the proceeding was initiated in 2008, the cartel carried out a series of agreements aimed at keeping BOB market prices at a level that allowed them to meet their earnings expectations.

The DI considers as demonstrated (§ 143 SO) that the Jerez wine sector has been suffering a structural crisis caused by a sustained drop in demand, especially in the export markets, that has led to a situation of excess supply. Efforts have been made to bring the oversupply down into line with demand at the proposal of various authorities, such as the Government of Andalusia and the DO Regulatory Board, designing various Structural Plans for this purpose during the 1980s. The greater part of the exports of this product are exported as white label or distributor's brand products, and represent a high percentage of their overall sales. In this context the cartel members sought an agreement on the BOB quota and on other questions relating to the marketing of these products. *Those agreements have been developed, according to the DI, in several time periods and evolved differently* (§ 169 SO). The years 2000 to 2004 are regarded as the first period of the cartel, which was followed by a period of reflection from 2004 to 2005, after which new agreements were reached on marketing BOB products during 2006, 2007 and 2008, this second phase being called the second period. The reflection period came about because a cartel member had failed to comply with all elements of the agreement, specifically the compensation arrangements. In other words, after abiding by all of the other elements that is, the cap on production and allocation of the final capped amount, respect for customers, application of price minimums and exchange of information on the quantities actually marketed by each, it had refused to make the compensation owed to an operator who had sold beneath its quota. In other words, there were partial breaches.

Those specific instances of non-compliance were followed by a period of reflection that would give way to a new marketing table. Though formally constituted on 30 May 2006, and even covered in the press, the contacts and talks to set it up started a year earlier, promoted by the CR and FEDEJEREZ. The DI therefore holds that the BOB table was resumed in 2006, and regards it as the same table, for its objectives are the same, to maintain the status quo with customers at higher prices than the present ones, the members are the same, with the addition of a smaller winery, and the instruments are practically the same or similar: quota restrictions, establishment of a differentiated quota based on past sales, no aggression between them, that is, respect for customers, no sales below a minimum price, … In short, the DI finds that this is one and the same conduct and that it is pursued on a continuous basis, even though over the years there were changes in the members and changes in some of the instruments. In their replies to the SO, and to the PR as well, a majority of the accused admit that in the period 2000-2004 the conducts described in the case record could be classified as a "cartel", but its prosecution would in any event be time-barred because more than four years had run from its conclusion in mid-2004 to the date proceedings were opened in July 2008.

This is the foundation on which the accused BARBADILLO, ESTÉVEZ, GB, CR, FEDEJEREZ and WH base their argument that the acts were neither a single conduct nor a continuous one, that there was no infringement in the second period and that the DI is confusing two radically different things in the “meetings for the quota” and the “BOB meetings”. Such confusion has led it to believe the 2004 and 2005 meetings are in relation to the quota when this is not the case — they were meetings to deal with the cartel, not the BOB market. On the later meetings held between 2006 and 2008, the majority do not question their existence or their content, but do dispute how they have

been assessed by the DI, because no anti-competitive agreement whatsoever can be inferred from them. Some of them stress that the SO contains a manifest error in dating certain annotations in the year 2005 that were actually made in 2006. This would reveal just the opposite of what the DI has found: that there were no contacts between them in 2005, and that they took place in 2006. The evidence therefore shows there was an interruption and continuity cannot be alleged. In addition, what took place in the ensuring years was a series of meetings with attempts on several occasions to reach an agreement that was never achieved.

BARBADILLO holds that the BOB agreement ended in February 2004 and that the investigated agreement as from May 2006 was independent of the previous one, and this one was even differentiated into two periods. WH makes the same argument and adds that the criteria set out by the Spanish Supreme Court in its judgment of 30 November 2004 (Foundation in Law Five) for finding the existence of a single continuing infringement are not met, as the identity of the liable parties is not the same for the multiple acts investigated; the actions are not sufficiently proximate in time; and there is no preconceived plan or continued wilful misconduct that can be extended to both accusations as part of the same psychological and material process, it not being sufficient to demonstrate the existence of a continuing offence that there was a repetition of conducts contrary to the same legal provision. GB puts forward the same arguments and ESTEVEZ does not recognise that the first period was a cartel, and even if it had been, its participation ended in 2003, when it refused to make compensation for customers.

In the opinion of the Council, the DI has answered these arguments amply; nevertheless, given that they deal with the core of the conduct, and hence of the investigation, it is appropriate that they be answered by the Council.

Based on what is set out in the preceding Foundation in Law, the argument made by several, including ESTEVEZ, that the DI is confusing quota meetings with BOB table meetings cannot be accepted. The idea of assigning a differentiated quota per winery based not just on stocks but on past sales as well does not arise autonomously or independently. It came from the BOB table and arose precisely when it was seen that production not controlled by the table was entering the BOB market, driving prices down and destabilising the companies seated at the table, who saw how they were losing customers. That loss of customers occurs precisely because that uncontrolled production was entering the BOB market, a market in which the prices had risen thanks to the success of the BOB table, leaving room for other operators not party to the table to undercut prices and make a profit. To separate out the differentiated quotas which the CR ended up authorising in the circulars later sanctioned by the CNC and pretend that these are independent conducts is simply an attempt to confuse and thereby obscure the continuance of a conduct which, if this argument were to be accepted, would be time-barred as to the early years, no matter how legitimate it may be for the defence to try to use that allegation.

It cannot be ignored, moreover, that maintaining prices in the BOB market also meant maintaining the prices for the rest of the products, the brand products, in both the export and domestic markets. This is why operators who only do business in the brand market did not participate in the cartel, but nevertheless supported its existence, as appears to

be the case of the previous president of FEDEJEREZ, as argued by the leniency applicant. This correlation between prices in the BOB market and prices in the brand market, which is not exclusive to this sector, is also mentioned in the e-mails entered into the case record (FF 6.34), which read: "*Another question to consider is the situation with the brand prices. In the Netherlands and Germany, the rise in BOB prices is limited by the prices of the brands (OSBORNE) that do not increase their prices. In the UK, where BOB is sold at a higher price than in the preceding markets, the prices of Harveys and, above all, of Croft (between the two they have a Nielsen of 51%) are making BOB lose share and sales (the market is not growing).* Therefore, when discussing measures to be implemented, the same document says: "*In addition to the quota measures, the brands would have to be brought into agreement to raise prices."*

Certainly, in July 2003 one of the cartel members voices objections to complying with one element of the agreement, the compensation in cases (FF 6.15). This gives rise to complaints from other members, but there is no breakup of the agreement; what is more, even the one that initially voices its objections remains committed to not touching the customers of the other members of the table, that is, it continues abiding by the non-competition pact (FF 6.20). The desire to give the table continuity is explicitly ratified by a majority of its members in a December 2003 meeting (FF 6.22), where the need to control the cases offered on the market is again stated, in the following terms:

> *"3.1 Control of possible bulk outflows for export and bottling in house (key role of the CR and actions through FEDEJEREZ, Arjeman).*
>
> *3.1 -Control quotas for operators (bodegas) outside the table and who do not sell BOB. (…)*
>
> *3.2 -Need to amend articles in the New Regulation to be presented to the Board.*
>
> *4 From the perspective of the CR, J.P. recommends that the table give consideration to:*
>
> *4.1 -Pressuring, informing the associations: FEDEJEREZ and Arjeman so that they convey our proposals to the strategic plan monitoring committee, including the following amongst others:*
>
> - *No bulk sale for export during the strategic plan,*
> - *Reduce quota by 35% and keep it there throughout the entire Plan (…)*
> - *Apply right now the modification of article 32.1 that will be set out in the new Regulation of the Governing Board."*

That meeting, held in the GB offices, was attended, in addition to the cartel member companies, by the president and general secretary of the CR, who specifically suggested other complementary measures for controlling the wine production to be market such as no bulk sales and reducing the quota to 35%, in addition to supporting the change to article 32.1. Note that reducing the quota to 35% and modifying article 32.1 affect not just the BOB market, even though this was a meeting of the "BOB Table Executive Committee". Much the same was indicated in a document obtained in the inspection of the WH offices "Table Situation at 11 February 2004" (FF 6.34), which reads:

Of special concern is the entry of cooperatives through Caydsa, due to its sales potential .(…) the table is going to lose several contracts in this year (…). Total of 552,000 [cases]. (…) we know that Mariscal has purchased 1,500 butts from CAYDSA/Caridad ready for bottling and that they are in talks with potential bottlers. (…) there are other wineries that have not entered thus far but could do so at any time (…).

Measures are being considered to try to limit the supply capacity of those wineries with low stocks that are grabbing contracts by lowering prices. Specifically, these measures refer to the ban on bulk exports and modification of article 32.1 so that no winery can sell, between its own quota (now 36%) and the quota purchased from crianza and storage bodegas, more than 50% of its total stocks. (…)

The connection between the BOB table and the differentiated quota per winery is undeniable, and the accused's efforts to deny it can only be explained as an attempt to deny the unity and continuity of the alleged conduct. They seek a declaration that the conduct based on the BOB table ended in March of 2004 and is thus time-barred, that during the rest of 2004 and until 2006 there was no BOB table whatsoever, and that the meetings held after that until these proceedings were brought do not constitute a prohibited conduct because they were only isolated agreements, or attempted agreements that did not materialise in any anti-competitive conduct.

What is more, after the disputes of 2004, they all recognised the need to reach agreements on different matters in order to improve the sector's earnings. The fact is that there are many players in this sector, with varied production structures and different histories and track records behind them. This makes it difficult to reach an agreement on a few simple points around which a consensus can be easily reached. Now, this does not negate the reality that there is a meeting of minds to reach such consensus on certain elements which, though they may be many, complex and varied, combine to serve a single common purpose: a cartel agreement to maintain their status quo in the sector with improved returns for all of them. This is what was considered to be a single and continuing conduct under the LDC and under the TFEU, no matter how complex its design or difficult its implementation.

That is the case here. The cartel had an instrument in its first stage, the BOB table, which consisted of a series of elements: limitation of the BOB market, distribution of quotas, price minimums and compensation, which were useful for the objective pursued. And the proof of its success, the increase in BOB prices, was that other producers not present in that market felt attracted by it when they saw the prices rise. And that is exactly what led to its destabilisation, because the new suppliers in that market started offering lower prices in order to be able to enter the market, which meant that the cartel members began to lose part of their business and started to engage in the breaches that took place in 2004. Nevertheless, the cartel drew a valuable lesson from that situation: they had to control the overall production, not just that of the cartel members, because they could not control prices otherwise. This led them to design new instruments to control all output, with the same objective as always. Thus arose the idea of the quota differentiated according to sales, not to stocks. And limits were placed on

the quantities that each operator could acquire from third parties in order to increase the overall amount that operator could offer in the BOB market. Does this mean that the differentiated quota is an independent and isolated cartel of its own? Nothing could be farther from the truth; it is nothing but a new or improved instrument at the service of the same parties and of the same interest. The aim is the same and so are the parties involved. It is not a matter, as the accused seek to argue, of independent cartels or conducts from different time periods, but of acts that constitute a single conduct that continues over time and is contrary to article 1 and article 101 of the LDC and TFEU, respectively.

The Council takes the view that, contrary to what is argued by WH, all of the relevant case-law requirements are met for proving the existence of a single and continued conduct as opposed to a number of distinct conducts when what is analysed is composed of acts that may in principle be individual but not necessarily independent. First, it has been demonstrated in the case record that the parties responsible for the conduct are the same, regardless of whether a minority, which, moreover is the smallest one, joined the cartel after it was already in operation. Second, the evidence shows thee was a preconceived plan, to limit supply in order to increase the prices of the product, something which requires a sequential series of actions to be successful: sharing of the salient commercial information, calculation of the market demand in order to curtail the total supply to that amount, establishment of minimum reference prices, monitoring with further exchanges of information and periodic meetings, etc. And third and last, the continuity in time shown in this case leaves no doubt, because the actions established in the case record are separated by only a few months, never more than six, as part of a conduct that went on for more than eight years.

In this regard, the Court of Justice of the European Union, in its judgment of 7 January 2004 (joined cases C-204/00 p, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 p, Aalborg Portland A/S, § 258 to 261), specifies that: *"(…) In the context of an overall agreement extending over several years, a gap of several months between the manifestations of the agreement is immaterial. The fact that the various actions form part of an 'overall plan' owing to their identical object, on the other hand, is decisive*". These are the circumstances that apply in this case, a set of actions carried on under an overall plan with the ultimate aim of a recovery of prices in the BOB market and, through that recovery, in the Jerez sherry market as well. WH's argument that a mere repetition of conducts contrary to the same legal provision is being treated as a continuing offence cannot prevail.

All of the foregoing renders irrelevant GB's argument regarding the error contained in the SO where certain annotations made in the year 2006 are dated as 2005. The DI has not formulated its Proposed Resolution ignoring that error, but has founded the continuity on numerous facts, and therefore the aforecited error does not invalidate the rest of the arguments made by the DI.

In view of all of the above, the Council deems that the rest of the claims made regarding the unity and continuity of the conduct, such as the lapse of the limitation period argued by ESTÉVEZ, BARBADILLO, GB, CR, FERRIS and WH, and that the conducts

subsequent to 2004 were not illegal, as put forth by CR, GB, FERRIS and WH, have been analysed and answered.

SEVEN.- Absence of infringement due to lack of agreement and absence of meeting of minds

ESTEVEZ claims that the case-law stipulates that existence of an agreement requires proof of the existence of a meeting of minds, and that the DI has not met this test. They argue that such understanding did not exist, because there was no intention by the parties that attended the meetings to engage in anti-competitive practices, but only to try to agree not to sell at a loss, which was not achieved. In fact, GARVEY's agreement was indispensable for achieving this in the second period and was not obtained.

The sixth foundation in law above has established the grounds for finding that there was a single and continuing conduct. The multitude of meetings held by the competitors and their sector institutions leave no room for doubt as to the shared intention to design and implement all actions needed to achieve a restriction of the production brought to market as a means of making price increases in the BOB market viable. For this purpose the acquiescence of the main companies in the market was required and sought, and this is what the DI has established beyond a doubt during the proceedings. Not even the lack of agreement by the Garvey-Bellavista Zoilo Ruiz Mateo group in the last part of the life of the cartel reveals any lack of joint will, because as has been demonstrated that lack of agreement came about because while a majority wanted a price agreement based on keeping their customers, the other group wanted a price agreement after a prior dividing up of customers that would allow the large amounts of stock accumulated in the previous years to be moved out. This is what the leniency applicant itself has declared and what is explicitly set out in the text of the numerous e-mails from the years 2006, 2007 and 2008. The fact that they don't reach an agreement on the cartel instruments does not mean that there is not a planned common objective and that they did not coordinate efforts to try to implement it.

The case-law often reminds us that proving a meeting of minds does not even require an explicit manifestation; a tacit agreement of such intention to arrange conducts prohibited by antitrust law is sufficient. However, in the present case there is an explicit agreement with all parties, ever since the first of the findings in fact. There are explicit manifestations of agreement for practically the majority of the instruments used by this cartel, to limit output and fix minimum prices, as well as the non-aggression agreement or gentlemen's pact. Suffice it to recall the findings in fact (FF) in their entirety, for example the *"Agreement to regulate the BOB market" (*FF 6.4); (*…) they admit the mutual benefit of the agreement and their intention to continue(…)* (FF 6.18); *"Ratify the intention to continue the BOB table of all of the houses present" (FF 6.22); "approve implementation of the differentiated quota with effect for the 05/06 marketing year" (FF 6.50); "propose a gentlemen's agreement" (FF 6.64); "With respect to the quota, the strategy has been coordinated and will be taken to the Executive for discussion" (FF 6.65); "Functions of the marketing table: Reach consensus on what the status quo is, establish target prices by market, ..." (FF 6.70); "For my part, the agreement is a reality and we are already applying it (...)" (FF 6.106, reply from ESTEVEZ to FEDEJEREZ, WH, GB, LUSTAU and BELLAVISTA and ZRM.*

As the DI states in its PR, this is a complex cartel, consisting of a succession of agreements the characteristics of which may change over time, not just as a function of the participants who may enter or leave the cartel, but also of the specific circumstances at each point in time. The Council shares that view, given that changes in the markets may require changes to be made in the parameters of the ongoing agreement, but those changes cannot be interpreted as different cartels, but simply as a means of ensuring achievement of the ultimate objective.

EIGHT.- Absence of analysis of markets and effects

Several of the companies, specifically BARBADILLO and ESTÉVEZ, argue that the relevant market has not been defined correctly, and the absence of that definition makes it impossible to establish the effects these conducts may have had in the market. In addition, the case record contains no empirical analysis for estimating those effects. First of all, this Council notes that what we have here is a cartel agreement between competitor companies, an infringement that is anti-competitive by object. In this case, a delimitation of the relevant market is not an indispensable element of the violation, as it would be in another type of infringement; not only is it not indispensable for proving the conduct, it is also not indispensable for establishing the existence of effects. Nor is there a need to apply empirical analysis to prove the existence of effects. Certainly, the use of such empirical analyses, when the information obtained in the proceedings so allow, can help quantify the impact of a given infringement, and empirical analysis will be welcome in this case, like any other tool that allows competition authorities to enhance the effectiveness of their work, likewise weighing the efficiency it provides. Now then, it cannot be argued that the absence of such analysis prevents the CNC from being able to prove the existence of the violation and from calculating the fine to be levied. Recall that for the sake of transparency and to make the procedure for calculating fines more objective, the CNC released its Communication on fines, thus equipping itself with other instruments that can be used as an adequate “proxy” for estimating effects when these cannot be directly or efficiently calculated. Thus, at the appropriate time, proper justification will be given for the calculation of the fines to be applied.

In this case, the evidence that the conduct has had effects has been provided by the cartel members themselves: in several documents they recognise the BOB table's success in allowing them to recover prices in that market. So successful was the cartel that the price increase was precisely what attracted new operators to that market. The consequently greater competitive pressure ended up destabilising the 2004 agreement and led to the design of a new instrument for controlling supply and allowing a new round of price hikes: the differentiated quota by wineries. At least for the first period, the existence of effects has been fully evidenced, notwithstanding that they have not been quantified.

NINE.- Legitimate expectation and appearance of valid right

Several of the accused, BARBADILLO, LUSTAU and ESTÉVEZ, already put forth this argument in the SO, and repeated it in reply to the PR. They insist that the Government of Andalusia, through its Department of Agriculture, also contributed to strengthening the appearance of legality of the Regulatory Board, since, they argue, the Government

of Andalusia supervised the lawfulness of the resolutions on quotas contained in the circulars.

Exploring the reasons put forth by the DI in the PR, the Council finds that the case record fully evidences an awareness that the conduct was illegal. As has already been stated, the CR document of September 2005 mentions as a "difficulty" of some of the proposed measures that they are "contrary to competition rules". Similarly, in a document obtained in the WH offices, titled "Table Situation at 11/2/04" (FF 6.34), in which two alternatives are compared as solution for the problems described earlier, it says: "*1) Implementation of measures that limit the capacity of certain operators in order to maintain the BOB price agreement, or 2) free competition between wineries".* And it concludes that in the free competition scenario: "*The short/medium-term effect of this scenario is a sector-wide decline in BOB prices".* It is obvious that the participants know that limiting the sales capacity of certain operators goes against free competition, and hence may be reasonably presumed to be unlawful. The case record also has evidence that the Government of Andalusia had previously rejected proposals it received to limit the sales capacity of other operators, such as cooperatives, for example. The case file therefore contains sufficient evidence for not accepting this appearance of legality, no matter how much an institution such as the CR, of a dual public-private nature, backed those measures. It is insufficient not just for proving lack of liability for the infringement, but also for accepting it as a mitigating factor, as some of the parties have suggested.

In any event, it has been demonstrated that it was the cartel participants who designed the next system for limiting sales, not just in the BOB market but in the whole market, promoting the idea of setting limits based on sales from prior marketing years and not just on stocks, as was allowed under the regulations prevailing at that time for fulfilling the objective of ensuring the quality and designation of origin. Aware that their proposals were not protected by law, they tried to obtain legal cover by amending article 32.1 of the Regulation on the Wine Designation of Origin. So, even if it is the CR that ultimately issues the circulars for which it is responsible, and for which it was already sanctioned in CNC Resolution 2779/07, the companies were the ones who instigated those measures, and they were perfectly aware of their illegality. That is why they also sought, in addition to the differentiated quota based on sales, the regulatory changes needed to try to legalise a measure that was by all lights unlawful and anti-competitive.

TEN.- Non bis in idem

Foundation in Law Four, on the unity and continuity of the conduct, has established the use of diverse instruments by the cartel to achieve its objectives. One of those instruments, which is common to the classic price-control cartels, is to control output, quite naturally, because given that prices are a function of supply and demand, controlling prices requires control, in turn, of one of those two variables, supply or demand. Obviously, the members of the cartel are on the supply side and that is the variable they can attempt to influence. The first phase of this production-control cartel was carried on by the six members of the cartel, with self-imposed caps on the quantities that each could take to market, so that the aggregate supply would match the demand, to avoid the excess supply that had brought prices down. As was seen, rising prices in the BOB market drew new non-cartel suppliers, prompting the cartel to design

new mechanisms for controlling supply. The changing conditions, with the entry of other operators with interests not necessarily aligned with those of the cartel, hindered consensus on the voluntary self-imposed limits and distribution, and made it necessary for them to use the regulatory capacity of the CR, so that said body would issue circulars imposing the needed cap on production, limiting aggregate sales to the market and allocating that sales capacity to the operators, that is, dividing up the previously capped quantity.

True, this conduct of the CR was sanctioned by the CNC, and that is why in the present case the DI has only accused the CR up to June 2006, in the understanding that it has already been penalised for its conduct after that date. But contrary to what is alleged by the accused, it is not true that the BOB table and quota meetings are independent conducts, and much less that rest of the accused in these infringement proceedings bear no liability for the anti-competitive content of the circulars issued by the CR. As has been evidenced by numerous facts (inter alia FF 6.12; FF 6.22; FF 6.30; FF 6.34; 6.40, FF 6.43; FF 6.46), the idea of controlling the total Jerez and manzanilla wine that could be marketed, whether in the BOB market or domestically, came out of the BOB table itself in early 2003, as one more instrument designed inside the cartel, and had as its object to contribute to the one common objective of the cartel: maintain prices in the BOB market high enough to earn adequate margins while maintaining the status quo with respect to their customers. The findings in fact show that the accused companies and FEDEJEREZ inspired and instigated the issuance of the CR circulars, which set up limits differentiated by winery on the wine that could be marked in each year. The aforesaid sanctioning resolution analysed the isolated act prosecuted at that time: the issuance of circulars. The Council held that the conduct was sanctionable and that the liability fell to the CR. This is no obstacle for these proceedings, in which the analysis spans that act and other ones that begin far earlier than the ones examined in the other case, to have shown that there were additional parties liable for that anti-competitive conduct and that the CR was also responsible for other conducts. All of those conducts taken together make up the cartel analysed here, and those facts can by no means give rise to a violation of the double jeopardy principle (*non bis in idem*), which, in any event, would only affect the CR and only as from 2006. Stated differently, the resolution RCNC 2779/07 only examined the CR's liability for issuing circulars that entailed restricting the freedom of operators to supply the market. The present case has analysed the liability of other operators not just for that conduct, but in respect of a series of conducts that together make up the cartel investigated here. Therefore, the DI has concluded, rightly in the opinion of the Council, that only the CR had been sanctioned for its responsibility in that cartel as from June 2006, as that was the only period assessed in the sanctioning resolution and only the CR's liability was analysed.

In conclusion, given that the previous case only sanctioned the CR, and that the CR is only charged in the present case for its conduct up to June 2006, it is obvious that there have not been fulfilled the three identities of infringement, conducts and perpetrators required by the case-law for a finding of breach of the *non bis in idem* principle.

ELEVEN.- On the individual liability of each operator

PEDRO ROMERO

They argue that there is not enough evidence to support the liability attributed to them by the DI since May of 2006. Against this argument we can only refer to the facts demonstrated in this proceeding, which place P. ROMERO in the key meetings, such as the ones held on 30 May 2006 (6.70) and 11 December 20007 (FF 6.112), and in the FEDEJEREZ executive committee since at least April 2006. Indeed, according to the minutes of the FEDEJEREZ meeting of 24 April 2006 (FF 6.60), the executive committee in which P. ROMERO participated, which sought to reaffirm the executive nature of that committee, recalled the pricing agreement reached (for the production sector) and reported on the "result of the meetings of the quota study committee held over the last four months", which consisted of a quota according to "the average sales of the last five years (…)", also discussed the importance that FEDEJEREZ "set the pace for the reform of the DO Regulation". In an e-mail of 18 May 2006 (FF 6.65) FEDEJEREZ writes that "*[...]* is up for the gentlemen's pact and for sitting down at a table to talk about BOB".

Both that meeting of the executive committee, as can be deduced from its content, and the other meetings in which this winery took part, discussed and agreed conducts prohibited by article 1 LDC and 81 TEC, with no evidence of *[...]* having publicly distanced itself from what was agreed. The statements of one of the cartel members that Pedro Romero did not attend a specific meeting, and saying that it was not in the agreement, cannot serve to exonerate this company from the rest of the evidence against it. Therefore, the Council holds that its liability for the acts sanctioned in these proceedings since May 2005 has been proven.

BARBADILLO

This winery argues that there is no evidence of its involvement in an anti-competitive agreement, and that it was actually expelled from the FEDEJEREZ. BARBADILLO's involvement in the acts that have been evidenced in this case allow it to be held liable for those conducts as from November 2001, as the DI has done, and its expulsion from FEDEJEREZ, apart from having occurred at the end of 2007, did not prevent it from continuing to participate in the cartel meetings (FF 6.112). What is more, at the 11 December 2007 meeting, where a non-aggression pact until December 2010 was signed and minimum prices set, the absence of FEDEJEREZ and the CR at the meeting was explained by their differences with BARBADILLO, and faced with its challenges to the quota assigned by the CR circular, the rest of the cartel members suggested that the winery challenge the formation of the CR, but not that specific measure. Its participation in the activities as from November 2001 is irrefutable; quite another question is that BARBADILLO does not regard those activities as a sanctionable anti-competitive conduct, but those questions have already been resolved by the Council in other foundations of this resolution.

ESTEVEZ

ESTEVEZ denies that the findings in fact demonstrate a violation of the LDC, because the intention of the parties was to reach an agreement not to sell at a loss, not an anti-competitive agreement. In addition, it claims its participation ended in 2003, when it refused to compensate cases. In the opinion of this Council, in agreement with the PR, the facts evidence ESTEVEZ's liability since at least November 2001, although the

information sent by the CR to WH in April 2001 already contained sensitive commercial information of ESTEVEZ that strongly suggests it was involved even earlier. It maintained a continuous and active presence in the cartel meetings during the ensuing years, and although disputes with the rest of the members began to arise in 2003 due to its refusal to comply with one of the elements of the cartel, that is, compensation for sales in excess of the assigned quota, those disagreements for specific breaches did not prevent it from continuing to belong to the cartel, as demonstrated both by its participation in the FEDEJEREZ executive committee that managed, as has been shown, basic elements of the cartel (differentiated quota and amendment of article 32.1 of the Regulation), and its attendance and active role for achieving implementation of new agreements in 2006 and 2007. Furthermore, although it did not attend the formal constitution of the table on 30 May 2006, due to differences with one of the parties in attendance, it did ratify the gentlemen's agreement of 18 May 2006 and was involved in the preparatory work of 2 May. It also ratified the subsequent 2007 agreements expressly.

LUSTAU

This winery argues that it has not participated in any agreement to share customers or fix prices, nor exchanged significant commercial information capable of altering the independent behaviour of its competitors. The DI holds it bears liability for the cartel as from September 2005. The facts show it attended the meeting of 15 May 2000 which the PR regards as the embryo of the cartel, as it included talks about the need to reduce stocks by 120,000-150,000 butts and setting an annual sales quota based on the previous year's sales, not on stocks. In an internal e-mail of 2 February 2004, in connection with LUSTAU having taken a customer away from GB, the latter says “I could not believe it, because this company [LUSTAU] has always sat at the table with us, even though it has not participated in all of the meetings”. In September 2005 sat on the FEDEJEREZ executive committee and was present at the committee meeting of 26 September 2005, as well as in the one held on 17 October. It is a matter of record that both meetings discussed marketing measures such as setting a quota for each winery, based on a range of years. In other words, the limits would not be based on stocks in order to apply the law of the third as a means of maintaining the organoleptic properties and quality; they were an outright restriction of supply to prevent excess supply from bringing prices down. In addition, in order to be able to establish those parameters, it was also agreed to ask the CR for commercial data on the companies. Those data turned out to be sensitive commercial information (FF 6.53). The 22 November 2005 meeting of the FEDEJEREZ executive committee, also attended by Lustau, approved the application of the differentiated quota beginning in the 05/06 marketing year and an entire series of measures to facilitate its implementation. In November 2005 and December 2005 there was an exchange of e-mails between the management of FEDEJEREZ and LUSTAU on the disaggregated data that were needed for calculating the differentiated quota. LUSTAU continued to be present at the 2006 meetings, both of the executive committee and the multilateral meetings, and also appears in a majority of the e-mails and meetings of 2007 and 2008, up until the last meeting for which there is a record.

The facts on record contain evidence of its participation in the cartel since at least 2004, without including its presence at the 2000 meeting, although the Council shares the DI's view that dates the winery's liability as from September 2005.

Regarding the content of those meetings, the winery claims they were few, of little importance, were called by the CR, spread out in time, and that LUSTAU did not play a leading role, but was present only passively and did not endorse any agreement. It claims its behaviour in the market was independent and competitive and that it signed up customers who had been previously supplied by others. In fact, the DI recognises there is a difference between the five leaders of the cartel and the other four (LUSTAU, PR, CAYDSA and FERRIS, Par. 379).

The Council believes that, even accepting that it did not play as active and intense a role as other companies, there is no doubt that it participated, whether through its role on the FEDEJEREZ executive committee, its attendance at other meetings of the cartel, in the joint plans of its competitors to limit the amount of bottled wine that could be placed on the market on the whole and for each producer, that is, a “differentiated quota”, an indispensable element for being able to limit access to the BOB market by competitors with real capacity to compete. Its attitude contributed, beyond doubt, to strengthening that indispensable, fundamental, artificial and jointly agreed limitation on production. In its arguments, LUSTAU claims that the fact that it did not agree minimum prices nor even apply them exempts it from liability for this conduct. The Council cannot accept this argument, because, although, as the DI has said, its role was not as active as others, it was not as non-existent or merely passive as it claims either, for it took part in designing the request for precise data from the companies.

A special response is merited by LUSTAU's pretension that the differentiated treatment of information exchanges was an independent conduct from the rest and had no anti-competitive implications. In the first place, the work of managing the capture of data and preparing the statistics based on that information, in which LUSTAU took direct part, was necessary for ascertaining an accurate view of the quantitative and structural realities of the market at that time, as a preliminary step for establishing the differentiated quota. And we repeat, once again, that implementing a differentiated quota was a cornerstone for controlling prices in the BOB market, the cartel's ultimate objective, for, as has already been explained, the prices in the rest of the Jerez market correlate with those of the BOB market, so the conduct cannot be divided up into independent agreements as LUSTAU seeks to do in its submissions. There is a single conduct: a shared intent to maintain Jerez wine prices at a given level, independently of the level that the play of supply and demand would set in a competitive market, that is, in a market without such arrangements between competitors. Limiting output, partitioning the market, fixing a minimum price, controls to monitor implementation, the attempts to discipline free-riders, etc, are nothing but tools at the service of a single common objective: to maintain prices above a given level. Nor can we accept the argument that it received no significant information capable of modifying its competitive strategy. They claim that LUSTAU was not present in any of the meetings evidenced in the case record as having included an exchange of information. Two points need to be made with respect to this allegation. First, once again we do not accept LUSTAU's attempt to divide up the conduct into as many conducts as the instruments required for

its implementation. In the case of a cartel such as the one investigated here, the exchange of information is not the conduct, it is only an instrument, so there is no room for LUSTAU's claim that the information exchanged in this case does not meet the requirements laid down in EU case-law to be considered as apt to distort competition, in which regard it cites the tractors case (Court of First Instance judgment of 27 October 1994 in T-35/92 John Deere LTD v Commission, paragraph 51) and the TDC decision in case 329/02 on brewery statistics. Secondly, Lustau forgets that the exchange of information in this cartel did not only take place at the meetings that discussed prices and distribution of customers, but also went on in the request submitted to the CR for information on the companies in order to draw up the differentiated quota. And it has been shown that LUSTAU, at least through its participation in the FEDEJEREZ executive committee, took part in designing the way the data were obtained and in putting together the formula for obtaining the differentiated quota.

WILLIAMS& HUMBERT

The DI holds that WH bears liability for this cartel since May 2001. The facts on record support this conclusion: in May 2001 the CR and WH exchanged information on the sales volumes of the other companies in the sector and established proposals for partitioning the market amongst the five companies that together first began participating in the cartel. Its participation since then was continual, with the exception of the last meeting on 23 June 2008, for which it excused its absence.

WH's arguments to not seek to refute these facts, but to challenge how they are assessed. Those arguments, fundamentally based on the absence of a single continuing practice, have already been amply answered in the body of this resolution.

WH argues that it is incomprehensible that for some of the accused the cartel began in November of 2001 and for GB and WH in May 2001. Contrary to what WH argues, the Council believes there is no grounds for such incomprehension and, what is more, shares the DI's view that the issue here is not when the cartel began, but the different times at which the responsibility of each cartel member in its formation has been evidenced. As was already pointed out by the DI in its PR, most cartel agreements consist of a series of agreements, of greater or lesser complexity, and in which the liability of each member need not be the same, neither as regards duration nor in relation to the role played by each of them. In long-term cartels such as this one, it is commonly seen that new members enter and old ones leave, and that some members are instigators and others merely accomplices. Competition authorities have the duty to underscore those differences if they do in fact exist, because though they may not affect the evidencing of the infringement, they can affect the sanction to be levied on each of the accused. This is precisely what the DI has done by individualising the liability of each of the accused.

In its assessment of the evidence, WH made submissions which did not evaluate the evidence but instead presented new arguments. This Council wishes to emphasise their mistiming, because they should have been presented in the submissions in reply to the PR, a phase which WH employed in exercise of its rights. Nevertheless, given that part of the arguments put forth by WH could not be assessed properly by the DI because they were not submitted in reply to the SO, nor by this Council until now, and that those

arguments address a fundamental issue, not a formal one, because they seek once again to invalidate the continuity of the infringement, supposedly for lack of evidence, it is considered appropriate to respond to them here, albeit on an exceptional basis.

WH claims there is no evidence that the 25 September document prepared by the CR was distributed at a meeting of that same date, as the DI has interpreted, and hence there is no evidence of that meeting, except for the leniency declarations that refer to meetings of Autumn and October 2005. The same may be said of the bilateral meetings of October 2006 and April 2007 between BELLAVISTA and ZRM and WH declared by the leniency applicants.

WH argues there is no continuity in the conduct because that continuity was based on meetings held in 2005, meetings for which the only evidence is the statements made by the applicants for exemption from the sanction. As to the validity of declarations of an officer of a company that files for leniency programme, this was already dealt with in the Court of First Instance decision of 18 June 2008, and the DI answered this in other parts of the PR (paragraph 218, *"102 At paragraph 297 of the judgment under appeal, the Court of First Instance stated that '[w]here, as in the present case as far as Mannesmann is concerned, a person not having direct knowledge of the relevant circumstances makes a statement as a representative of a company, admitting the existence of an infringement by it and by other undertakings, that person [necessarily] relies on information provided by his company and, in particular, by employees thereof with direct knowledge of the practices in question. […] statements running counter to the author's own interests must, in principle, be regarded as probative and it is therefore appropriate to give considerable weight to…]'s statement in this case.*

103 It follows from that paragraph that the Court of First Instance did indeed take into account, in its appraisal of the probative value of […]'s statements, the fact that he had no direct knowledge of the infringement in question. Furthermore, the reasoning developed by the Court of First Instance in that paragraph is not vitiated by any breach of the rules on the burden of proof and the taking of evidence. As the Advocate General observed at point 119 of his Opinion, a statement made by a person acting in the capacity of a representative of a company and admitting the existence of an infringement by that company entails considerable legal and economic risks, which makes it extremely unlikely that such a statement will be made unless the person making it had information provided by employees of the company who themselves have direct knowledge of the facts complained of. In those circumstances, the fact that the representative of the company did not himself have direct knowledge of the facts does not affect the probative value which the Court of First Instance was able to attribute to such a statement".)

The rest of the WH argument seeks to show that the DI has evidenced the infringement's continuity exclusively on the basis of those declarations. Having seen that judgment of the GC, it is clear that those declarations are sufficient evidence, but the fact is that there are other pieces of evidence in the case record that were obtained in the inspections conducted by the CNC, in addition to the leniency application declarations, as borne out by the events occurred between July 2004 (FF 8.38) and October 2005 (FF 6.48), that is, there are ten findings in fact apart from the leniency statements, all of them pointing once again to the existence of a joint plan and coordination for achieving the plan's success. Similarly, independently of the bilateral meetings declared by BELLAVISTA and ZRM, WH's presence in the cartel during 2006 and 2007 is demonstrated by the numerous facts set out above, the evidence for which was largely obtained in the CNC inspections of the GB and WH offices. A review of FF 6.53 to FF 6.112 leaves no doubt as to the overwhelming presence of WH.

CAYDSA

The DI holds that CAYDSA's liability for this cartel has been demonstrated only as from December 2007, and the findings in fact support this conclusion. It participated in the 10 December meeting, as indicated in an e-mail obtained in the inspection of GB. That meeting, according to the summary given by GB, was a meeting of the BOB table, it was attended by GB, ESTÉVEZ, WH, BARBADILLO and CAYDSA, FERRYS and P. ROMERO, and agreed to sign a non-aggression pact until 31 September 2010 with the aim of raising prices, with each party doing what it could with its customers. A minimum of €1.2 per bottle was discussed. It likewise took part in the meeting of 23 June 2008, record of which is provided by CAYDSA itself, as the summary of the meeting was submitted by BELLAVISTA and ZRM in their leniency declaration to demonstrate the boycott which the other companies sought to apply to them.

In its submissions, CAYDSA denies having attended the first meeting of 10 December 2007, without this having been refuted by any evidence in its favour. As for the second, it claims it was called to that meeting for the sole purpose of being used as a messenger to let BELLAVISTA and ZRM known of the possible actions against them.

This Council finds that its presence, as evidenced, at the first meeting has not been refuted by any evidence submitted by CAYDSA. This argument by the accused is therefore unfounded. As for the second, here, too, there is no evidence in the summary prepared by CAYDSA itself that it rejected the rest of the resolutions approved there. According to that summary, it did not distance itself from the resolutions, nor make any statement against them, such as could have led the other participants to believe that CAYDSA would in the future not act in accordance with what had been agreed at the meeting. Therefore, by its conduct it contributed, at minimum, to strengthening the actions of the rest, without any reasons for doubting that what was agreed there would be put into practice.

Nor can the previous intense commercial relation between CAYDSA and the BELLAVISTA and ZRM group (which according to CAYDSA is demonstrated by the evidence obtained by the CNC at their initiative) serve to refute its presence at two meetings that reached agreements of a clear anti-competitive nature.

GONZALEZ BYASS

GB's liability for this cartel is demonstrated, according to the DI, beginning in May 2001, although according to its own statements in the leniency programme application it had entered into talks to reach an agreement on the BOB market before that date. In any event, the Council assumes that at least since May 2001 GB was partly responsible for forming the cartel investigated in these proceedings, and that its participation was continuous since then, with the exception of the last meeting of 23 June 2008, as there record that it excused its absence in advance.

Its arguments on the assessment of its conduct have already been answered over the length of this resolution, as the Council believes that it has been established and answered that this was a single continuing conduct and that in no period was it a unilateral conduct as GB has claimed.

FERRIS

The DI charges FERRIS with liability for this infringement beginning in September 2002, as the evidence shows that though it was not present at the meeting of that date, the CR acted explicitly in its name. In the Council's opinion there are indications that its responsibility may date back further, at least back to November 2001, because though the initial agreement records the approval of five other companies, GB, WH, GARVEY, ESTEVEZ and BARBADILLO, documents have also been obtained showing rectifications of the initial distribution amongst five, giving rise to new allocations amongst six, including FERRIS, for the 2001/2002 marketing year. Nevertheless, this possible alternative interpretation would not affect how the infringement is assessed, but only the amount of the fine insignificantly, given the lengthy duration of the conduct and the small weight of the most distant years in how the sanction is calculated.

This Council cannot accept its arguments, for none of them refutes the facts which place it in significant meetings where the agreements were made explicit and, what is more, include it in the early distribution amongst the initial group at the beginning of the cartel. Its presence was also maintained in meetings of the companies in 2003, 2006, 2007 and 2008.

The approach of the arguments put forth by FERRIS attempt to rebut its participation in each of the different actions that were required for the cartel to be successfully concluded, the same as was done by LUSTAU. In this context, we can do no more than recall that this is a single continuing conduct from 2001 to 2008, and that FERRIS's participation in the cartel has been amply demonstrated.

GARVEY, BELLAVISTA AND ZOILO RUIZ MATEOS

The attribution of liability to this group is considered to have been proven as from November 2001 and until the time the DI grants it conditional exemption from the fine on 14 July 2008.

They have submitted no arguments against this attribution.

FEDEJEREZ

The DI attributes liability in the investigated conduct to FEDEJEREZ as abettor from July 2005 until the opening of the proceedings.

The facts established in this case first place FEDEJEREZ at the meeting of 15 May 2000, but there is no record of it being present at the meetings that followed in 2001, 2002 and 2003. The DI believes that it is not until July 2005 that the facts established in the case record demonstrate its participation in the conduct, as that is when its concrete involvement is noted in a e-mail between FEDEJEREZ and the CR (FF 6.44) in relation to the differentiated quota as part of the renewal of the sector plan. However, the case record indicates that in November 2004 (FF 6.40) FEDEJEREZ, in its Revision of the Strategic Plan, already included the anti-competitive supplyside restrictions and regulation article of 32.1. The record also shows that in November 2004 (FF 6.43) there was a meeting of the CR, on 29 November 2004, at which, under point 2 of the agenda, "*FEDEJEREZ has designed rules to implement that would require a consensus amongst all members of the Sector, including the following: (…) A cap on annual*

exports of 40% of the stocks at 1 September of each year, even where purchases are made externally to complete the quota (…) Pro rata sales quota system by winery. This proposal will require consensus amongst the different sectors of the winegrowing trade and approval from the Agriculture Delegation of the Government of Andalusia" (…). And another summary of the same topic reads: *"FEDEJEREZ has prepared and agreed with all its members a revision of the Jerez Strategic Plan, that basically consists of: "(…) 2.Quota system per firm, with the following exceptions requested by us: (…) Also, article 32.1 of the current Regulation will be modified, limiting the total outflows from each firm, including its own quota and quota acquired from other wineries, to 40% of the stocks as at the start of each marketing year."*

References of this kind are found in diverse documents and e-mails (FF 6.44, FF 6.47, FF 6.48…). Throughout those references it is seen that these measures were discussed and worked on in the executive committee of FEDEJEREZ, composed of the companies in the sector, and a majority of which consisted of the companies accused in these proceedings, and, what is more, they evidence the close collaboration between the CR and FEDEJEREZ, which was even set out in a working document (FF 6.55) called "Coordination CR-FEDEJEREZ". That document details their priorities, which included the sector plan and, within the latter, the differentiated quota and marketing tables.

In the judgment of this Council, the facts investigated and demonstrated here support the conclusion that FEDEJEREZ is co-perpetrator, together with the CR and the rest of the companies accused in this proceeding, of an infringement of article 1 of the LDC and article 101 of the TFEU. This conclusion follows from the fact that as early as November 2004 FEDEJEREZ prepared a document discussing possible measures to freeze sales, establish a differentiated quota and regulate article 32.1. In other words, since the time the BOB table broke up, FEDEJEREZ worked to implement measures in the sector that would lead to similar results as those achieved by the BOB table, that is, to limit supply and partition that limited supply. There was also a reference to the change to article 32.1 the CR approval of which it would later manage, and which was needed in order to establish a cap on the production taken to market as a function not of stocks, as had always been done for reasons of quality (DO), but on the basis of other parameters not related to quality, such as the sales of each winery in preceding years. These measures had been proposed at meetings of the BOB table in 2003 between the companies that participated in the BOB agreement. Of note was the creation of a Sector Committee charged with the differentiated quota, in which there were represented inter alia GB, LUSTAU, WH, BARBADILLO and ESTEVEZ (FF 6.77).

As from that time its presence was continuous in the following years, calling meetings, making proposals, maintaining bilateral contacts and mediating in disputes. Its contribution to the design of the formulas eventually applied for calculating the quota assignable to each winery as a function of its stocks and past sales is unquestionable (FF 6.50; FF 6.51, FF 6.52, 6.53, FF 6.54, FF 6.56, FF 6.57, FF 6.58, and FF 6.59). Likewise unquestionable is its leading role and participation in the meetings that fixed minimum prices (FF 6.64, FF 6.82, …), and the rest of the complementary actions to achieve a recovery in BOB prices that were to be implemented under what was termed "gentlemen's pact" (FF 6.64, FF 6.65, FF 6.70, ...). There is record of its presence during 2007 in nearly all of the activities evidenced in the case record (FF 6.87 to

6.113), and the same conclusion holds with respect to the contacts that took place in 2008 (FF 6.115 to 6.112).

In its submissions, FEDEJEREZ argues that the DI has not demonstrated the “own role” which the EU case-law requires for being able to attribute liability to an association in connection with an antitrust violation. Subsidiarily, it says, not all of the requirements that the Treuhand judgment establishes for a finding of necessary collaborator are met.

The facts on record indicate that the agreement at first did not require FEDEJEREZ's collaboration and that its effectiveness did not depend on FEDEJEREZ. Clearly the unquestionable players in the cartel in the period 2000-2004 were the six accused wineries, which were capable of successfully carrying on the main elements of the cartel: limitation of the BOB market supply that they controlled, allocation amongst the six of that limited supply, compensation amongst the six for to achieve the agreed partitioning of the market and price increases in that market. As has already been mentioned, the very success of the cartel, as seen in the improved prices obtained in that market, drew other operators in the sector who were not present in the BOB market, spurred by the lure of the attractive prices being obtained there. The new BOB market entrants undercut the agreed prices and thus won customers away from the cartel six. This new trend, which the six cartel members had already noted in 2003, is what led them to consider the need to curb the total supply of Jerez wine brought to market. As this required implementing measures that would bind the entire market, they sought the involvement of FEDEJEREZ and the CR; the former to propose the measures to the CR and the latter to apply the restrictions needed to limit supply and make those limits “mandatory” so that they be applied by all operators. In its conduct, FEDEJEREZ can only be considered to have played its own role, because it is inside that federation, through its executive and sector committees, that the commercial data needed to estimate demand were requested and the formulas for the differentiated quota were designed, and it was FEDEJEREZ that submitted the different options to voting. And it was the FEDEJEREZ executive committee that approved the final formula for the quota and sent it on to the CR in order for it to put the quota into operation by issuing the relevant circulars.

With respect to the subsidiary argument put forth by FEDEJEREZ on non-fulfilment of the Treuhand judgment requirements, this Council believes that FEDEJEREZ's actions, as demonstrated in the record, go beyond mere mediation to facilitate the implementation of a restriction of competition, and are anti-competitive on their own, because it also acts jointly with the other operators in the market to achieve a common objective, namely, the application of a restriction of competition, with full awareness of the illegality of this conduct.

First of all, it bears emphasis that the GC has established that the fact of an entity not operating the market in which the sanctioned conduct is carried on does not release it from liability for its contribution to the conduct's implementation. Second, it points out that even when an entity is not an operator in the market in which the conduct is pursued, that entity may perfectly well foresee that it is subject to the prohibition of article 81.1. Lack of status as an operator in the market cannot be taken to mean it can participate in collusive conducts. Lastly, the aforesaid judgment established that the requirements needed for holding an undertaking liable for a cartel “*apply mutatis*

mutandis to the participation of an undertaking whose economic activity and professional expertise mean that it cannot but be aware of the anti-competitive nature of the conduct at issue and enable it to make a significant contribution to the committing of the infringement". The requirements referred to by the GC for an undertaking to be considered liable as co-perpetrator of an infringement is that it has participated in the cartel meetings at which there have been reached tacit or explicit agreements contrary to competition rules without publicly distancing itself from those agreements. In the case of a single agreement composed of a set of unlawful conducts, an undertaking that contributes by its own conduct to achieving the common objectives pursued by the participants as a group and which was aware of the actions of the rest of the undertakings to achieve the same objectives will be considered a co-perpetrator.

Lastly, the GC establishes that an entity will bear liability as co-perpetrator of the sanctioned infringement when (1) that entity has contributed, even in a subsidiary role, to implementing the restriction at issue, which would be the case where there is a sufficient causal link between its contribution and the anti-competitive restriction generated, and (2) its explicit or tacit intention in the conduct is established.

Having seen all of the foregoing, we can only conclude that FEDEJEREZ's actions demonstrate the causal relation between its own role and the implementation of the differentiated quota and amendment of article 32.1, in addition to its active collaboration in achieving the "gentlemen's pact", and obviously show its intentions to collaborate in the practice. FEDEJEREZ lists all of the functions which the GC held were performed by Treuhand, in order to check one by one whether FEDEJEREZ had or had not performed the same ones, and concludes that no, the actions carried on by FEDEJEREZ are fewer in number than those carried on by Treuhand in order to be considered a necessary collaborator. First, the Council has already stated that in this conduct FEDEJEREZ played the role of co-perpetrator of the infringement, beyond its functions as mediator between members, which would likewise be sanctionable. Secondly, not each of the 15 functions set out by FEDEJEREZ in its submissions need to be answered, because, as has already been pointed out, the general requirements have been met.

REGULATORY BOARD

The DI holds that the CR acted as a necessary collaborator from November 2001 to June 2006. The facts on record show that on 23 April 2001 a fax was sent from the CR to the companies, except for WH, with sensitive commercial information needed to establish the BOB quotas per winery.

The meeting of 9 November 2001, where the terms of the agreement were formalised, was held at the CR's offices. The inspections in WH and GB showed that during 2002 the CR participated in most of the meetings held, several of which took place at the CR's own offices. The content of those meetings was exchange of information on sales by each participant in each market, the quotas agreed, the compensation mechanisms and the possible entry of other wineries in the table. During 2003 the same behaviour as in 2002 was maintained, as evidenced by the information submitted by GB in its leniency application. Specifically, the meeting of 18 February held at its offices discussed immediate modification of article 32.1 of the Regulation, with FEDEJEREZ being designated to handle its presentation to the CR. It also attended the 14 October

meeting at which it was likewise concluded that the CR should act on the Regulation and that the article 32.1 amendment had to be applied already. The record also shows it was present at the 22 December 2003 meeting at which it was made explicit that both FEDEJEREZ and the CR had a key role in controlling possible bulk outflows for export and bottling, all after concluding that entry in the BOB market by other operators that were not on the BOB table was eroding the sales of those on the BOB table.

Evidence has been seen of its intention during 2004 to bring together several wineries to start the BOB table up again, by means of an e-mail it sent to B, in which it also suggests that the latter was selling below the market price. In 2005, the CR and FEDEJEREZ together took active part in preparing documents designing the strategy for the Jerez wine sector. In addition to a diagnosis of the situation, the documents included proposals to curb the amount of wine that could be taken to market, that is, to limit production, and mechanisms for allocating part of the final quantity, that is, the differentiated quota or market-sharing document. They recognise in some of their own documents that one of the proposed measures may be contrary to competition law.

In 2006 one of the key meetings (30 May 2006) for starting up the BOB table again was held at the CR's offices and with its presence. That same day saw the approval of the first circular subsequently sanctioned by the CNC (RCNC 2779/07). After that meeting had been held and its content leaked to the press, on 5 June 2006 it e-mailed the companies that attended to announce cancellation of the meeting scheduled for the 8th due to the leak. The CR wrote to the Government of Andalusia on 15 June 2006 to report that the approval of circular 7/2006, and that said circular requires the regional government to amend article 32.1 of the Regulation, as that article authorises the CR to establish the annual cap based on stocks, up to a maximum of 40% (but not based on sales of previous years).

In its submissions in this case it argues that there is no single continuing offence, a position that has been replied to in this resolution.

The CR holds that its liability, apart from being limited, is confined to its role as representative and that it not as an economic operator, but a professional corporation formed under public law and which during 2005 and 2006 worked on the needed revision of the sector plan. And lastly, it claims that the Treuhand judgment requirements for being considered a necessary collaborator are not met.

With respect to the status and functions of the CR, this Council draws attention to the dual public and private aspect that coexist in the Regulatory Board for the DO. As recognised on its website, the CR has a dual role, for "*From a legal point of view, the Regulatory Board of the Designations of Origin is a Public Law Corporation representing both economic and social interests which during the discharge of specific public responsibilities acts as a decentralised body of the Department of Agriculture and Fisheries of the Government of Andalusia.*

Put simply, the Regulatory Board has a "private" dimension in that it represents the private interests of all the registered wine-growers and sherry firms; and a "public" dimension, acting as it does in the name of the Administration in a series of matters directly related to the management and defence of an asset which is public in nature, that of the Designation of Origin itself."

Having regard to its composition, we can see that the private aspect is more decisive, for of the 21 members on the governing board, 18 represent economic operators in the production and commercial areas, and only one represents the Government of Andalusia, and that representative, moreover, has the right to be heard but not to vote. The Andalusian competition authority, the Consejo Andaluz de Defensa de la Competencia, also agrees that the CR acts as an economic operator in the market.

As for the liability of the CR, the CNC Council underscores that one of the essential functions of any DO Regulatory Board is to control the quality and ensure the origin of the products covered by the DO. For this reason, the Regulations of the Jerez CR contain a series of mandatory provisions regarding the entire production chain, beginning with the vine and ending when the wine is acquired by the consumer. None of these functions, however, includes the role the CR has played in relation to the sale of Jerez wines, because the Regulation does not give it authority to restrict the marketing of sherry beyond what is required for purposes of quality control and certification of origin and quality. Obviously, its role as architect of a supplyside restriction based solely on parameters involving sales from previous years is not authorised by the applicable regulation, and that is why it was sanctioned by the CNC for issuing the circulars that imposed such restrictions. But its liability did not begin the day it issued those circulars, on 1 June 2006 — its part in designing how those restrictions would be calculated began much earlier, at least as far back as the time it faxed information on the ceilings and how they would be distributed amongst the sherry firms. It was therefore co-perpetrator of an infringement of articles 1 and 81, consisting of placing caps on the quantity to be marketed that were not tied to parameters of assuring quality and origin, but to the market parameters of quantity and price. In this sense, it was acting in its “private” facet as guarantor of the interests of the wineries and violated competition rules, not just as an abettor, but as co-perpetrator, in the sense set out in the Treuhand judgment.

With respect to that Treuhand judgment, after what was stated above in this regard in connection with the arguments put forth by FEDEJEREZ, the Council can only conclude that the CR's actions, as demonstrated by the findings in fact and as has already been argued in relation to FEDEJEREZ, represent a joint action with the market operators to achieve a common objective, namely, to implement a restriction of competition, with full awareness of its illegality. The CR is therefore a co-perpetrator of the sanctioned infringement.

Having analysed the CR's role from 2001 to 2006, the Council must at the least conclude that the CR contributed beyond any doubt to curbing the supply of sherry wine to the BOB market, because since 2001 it collaborated with the cartel members by organising meetings at its headquarters and, moreover, by calculating the strategic variables for implementing the conduct at issue. The CR, based on the functions assigned to it, has confidential commercial information of the various companies that operate in the DO that it oversees and supervises. It therefore knows the amounts sold by each company in each of the markets where they operate. That information was made available to the cartel members in order to estimate the demand in each marketing year so as to be able to limit supply to the expected demand and thus prevent excess supply from being corrected by a fall in prices. In addition to curbing

supply, the information was used to divide up the supply amongst the cartel members. Hence the conclusion that there is a causal nexus between its contribution and the design and commission of the infringement. Its intention to so contribute is obviously unquestionable.

With respect to its role during 2004, 2005 and 2006, we cannot accept that it was only focused on renewing a sector plan that was needed by everyone. As has been shown here, not only did it attempt to reactivate the anti-competitive BOB table, which is obviously not part of any sector plan to defend the DO, but it also worked to advance the viability of measures designed by the BOB table in 2003 that were completely anti-competitive, such as quotas differentiated by wineries based on sales from previous years and amendment of article 32.1 of the DO Regulation to give them a veneer of legality.

Lastly, the CR argues that EU law on agricultural matters prevails over competition rules and that its actions were covered by the prevailing CMO wine. Here we will refer to the position expounded in the aforecited resolution RCNC 2779/07 of 4 June 2009, in its fourth foundation in law. Moreover, in the recent CNC report on "Competition and the Agrifood Sector", the entire chapter 4 addresses the interrelation between competition rules and the agricultural sector. The relevant community case-law has been analysed and the following conclusion reached: *"The application to the agricultural sector of the doctrine of effects developed by the European Court of Justice in its case law means that the Treaty on the Functioning of the European Union is incompatible with any national measure, even a law, that requires or favours restrictive practices contrary to the Treaty or reinforces the effects of such practices".* First of all, the CMO wine does not have any provision that allows, in this sector, the imposition of supplyside limits based on the sales recorded by the operators in previous years, nor fixing reference prices for sale of the products involved in this infringement proceeding. Secondly, even if the DO Regulation were amended to allow such supplyside restrictions or minimum pricing to be introduced, those modifications would be completely incompatible with the TFEU. Suffice it to recall the declaration of infringement imposed by the Commission and upheld by the GC in cases T-217/03 and T-245/03, FNCBV vs Commission, on 13 December 2006, known as the French beef case. In that case, certain beef industry operators, with the support of the competent authority in the sector, imposed restrictions on the entry of that product in French slaughterhouses.

TWELVE.- Sanction

Having assessed the charges made in the Proposed Resolution which the Investigations Division has submitted to the Council, together with the arguments put forth by each of the accused here, the Council, for the reasons expounded over the course of this resolution, finds that the evidence shows the accused violated article 1 of the LDC and article 101 of the TFEU and that a monetary fine is therefore warranted.

The amount of those fines will be established in this foundation in law. The LDC 15/2007 regulates, in articles 61 to 64, the main questions to be considered when calculating the fine.

For purposes of establishing said amount, in its PR the DI presents its evaluation of the relevant criteria. It points out that this qualifies as a very serious infringement, such as allows levying the sanction established in article 63.1.c, as regulated in article 62.4.a. This means the maximum fine can be 10% of the total turnover of the infringing company.

Nevertheless, the article 64 criteria are centred on (1) the scale and characteristics of the market affected by the infringement, (2) the market share of the liable company or companies, (3) the scope of the infringement, (4) its duration, (5) the effect of the infringement on the rights and legitimate interests of consumers and on other economic operators, (6) the illicit gains obtained as a result of the infringement and (7) the aggravating circumstances and mitigating factors in play in relation to each of the companies found liable.

The DI points out that the cartel member companies concentrate more than 90% of BOB product exports, at least at the time of the infringement; 60% of the total sector sales are accounted for by BOB or private label wines; this is a very serious infringement, a cartel, and has an appreciable effect on trade between Member States; its duration generally ran from May 2001 to July 2008, although it specifies the individual duration for each company; the agreement increased the price of the BOB products artificially, with direct affect on their customers and then on the end consumers; and the foregoing entails the existence of illicit gains. With respect to the mitigating and aggravating circumstances, the DI holds that the content of the last meeting of the cartel could be considered an aggravating factor, and no mitigating circumstances are seen.

The accused put forth several issues they argue should be treated as mitigating circumstances, namely: the proven existence of a structural crisis in the sector; the lack of effects of the conduct and absence of illicit gain; cooperation with the DI that ran beyond what was required by the LDC; the lack of recidivism; the absence of intention; and legitimate expectations.

The attempt to use a crisis in a sector as justification for creating a cartel has long been seen in competition law, and just as old are the grounds for rejecting that argument, which, incidentally, has also been answered by the DI in its PR, citing the aforementioned T-217/03 and T-245/03 judgment. In that decision the GC reduced the fine levied by the Commission having regard to the special economic circumstances of the case. The circumstances referred to were notably different than those seen in this proceeding, because the crisis being suffered by the sector at the time of the infringement was a sudden and temporary crisis caused by the outbreak of a human disease that was transmitted by beef and was having tragic consequences. The result was a quick and very sharp drop in beef consumption. This description cannot be applied to the crisis affecting the Jerez sherry market, as that sector has been undergoing a sustained decline in demand over the last 30 years. The supply could have adapted to that demand following the laws of supply and demand that should guide a competitive sector, instead of maintaining artificially high prices by curbing supply, dividing up the market and setting minimum prices.

The Council cannot accept lack of effects as a mitigating factor. Those effects play an important part in calculating the base fine, so the assessment of whether or not such effects exist must be taken into account in order to arrive at that base amount and it would therefore be improper to consider them again in the chapter of mitigating factors. But, what is more, in this case the infringement did have effects and their existence has been proven. At least during the years 2001 to 2004 the cartel succeeded in its objective as it achieved a recovery in BOB prices. During that time, and contrary to economic logic, a market in which demand was dropping year after year saw prices return to levels of previous times when the demand was significantly larger. Another question is whether the size of that effect has been quantified. There are documents that show the price prior to the cartel agreement was on the order of 12 €/case, although there was also mention that some operators were selling at 10 €/case. In the initial terms of the 2001 agreement a benchmark price of 17 €/case (2,800 pesetas) was established. In e-mails from 2003, when it has been shown the cartel was in existence and before non-cartel members were seen to have entered the market, there was talk about trying to raise prices to 21 €/case (3,500 ptas). These facts also refute the claim that there was no illicit gain.

As for the claimed collaboration with the DI beyond what is required by the LDC, the DI itself did not find this to be the case with any of the accused and the Council sees no evidence to differ from that assessment.

Nor can lack of recidivism be taken to mitigate the liability of the accused, for the simple reason that the presence of recidivism is considered an aggravating factor. The Council does not consider the liability mitigated by any lack of intentionality, for as has been demonstrated in the resolution there was a clear awareness of the unlawful nature of the conduct.

Having regard to all of the foregoing, to calculate the amount of the sanction the CNC Council has only taken into account the sales recorded by each company of Jerez wine for the BOB market during the exact time (in years and months) during which each participated in the infringement. Given that this is a very serious infringement, for all of them the fine has been set at 10% of the sales volume involved, obtained taking into account the duration and economic context of the sector. However, given that the effects during the first stage of the cartel were such that they could be quantified, and the existence of illicit gain therefore undeniable, it has been considered proportionate to apply an additional 5% to the sales recorded by the five initial cartel members in the years 2001, 2002 and 2003, and the same for years 2002 and 2003 in the case of JF.

As a result, the fines levied on the accused companies in this proceeding are as follows:

PEDRO ROMERO	240,000 €
LUSTAO	400,000 €
W&H	2,300,000 €
BARBADILLO	950,000 €
GARVEY	670,000 €
JOSÉ ESTÉVEZ	1,250,000 €
GB	870,000 €
FERRIS	135,000 €
CAYDSA	28,000 €

In the case of FEDEJEREZ and the CR, having regard to their respective roles, and the duration and gravity of their participation, they are fined €400,000 and €200,000, respectively.

THIRTEEN.- Application of the leniency programme

This proceeding was initiated pursuant to an application for the leniency programme submitted to the CNC on 28 February 2008 by the BELLAVISTA and ZOILO RUIZ MATEOS Group; followed by a second leniency application from the GONZALEZ BYASS Group.

In its proposed resolution, as set out in the background facts of this resolution, the DI proposes that the Council grant a full exemption from the fine to the BELLAVISTA ZOILO RUIZ MATEO GROUP and that the reduction of fine requested by the GONZALEZ BYASS Group not be made. In the latter case, it holds that after notification of the SO, in which the DI proposed that said reduction be granted in view of fulfilment of the article 66.1.a) requirements, the group breached the requirements set out in article 65.2.a).

Several of the other accused in this case have alleged that BELLAVISTA and ZOILO RUIZ MATEO do not meet the LDC requirements for receiving the exemption. First, because those companies did not make up a single business group within the meaning required by the case-law for application of the exemption to all companies in the group, and, second, because they did not fulfil the article 65.2.a) requirements.

With respect to the first of these allegations, we begin by noting that according to article 61.2 of the LDC, *"for the purposes of the application of this Act, the action of an undertaking is also attributable to the undertakings or persons that control it, except when its economic behaviour is not determined by any of them"*. This rule of co-responsibility in competition law is devised as an instrument aimed at achieving real compliance with the prohibitions on actions contrary to competition rules, by granting legal relevance to the economic unit composed of different companies that belong to a single group.

This rule has its origin in EU law; according to the CJEU, if several undertakings can be regarded as one economic unit with respect to a specific restriction and exercise of control can be proven in the specific case, liability will be attributed to the entity that

exercised control regardless of the structure of the group and, in particular, of whether the accused company is the one that controls those which acted in the market.

In this case, joint and several liability has been attributed to Complejo Bodeguero Bellavista S.L.U. (Complejo Bodeguero) and Zoilo Ruiz Mateos S.L. (Zoilo), for the following reasons. The Beverages Division of the New Rumasa, also known commercially as Grupo Bodegas Garvey, is composed of four winemaking companies: the two mentioned above plus Vinícola Soto S.A. and Bodegas Valdivia. These four firms, headed by Complejo Bodeguero, the leading winery in the sector, are ultimately owned directly and indirectly by *[...]*, which is headed by *[...]*.

Specifically, the sole shareholders of Zoilo and Complejo Bodeguero are two different Netherlands companies but both are managed under the direction and ultimate control of *[...]*. In addition, the main offices of the Division are located at the physical headquarters of Complejo from where there are managed the sales team and the exports of the companies active in the sector. Also, the personnel in charge of Complejo also work for Zoilo because the latter only has a bottling and warehouse facility and the Complejo sales and commercial team is used by Zoilo. Lastly, several members of *[...]* work as attorneys in fact and directors in the companies.

All of this leads the Council to conclude that there is a decentralised business group, the control over which is ultimately held by *[...]*, following a consistent line of conduct in the market and systematically acting on a concerted basis in the economic and commercial arenas, and within which the company charged with managing the Jerez wines market is Complejo Bodeguero.

Given all of the above, the attribution of joint and several liability to Zoilo and Complejo Bodeguero is consistent with the law and with community practice and case-law, because the latter undertaking, in addition to participating in the meetings, is capable, because it operates inside a group in which there is a controlling relation, of imparting instructions and having them executed by the companies in the Division. In the Jerez wines market, Complejo Bodeguero exercises the control held by the entity or person that heads the group, albeit not as titular head.

Furthermore, if the co-responsibility rule is based on the grant of legal relevance to an economic unit composed of undertakings belonging to the same group, in order to enforce competition rules having regard to economic reality over legal forms, it is obvious that a coherent application of this principle will lead to certain consequences not just with respect to the attribution of liability but also to the possible exemption from payment of the fine. In short, this Council has understood that they form an economic unit for purposes of the attribution of liability and, therefore, the same single and joint consideration should be followed in relation to grant of the exemption if the requirements established in article 65 of the LDC are met.

As regards the meeting of those requirements, the arguments made by third parties with respect to lack of cooperation with the CNC, in the form of having concealed salient information or evidence, either by not submitting more documentary evidence or by having denied they attended meetings called by FEDEJEREZ at which they were in fact present, are not viewed by the Council as sufficient elements for ruling that the requirements are not fulfilled, especially when the DI believes the evidence provided

was sufficient for arranging an effective inspection, as was done. It is therefore in order to grant the exemption requested by the Bellavista and Zoilo Ruiz Mateos Group.

With respect to the proposal not to reduce the fine on the GB Group, they claim that the DI is arguing requirements not contained in article 52 for assessing the duty to cooperate, which duty the DI says has been breached after GB submitted its reply to the SO.

The DI, in the SO, was in favour of reducing the fine in consideration of its view that the documents provided by GB added significant value to the evidence in the case record.

The Council has resolved to declare an infringement on the basis of the entire content of the case file. As the record contains an overwhelming series of proven facts, not all of them, naturally, carry the same probative weight with respect to the infringement. It being clear that a finding of infringement is not based on just one fact or on a limited number of facts, but draws on a combined analysis of all of the evidence in the record, it is necessary, albeit not easy, to try to evaluate the relative contribution of each piece of evidence to the declaration of infringement. In this regard, the GB has provided a large number of documents relating to the cartel, from which it may be inferred without doubt that the first multilateral agreement evidenced in this proceeding was established in 2001 and, what is more, that GB acknowledges its misconduct in 2000, even though it has been charged as from 2001 not 2000. Conversely, the declaration of the first leniency applicant are based most especially on events that took place since 2005, for though it mentions the cartel's existence in 2001, it provides no exhaustive description or document in this regard. It is therefore understandable for the DI to have assigned to GB's contributions the significant value it said existed in the SO. The Council, in response to the DI's final proposal not to reduce the fine and the arguments submitted by GB on this issue, believes —beyond the lack of cooperation alleged by the DI and the discussion of whether article 52 of the RDC does or does not represent a closed set of criteria to be considered when assessing that cooperation— that the added probative value contributed by GB was scarcely significant. The key set of document for establishing the infringement, though provided by GB, were available in the case record as a result of the inspection carried out two days before GB's application by the DI at its head offices.

In the Council's view, given that GB knew the content of the documents that the DI had obtained in the inspection, it was a simple matter to submit them, along with other similar ones, and thus create the false appearance of adding value. And, what is more, together with the documents evidencing the infringement, GB submitted another series of documents normally selected for the purpose of generating the misimpression that the clock had run out on prosecuting the misconduct. Having analysed the items submitted by GB other than those already in the DI's possession, the Council can only see in them an attempt to provide the Council with evidence for its defence against the infringement with which it could fully expect to be charged by the DI, knowing as it did the evidence against it held by the DI at the time of its leniency application. Certainly, this conduct is not found on the list given in article 52, but in the opinion of this Council it could not be any more contrary to anyone's idea of what is meant by the term cooperation. It is obvious that in its defence, an accused may incorporate into the record as may pieces of evidence in its favour as it deems fit, but the procedure for doing so is

to propose that the Council admit the evidence, not to use the leniency programme, which was conceived of by lawmakers for other purposes. For the reasons stated above, and having analysed the set of requirements for qualifying for a reduction of the fine, this Council does not consider the reduction previously determined in the case of GB to be in order.

On the basis of all of the foregoing, the CNC Council does hereby

RESOLVE

ONE.- To declare that COMPLEJO BODEGUERO BELLAVISTA, S.L.U. and ZOILO RUIZ MATEOS S.L., BODEGAS GONZÁLEZ BYASS S.A., BODEGAS JOSÉ ESTÉVEZ, S.A., BODEGAS WILLIAMS & HUMBERT S.A., BODEGAS EMILIO LUSTAU, S.A., BODEGAS BARBADILLO, S.L., CAYDSA, BODEGAS J. FERRIS M. C.B., BODEGAS PEDRO ROMERO, FEDERACIÓN DE BODEGAS DEL MARCO DE JEREZ and the CONSEJO REGULADOR DE LAS DENOMINACIONES DE ORIGEN "JEREZ-XÉRÈS-SHERRY" Y "MANZANILLA SANLÚCAR DE BARRAMEDA" have committed an infringement of article 1 of the LDC and article 101 of the TFEU, for conducts that contributed to setting up a cartel that carried on the marketing of Jerez wine, with the scope, duration and liability for each of the accused established in Foundation in Law Eleven of this Resolution.

TWO.- To levy the following fines:

- On BODEGAS GONZÁLEZ BYASS S.A., eight hundred seventy thousand euros (€870,000).
- On BODEGAS JOSÉ ESTÉVEZ, S.A., one million two hundred fifty thousand euros (€1,250,000).
- On BODEGAS WILLIAMS & HUMBERT S.A., two million three hundred thousand euros (€2,300,000).
- On BODEGAS EMILIO LUSTAU, S.A., four hundred thousand euros (€400,000).
- On BODEGAS BARBADILLO, S.L., nine hundred thousand euros (€900,000).
- On CAYDSA, twenty-eight thousand euros (€28,000).
- On BODEGAS J. FERRIS M.C.B., one hundred thirty-five thousand euros (€135,000).
- On BODEGAS PEDRO ROMERO, two hundred forty thousand euros (€240,000).
- On FEDERACIÓN DE BODEGAS DEL MARCO DE JEREZ, four hundred thousand euros (€400,000).
- On the CONSEJO REGULADOR DE LAS DENOMINACIONES DE ORIGEN "JEREZ-XÉRÈS-SHERRY" Y "MANZANILLA SANLÚCAR DE BARRAMEDA", two hundred thousand euros (€200,000).

THREE.- To grant COMPLEJO BODEGUERO BELLAVISTA, S.L.U. and ZOILO RUIZ MATEOS S.L. an exemption from payment of the fine that would have been levied thereupon given its fulfilment of the requirements set out in article 65 of the LDC.

FOUR.- To instruct COMPLEJO BODEGUERO BELLAVISTA, S.L.U. and ZOILO RUIZ MATEOS S.L., BODEGAS GONZÁLEZ BYASS S.A., BODEGAS JOSÉ ESTÉVEZ, S.A., BODEGAS WILLIAMS & HUMBERT S.A., BODEGAS EMILIO LUSTAU, S.A., BODEGAS BARBADILLO, S.L., CAYDSA, BODEGAS J. FERRIS M. C.B., BODEGAS PEDRO ROMERO, FEDERACIÓN DE BODEGAS DEL MARCO DE JEREZ and the CONSEJO REGULADOR DE LAS DENOMINACIONES DE ORIGEN "JEREZ-XÉRÈS-SHERRY" Y "MANZANILLA SANLÚCAR DE BARRAMEDA" to abstain in the future from engaging in the practices sanctioned here and in all others of comparable effect.

FIVE.- The Investigations Division is instructed to oversee and ensure compliance with this Resolution.

This Resolution shall be communicated to the Investigations Division of the CNC and notified to the interested parties, informing the latter that the Resolution admits of no appeal in the administrative jurisdiction, but may be challenged by filing an application for judicial review before the National Appellate Court (Audiencia Nacional) within two months after the date of its notification.