COMMISSION DECISION

of 3 July 1973

relating to proceedings under Article 85 of the Treaty (IV/25.9 63 'Gas water-heaters and bath-heaters')

(Only the French and the Dutch texts are authentic)

(73/232/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and in particular Article 85 thereof;

Having regard to Council Regulation No 17 [1] of 6 February 1962;

Having regard to the notification of the 'Agreement regulating the sale in Belgium of instantaneous gas water-heaters and bath-heaters' submitted to the Commission on 3 January 1966 pursuant to Article 4 (1) of of Regulation No 17;

Having heard the parties concerned pursuant to Article 19 (1) of Regulation No 17 and in accordance with Regulation No 99/63/EEC [2];

Having regard to the Opinion delivered by the Advisory Committee on Restrictive Practices and Dominant Positions, pursuant to Article 10 of Regulation No 17 on 22 November 1972.

1. Whereas the 'Agreement regulating the sale in Belgium of instantaneous gas water-heaters and bath-heaters', hereinafter referred to as 'the Agreement' was concluded on 29 December 1965 between the following undertakings, hereinafter referred to as 'the member undertakings':

(i) SPRL LE RENOVA, Forest,

(ii) SA CONTIGEA, Brussels,

(iii) SNCR JOSKI et FILS, Ghent,

(iv) SA ETABLISSEMENTS GUILLAUME PRIST, Antwerp,

(v) SAB CHAFFOTEAUX et MAURY, Brussels;

2. Whereas the declared aim of the Agreement is, *inter alia*, to promote the sale and use of the appliances concerned; whereas undertakings which produce a minimum of 2 000 appliances per year of a sufficient standard to carry the trade mark 'Benor', are automatically admitted to the agreement; whereas undertakings are admitted as 'manufacturer members' if they have a registered factory in Belgium, and as 'importer members' if they represent undertakings whose registered places of business are outside Belgium; whereas the ruling body of the Agreement is a Board of Managers to which each member delegates one Manager, whereas these Managers are divided into two groups: 'manufacturers' and 'importers', with each of these groups having five votes;

3. Whereas the Agreement prohibits its members from granting to various categories of clients, discounts, allowances, or special advantages not provided for by the marketing rules laid down in the Agreement; from supplying goods to customers on sale or return; from giving guarantees for longer than one year from the date of installation; and from giving after-sales service on terms other than those laid down by common agreement; whereas the members must undertake, *inter alia*, to inform the secretary of the Agreement of any known or suspected breaches, and to send him, within one week of their date of issue, copies of all invoices and corresponding credit notes relating to the appliances covered by the Agreement; whereas once any breach of any duty imposed by the Agreement has been established by expert enquiry and confirmed by a Decision of the Board of Managers, it must be penalized by a fine of Bfrs 25 000 for the first offence and Bfrs 50 000 for all subsequent offences; whereas to guarantee the payment of these penalties the members of the Agreement must place on permanent deposit in a bank the sum of Bfrs 25 000; whereas all disputes are to be settled by arbitration;

4. Whereas the marketing rules laid down by the Agreement are as follows:

A. The only purchasers to whom manufacturer members of the Agreement may sell are divided into

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

categories which must meet the following requirements:

(a) Distributors, appearing on a list drawn up by the secretary and sent to all members of the Agreement, must be entered in the Commercial Register; trade as wholesale dealers in sanitary appliances; have a minimum annual turnover in sanitary appliances of Bfrs 6 000 000; have shops and salerooms with a minimum floor surface of 500 m² and 300 m² respectively (this criterion was abolished at the resolution of the undertakings party to the Agreement during the meeting on 11 January 1966); furnish all the necessary references as to solvency, good character and business capabilities; not have any interests, either direct or indirect, in undertakings which install the products in question and grant fitters the usual discount,

(b) Distributors of bottled gas appearing on a list drawn up by the secretary and sent to all parties to the Agreement must be appointed as such by the petrol companies; sell water- and bath-heating appliances; and undertake to grant the usual discount to the fitters,

(c) Gas and petrol companies must be companies supplying town gas which hire out or companies which distribute gas in bottles and which sell appliances to their customers,

(d) Installers must be recognized installers of sanitary appliances,

(e) Other customers are builders of housing estates and blocks of flats; contractors or foremen ordering more than 20 appliances at the same time for fitting out a specific worksite (cheap housing firms (HBM) or small landholding undertakings (PPT), also all bodies financially dependent, even partially, on the Treasury, on quasi State bodies or on bodies with delegated powers, which are not subject to the marketing rules); private purchasers;

B. The following discounts are granted to the abovementioned customers:

(a) A basic discount on the 'list' price, inclusive of tax for appliances and accessories):

(i) to distributors	37%
(ii) to gas and petrol companies	37%
(iii) to distributors of bottled gas	34%

(b) A fixed discount on the gross list price:

(i) to builders of housing estates and blocks of flats	20%
(ii) to installers	20%
(iii) to private purchasers	5%

(c) A quantity discount granted on deliveries to the same address or for appliances collected at the same time from the factory or the importer (inclusive of tax but less basic discount):

(i) to distributors

(ii) to gas and petrol companies

(iii) to distributors of bottled gas

on deliveries of Bfrs 50 000 to 100 000	1%
of Bfrs 100 000 to 150 000	1·5%
of Bfrs 150 000 to 250 000	2%
exceeding Bfrs 250 000	3%

(iv) to installers

on an order of more than five appliances delivered and invoiced at one and the same time, an additional discount of 4%,

(d) A turnover allowance, granted to distributors, gas and petrol companies and distributors of bottled gas, on the total purchases (net amount, inclusive of tax), paid for during the previous financial year for the appliances concerned, whether or not the suppliers were members of the Agreement:

from Bfrs 500 000 to 1 000 000	1%
from Bfrs 1 000 000 to 1 500 000	1·5%
from Bfrs 1 500 000 to 2 000 000	2%
from Bfrs 2 000 000 to 3 000 000	2·5%
from Bfrs 3 000 000 to 4 000 000	3%
from Bfrs 4 000 000 to 5 000 000	3·5%
exceeding Bfrs 5 000 000	4%

C. Uniform terms relating to payment and contract periods are applied in respect of all categories of customers;

5. Whereas the undertakings Le Renova, Contigea and Joski are manufacturer members of the Agreement and whereas the undertakings Prist and Chaffoteaux and Maury are importer members of the Agreement, Prist for German appliances and Chaffoteaux and Maury for French appliances; whreas all are members of the Union des fabricants belges de chauffeeau et chauffe-bains, an association governed by Belgian law, hereinafter referred to as the 'Union', which is responsible for implementing the Agreement;

6. Whereas the member undertakings and almost all the dealers who sell their products were bound between 1947 and 1966 (when the Agreement entered into force) by collective reciprocal exclusivity in buying and selling;

7. Whereas the appliances in question are of a relatively homogeneous type; whereas for each appliance, the selling prices charged to the consumer by the member undertakings are uniform:

Whereas, the market share of total Belgian sales of the member undertakings exceeds 70 %; whereas each of the member undertakings obtained on average, during the years 1967 to 1969, the following percentages of this market share:

Le Renova (manufacturer)	36·30 %
Contigea (manufacturer)	34·35 %
Joski (manufacturer)	0·91 %
Prist (importer)	26.22 %
Chaffote aux et Maury (importer)	2·22 %

Whereas, during the same three years, the 'distributors' obtained 94·25 % of their supplies from member undertakings and 5·75 % from other manufacturers;

8. Whereas after the Commission had notified its objections to the Union and to the member undertakings on 3 March 1972, the Union informed the Commission by letter on 17 March 1972, that on 31 December 1970 the member undertakings had terminated the Agreement and dissolved the Union; whereas, however, on 30 March 1972 the Union made certain replies to the objections sent to it, and asked for an additional period in order to examine these objections more thoroughly; whereas, therefore, the request submitted by the undertakings concerned for the application of Article 85 (3), should be treated as still in existence;

II

1. Whereas the provisions of the Agreement set out below have as their object and effect the perceptible restriction and distortion of competition within the common market:

(a) Whereas the Agreement establishes a distribution network through which the member undertakings must sell the products in question on the Belgian market; whereas dealers such as large shops, co-operatives, and chain stores are excluded from this network; whereas, consequently, the member undertakings, in particular the two importers, cannot sell their products to these dealers, whose business capacity is not in question;

Whereas this provision perceptibly restricts the two importers' possibilities of selling in Belgium; whereas they cannot supply the aforementioned dealers who are important buyers; whereas this provision deprives these dealers of some important sources of supply situated within the common market, since the importer members of the Agreement hold approximately a 20 % share of the Belgian market;

(b) Whereas the marketing rules and the 'basic discounts' laid down by the Agreement oblige the member undertakings and the dealers included in the distribution network 'distributors', 'gas and petrol companies','distributors of bottled gas') to grant their customers discount allowances and other standardized conditions of sale; whereas, consequently, these provisions deprive these undertakings, in particular the importers and these dealers, of the possibility of determining all their conditions of sale in accordance with their own judgement and according to the services which the buyers do in fact give, quite apart from the category in which they are classed by the Agreement;

Whereas these provisions perceptibly restrict the competitiveness of these importers and dealers on the Belgian market; whereas no competition by the offering of more favourable conditions is possible, either between the importer with regard to, all their sales, nor between the dealers with regard to purchases from the importers (26 % of their turnover), nor on the part of the importers and dealers *vis-à-vis* their respective competitors;

(c) Whereas, moreover, the Agreement obliges the member undertakings to grant to 'distributors', 'gas and petrol companies' and 'distributors of bottled gas', an allowance on the turnover of each customer in respect of purchases from all his suppliers, whether or not they are members of the Agreement;

Whereas the distinctive feature of this type of aggregated rebate system is that the amount of the allowance granted by each supplier is calculated by applying the relavant rate to the total turnover of the customer whatever the annual amount of his purchases from the supplier concerned; whereas consequently, this aggregated rebate system:

(i) makes it pointless for these customers to render services to individual suppliers (such as off-season purchasing, stocking-up, promotion),

(ii) dissociates the selling price from the cost price and artificially places all suppliers in the same position with regard to the relationship between these two prices;

Whereas the abovementioned distinctive feature has the effect of:

(i) making it a matter of no consequence to the customers whether they render services to individual suppliers and therefore concentrating their interest solely on the product (lack of product differentiation, differences in selling price, range of consumer choice),

(ii) supplementing the amount of the reduction which each supplier must grant by an additional unjustified charge which assumes larger proportions where the amount of purchases made annually by a customer from any one supplier is small by comparison with his total turnover;

Whereas, in this specific case, the two importer members of the Agreement account respectively for approximately 18·50% and 1·50% of total sales of the products in question on the Belgian market; whereas, by reason of the application of this type of aggregated rebate system, they are obliged to grant the abovementioned dealers a turnover discount which involves a further appreciable discount on the selling price without any services being rendered in return;

Whereas this provision, therefore, perceptibly distorts competition on the Belgian market in the products concerned;

Whereas these abovementioned dealers display but little interest in the appliances sold by other manufacturers; whereas since 1947 they have been closely bound to the member undertakings from whom they obtain the supplies for 94% of their sales; whereas the three manufacturer members of the Agreement represent almost the total national production and whereas with the two importer members they offer a varied range of appliances which are relatively homogeneous, have fairly similar prices, and to which customers have been accustomed for a long time; whereas no services are requested from individual dealers in return for the range of discounts granted by the member undertakings; whereas in order, therefore, to interest these dealers in products from other sources, in particular in products originating in another member country and whose launching would necessitate promotion and additional risks, manufacturers who are not members of the Agreement must grant these dealers bigger reductions than those granted to them by the member undertakings of the Agreement for 94% of their total turnover;

Whereas, consequently, manufacturers who are not members of the Agreement, in particular those from other member countries, who wish to make inroads into the Belgian market but who can only obtain initially at least, a very small share of the Belgian market, will find themselves faced with the alternative of giving up selling to the other dealers who have only 30% of the total sales, or if they also wish to sell to the abovementioned dealers, granting them a greater reduction than all those granted by the member undertakings;

Whereas, consequently, the provision of the Agreement which obliges the member undertakings to grant an allowance on each customer's turnover on purchases from all his suppliers whether or not they are members of the Agreement, perceptibly restricts or distorts competition on the Belgian market for the products in question, the same also holding true for manufacturers who are not members of the Agreement, in particular those from other member countries;

2. Whereas the abovementioned restrictions on competition are liable perceptibly to affect trade between Member States;

Whereas this is the result of the restrictions on competition referred to above, affecting not only the importer members of the Agreement but also manufacturers from Community countries other than Belgium who are not members of the Agreement; whereas these restrictions affect imports into Belgium of appliances manufacturered in the other member countries;

Whereas it follows that this Agreement directly jeopardizes free trade between the Member States in a way which is harmful to the realization of the objectives of a single inter-State market;

III

Whereas the Agreement does not fulfil the conditions required by Article 85 (3); whereas it does not contribute to improving production or distribution or to promoting technical or economic progress within the meaning of these provisions;

Whereas the submissions of those who notified the Commission of the Agreement contain no indication that the restrictions examined in Part II would be better

than competition itself for the purpose of improving production and distribution and technical and economic progress; whereas the facts with which the Commission is acquainted do not permit the conclusion that such a situation exists;

Whereas the need to adhere to certain technical standards has no connection with the imposition of standardized reductions and other conditions of sale and after-sales service or with the exclusion of certain categories of purchaser;

Whereas, furthermore, it is not apparent in what manner the obligations imposed by the Agreement could improve sales of the products in question better than competition itself; whereas the exclusion of certain categories of qualified purchasers and the restricted opportunities to attract orders of the dealers allowed into the distribution network, are both likely to obstruct, rather than contribute to the improvement of sales of the products concerned;

Whereas, therefore, the Agreement, compared with the situation which would exist without it, does not give rise to any perceptible objective advantages for the distribution of the products in question which could compensate for the inconveniences resulting therefrom as regards competition;

HAS ADOPTED THIS DECISION:

Article 1

The 'Agreement regulating the sale on the Belgian market of instantaneous gas water-heaters and bath-heaters' concluded between the undertakings:

(i) SPRL Le Renova, Forest

(ii) SA Contigea, Brussels

(iii) SNCR Joski et Fils, Ghent

(iv) SA Etablissements Guillaume Prist, Antwerp

(v) SAB Chaffoteaux et Maury, Brussels

providing for standard discounts and other conditions of sale and after-sales service, and an allowance on the annual turnover of customers on purchases from all suppliers, whether members of the Agreement or not, constitutes, at least for the period from 29 December 1965 to 31 December 1970, a breach of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The request for exemption pursuant to Article 85 (3), submitted by the undertakings referred to in Article 1, in respect of the Agreement referred to in Article 1, is refused.

Article 3

This Decision is addressed to the undertakings referred to in Article 1.

Done at Brussels, 3 July 1973.

For the Commission

The President

François-Xavier ORTOL