COMMISSION

COMMISSION DECISION

of 5 October 1973

relating to proceedings under Article 85 of the EEC Treaty (IV/27.010 — Deutsche Philips GmbH)

(Only the German text is authentic)

(73/322/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, and in particular Articles 3 and 15 thereof;

Having regard to the Commission Decision of 26 July 1972 to initiate proceedings against Deutsche Philips GmbH, Hamburg, as regards certain price-fixing and distribution agreements of that company;

After hearing Deutsche Philips GmbH in accordance with Article 19 (1) of Regulation No 17, together with Regulation No 99/63/EEC ([2]);

Having regard to the Opinion delivered on 18 May 1973 by the Advisory Committee on Restrictive Practices and Monopolies under Article 10 of Regulation No 17,

WHEREAS:

I. Statement of facts

1. On 18 June 1967 the Commission initiated proceedings under Council Regulation No 17 against Deutsche Philips GmbH, hereinafter called DPG, and other subsidiaries of N.V. Philips Gloeilampenfabrieken, Eindhoven, because the general terms of business notified by the subsidiaries concerned contained an export ban. In its letter of 13 May 1968 the parent company declared that it had decided to lift any ban on exports to the Member States of the Community contained in the general conditions of sale, business documents and invoices of the various Philips companies against which proceedings have been initiated, and called upon the subsidiaries concerned to amend the general terms of business accordingly.

DPG, in a letter of 29 July 1968, submitted to the Commission its new terms of delivery and payment (1968 version), in which the export ban only covered exports to countries outside the EEC. The Commission thereupon informed DPG on 7 March 1969 that proceedings had been discontinued.

2. At the time the abovementioned proceedings were initiated DPG was applying, in addition to its terms of delivery and payment, a number of price-fixing and distribution agreements which had not been notified to the Commission, and which contained *inter alia* the following provisions:

(a) In the agreement covering Philips electric shavers (March 1967 version), the resale, by wholesalers or retailers in Germany of the goods covered by the agreement, for direct or indirect dispatch abroad was prohibited under DPG's terms of delivery and payment, unless DPG had given prior consent thereto in writing in each particular case.

(b) Under the agreements for electric shavers, for large domestic appliances, for domestic appliances and for experimental apparatus, the goods covered by those agreements were to be offered and sold to consumers only at the retail prices laid down by DPG in each case. The agreement for ordinary lamps and discharge lamps contained a provision to the same effect (price-fixing).

([1]) OJ Special Edition 1959-62, p. 87.
([2]) OJ Special Edition 1963-64, p. 47.

(c) The price fixing applied irrespective of whether goods covered by the agreement were purchased from DPG direct or from domestic or foreign suppliers (reimport price-fixing).

(d) Under the agreements for large domestic appliances, for electric shavers and for television sets in wholesale trade, wholesalers were to supply only to specialized retailers. Hence they were not to supply the goods covered by the agreements to other wholesalers or to other suppliers to the trade, whether or not the latter were resident abroad, unless DPG had given prior consent in writing to each particular case. The agreement for domestic appliances and for ordinary lamps and discharge lamps contained a similar provision (ban on horizontal supplies at the wholesale stage).

Under the agreements for large domestic appliances and for colour television sets in wholesale trade, retailers were to sell and/or supply the goods covered by the distribution agreements — even for export — only to consumers. Moreover, they were not to engage in any advertising in trade literature sent to dealers (ban on horizontal supplies and advertising at the retail stage).

(e) Under the agreements for large domestic appliances, for electric shavers, for colour television sets in wholesale trade, for domestic appliances and for ordinary lamps and discharge lamps, wholesalers were not to sell to consumers (ban on direct supplies).

(f) Under the agreements for large domestic appliances and for colour television sets in wholesale trade, retailers were not to sell to wholesalers (ban on reverse deliveries).

DPG maintained this export ban unchanged in its electric shaver agreement even after the abovementioned proceedings concerning DPG's terms of delivery and payment had been initiated and then discontinued. The export ban in question was therefore still contained in the price-fixing and distribution agreement in respect of electric shavers submitted by DPG in the litigation before the Landgericht und Oberlandesgericht in Hamburg against Josef Reitz Ohg and others [1]. Not until the Commission had on 26 July 1972 initiated new proceedings against DPG concerning this and other similar agreements did the latter in October 1972 point out in a circular to its wholesalers and retailers in Germany that, its price-fixing and distribution agreement in respect of electric shavers made reference to its terms of delivery and payment, under item XI 2 of which the resale of its goods for direct or indirect dispatch to countries outside the EEC was prohibited, unless the company had given prior consent thereto in writing in any particular case.

After the objections at the second proceeding had been communicated to DPG on 25 October 1972, DPG immediately abandoned the reimport price fixing and restricted the application of the price fixing, the ban on horizontal supplies, the ban on advertising and the bans on direct supplies and re-deliveries to domestic trade.

II. Applicability of Article 85 (1) of the EEC Treaty

1. The price-fixing and distribution agreements set out above take the form of written agreements between DPG and its German dealers : they are thus agreements between undertakings.

2. (a) The export ban imposed on German dealers by the electric shaver agreement (I.2.a) was designed to prevent them from offering electric shavers, distributed in Germany by DPG, for sale in other Member States and thereby entering into competition. The export ban thus had as its object the restriction of competition within the common market.

(b) Under the price-fixing arrangement (I.2.b), a German retailer could sell the goods covered by the agreements to consumers in other EEC countries only at the prices fixed in Germany, although the price-fixing in force in Germany covered only domestic transactions. The extension of the price-fixing to sales — and to advertisements at the fixed prices — in other Member States of the EEC is consequently a restriction of competition within the meaning of Article 85 (1) of the EEC Treaty.

(c) Since the price-fixing applied without exception to all goods covered by the agreement, which German retailers had purchased from DPG direct or from domestic or foreign suppliers (I.2.c), the German retailers were obliged to observe the fixed prices applying in Germany when reselling goods covered by the agreement and imported from another EEC country into Germany. This reimport price-fixing thus prevented the German retailer from entering into competition with other German retailers as regards prices when reselling reimported goods in Germany.

This reimport price-fixing cannot be justified by the fact that it serves to protect the price-fixing which is legally permitted in Germany

[1] Judgment of the Oberlandesgericht Hamburg, 23. 12. 1971, 3 U 129/71.

by preventing the sale of imported goods below the prices fixed in Germany and thus makes it possible to maintain the price-fixing. The fact that vertical price-fixing is allowed in a given Member State is not sufficient justification for exempting measures designed to preserve this price-fixing from the scope of Article 85 (1). A market-sharing policy conflicting with the objectives of the common market cannot be considered to comply with the competition rules in the EEC Treaty simply because the national legislature has permitted the fixing of consumer prices for certain goods.

Clearly it should not be overlooked that retailers in Germany did not, as a result of the reimport price-fixing, lose the possibility of purchasing products in other EEC countries on more favourable terms, notably at lower purchase prices. However, the only advantage to be gained from this would be an increase in dealers' trading margins without the dealers being able to pass this advantage on to consumers in the form of lower prices, and thereby increase sales and obtain new customers. At any rate the competitive position at the retail stage — as regards the prices which were decisive for the consumer — would be the same as in the case of protection by means of export or reimport bans.

(d) The obligation imposed on German wholesalers to supply other wholesalers only after receiving the prior written consent of DPG (I.2 (d) paragraph 1) and the obligation imposed on the German retailers to sell goods covered by the agreement only to consumers and to refrain from advertising in publications which were addressed to retailers (I.2 (d) paragraph 2), prevented wholesalers and retailers in Germany from supplying dealers in other Member States at the same trading stage. Such bans on horizontal supplies can have the same effect on cross-frontier trade as export bans.

(e) As a result of the ban on sales by German wholesalers to consumers (I.2.e), consumers in other Member States were deprived of the possibility of obtaining goods covered by the Agreement direct from German wholesalers — so far as this did not already conflict with the ban on exports in the electric shaver agreement — and the ban on sales of goods covered by the agreement by German retailers to wholesalers (I.2.f) further cut down the number of sources of supply for wholesalers in other EEC countries, already restricted by the ban on horizontal supplies in international trade.

3. The obligations specified at point 2 were also such as to effect trade between Member States, for they created artificial barriers to trade in the relevant goods between the Federal Republic and the rest of the Community. They thus had a direct influence on trade flows between the Member States in a manner which could only be prejudicial to the attainment of the objectives of a single market.

4. The obligations in question therefore fall under Article 85 (1).

III. Non-applicability of Article 85 (3) of the EEC Treaty

1. A declaration under Article 85 (3) cannot be made in respect of the obligations contained in II (2) because the obligations were not notified to the Commission in accordance with Article 4 (1) of Regulation No 17.

2. The obligations in question do not come under Article 4 (2) (1) of Regulation No 17, since they concern exports between Member States.

3. Article 85 (3) is therefore not applicable in this case.

IV. Fixing a fine

Since DPG, on being notified of the objections on 25 October 1972, immediately put an end to the infringements mentioned under II.2 (b) to (e), the question of whether to impose a fine on account of these infringements can be disregarded. However, the same does not apply in respect of the export ban contained in the electric shaver agreement. Although after proceedings were initiated in 1967, N.V. Philips Gloeilampenfabrieken in its letter of 13 May 1968 expressly declared that it had decided to lift all bans on exports to EEC countries and although it directed DPG accordingly, the latter lifted the export ban only in October 1972, following the initiation of further proceedings. The Commission therefore considers that it is bound to impose a fine in respect of this infringement.

V. Applicability of Article 15 (2) (a) of Regulation No 17 to the export ban

Under Article 15 (2) (a) of Regulation No 17, the Commission may by decision impose on undertakings fines of from one thousand to one million units of account, or a sum in excess thereof but not exceeding ten per cent of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) of the EEC Treaty. In fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement.

1. DPG was aware by 18 June 1967 at the latest, when proceedings were commenced in respect of the export ban contained in DPG's terms of delivery and payment, that the export ban in its electric shaver agreement infringed Article 85 (1). Moreover DPG was expressly required by the parent company to delate the ban on exports to EEC countries from its general terms. However, although DPG did in fact restrict to third countries the scope of the export ban contained in its other price-fixing and distribution agreements put into operation after 1969, it maintained an unlimited ban in the electric shaver agreement until October 1972.

DPG explains that the maintenance of the export ban in this agreement was the result of an error, and points out that the restriction of the export ban to covering exports to third countries only, is to be found in the general conditions of delivery and payment which expressly state that exporting to Member States of the Community is permitted. DPG further states that it informed German wholesalers wishing to export Philips electric shavers that the export of these products to other Member States was not forbidden. DPG presented the Commission with letters from German wholesalers which state that they had actually made deliveries of Philips electric shavers to other EEC countries.

The above circumstances suggest that DPG did not commit this infringement deliberately. The company must nonetheless be considered to have been negligent, for it was to be expected that other traders would consider as obligatory the unlimited ban on exporting contained in the agreement relating to electric shavers and would therefore refrain from exporting to other Member States. DPG did not exhibit the necessary degree of care by stating, in a modification of the agreement, that exports to other Member States were to be allowed.
DPG has thus, through negligence, infringed Article 85 (1).

2. In fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement as well as to the position of the undertaking.

(a) Export bans constitute a severe infringement of Article 85 of the EEC Treaty, for they prevent the creation of a uniform market. This has been well-known since the Commission Decision of 23 September 1964 in the Grundig/Consten case [1] and the judgment of the Court of Justice of 13 July 1966 in associated cases 56 and 58/64 — Grundig/Consten [2].

It must nonetheless be borne in mind that DPG committed the infringement negligently.

(b) Electric shaver agreements were signed from March 1967 onwards, and DPG presented its new conditions of delivery and payment to the Commission on 29 July 1968. It was not until October 1972 that DPG put an end to the infringement, which therefore continued over a long period of time.

(c) DPG is an undertaking of importance in the electrical industry. Both its turnover from sales of electric shavers and its share of the market for this product are considerable.

3. For these reasons the Commission considers it appropriate in this case to impose on DPG a fine of 60 000 (sixty thousand) units of account,

HAS ADOPTED THIS DECISION :

Article 1

It is hereby established that the following obligations imposed by Deutsche Philips GmbH on its German dealers constitute infringements of Article 85 (1) of the EEC Treaty :

— the ban on exports contained in the price-fixing and distribution agreement for Philips electric shavers (I.2.a) ;

— the reimport price-fixing contained in the price-fixing and distribution agreements for Philips electric shavers, for large domestic appliances, for domestic appliances, for experimental apparatus and for ordinary lamps and discharge lamps (I.2.c) ;

— the price-fixing (I.2.b), the ban on horizontal supplies by wholesalers (I.2 (d) paragraph 1), the ban on horizontal supplies and advertising by retailers (1.2(d) paragraph 2), the ban on direct supplies (I.2.b) and the ban on reverse deliveries (1.2.f), contained in some of the agreements aforesaid or in the agreement for colour television sets in wholesale trade, the extent that they applied to trade between Member States.

(1) OJ No 161, 20. 10. 1964, p. 2545/64.
(2) Recueil of the Court of Justice, Volume XII, p. 430.

Article 2

1. A fine of 60 000 (sixty thousand) units of account, or 219 600 (two hundred and nineteen thousand six hundred) Deutsche Marks is hereby imposed on Deutsche Philips GmbH by reason of the maintenance of its ban on exports contained in its price-fixing and distribution agreement for Philips electric shavers (March 1967 version) until October 1972.

2. This Decision shall constitute an obligation on Deutsche Philips GmbH enforceable under Article 192 of the EEC Treaty.

Article 3

This Decision is addressed to Deutsche Philips GmbH, Hamburg.

Done at Brussels, 5 October 1973.

For the Commission

The President

François-Xavier ORTOLI