COMMISSION DECISION

of 21 December 1973

concerning proceedings under Article 85 of the Treaty (IV/223 — Transocean Marine Paint Association)

(Only the English text is authentic)

(74/16/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 of 6 February 1962 [1], and in particular Articles 4, 6 and 8 thereof ;

Having regard to the Decision of 27 June 1967 [2], whereby the Commission granted exemption until 31 December 1972 to the Transocean Marine Paint Association in accordance with Article 85 (3) ;

Having regard to the application, lodged on 27 October 1972 by the General Secretary of the Association on behalf of the Members, for an extension of the exemption ;

Having heard the undertakings concerned in accordance with Article 19 (1) of Regulation No 17 and Regulation No 99/63 [3] ;

Having regard to the publication of the essential content of the application for extension in pursuance of Article 19 (3) of Regulation No 17 in the *Official Journal of the European Communities*, No C 98 of 16 November 1973 ;

Having regard to the Opinion delivered on 5 December 1973 by the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17,

I

Whereas :

The Transocean Marine Paint Association (hereinafter called 'the Association') is an association of medium-sized marine paint producers which was established in 1959. It consists at present of the following 20 producers :

— Molijn & Co. NV, Rotterdam, Netherlands,

— J.C. de Coninck en Zonen NV, Antwerp, Belgium,

— Astral, Société de Peintures, Vernis et Encres d'Imprimerie, Paris, France,

— Veneziani Zonca S.p.A., Trieste, Italy,

— Farbenfabriken Hansa-Hoëg, Kiel, Federal Republic of Germany,

— Storry Smithson Group of Companies, Hull, England,

— Sadolin & Holmblad A/S, Copenhagen, Denmark,

— C. Ljungdahls, AB, Göteborg, Sweden,

— Urruzola SA, Madrid, Spain,

— The National Lacquer and Paint Products Co. Ltd., Hongkong,

— Pacific Products Inc., Manila, Philippines,

— Nippon Paint Co. Ltd., Osaka, Japan,

— Nippon Paint Ltd., Singapore,

— Nippon Paint, Malaysia,

— Nippon Paint Co. Ltd., Thailand,

— Spartan Paints Pty. Ltd., Melbourne, Australia,

— Patterson-Sargent, New Brunswick, USA,

— Galleon Paints Co. Ltd., Parow, South Africa,

— Mauvilac & Co. Ltd., Pailles, Mauritius,

— Antillian Paint Factory Ltd., Netherlands Antilles.

The object of the Association is to enable its members to compete effectively in the special circumstances of the world marine paint market. This requires that paint of standard description should be available in as many ports as possible. The members therefore have each agreed to manufacture marine paints of identical composition and to market these in the same packaging and under a common trade-mark. Each member is to promote the sale of these paints in the State in which it is established and the other territories specifically allocated to it. The members are to maintain stocks of the paints in the ports situated in these territories and to be responsible for after sales service and promotion.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 163, 20. 7. 1967, p. 10.
[3] OJ No 127, 20. 8. 1963, p. 2268/63.

The members are bound to respect the uniform quality formula, to submit to quality control and to exchange licences and the benefits of experiences acquired. They may export paints to another member's territory, but in such case must pay a commission to such member. A commission is also payable in the case of delivery to a ship registered in another member's territory. A member's cooperation in securing or executing orders also gives rise to a claim for commission, for which a reference rate is given and the precise amount of which is fixed in individual cases by the members concerned.

The members are entitled to manufacture and sell marine paints of other composition under their own individual trade-marks. Such paints may only be exported to the territory of another member with the latter's consent. Such consent however may not to be withheld unless the interests of the Association would be adversely affected.

Cooperation between the members and other marine paint producers is prohibited unless previously authorized. Membership requires a two-third majority. The former requirement of a unanimous vote was abolished in 1972. In addition, reference is made to the other facts and matters set out in the abovementioned Commission Decision of 27 June 1967.

Since the Decision of the Commission in 1967 the total turnover of the members in all marine paints has increased considerably. This may be attributed particularly to the Nippon Paint Group which alone accounts for 60 % of the turnover in marine paints of members of the Association. The proportion of Transocean paint has also risen considerably in relation to the total marine paint turnover of the members, rising from one third before the Commission Decision in 1967 to about three-quarters in 1972.

The members of the Association are, as was the case at the time of the former Decision, faced with genuine competition from other marine paints producers who owing to their large size and international links, have a world wide sale's network. The most important competitor is International Red Hand with a world market share of approximatively 25 to 30 %. Other important competitors are :

— British Paints/Federal Paint, which is today a subsidiary of Hoechst (FRG),

— Hempel (Denmark),

— Jotum, a group belonging to Nippon Oil and including the former Transocean Member Bjercke (Norway),

— Sigma Coatings, a group of Marine paint producers belonging to Petrofina and comprising, within the Community, the companies Ripolin, Pieter Schoen, Vettewinkel and Varrossieau,

— Pinchin Johnson, belonging to Courtaulds,

— Pan World Paint Association, which has been established recently and to which Herberts, a subsidiary of Bayer, belongs,

— Camrex and W & J Leigh (UK).

The share of the members of the Association amounts to from 5 to 10 % of the marine paint world market.

AKZO and BASF are also manufacturers of marine paints. The AKZO Group includes the French Transocean member Astral and the Netherlands firm Sikkens, which manufactures marine paints but is not a member of the Association. The BASF group includes the Spanish member Urruzola and also the German firm Glasurit, which is also a non-member paint manufacturer. In the marine paints sector, which must be distinguished from the general paints sector — 80 % of marine paints cannot be used outside the marine market — the firms AKZO/Sikkens and BASF/Glasurit however, at present occupy positions of little significance, and do not exercise any influence on the policy of the two Transocean members in the marine paints sector.

No observations from third parties were received by the Commission following the publication of a summary of the application for an extension of the exemption.

II

The Commission has already given its reasons, which are set forth in detail in the Decision of 27 June 1967, for holding that the Agreement on which the Association is based falls within the prohibition contained in Article 85 (1). The Agreement obliges the members to concentrate their production and marketing activities on their own contract territory and makes it difficult for them to engage in economic activity in the marine paints sector within the contract territory of other members. Such close cooperation gives rise to mutual consideration and observance of the member's own contract territories. The Agreement therefore restricts competition between the members within the Common Market and may affect trade between Member States.

The Commission considers however that the exemption already granted may be extended in accordance with Article 8 (2) of Regulation No 17, in view of the fact that the conditions of Article 85 (3) remain fulfilled. Coordination of the member's individual sales networks at present provides members with a suitable means of improving supply and distribution in the marine paints sector, and enables them to enter into more intensive competition with large producers of marine paint. Consumers also share these benefits.

In its Decision of 27 June 1967, the Commission considered that the provisions of the Agreement, whereby a member may only deliver within the contract territory of another member or for a ship registered in such territory against payment of commission and may only export other marine paints to a country in which another member is established with the consent of the latter, were for 'an initial period' indispensable restrictions for the attainment of the objects of the Association. In view of the fact that the total turnover of Transocean members has risen noticeably since the Commission Decision, as has the share of Transocean paints in the total turnover of marine paints of the members, the maintenance of these restrictions no longer appears to be justified.

The Commission regards as unjustified the obligation to pay commission in the case of the export of Transocean paints or delivery to a foreign ship, irrespective of the role played by the member claiming such commission in the obtaining or in the execution of the order in question. The obligation to provide full details to the member entitled to commission in respect of each of the abovementioned transactions, for the purposes of calculating such commission, hinders the achievement of such deliveries to an extent that is no longer justifiable. Transocean marine paints have become generally well known thanks to the joint sales and promotion initiatives of the members ; the obtaining of an order to be executed in another territory can no longer be automatically attributed to the member established in that territory, or be assumed therefore to give a right to commission.

The Commission also regards as unjustified requirement to seek consent in the case of the supply of non-Transocean paints. Even where such consent is normally given as a matter of course, the requirement amounts to an unnecessary restriction on opportunities for export.

The Commission considers that both these provisions in the present circumstances favour the creation of a preferential position within a territory, and to this extent are no longer required for the attainment of the objects of the Agreement. The Association should therefore be instructed to revoke these provisions.

The Commission has further examined whether the fact that the Transocean members Astral and Urrazola both belong to important and financially powerful groups of enterprises (AKZO and BASF), which enjoy a strong position in the general paints market, militates against an unqualified extension of the exemption, and whether it is necessary to remove these close ties or to require the withdrawal of the members concerned in order to guarantee genuine competition between the Transocean members on the one hand and AKZO/Sikkens and BASF/Glasurit on the other. The Commission has neverthelesss also considered the fact that the position of the AKZO company Sikkens and the BASF company Glasurit in the specialized marine paint sector has until now remained unimportant, although due to the size of the companies concerned it may be considerably strengthened in a relatively short time. Should the facts in this regard change the present exemption could be reconsidered. The Commission considers it appropriate in the circumstances to limit the decision to a fixed period ending on 31 December 1978.

Subject to the reservation expressed in the foregoing, it may be said that the Agreement has advantages which may well have the effect of compensating for its disadvantages, and that a market share of 5 to 10 % in the Common Market does not present any opportunity to restrict competition significantly in the goods in question.

In order to examine thoroughly and with full knowledge of the facts whether the implementation of the Agreement affects competition within the Common Market in a manner which is incompatible with the EEC-Treaty, the Commission is to be informed without delay of any amendment or addition to the Agreement, and of any decision or arbitration held pursuant to the restrictive provisions of the Agreement, in particular Articles 3 to 9 thereof, as well as of any change in membership, participation or interlocking directorates, and also to receive an annual report on the activities of the Association,

HAS ADOPTED THIS DECISION :

Article 1

The declaration of exemption in accordance with Article 85 (3) of the Treaty establishing the European Economic Community, which the Commission issued by its Decision of 27 June 1967 concerning the Agreement of 1 January 1959 establishing the Transocean Marine Paint Association is hereby extended from 31 December 1972 to 31 December 1978.

Article 2

This Decision is subject to the condition that the following provisions of the Agreement shall be rescinded and cease to have effect within six months of this Decision, that is to say :

1. The provision in Article 5, whereby a member may only export marine paint products bearing its own trade mark to the contract territory of another member with the latter's consent and

2. The provision in Article 8, whereby a member may only deliver uniformly marked marine paint products to the contract territory of another member or for a ship from such a territory against payment of a commission to the other member concerned irrespective of the services which the latter has furnished in obtaining or in executing the order in question.

Article 3

This Decision is subject to the following obligations :

1. That the Commission shall be informed without delay of the following matters :
   (a) Any amendment or addition to the Agreement,
   (b) Any decision taken by the Board of Directors or the result of any arbitration held, pursuant to the restrictive provisions of the Agreement, in particular Articles 3 to 9 thereof,
   (c) Any change in the composition of membership,
   (d) Any links by way of common directors or managers between a member of the Association and any other company or firm in the paints sector or any financial participation by a member of the Association in such outside companies or *vice-versa* including all changes in such links or participations already in existence.
2. A report is to be submitted by the Association annually to the Commission on the activities of the Association and in particular on improvements in the production and marketing of marine paint products achieved.

Article 4

This Decision is addressed to the members of the Transocean Marine Paint Association through the intermediary of the Secretary-General, Mr F. Th. Regnault, Delftse Plein 37, Rotterdam, the Netherlands.

Done at Brussels, 21 December 1973.

For the Commission

The President

François-Xavier ORTOLI