COMMISSION DECISION

of 24 July 1974

relating to a proceeding under Article 85 of the EEC Treaty (IV/28.374 — Advocaat Zwarte Kip)

(74/432/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 Article 3 thereof;

Having regard to the application dated 27 December 1973 made by Mr J. Soenen-Bouckaert, a wine trader of Rumbeke, Belgium, under Article 3 of Regulation No 17;

Having regard to the decision taken by the Commission on 6 February 1974 to initiate proceedings pursuant to Article 3 of Regulation No 17;

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

Having regard to the Opinion dated 29 May 1974 obtained of the Advisory Committee on Restrictive Practices and Monopolies pursuant to Article 10 of Regulation No 17,

WHEREAS:

I. The facts

The facts of the case may be summarized as follows:

On 29 April 1920, a company called VN Handelsmaatschappij v/h J.A. Van Olffen of Rotterdam — now VB Van Olffen of Hattem — (hereinafter referred to as 'Van Olffen') registered different designs and trade marks embodying the words 'Advocaat Zwarte Kip';

On 17 February 1938, Van Olffen entered into an agreement with Mr A.C. Thissen of Brussels (hereinafter referred to as 'Thissen') transferring all rights in the registered mark to Thissen, who was thereafter solely entitled to use the trade mark 'Advocaat Zwarte Kip' in the territories of Belgium and Luxembourg and to sell advocaat products manufactured by him under this trade mark, provided that nothing was done that might damage the reputation of the trade mark. This agreement also transferred to Thissen the goodwill concerned, namely the recipie for the product.

Van Olffen, which is now fully owned by the VN Heineken of Amsterdam through a holding company, and in which Heineken had in 1971 already acquired a shareholding of over 25%, produces and sells an egg-based liqueur (hereinafter referred to as 'advocaat') on the Dutch market under the trademark 'Advocaat Zwarte Kip'.

On 14 February 1947, Thissen signed an agreement with Mr C.I. Nolet de Brauwere van Steeland, of Vilverde (hereinafter referred to as 'Nolet'), whereby Nolet, with whom he had been in partnership, acquired the rights assigned to Thissen under the agreement of 17 February 1938.

On 27 July 1955, Nolet assigned his business, together with all his trademarks, to PVBA Cinoco of Vilvorde, a company which he had founded and which subsequently became Cinoco Sa of Brussels (hereinafter referred to as 'Cinoco').

Cinoco is an undertaking which produces and distributes alcoholic beverages in Belgium and Luxembourg. The Stella Artois group has since 1972 had a minority shareholding in it of more than 25%.

On 25 February 1971 Van Olffen re-registered under the 'Benelux' registration arrangements as existing owner of all rights in Trade mark 'Advocaat Zwarte Kip', with the exception of the rights in 'advocaat' in Belgium and Luxembourg.

On 20 July 1971 Cinoco re-registered under the 'Benelux' arrangements as owner of the Trade mark 'Advocaat Zwarte Kip' for Belgian and Luxembourg territory, its original registration having been filed on 20 December 1966 with the register of the Brussels

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

Tribunel de Commerce. The question of existing rights is dealt with in Article 32 and 33 of the Benelux Convention on Trade Marks of 1962. Article 33 provides that where pursuant to Article 32 a Trade mark is owned in different Benelux countries by different persons, the owner of the trade mark in one of these countries cannot object to the importation from another of the Benelux countries of a product bearing this same trade mark or claim compensation on account of such importations where the trade mark was affixed by the owner thereof in such other country or with his permission and where there exists between the two owners an economic link as regards the exploitation of the product concerned.

On 8 February 1971, Mr. J. Soenen-Bouckaert, a wine trader of Rumbeke (hereinafter referred to as 'Soenen'), purchased from a dealer established in the Netherlands a quantity of advocaat bearing the trade mark 'Advocaat Zwarte Kip' which had been manufactured and put into circulation by Van Olffen. This he then imported into Belgium.

On 27 August 1971 Cinoco brought proceedings against Soenen in the Courtrai *Tribunal de commerce*, claiming an infringement of the trade mark and design 'Advocaat Zwarte Kip' and applying for an injunction forbidding him to exploit it. On 24 May 1973 the *Tribunal de Commerce* gave judgment in favour of Cinoco without taking into account the provisions of the EEC Treaty. This judgment granted an absolute territorial protection in respect of the trademark. On 30 July 1973 Soenen appealed against the judgment to the Court of Appeal at Ghent. This Court has adjourned indefinitely the hearing of the appeal.

The scope of the agreement which involved the partitioning of markets was confirmed by letters between the parties of 25 March and 13 October 1971, 8 June 1972, 1 June, 19 June and 31 July 1973; in particular the letter which Van Olffen sent on 13 October 1971 in reply to the letter of 25 March 1971 of Cinoco said: 'Wij verzekeren U echter, dat wij al het mogelijke zullen doen om te voorkomen dat onze Advocaat vanuit Netherland naar België geleverd wordt'. (1)

Van Olffen puts into circulation in the Netherlands advocaat of different qualities, under the same trademark 'Advocaat Zwarte Kip'. Since July 1973 Van Olffen has manufactured some of the advocaat which is sold by Cinoco on the Belgium and Luxembourg markets. At the request of Cinoco, this advocaat differs in composition, alcoholic content, and presentation from advocaat currently sold by Van Olffen in the Netherlands.

Van Olffen indicates the alcoholic content of its advocaat on the bottle: thus the bottles imported by Soenen indicated an alcoholic content of $14^3/_4°$. Cinoco on the other hand does not indicate alcoholic content on the bottle; it differentiates its bottles from those of Van Olffen by attaching a label on which it displays its name and address, even though the advocaat may in fact have been manufactured by Van Olffen, and sold by Cinoco in Belgium or Luxembourg.

II. Findings

Under the terms of Article 85 (1) of the EEC Treaty, the following are prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market.

The fact of prohibiting in a Member State trade in a product legally trade marked in another Member State on the sole ground that an identical trade mark of the same origin has been registered in the first Member State is incompatible with the provisions for the free movement of goods within the common market — namely Articles 30 and 36 of the EEC Treaty. So long as undertakings act in accordance with principles which do not conform to the EEC Treaty in the field of trademark rights, Article 85 of the Treaty will be applicable, provided the circumstances are such as to constitute an infringement of the Article and that, in particular, there exist links of a legal, financial, technical or economic nature between two current owners (2).

Products manufactured by the original Dutch owner of the trade mark, and imported by it or by a third party into Belgium and Luxembourg, cannot be regarded as spurious products; furthermore, nothing in the present decision will prevent Cinoco from prohibiting, on the basis of its rights in the trademark 'Advocaat Zwarte Kip', the importation and supply of products which are truly spurious (3). Thus the substance of the trademark right is not put in issue.

Van Olffen, Thissen, Nolet and Cinoco are undertakings within the meaning of Article 85 (1) and the agreement signed in 1938, which concerned rights

(1) Translation: 'We assure you that we will do everything possible to prevent delivery of our Advocaat from the Netherlands to Belgium'.

(2) Judgment of the Court of Justice on 3 July 1974 in case 192/73, not yet published in the Reports.

(3) Decision of the Commission of 29 September 1964, Grundig/Consten, OJ No 161, 20. 10. 1964, p. 2545/64.

and interests which have since devolved on new owners, is an agreement between undertakings which is capable of falling within the scope of Article 85 (1).

Agreements concluded before the EEC Treaty came into force, but whose effect continues after that date, may come within Article 85. Although the text of the 1938 agreement also included the assignment of the trade mark 'Advocaat Zwarte Kip', the wording of the agreement and the subsequent events, such as the devolution of the interests to new parties, the registration of the trade mark by both parties, their exchange of letters, and the proceedings instituted by Cinoco, show clearly that the agreement of 1938 was intended to partition the market and continues to have this effect in any event.

This agreement has therefore, in so far as the trade mark 'Advocaat Zwarte Kip' is used to prevent the importation of products bearing that same trade mark, the effect of restricting competition within the common market and, by depriving the parties to the agreement and Dutch dealers of the capacity to export freely the products concerned to Belgium and Luxembourg, restricts supply on the market and at the same time, by preventing Belgian and Luxembourg dealers from importing the products, reduces demand for such products. The free interplay of supply and demand is thus restricted by this partitioning of markets.

It should be noted that as regards the significance of the restriction, Cinoco has requested the Commission to apply the Communication of 1970 concerning agreements of minor importance [1]. It must, however, be pointed out that this Communication is for guidance purposes only and that the terms of the agreement do not in any case fulfil the essential conditions in favour of small and medium-sized undertakings laid down in the Communication.

Van Olffen benefits from the financial and commercial support of V. N. Heineken, which holds an important position amongst manufacturers of alcoholic beverages in the Benelux countries and by which it is in fact fully owned. A similar though less pronounced relationship exists between Cinoco and Stella Artois. Further, the position on the Benelux market for advocaat of the parties to the agreement is far from negligible. It should nevertheless be examined whether or not the restriction of competition is significant. Despite the fact that the quantities of advocaat imported by Soenen were very small, the creation of obstacles to trade between Member States based on trade mark rights can prevent the importation of extremely large quantities; therefore the potential restriction of competition that can result from such obstacles is very considerable. Consequently, the agreement has the effect of restricting trade within the common market to a significant extent.

Cinoco objected that the partition of markets was justified by the difference in quality in the products concerned; that the advocaat imported by Soenen contained about 14° alcohol whilst that manufactured by Cinoco contained 18°. Cinoco has in fact in the meantime reduced the alcoholic content of its product to 16°, but, in any event, a difference in quality cannot justify a partitioning of markets. A supplier is entitled to indicate on the packaging of his product its composition, origin, and alcoholic content. Van Olffen in fact states the alcoholic content on the bottle, whilst Cinoco indicates the origin of the products sold by it. The consumer is in danger of being misled only if the supplier omits to state either the composition or the origin of a product. The importation by Soenen of advocaat manufactured and put into circulation by Van Olffen has not harmed the interest of the consumer, but has, if anything, benefited it, by allowing the consumer the opportunity of purchasing advocaat manufactured by Van Olffen's new processes — and moreover at a lower price. It is ultimately for the consumer to decide the effect he will allow a difference in quality to have on the choice he alone must make.

Equally, the agreement, by separating off the Netherlands market from those of Belgium and Luxembourg, has the effect of affecting trade between Member States, in that the importation of products originating in the Netherlands and bearing the same trade mark in Belgium and Luxembourg is prevented, something which may significantly affect trade between Member States in a manner potentially harmful to the achievement of the objectives of a single market among Member States;

The assignment of a trade mark does not escape the application of Article 85, unless it is effected in such a way as both to avoid any partitioning of the market and to reconcile the overall exercise of trade mark rights at Community level with respect for the conditions of competition and for the principle of the

[1] OJ No C 64, 2. 6. 1970.

unity of the market (1). In this case, the effect of the agreement is to keep the markets partitioned off from one another; it is this restriction alone which must be opposed in order to maintain the unity of the market. Thus the present Decision is not directed at the agreement in so far as the latter assigns a trade mark from one undertaking to another, but only at the agreement for the partitioning of markets included therein.

The 1938 agreement therefore fulfils the conditions necessary for the application of Article 85 (1) of the EEC Treaty.

The provisions of Article 85 (1) may be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, and any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods, or to promoting technical or economic progress, whilst allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The agreement was not notified to the Commission under Article 5 (1) of Council Regulation No 17/62. It was not exempt from such notification by virtue of Articles 5 (2) and 4 (2) (b) of that Regulation, given that its effect is to prevent the vendor and third parties from freely importing and exporting within the Community products bearing the same trade mark.

Even if the agreement had been exempt from notification, it would still not have come within Article 85 (3), since it does not satisfy the requirements of that paragraph. In particular — the agreement does not contribute to improving the production or distribution of goods or to promoting either technical or economic progress within the meaning of the paragraph; on the contrary, the effect is to hinder the distribution of advocaat.

Under Article 3 (1) of Regulation 17/62, where the Commission upon application finds that there is an infringement of Article 85, it may by decision require the undertakings concerned to bring such infringement to an end. It is the intention of the Commission, having regard to the foregoing considerations, to require the undertakings concerned to bring this infringement to an end forthwith,

HAS ADOPTED THIS DECISION:

Article 1

The agreement dated 17 February 1938 concerning the use of the trade mark 'Advocaat Zwarte Kip' in the Netherlands, Belgium and Luxembourg, in so far as it has the effect of prohibiting the importation of products bearing the same trade mark, namely 'Advocaat Zwarte Kip', constitutes an infringement of Article 85 (1) of the EEC Treaty and does not qualify for exemption under paragraph 3 of that article.

Article 2

VB Van Olffen of Hattem and SA Cinoco of Brussels shall forthwith bring to an end the infringement as found in Article 1 by refraining from preventing the free movement between the Netherlands, Belgium and Luxembourg of products bearing the trade mark 'Advocaat Zwarte Kip'.

Article 3

This Decision is addressed to:

— Van Olffen VB of Hattem;

— Cinoco SA of Brussels.

Done at Brussels, 24 July 1974.

For the Commission

The President

François-Xavier ORTOLI

(1) Judgment of the Court of Justice of 18 February 1971 in Case 40/70, Reports XVII, 83.