COMMISSION DECISION

of 14 July 1975

relating to a proceeding under Article 85 of the EEC Treaty (IV/28.838 — INTERGROUP)

(Only the Dutch text is authentic)

(75/482/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 Regulation No 17 (1) of 6 February 1962, and in particular Article 2 thereof;

Having regard to the notification and application for negative clearance submitted on 3 March 1974 pursuant to Articles 2 and 4 of Regulation No 17 by INTERGROUP TRADING B.V. (hereinafter referred to as INTERGROUP), Amsterdam, concerning its statutes and the agreement concluded by it on 22 May 1973 with INTERNATIONALE SPAR CENTRALE BV (hereinafter referred to as ISC), Amsterdam;

Having regard to the publication of the essential content of the notification, pursuant to Article 19 (3) of Regulation No 17, in *Official Journal of the European Communities* No C 136 of 6 November 1974;

Having regard to the Opinion delivered on 29 January 1975 by the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17;

I.

1. INTERGROUP, a limited liability company incorporated under Dutch law whose statutes were approved on 28 December 1973, was founded by INTERNATIONALE SPAR CENTRALE BV Amsterdam and the following SPAR chains:

— BV SPAR Centrale, Amersfoort,

— SPAR (Britain) Ltd, Harrow,

— Deutsche SPAR Handels GmbH & Co., Frankfurt am Main,

— DESPAR Centrale Italiana, Milan,

— SPAR Osterreichische Warenhandels A.G. Salzburg,

— Société Française SPAR S.A., Levallois-Perret,

— Ets. POSTALIA S.A., Madrid,

— SPAR Centralen Denmark, Glostrup,

— Suomen SPAR Oy, Helsinki,

— SPAR Ireland Ltd, Dublin.

2. The decision to form INTERGROUP was taken by the national SPAR chains, the essential characteristics of which can be described as follows:

(a) each national chain is composed of retailers and wholesalers entitled to use the SPAR symbol and to benefit from collective advertising of SPAR trademarks. The retailers, who are independent traders, derive advantages from the chain which consist primarily of assistance in their sales organization and the opportunity to obtain supplies from an expanded range; they are obliged to sell the products which the chain supplies under a SPAR trademark, although they are also able to obtain supplies from elsewhere; they may leave the chain whenever they wish. Wholesalers, each of whom is given a territory outside which he can operate only if he renounces the SPAR trademark derive advantages consisting primarily of loyalty from retailers and greater security in their commercial affairs; however they obtain a large proportion of their supplies from outside the chain, which they too are free to leave at any moment. The national SPAR chains, currently comprising about 35 000 retailers and 180 wholesalers throughout Europe, have always based their business on food products;

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(b) in 1954 the above SPAR chains and those in Portugal, South Africa and Rhodesia concluded an 'international SPAR contract', whose aim was to establish systematic cooperation by the formation of a new company INTERNATIONALE SPAR CENTRALE BV (ISC);

(c) the latter is a company under Dutch law founded in 1955; its shareholders are all the SPAR chains mentioned above plus that in Belgium; its objects are to protect SPAR trademarks at an international level, to provide secretarial services in relations between national chains and to act as an intermediary when the national chains purchase imported products; early in 1973 ISC gave up this latter activity, which had in any event never assumed any great importance.

3. According to its statutes the objects of INTERGROUP are the purchase and sale of goods, the fulfilment of the role of intermediary and commercial agent in the purchase and sale of goods of all types for any customer and at any place and, particularly within the context of a licensing agreement to be concluded with ISC, in favour of undertakings belonging to the SPAR organization in respect of products bearing a SPAR trademark. The statutes further provide that:

(a) the management of INTERGROUP shall be the responsibility of a managing body subject to supervision by a supervisory board;

(b) the members of the managing body and of the supervisory board shall be appointed by the shareholders in general meeting, decisions being taken by an absolute majority of those voting except where the statutes are to be amended, in which case a three-quarters majority and plenary meeting shall be required;

(c) INTERGROUP shares may be acquired only by national or regional groupings of wholesalers to which ISC has granted the right to use the SPAR symbol and trademarks and which have signed the 'SPAR international contract'; any shareholder may withdraw from INTERGROUP, but in such a case, or where the conditions for being a shareholder are no longer fulfilled, the general meeting is entitled to decide who shall acquire the shares.

4. The agreement notified, entitled 'licensing agreement' by the parties (and hereinafter referred to as the agreement), was concluded on 22 May 1973 between INTERGROUP and ISC, the latter acting both for the 10 SPAR chains which formed INTERGROUP and for wholesalers affiliated to these chains. By virtue of the agreement ISC authorizes INTERGROUP to conclude supply contracts in respect of goods bearing a SPAR trademark belonging to or controlled by ISC; INTERGROUP may enter into transactions on the basis of the agreement only with persons entitled to use SPAR trademarks.

5. INTERGROUP, which has been operating since 1 January 1973, functions primarily as an intermediary. It negotiates prices and conditions of sale with suppliers and coordinates orders and consignments; it draws up supply contracts, carries out formalities relating to consignment and customs clearance and deals with complaints and disputes between customer and supplier. It does not promote any form of cooperation in the commercial activities of its customers. In most cases it concludes the contracts in the name of its customers. Hitherto its main customers have been the SPAR chains operating in the EEC countries; all customers remain free at all times to determine the resale prices of the products purchased through or after negotiation by INTERGROUP; transactions effected by INTERGROUP have so far generally related to products bearing a SPAR trademark first affixed by the producer.

6. In respect of the main products involved in such transactions, such as lemons, mandarins, pineapples and pears, the volume of purchases made in 1973 through or after negotiation by INTERGROUP accounted for approximately 2·4 %, with a maximum of 5·9 % for pineapples, of imports of these products into the Member State of destination. In respect of those of the above products which are of Community origin, the volume of purchases carried out in 1973 through or after negotiation by INTERGROUP averaged approximately 1·5 % of the production of each Member State of origin.

7. In 1973 the total volume of imports carried out by each SPAR chain through or after negotiation by INTERGROUP represented between 0·06 and 0·89 % of the total turnover of all the wholesalers affiliated to SPAR chains. The 1973 turnover on foodstuffs for all wholesalers affiliated to each SPAR chain represented between 0·02 and 3·82 % of the total turnover of the foodstuffs retail trade in the member countries of the EEC.

8. INTERGROUP was formed for an indefinite period and the agreement notified was concluded for an unlimited duration.

9. Following publication of the essential content of the notification, no third parties have submitted observations to the Commission.

II.

1. Negative clearance may be given under Article 2 of Regulation No 17 if the Commission certifies that, on the basis of the facts in its possession, there are no grounds for action under Article 85 (1) of the Treaty in respect of the statutes or activities of INTERGROUP and of the agreement notified.

2. INTERGROUP, ISC and the SPAR chains which formed INTERGROUP are undertakings. The provisions in the statutes forming INTERGROUP and the agreement notified are agreements between undertakings.

3. According to its statutes, the objects of INTERGROUP are to purchase and sell goods, to act as intermediary and commercial agent in the purchase and sale of goods for any customer and, within the context of the agreement, to deal in products bearing a SPAR trademark. INTERGROUP fulfils its functions through market research, by negotiating prices and other conditions of purchase with suppliers and by providing legal and technical assistance required by its customers. Hence the object of the agreements is to enable INTERGROUP customers, and particularly the SPAR chains, to carry out joint imports under identical purchasing conditions more favourable than those they would have received had they imported separately. Accordingly the object of the agreements is to confront suppliers with a combined single order from purchasers, who thereby hold a stronger position resulting, not from their strength as individuals, but from the fact that they are operating together.

4. The SPAR chains are however free not to use INTERGROUP'S services when making purchases and, when availing themselves of those services, they, like any other INTERGROUP customer, are in any event free to determine their prices and resale terms without being subject to any form of coordination by INTERGROUP in respect of the marketing of the goods. INTERGROUP is free to trade in any product both within and outside the context of the notified agreement, and in the latter case may deal in products competing with those bearing SPAR trademarks.

5. The agreements, furthermore, do not have substantial effects on competition, since imports effected by the SPAR chains through or after negotiation by INTERGROUP represent only a small part of their total turnover, and because purchases effected or negotiated by INTERGROUP account for a relatively small proportion of the total turnover in the retail food trade in each of the EEC member countries. The freedom of choice in both supply and demand in respect of the products concerned is not therefore affected by the agreements to any appreciable extent.

6. Having regard both to facts currently available and to the way they have been seen to develop in past activities of ISC and can reasonably be expected to develop in the future, neither the volume of these purchases for each product nor the number of products concerned is likely to increase to any appreciable extent in the near future. This is not only because of the marginal scale of the joint imports by wholesalers but also because it has always been found difficult in practice to promote concerted action by wholesalers, since the diversity and abundance of supplies often enable them to obtain better conditions acting individually than those to be obtained by acting together. Moreover, imports from non-member countries to EEC countries have been and remain at an insignificant level as compared with total consumption capacities in each of the Member States. As the goods concerned are very often not produced in the EEC, such purchases seem unlikely to increase in scale in the near future since, apart from the coordination difficulties already mentioned, wholesalers in each region are obliged to take account of the very slow development of consumer tastes and of consumers' preferences for local products.

7. At present the agreements seem to have no substantial implications for the market position of suppliers of the relevant goods within the EEC. They have neither as their object nor as their effect the prevention, restriction or distortion of competition within the common market. Nor are these agreements likely to have appreciable restrictive effects in the near future.

8. Accordingly the agreements do not fall within Article 85 (1) of the Treaty, so that the Commission, as requested by INTERGROUP, may certify that, on the facts in its possession, there are no grounds for action under Article 85 (1) of the Treaty in respect of the agreement notified; negative clearance can accordingly be given,

HAS ADOPTED THIS DECISION:

Article 1

On the facts in its possession the Commission has no grounds for action under Article 85 (1) of the Treaty establishing the European Economic Community in respect of the statutes of INTERGROUP TRADING BV, a company under Dutch law, nor of the agreement between that company and INTERNATIONALE SPAR CENTRALE BV, also a company under Dutch law.

Article 2

This Decision is addressed to INTERGROUP TRADING BV and INTERNATIONALE SPAR CENTRALE BV, both of Amsterdam.

Done at Brussels, 14 July 1975.

For the Commission

The President

François-Xavier ORTOLI