COMMISSION DECISION

of 25 July 1975

relating to a proceeding under Article 85 of the Treaty establishing the EEC (IV/28.967 — Bronbemaling V., Heidemaatschappij)

(Only the Dutch text is authentic)

(75/570/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 1, 3, 4 and 15 (6) thereof ;

Having regard to the notification dated 6 August 1974 by the Dutch undertakings Heidemaatschappij Beheer NV, Grondboorbedrijf J. Mos BV, Reinders-Wessemius Grondboorbedrijven BV, De Ruiter Boringen en Bemalingen BV and Lareco BV, of the agreements whereby Heidemaatschappij granted each of the other four undertakings a licence over its Dutch Patent No 128.766 ;

Having regard to the complaint filed pursuant to Article 3 of Regulation No 17 by the Dutch undertaking Zuid-Nederlandsche Bronbemaling en Grondboringen BV on 21 October 1974 ;

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

WHEREAS :

I. The facts

On 18 June 1965 and 2 August 1967 Heidemaatschappij Beheer NV (hereinafter called 'Heidemaatschappij'), Arnhem, Netherlands, lodged two patent applications in respect of a process for the installation of a well-point drainage system consisting of filter tubes connected to pumps and of a well-point drainage system installed in this way.

In the course of the administrative procedure preceding the grant of the patents, three undertakings — A.H. Steenbergen BV, Klaaswaal, De Ruiter BV, Halfweg-Haarlemmerliede, and Grondboorbedrijf J. Mos BV, Rhoon — opposed the grant of the patents applied for by Heidemaatschappij on the ground that the patents would confer on Heidemaatschappij monopoly rights to operate a process which the opposing firms regarded as being no longer patentable, which they were all using and for which one of them — Steenbergen — was manufacturing special equipment. The three opponents were supported in their action by Reinders-Hagendoorn and Wessemius.

The record of the evidence given before the Arnhem District Court (arrondissementsrechtbank) on 9 May and 20 June 1974 in the action brought by Zuid-Nederlandsche Bronbemaling en Grondboringen (hereinafter 'ZN Bronbemaling') shows that an agreement was concluded between Heidemaatschappij, the patent applicant, and the opposing firms whereby the latter withdrew their opposition to the patent in consideration of Heidemaatschappij's granting each of them a licence. In their comments on the Commission's statement of objections the firms in question allege that this is not a true account of the facts. However this issue can be reserved for the administrative procedure in connection with the final decision as, whatever else may not be certain, there can be no doubt that Heidemaatschappij undertook not to grant licences to other firms in the Netherlands without the consent of a majority of the firms party to the agreement.

A clause to this effect is contained in the licensing agreements concluded by Heidemaatschappij with Grondboorbedrijf J. Mos BV, De Ruiter Boringen en Bemalingen BV and Lareco BV, on 17 June 1971, and with Grondboorbedrijf Wessemius NV and Reinders Grondboorbedrijf NV, on 17 July 1971 ; the latter two firms subsequently merged into a single enterprise — Reinders-Wessemius Grondboorbedrijven BV — and the original licensing agreements with them were replaced by a new agreement concluded on 3 July 1974 with retroactive effect to 1 January 1974.

The agreements are identical. The second subparagraph of Clause 11 (1) stipulates that : 'Heidemaatschappij will not grant identical or similar licences to

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

other firms in the Netherlands without the consent of a majority of the parties to this agreement and the other legal persons named in the preamble (i.e. each of the other firms with whom Heidemaatschappij had concluded an agreement)'. The parties state that the reason for this is that they have gone to the trouble and expense of improving the patented invention.

When these firms withdrew their opposition, the Dutch Patent Office on 15 June 1972, granted Patent No 128.766, entitled 'process for the installation of a well-point drainage system consisting of filter tubes connected to pumps, and a well-point drainage system installed in this way'.

On 30 August 1971 and 19 January 1973 two Dutch firms — Grondboorbedrijf H. Haitjema en Zn BV, Dedemsvaart, and ZN Bronbemaling already mentioned — separately applied to Heidemaatschappij for a licence to exploit the horizontal drainage process specified in its patent.

As required by the second subparagraph of Clause 11 (1) of the licensing agreements, Heidemaatschappij consulted the licensee firms on these two applications, and it was decided that licences should not be granted.

In its letter to Haitjema dated 19 October 1971, Heidemaatschappij stated its view that there was no pressing need to increase production of machines of this type, and on 29 November 1972, in response to new approaches by Haitjema, it restated its refusal to grant a licence for the exploitation of the process in the Netherlands in the light, notably, of market forecasts for 1973 and of the opinion of the existing licensees.

Heidemaatschappij's letter to ZN Bronbemaling dated 9 February 1973 addresses the same grounds — reiterated in November of the same year — for refusing to grant a licence for the exploitation of the process in the Benelux countries.

In February 1974 ZN Bronbemaling consequently brought an action in the Arnhem District Court, requesting the Court to summon and hear witnesses so as to establish the circumstances of fact surrounding the grant of Patent No 128.766 to Heidemaatschappij, the grant by Heidemaatschappij of licences to the firms which had withdrawn their opposition and the refusal to grant a licence to the plaintiff, and seeking a declaration that by refusing to grant a licence to the plaintiff and by exercising the monopoly rights conferred by the patent in concert with its licensees in order to prevent the plaintiff from exploiting the horizontal drainage method in the Netherlands under the patented process, Heidemaatschappij was in breach of Article 85 and, possibly, Article 86 of the Treaty establishing the EEC.

This action having been brought and witnesses having been heard by the Court on 9 May and 20 June 1974, Heidemaatschappij notified the licensing agreements to the Commission on 6 August 1974.

II. Provisional appraisal in the light of Article 85 (1) of the EEC Treaty

Article 85 (1) prohibits as incompatible with the common market all agreements between undertakings 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.

A final appraisal of the agreements is not yet possible. However, after preliminary examination, the following conclusions can be reached :

(a) Heidemaatschappij, holder of Dutch Patent No 128.766 dated 15 June 1972, and its licensees — Grondboorbedrijf J. Mos BV, Reinders-Wessemius Grondboorbedrijven BV, De Ruiter Boringen en Bemalingen BV and Landdevelopment and Reclamation Company (Lareco) BV — are all undertakings for purposes of Article 85 of the EEC Treaty.

(b) The separate licensing agreements between Heidemaatschappij and each of the above four licensee firms are agreements for purposes of Article 85.

(c) The decisions taken jointly by Heidemaatschappij and its licensees under the second subparagraph of Clause 11 (1) of the agreements are also agreements for purposes of Article 85.

(d) These agreements do have as their object or effect the restriction of competition within the common market in that they prevent Heidemaatschappij from freely granting licenses under its patent to other firms in the Netherlands. These are substantial restrictions of competition in that, in numerous cases of contracts awarded for major projects by public authorities or large firms, the specifications of the work to be performed stipulate that the horizontal drainage process be used or at least impose such conditions for performance of the work that there is very little alternative.

(e) These agreements may affect trade between Member States in that they restrict the availability of horizontal drainage to the Netherlands, thus preventing the process being used in work extending beyond Dutch frontiers. The process is capital intensive and is consequently used only in major projects. The restriction is therefore appreciable.

(f) Preliminary examination of these facts suggests that the agreements are caught by Article 85 (1) of the Treaty.

III. Provisional appraisal in the light of Article 85 (3) of the EEC Treaty

Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The firms concerned supported their application for exemption under Article 85 (3) by the following arguments :

(a) The licensing agreements ensure that the patented process can be exploited more widely and technical progress is promoted in that the licensee firms pool their experiences, thus enabling improvements to be made both to the process itself and to the machinery used to work it.

(b) The users of the process benefit by improvements made as a result of cooperation on know-how between licensees and by the favourable influence on prices of competition between licensees.

(c) In the absence of the agreements only Lareco — a Heidemaatschappij subsidiary — would have worked the process ; the beneficial effects would have been smaller and there would have been no exchange of know-how and no competition between the licensees.

(d) The licensees are in competition with each other, and there are other competing processes.

The first point to be made is that what is objected to is not the patent licensing agreements themselves but only the anticompetitive provisions in the second subparagraph of Clause 11 (1) and the decisions taken jointly under that subparagraph. These therefore are the only provisions requiring appraisal in the light of Article 85 (3).

An undertaking by a patentholder to restrict his own freedom to grant licences is not of the essence of his rights as patentholder, even where the licensees have gone to the trouble and expense of improving the invention. There might be justification for differences in royalties, but there is none for a restriction of capacity.

The provisions objected to do not contribute to improving the production or distribution of goods or to promoting technical or economic progress. On the contrary, by allowing the number of firms authorized to exploit the patented process to be restricted they hinder wider use of the process and prevent know-how from being enriched by a broader range of experience. This process is already well known and widely used in the Netherlands ; confining its exploitation to a limited number of licensees has no beneficial economic effect such as might be expected of an exclusive licence having the prime purpose of facilitating penetration of a new market.

As the first test of Article 85 (3) is not satisfied, there is no need for the Commission to consider the others. In point of fact, however, the agreements fail the other tests too. Far from allowing consumers a fair share of the benefit derived by the firms concerned from the agreements, the agreements hinder the development of competition and prevent users from being supplied on more favourable terms. The agreements do not contribute to attaining the economic objectives in the first subparagraph of Article 85 (3), so the question of their indispensability does not arise. Despite the assertions of the undertakings concerned, the clause objected to enables them to eliminate competition from all other Dutch or foreign firms in installing drainage systems in the Netherlands by the patented process. In many cases vertical and horizontal drainage processes are not interchangeable. Selection of one or other of the processes depends on a number of circumstances, particularly the configuration of the soil and subsoil, the depth of the water table, and whether buildings are already standing on the land to be drained or are to be put up during the operation. Moreover, contracts for major projects frequently stipulate that the horizontal process must

be used while in other cases the specification as regards, for instance, the maximum width of the trench to be dug means that no other process can be used and that undertakings which are not licensed to exploit the patented process cannot tender. Even if, as the firms concerned argue, there are a large number of drainage firms in business in the Netherlands, the fact remains that very few of them have the material or financial resources needed to carry out large projects ; consequently competition, already considerably reduced, is virtually eliminated by the agreements in question.

Prelimary examination has shown, then, that the agreements do not satisfy the tests of Article 85 (3) of the Treaty establishing the EEC.

IV. Application of Article 15 (6) of Council Regulation No 17

The infringement of Article 85 began on the day on which the agreements between Heidemaatschappij and its licensees were concluded, that is to say on 17 June 1971 for the agreements with Lareco, Mos and De Ruiter and on 17 July 1971 for the agreements with Reinders and Wessemius, which merged into a single firm in March 1973.

The firms did not notify the agreements until 6 August 1974, and then only in anticipation of the possible liability as a result of the action brought against them before the Arnhem District Court for breach of Articles 85 and 86 of the EEC Treaty and from the filing of a complaint with the Commission.

In their reply to the statement of objections against them the firms in question offered to call witnesses in support of their arguments. These witnesses need not be heard until the administrative procedure in connection with a final decision, for with the additional material obtained from the reply there is now enough evidence for a provisional Decision to be taken.

The effect of this Decision will be to remove the immunity given by notification of the agreements from the imposition of fines under Article 15 (2) (a) of Regulation No 17,

HAS ADOPTED THIS DECISION :

Article 1

After preliminary examination the Commission is of the opinion that the second subparagraph of Clause 11 (1) of each of the patent licensing agreements concluded by Heidemaatschappij Beheer NV with Grondboorbedrijf J. Mos BV, Reinders-Wessemius Grondboorbedrijven BV, De Ruiter Boringen en Bemalingen BV and Landdevelopment and Reclamation Company (Lareco) BV, whereby Heidemaatschappij as patentholder undertakes not to issue identical or similar licences to other firms in the Netherlands without the consent of the parties to each agreement and the other licensees, and the decisions taken jointly by Heidemaatschappij and its licensees in pursuance of the second subparagraph of Clause 11 (1), satisfy the tests of Article 85 (1) of the EEC Treaty and that there are no grounds for granting exemption under Article 85 (3).

Article 2

This Decision is addressed to the following undertakings :

1. NV Heidemaatschappij Beheer,
   Lovinklaan 1,
   Arnhem ;

2. Landdevelopment and Reclamation Company (Lareco) BV,
   Zijpendaalseweg 87,
   Arnhem ;

3. BV Grondboorbedrijf J. Mos,
   Kleidijk,
   Rhoon ;

4. De Ruiter Boringen en Bemalingen BV,
   Haarlemmerstraatweg 79,
   Halfweg-Haarlemmerliede ;

5. Reinders-Wessemius Grondboorbedrijven BV,
   Kanaal ANZ 133-1,
   Emmer-Compascuum.

Done at Brussels, 25 July 1975.

For the Commission

The President

François-Xavier ORTOLI