COMMISSION DECISION

of 19 December 1974

relating to a proceeding under Article 85 of the EEC Treaty (IV/560 — Duro-Dyne — Europair)

(Only the English and French texts are authentic)

(75/74/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 Articles 5 to 8 thereof;

Having regard to the notification submitted on 31 October 1962 pursuant to Article 5 (1) of Regulation No 17 by Societe Van Den Bosch S.P.R.L., of Ixelles, Belgium, part of whose business, and in particular that covered by the agreement in question, was transferred on 11 January 1968 to Europair International SA of Ixelles (hereinafter called 'Europair'), relating to an agreement concluded on 24 September 1956 with Duro-Dyne Corporation of New York, USA, hereinafter called Duro-Dyne;

Having regard to the publication in *Official Journal of the European Communities* No C 73 of 29 June 1974 of a summary of the notification, as required by Article 19 (3) of Regulation No 17;

Having regard to the Opinion obtained of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17 on 16 October 1974;

Whereas:

I

The current version of the agreement notified contains the following provisions:

Duro-Dyne, which is engaged in the manufacture and distribution of highly specialized products designed mainly for use in heating and air-conditioning installations, has appointed Europair to be the exclusive general distributor of products bearing the Duro-Dyne trademark in Belgium, the Netherlands, Luxembourg, the Federal Republic of Germany, Switzerland, France, Italy, the United Kingdom, Denmark, Ireland and South Africa. The appointment therefore covers, in addition to South Africa and Switzerland, all the Member States of the EEC.

The range of products which Europair has agreed to market consists of several hundred varied articles, including valves, screws, flexible couplings and electric welding machines.

Europair buys and sells on its own account and is free to fix its resale prices; it undertakes to maintain an adequate stock of Duro-Dyne products and to provide a satisfactory technical service and to promote sales in the different territories assigned to it; every six months it is to provide Duro-Dyne with information concerning sales, the number of customers and quantities purchased.

Duro-Dyne undertakes to assist Europair in the promotion of sales in all the territories covered by the agreement. It provides a one-year guarantee against faults in construction.

Europair is engaged both in the manufacture and importation and the exportation of heating and air-conditioning equipment. It markets a wide range of products of its own manufacture supplemented by those which are covered by the contract with Duro-Dyne. Its total turnover exceeds Bfrs 500 million.

With the exception of France where it markets directly, Europair entrusts the distribution of its products to an exclusive dealer in each country of the common market. It offers its products to these dealers at identical prices. The agreements concluded with them satisfy the conditions laid down in Commission Regulation No 67/67/EEC (2) of 22 March 1967 for the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements, as amended by Regulation (EEC) No 2591/72 (3) of 8 December 1972, so that the prohibition in Article 85 (1) will not apply to them until 31 December 1982. In particular, under these agreements each dealer is free to resell outside the territory assigned to him.

There have been no objections from third parties following publication of the notification, pursuant to Article 19 (3) of Regulation No 17, in the *Official Journal of the European Communities*.

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

(2) OJ No 57, 25. 3. 1967, p. 849/67.
(3) OJ No L 276, 9. 12. 1972, p. 15.

II

Under Article 85 (1) of the Treaty, 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 are prohibited as incompatible therewith.

The agreement in question is an agreement between undertakings under which Duro-Dyne has bound itself to deliver only to Europair in the territory concerned, thus preventing all other undertakings in the common market from buying the products covered by the agreement direct from Duro-Dyne. This undertaking for exclusive supply not only restricts the freedom of the parties to the agreement but also affects the position of those third parties, particularly other retailers established in the EEC, who might wish to obtain supplies of the products covered by the agreement direct from Duro-Dyne.

This restriction of competition has an appreciable effect on many of the individual products covered by the agreement ; for example, it is estimated that Duro-Dyne has between 20 % and 30 % of the EEC market in ready-made flexible couplings, about 10 % of the market share in valves, and only few direct competitors in the market for electric welding machines.

This agreement is capable of affecting trade between Member States. Duro-Dyne products have an appreciable share of the EEC market. But for the agreement other dealers in the EEC would have been able to buy, and would have bought, directly from Duro-Dyne for resale in their own or in another Member State. As a result of the agreement Duro-Dyne products can only be imported into the EEC for resale in the various Member States either directly through Europair and its distributors or indirectly through a distributor outside the EEC. The flow of inter-state trade in the products in question will therefore develop on lines other than those which would have prevailed without the restrictions caused by the agreement.

This agreement accordingly comes within the scope of Article 85 (1).

III

Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable to the agreement if it 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 :

(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.

1. Commission Regulation No 67/67/EEC does not apply to the agreement in question since the latter relates not to resale within a specific part of the territory of the common market but to resale within the whole of that territory.

Nevertheless, in the present case the existence of a single exclusive distributor responsible for importing an extensive range of American products into the whole territory of the EEC does contribute to improving the distribution of these products within the common market.

For in this way Duro-Dyne can consolidate the distribution of its production. It is not obliged to maintain numerous business contacts with distributors in the various Member States and the fact that it entrusts the organization of the sale of its products within the EEC to one general distributor makes it easier to overcome difficulties resulting from linguistic, legal or technical differences. This is particularly advantageous since the products concerned, which are mostly small accessories for heating and air-conditioning installations, consist of a large number of varied articles which have to conform to the various systems existing in the common market and comply with the necessary technical specifications.

The agreement notified therefore makes the promotion of the sale of the products concerned easier and permits more intensive marketing to be undertaken and ensures continuity of supplies while at the same time rationalizing distribution.

Furthermore, it is because Europair has undertaken on Duro-Dyne's behalf, in return for exclusive rights, not only to promote sales of the products covered by the agreement within the EEC, but to maintain an adequate stock of such products and to provide satisfactory technical service, that the products of Duro-Dyne are able to be competitive in the market.

In addition, by channelling through Europair the import into the EEC of a large range of fairly low-priced products from a relatively distant third country, the agreement enables import formalities to be streamlined and the incidence of transport costs on unit prices to be reduced.

Finally, since the agreement in question relates to products which complement and supplement those of Europair's own manufacture, the latter is thus in a position to offer a greater selection of heating and air-conditioning components to consumers within the common market.

It can, therefore, properly be concluded from the foregoing appraisal of the facts that the existence of the exclusive dealing agreement between Duro-Dyne and Europair produces a better system of distribution than would otherwise be the case if there were no agreement for exclusive dealing.

2. The agreement allows consumers a fair share of the resulting benefit. Given the pressure of competition both on the markets in the various components concerned and on the market in the whole range of products, Europair must pass on the advantages described above in the terms it offers to its own dealers in the Member States of the EEC.

Each of these dealers must in turn take into account in its sales policy not only the competition of similar products to those of Duro-Dyne but also, since there is no export prohibition in the sub-distribution contracts, the competition of Duro-Dyne products coming directly or indirectly from other Europair dealers. It is, therefore, in the interest of dealers to offer the products concerned to consumers on the most favourable terms.

3. The advantages indicated in point 1 of this Section could only be obtained at the price of a restriction of competition, that is by the grant to Europair of exclusive rights in respect of the whole territory of the EEC. The Commission believes, on the facts available, that in the present case the improvement of distribution could not be as well achieved by any other sales system.

The agreement notified does not contain any other restrictions of competition.

4. Duro-Dyne products are in direct competition with comparable products offered for sale in the common market by a number of other undertakings. Moreover, Europair, as principal exclusive distributor, does not enjoy absolute territorial protection. In particular, Duro-Dyne has not undertaken to refrain from making indirect deliveries to the area covered by the agreement; thus undertakings other than Europair may acquire the products covered by the agreement through dealers other than Duro-Dyne situated outside the territory;

Furthermore, competition is maintained at the final distribution stage, since Europair applies a single price list for transactions with its own dealers and the distribution system set up by it permits parallel imports as between the various territories of the common market.

Consequently, the agreement does not give the undertakings concerned the opportunity to eliminate competition in respect of a substantial part of the products in question.

All the requirements of Article 85 (3) are therefore satisfied.

IV

The Decision is made retroactive to 13 March 1962, as is permitted under Article 6 (2) and is issued for a specified period, as is required under Article 8 (1) of Regulation No 17. For the purpose of fixing this period, it can be assumed that the main grounds on which the Decision is based will not change as long as the sub-distribution agreements fulfil the requirements of Regulation No 67/67/EEC,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of Article 85 (1) of the Treaty establishing the European Economic Community is hereby declared pursuant to Article 85 (3) thereof to be inapplicable to the exclusive distribution agreement at present in force between Duro-Dyne Corporation of New York and Europair International SA of Ixelles, Belgium.

Article 2

This Decision shall take effect from 13 March 1962 and shall apply until 31 December 1982.

It is addressed to Europair International SA of Ixelles (Belgium), and to Duro-Dyne Corporation of New York (USA).

Done at Brussels, 19 December 1974.

For the Commission

The President

François-Xavier ORTOLI