COMMISSION

COMMISSION DECISION

of 19 December 1974

relating to proceedings under Article 85 of the EEC Treaty

(IV/23.013 — Goodyear Italiana-Euram)

(Only the Italian text is authentic)

(75/94/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 6 and 8 thereof ;

Having regard to the notification made pursuant to Article 4 of Regulation No 17 on 7 November 1963 by Goodyear Italiana SpA, Rome, Italy (hereinafter called 'Goodyear Italiana') of the exclusive sales agreement concluded on 1 May 1963 with Euram Italia SpA, Milan, Italy (hereinafter called 'Euram') ;

Having regard to the publication of the summary of the notification in *Official Journal of the European Communities*, No C 91 of 3 August 1974 pursuant to Article 19 (3) of Regulation No 17 ;

Having regard to the Opinion of the Advisory Committee on restrictive practices and dominant positions dated 16 October 1974, delivered in accordance with Article 10 of Regulation No 17 ;

Whereas :

I

1. The main provisions of the present version of the agreement as notified are as follows :

Goodyear Italiana appoints Euram as its exclusive distributor in Italy for plastic film bearing the trade mark 'Vitafilm', a product for wrapping foodstuffs which is manufactured or supplied by Goodyear Italiana ; Goodyear Italiana undertakes not to sell Vitafilm directly to any person or undertaking in Italy other than to United States Government agencies or offices established there.

Euram (which buys and sells on its own account) is free to set its resale prices. It undertakes not to sell products similar to those to which the contract relates and which could compete with them and also undertakes to purchase agreed minimum quantities each year, the breach of which conditions gives Goodyear Italiana the right to terminate the contract. Goodyear Italiana reserves the right to supervise Euram's advertising and to promote the sale of the product in question, all related costs being borne by Euram.

2. On 7 August 1973, at the request of the Commission, the parties amended the clause prohibiting Euram from exporting the product supplied by Goodyear Italiana out of the territory covered by the contract. Euram is still prevented from selling outside the Community but may sell anywhere within the common market while undertaking not to engage in active sales promotion outside Italy by setting up branches, for example, or operating depots or advertising.

From the same date, the parties deleted by agreement the following clauses :

(a) the obligation on Goodyear Italiana not to sell any product in Italy similar to those to which the contract relates and which could compete with them, without the consent of Euram ;

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

(b) the obligation on Euram not to challenge the validity of the trade mark 'Vitafilm' used in respect of the product covered by the agreement in question.

3. The product concerned, polyvinyl chloride film, is usually supplied on reels 30 cm wide in lengths of 120 m and is one of the most widely used intermediate products of the plastics industry. Properties such as impermeability, shrinking and sealing under heat, transparency and ease of handling are helping the product to gain a constantly increasing share of the general packaging market and in particular of the foodstuffs packaging market, where it is most widely used.

The manufacture of the product in question accounts for only a small part of the operations of Goodyear Italiana, which are centred mainly on tyres. In the common market three other subsidiaries of the American company Goodyear International Corporation manufacture the product in question, but in the fulfilment of this agreement Goodyear Italiana has in fact only ever supplied Euram with film exclusively of its own manufacture and has always acted independently.

Euram is a company which, in addition to Goodyear Vitafilm, distributes a range of other items used in the packaging of foodstuffs, such as containers made of woodpulp and polystyrene, cans, aluminium foil, polythene bags, automatic labelling machines and felt pens. Approximately half its customers are large supermarkets and the other half small- or medium-sized self-service shops ('superettes'). It markets this range of additional products through salesmen directly responsible to it. It also helps its customers, especially the smaller ones, to set up their foodstuffs packaging systems by means of plastic film.

The film distributed by Euram competes on the Italian market with similar products manufactured by a number of undertakings, one at least of which produces more than Goodyear Italiana. Even Euram's own customers, particularly large supermarkets do not obtain all their requirements for packaging film from Euram, but also buy from other manufacturers.

4. No objections have been made by third parties following publication of the notice in the *Official Journal of the European Communities* pursuant to Article 19 (3) of Regulation No 17.

II

Whereas :

5. Article 85 (1) of the Treaty provides that all agreements between undertakings which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market shall be prohibited as incompatible with the common market.

6. Euram, by virtue of the exclusive dealing agreement is prevented from selling any product which could compete with those to which the agreement relates ; this has the effect not only of restricting the freedom of Euram to do business but also affects the positions of existing or potential suppliers of packaging film who might wish to market their products in Italy through Euram. This restriction must have an appreciable effect because Euram is at the present time the only Italian undertaking dealing with the complete range of products for wrapping foods in plastic film and whose products meet about 30 % of the demand from consumers in the Italian market. For the same reason this restriction is capable of affecting trade between Member States to the extent that the flow of trade between other parties of the common market and Italy might develop in a different way in the absence of the agreement and there might otherwise be the possibility of establishing a single market among the Member States.

7. Euram has agreed not to undertake an active sales policy for the product in question in other countries of the common market which has the affect not only of restricting the freedom of the exclusive distributor to sell the goods but also affects the position of others, particularly dealers and consumers in other common market countries who have to face a limited availability of the goods in their own countries. This restriction has an appreciable effect because Euram holds a leading position in the distribution of packaging films for foodstuffs on the Italian market and also because the market for this product is expanding throughout the whole Community. For the same reasons, this restriction is capable of affecting trade between Member States to the extent that the flow of trade between Italy and other parts of the common market might develop in a different way in the absence of the agreement and there might otherwise be the possibility of establishing a single market among Member States.

8. Euram has moreover agreed not to export the products in question outside the EEC ; this not only prevents Euram from carrying on this business outside the EEC but, in particular, it also prevents every under-

taking outside the EEC from buying the product in question from Euram for resale within the common market which results in the distortion of competition within the common market. This clause does not, however, have the effect of restraining competition to an appreciable degree within the common market. Any purchaser whose business is situated within the common market is able to obtain supplies of Vitafilm not only directly from Euram itself, but also either directly or indirectly, from other main suppliers of this product whether their place of business is within the Community or not. However, with regard to these other sources of supply, there is little likelihood that anyone would wish to sell Vitafilm in the common market after it had passed from Goodyear Italiana to Euram and had then been exported from the EEC. Such sales would be subject to such additional economic factors as the accumulation of consecutive profit margins, and transport costs as well as customs duties which would result from the goods passing and re-passing through the border controls of the European Community. Such sales are even less likely because as far as the Commission is aware there are not, nor having regard to the competitive situation in this field, are there likely to be in the foreseeable future, such differences in price for this product between the EEC and other countries as to allow such additional charges to be absorbed.

9. Because of the obligations imposed on Euram not to sell competitive products and not to undertake an active sales policy outside Italy, the agreement comes within the provisions of Article 85 (1).

III

Whereas :

10. 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 does not :

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

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

11. By virtue of Article 1 (2), Commission Regulation No 67/67/EEC [1] of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements, is not applicable to the agreement in question because it is an agreement to which only undertakings of the same Member State are party and it is concerned with the resale of goods within that Member State.

[1] OJ No 57, 25. 3. 1967, p. 849/67.

12. However, on the one hand, Goodyear Italiana, which operates mainly in the tyres market may thus devolve its sale of Vitafilm and is not obliged to maintain business relations with a large number of intermediaries and buyers. On the other hand Euram, which markets a whole range of complementary articles to be used for wrapping foods in plastic film, is able to meet the increasing demand for this product, by selling direct to users ; in fact the agreement ensures that the latter, both food supermarkets and 'superettes', are supplied more easily and more regularly and enables them to make better use of the product with the assistance provided by Euram.

13. The agreement notified allows consumers a fair share of the resulting benefit. Euram has to take account in its sales policy not only of similar competing products available on the market but also of Vitafilm coming from other suppliers, so it is in its interest to offer consumers the products in question on the most favourable terms.

14. The obligation on Euram to refrain from engaging in an active sales policy in other common market countries may also be regarded as a restriction indispensable to the attainment of the advantages described above ; it encourages Euram to concentrate its trading in the territory where it has exclusive dealing rights and in this manner to make a greater contribution to improving distribution in Italy.

15. The provision forbidding Euram to sell products competing with the product to which the contract relates may also be regarded as indispensable to the improvement of distribution since it encourages Euram to concentrate on the sale of the Goodyear Italiana product.

16. The product to which the exclusive dealing agreement at issue relates is in direct competition with similar products marketed in Italy by other undertakings and also with Vitafilm manufactured elsewhere which may be imported into Italy, so that the agreement does not afford undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

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

18. The agreement in question has only complied with the conditions for the application of Article 85 (3) since 7 August 1973 ; the Decision must, therefore, take effect from that date.

19. In determining the duration for which this Decision shall be applicable it will be assumed that the principal grounds for making the Decision will not alter substantially before 31 December 1982,

HAS ADOPTED THIS DECISION :

Article 1

The provisions of Article 85 (1) of the Treaty establishing the European Economic Community are hereby declared inapplicable, pursuant to Article 85 (3), in the case of the exclusive sales agreement between Goodyear Italiana SpA, Rome, and Euram Italia SpA, Milan, concluded on 1 May 1963, as amended on 7 August 1973.

Article 2

This Decision shall have effect from 7 August 1973 ; it shall apply until 31 December 1982.

This Decision is addressed to Goodyear Italiana SpA, Rome, Italy and Euram Italia SpA, Milan, Italy.

Done at Brussels, 19 December 1974.

For the Commission

The President

François-Xavier ORTOLI