II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 June 1976

relating to a proceeding under Article 85 of the EEC Treaty (IV/26.186 — CSV)

(Only the Dutch text is authentic)

(76/593/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 85 and 86 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 [1], and in particular Article 11 (5) thereof,

Whereas :

On 13 March 1967 a proceeding was brought by the Commission on its own initiative under Article 85 of the Treaty against the Dutch joint selling agency for simple nitrate fertilizers, 'Centraal Stikstof Verkoopkantoor (CSV)', of The Hague, and against the manufacturers who hold shares therein. The first statement of objections was sent on 29 May 1968. On 27 June 1969 CSV and its members applied for negative clearance and amended CSV's rules and regulations and its terms of sale in such a way that CSV would thereafter only deal with sales in the Netherlands and outside the EEC. These changes were accepted by the Commission subject to a subsequent review of their results.

In a second statement of objections dated 23 December 1974 the Commission took the view that CSV should cease operating as a joint selling agency, even though it was then only concerned with sales in the Netherlands and outside the Community, because of the effects on the individual exports to other EEC countries of the CSV shareholder companies. On 27 March 1975 these companies, namely, Unie van Kunstmestfabrieken NV and Nederlandse Stikstof Maatschappij NV together with CSV itself, notified to the Commission all the agreements referred to in the statement of objections dated 23 December 1974.

On 29 August 1975 the lawyers acting for the notifying companies proposed to the Commission to make certain changes to the agreements and practices which in their opinion would meet the objections raised by the Commission.

In his reply dated 17 October 1975, the Director-General for Competition, after reviewing the proposed changes, states 'As has already been observed in the statement of objections, it is difficult for the restrictions imposed by the agreements to escape liability under Article 85 (1) or to qualify for exemption under Article 85 (3)'. Nevertheless his staff 'would carefully consider the possible effects resulting from the adoption of the measures proposed on 29 August 1975'.

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

On 22 December 1975 the Commission requested CSV to supply the information set out in Article 1 of this Decision in preparation for a meeting between Commission officials and CSV representatives. CSV had until 19 January 1976 to supply this information.

On 14 January 1976 CSV and its lawyers orally informed the Commission that part of the information requested concerned CSV's exports outside the EEC under an agreement bringing all European manufacturers of nitrate fertilizers together in Nitrex AG, Zurich, Switzerland, which was responsible for the operation of the agreement. The notifying firms considered that if the information supplied to the Commission included documents relating to the activities of Nitrex, those members of their staff who were also on the Nitrex Board of Directors could be regarded by the Swiss authorities as committing an offence under the Swiss criminal code.

Notwithstanding the fact that the Commission again wrote on 16 January 1976 stating that if necessary it would issue a decision requiring this information to be supplied, on 19 February 1976 CSV refused to supply the information. The ground for the refusal was that CSV's legal advisers in Switzerland had stated that the production of the documents called for by the Commission could expose those producing them to the risk of imprisonment or fines under Article 273 of the Swiss Criminal Code and that it would therefore be preferable, if prosecutions were brought, to be able to plead compulsion (état de contrainte) under Article 34 of that Code. The information would therefore not be supplied except in response to a legally enforceable decision. CSV therefore stated that it was obliged not only to refuse to supply the documents called for but also to inform the Commission it would appeal against the decision requiring the production of such documents.

As the Commission stated in its letter of 16 January 1976, the Commission requires this information, because without it the effects of CSV's conduct on competition within the Community cannot properly be assessed.

The reason given by CSV for refusing to comply with the request is unacceptable. The information requested concerns the business activity of the Dutch firms belonging to CSV and of CSV itself. The information is available within the Community and the Commission is entitled to call for it. The Commission's staff may not disclose any information acquired if it is covered by the obligation of professional secrecy.

Part of the information has also been supplied to an international combine established in Switzerland. However, the fact that information has been supplied to a body governed by Swiss law does not mean that it can no longer be supplied to the Commission. Nor are the Commission and its staff released from their obligation of professional secrecy simply because the information has been supplied to the combine based in Switzerland.

Even if Swiss law could be interpreted to mean that the supply of information to the Commission amounted to unlawful disclosure, this would still not warrant delaying the performance of obligations imposed by the Commission in order to enforce the rules of competition.

Under Articles 15 (1) (b) and 16 (1) (c) of Regulation No 17 the Commission may, by decision, impose on undertakings or associations of undertakings :

(a) fines of from 100 to 5 000 units of account where, intentionally or negligently, they supply incorrect information in response to a request made pursuant to Article 11 (3) or (5) or do not supply information within the time limit fixed by a decision taken under Article 11 (5);

(b) periodic penalty payments of from 50 to 1 000 units of account per day, calculated from the date appointed by the decision, in order to compel them to supply complete and correct information which it has requested by decision taken pursuant to Article 11 (5).

Having regard therefore to the facts stated above, measures should be taken to limit as far as possible the duration of CSV's refusal to comply with the request for information. Periodic penalty payments should therefore be imposed pursuant to Article 16 of Regulation No 17 for each day beyond a time limit which, having regard to the circumstances of the case, may reasonably be set at 80 days from the notification of this Decision. In view of the size of the firms concerned and of the grounds for their refusal to supply information, the amount of the penalty payment may reasonably be fixed at the equivalent in Dutch florins of 1 000 units of account per day of delay. The calculation of the sum due, taking into account the date on which the liability to pay commences, shall be reserved for a later decision of endorsement,

HAS ADOPTED THIS DECISION :

Article 1

Centraal Stikstof Verkoopkantoor BV (CSV) shall forward to the Commission :

(a) in respect of 1974/75 and 1975/76 :

— the monthly returns sent to it by Unie van Kunstmestfabrieken NV and Nederlandse Stikstof Maatschappij NV containing statements and forecasts of production and individual sales of simple nitrate fertilizers, the documents which CSV sent in reply and the corrected and final versions of these statements and forecasts resulting from the discussions between CSV and those companies ;

— the annual equalization accounts ;

— reports of the Planningscommissie ;

— forecasts for future years, together with their covering notes ;

(b) in respect of the two months immediately preceding its reply :

— all documents relating to production and sales of simple nitrate fertilizers exchanged between CSV on the one side and Unie van Kunstmestfabrieken NV and Nederlandse Stikstof Maatschappij NV on the other.

Article 2

The information called for in Article 1 shall be supplied within 80 days from the day on which the addressee receives this Decision.

Article 3

In conjunction with the obligation to supply the information specified in Article 1 there shall be imposed a periodic penalty payment of the equivalent in Dutch florins of 1 000 units of account per day of delay beginning on the 81st day following that of the notification of this Decision.

Article 4

This Decision is addressed to Centraal Stikstof Verkoopkantoor BV, Thorbeekelaan 360, 2025 The Hague, The Netherlands.

Application may be made to the Court of Justice of the European Communities, Luxembourg, for review of this Decision as provided in the Treaty establishing the European Economic Community, and in particular in Articles 173 and 185 thereof.

Done at Brussels, 25 June 1976.

For the Commission

G. M. THOMSON

Member of the Commission