COMMISSION

COMMISSION DECISION

of 1 December 1976

relating to a proceeding under Article 85 of the EEC Treaty (IV/29.018 — Miller International Schallplatten GmbH)

(Only the German text is authentic)

(76/915/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 of 6 February 1962 [1], and in particular Articles 3 and 15 thereof,

Having regard to the Commission Decision of 23 February 1976 to initiate proceedings against Miller International Schallplatten GmbH, Quickborn bei Hamburg,

Having heard that undertaking in accordance with Article 19 (1) of Regulation No 17 and with Regulation No 99/63/EEC [2],

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions delivered pursuant to Article 10 of Regulation No 17 on 6 July 1976,

Whereas :

I. The facts

1. Miller International Schallplatten GmbH, Quickborn (hereinafter referred to as 'Miller') produces sound recordings (records, tapes and cassettes) which it distributes under the 'Europa' and 'Sonic' labels. A third Miller label 'Somerset' is no longer used.

2. Miller's goods are exclusively in the so-called bargain range, currently retailing at up to DM 12·80. The low price is made possible by the fact that Miller's recordings are of relatively unknown artists. Miller does not use international stars or well-known artists in the production of its recordings, but produces 'cover' versions, that is to say identical copies by unknown artists, to whom Miller pays a single fee.

3. Miller's repertoire consists primarily of light music, including recordings for children in German, which account for about half the titles published, music from the German hit parade and German folk music and, to a lesser extent, vocal music in English and instrumental music.

4. Miller states that in 1975 its share of the entire sound recordings market in Germany was ... % and its share of exports was ... %.

Miller is a wholly owned subsidiary of the American firm MCA Records Inc., whose holding company is MCA Inc., Universal City.

5. Miller has concluded exclusive dealing agreements for the sale of its products in Alsace and Lorraine and in the Netherlands. Clause 5 of the agreement with the French sole distributor dated 11 June 1971 provides :

> 'No Miller products shall as a rule be exported from Alsace-Lorraine to other countries.'

Clause 9 of the agreement with the Dutch sole distributor, dated 15 November 1973, although not enforced as a result of a supplemental provision, provides :

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

'In conforming with the EEC Regulations pertaining to title and reshipping rights of goods Delta (the sole distributor) and Miller agree the following:

In that Miller is giving an exclusive right to the territory to Delta, Delta will in the spirit of the agreement refrain from shipping the subject goods outside of the Netherlands without an express understanding from Miller that it will not have a harmful effect on Miller's other importers or licensees in areas other than the Netherlands.'

Within the common market, apart from the two sole distributors already named, Miller has sole importers in Belgium, Luxembourg and Denmark, though without any formal agreement. For Italy, Miller had granted until 31 December 1975 an exclusive license for the manufacture and sale of recordings on the Europa and Somerset labels.

6. From about 1970 Miller's terms and conditions of sale (domestic market) contained a clause 9 (exports) which provided:

'No records on our labels may be exported. If this provision is not complied with, we may cease supplying the seller and may hold him liable for any claims in damages brought against us in foreign countries in respect of such exports.'

Since 1 August 1974 the terms and conditions of sale and payment applicable to all domestic and foreign customers have contained the same provision in the following form at Clause IX (exports):

'The customer shall as a rule refrain from exporting goods supplied to him by us. In case of breach of this provision we may cease supplying the customer who is in breach and may seek from him an indemnity in respect of any claim for damages brought against us in foreign countries.'

7. After the Commission had made representations upon receiving a complaint against the export prohibition contained in Miller's terms and conditions of sale (domestic market), Miller stated by letter dated 7 May 1975 that it would not impose such an export prohibition in future and would no longer enforce export prohibitions against its customers.

By letter dated 3 November 1975, Miller sent the Commission a revised version of its terms and conditions of sale and payment, in which the export prohibition no longer appeared.

8. Miller's object in imposing the prohibition was to prevent the export of sound recordings to other countries, notably Community countries, so as to shield its sole importers or licensees from competition.

II. Applicability of Article 85 (1) of the EEC Treaty

9. 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.

10. The exclusive dealing agreement concluded by Miller with the exclusive dealer in France is an agreement between undertakings, as are Miller's terms and conditions of sale, for they of necessity form part of the agreements between Miller and its individual customers.

11. The object and effect of these agreements was to prevent exports of the goods to other Community countries. They thus had the object and effect of restricting such competition as Miller's customers could have created by exporting such goods to other Community countries.

12. The finding that there has been an infringement of competition in this case cannot be affected by the size of Miller's share of the market for all sound recordings. Miller primarily records light music. The peculiar characteristics of light and serious music are such that they are only rarely interchangeable. Accordingly, recordings of light music may be said to constitute a separate market. Since in the Federal Republic of Germany light music recordings account for around 90 % of the turnover in sound recordings of all types, the share of ... % enjoyed by Miller in the market for all sound recordings represents a share of ... % in the market for recordings of light music.

13. It should furthermore be noted that around half of Miller's repertoire consists of recordings for children, in which market this undertaking has a leading position.

14. Although half of Miller's repertoire consists of recordings in German for children and the rest mainly of music from the German hit parade and German folk music, the customers of this company might have been in a position to compete by exporting the goods in question to other countries of the Community. For the sale of Miller's recordings is not restricted by reason of language to the German market, as can be seen from the fact that Miller accounted for ... % of German record exports in 1975. Many other Community countries may be regarded as export markets, since, even if only in regions bordering on Germany, people in those countries tend to have at least some knowledge of the German language.

Knowledge of the German language by purchasers in other Community countries may be said to be of minor importance as regards the sale of sound recordings of the German hit parade and folk music (songs in dialect and carnival songs, for example). Furthermore, purchasers in other Member States may have an interest in reimporting Miller's products into the Federal Republic of Germany from other countries.

15. The restriction of competition was consequently appreciable.

16. The export prohibitions were for these reasons likely to affect trade between Member States. They raised artificial barriers to trade in the goods in question between the Community countries. They had a direct effect on the flow of trade between the Member States of such a nature as to jeopardize attainment of the objectives of a single market.

17. The exclusive dealing agreements and terms and conditions of sale in question are therefore within Article 85 (1).

III. Inapplicability of Article 85 (3) of the EEC Treaty

18. Under Article 85 (3), Article 85 (1) may be declared inapplicable in the case of any agreement which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing the consumer 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.

19. Such exemption under Article 85 (3) is barred from the outset, for the export prohibitions were not notified to the Commission as required by Article 4 (1) of Regulation No 17.

Nor do the export prohibitions fall within subparagraph 1 of Article 4 (2) of Regulation No 17, for they concern exports from one Member State to another.

Article 85 (3) is therefore inapplicable to the present case.

IV. Applicability of Article 15 (2) (a) of Regulation No 17

20. Under Article 15 (2) (a) of Regulation No 17, the Commission may by decision impose on undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) of the Treaty. In fixing the amount of the fine, regard must be had both to the gravity and to the duration of the infringement.

21. Miller has intentially infringed Article 85 (1). It knew and intended that its prohibitions on export would prevent its customers from competing in the goods in question in other Community countries. Miller was also aware that export prohibitions were contrary to Community law, or at least chose to ignore any doubt on this question. So much is evident from the reference to EEC Regulations in the formulation of the export prohibition, which however never came into force, in the agreement with the Dutch sole distributor and from a statement by the manager of the company, made in the course of the hearing, that he knew that such a prohibition was not permitted. Furthermore it has been well known since the Decision of the Commission of 23 September 1964 in the Grundig/Consten Case [1] and the judgment of the Court of Justice of 13 July 1966 in Case Nos 56 and 58/64, Grundig/Consten [2], that prohibitions on export constitute a serious infringement of Article 85 of the EEC Treaty. Furthermore, in its Decision of 22 December 1972 in the WEA-Filipacchi Music SA Case [3], the Commission found that export prohibitions on records produced by that undertaking were

[1] OJ No 161, 20. 10. 1964, p. 2545/64.
[2] (1966) ECR 299.
[3] OJ No L 303, 31. 12. 1972, p. 52.

infringements of Article 85 (1) of the EEC Treaty, and it fined the undertaking for having imposed the same.

22. In fixing the amount of the fine the gravity and duration of the infringement as well as the position of the undertaking should be taken into account.

(a) Export prohibitions constitute a serious infringement of Article 85 of the EEC Treaty since they prevent the creation of a single market.

The export prohibitions imposed by Miller International Schallplatten GmbH affected large numbers of retailers in the common market. Miller was, however, aware of instances of exports being made to other Member States and did not apply sanctions.

(b) Miller imposed the export bans under its terms and conditions of sale in about 1970 and in its exclusive dealing agreements of 11 June 1971 with its French distributor. It enforced them until May 1975. The infringements thus continued over a considerable length of time.

(c) Miller is a medium-sized firm which, although belonging to the American MCA group, does not itself have a very high turnover.

23. In the light of these considerations the Commission considers that Miller should be fined 70 000 units of account,

HAS ADOPTED THIS DECISION:

Article 1

The export prohibitions on recordings by Miller International Schallplatten GmbH contained, until 7 May 1975, in the exclusive dealing agreement concluded by that undertaking on 11 June 1971, in its terms and conditions of sale (domestic market) operating until 31 July 1974 and in its terms and conditions of sale and payment in force from 1 August 1974 constituted infringements of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

A fine of 70 000 (seventy thousand) units of account, being 256 200 (two hundred and fifty six thousand two hundred) German marks is imposed on Miller International Schallplatten GmbH in respect of the infringements referred to in Article 1. The fine is to be paid within three months of notification of this Decision.

Article 3

This Decision shall be enforceable pursuant to Article 192 of the Treaty establishing the European Economic Community.

Article 4

This Decision is addressed to Miller International Schallplatten GmbH, Justus von Liebig-Ring 2—4, Quickborn.

Done at Brussels, 1 December 1976.

For the Commission

R. VOUEL

Member of the Commission