II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 December 1976

relating to a proceeding under Article 85 of the EEC Treaty

(IV/28.812 Theal/Watts)

(Only the English and Dutch texts are authentic)

(77/129/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, 5 and 15 thereof,

Having regard to the notification made on 24 January 1963, pursuant to Article 5 (1) of Regulation No 17, by Theal N.V. of Amsterdam, Netherlands, of an oral agreement made on 8 September 1956 between Theal N.V. and Mr Cecil E. Watts of Sunbury-on-Thames in the United Kingdom,

Having regard to the application submitted to the Commission on 30 January 1974 pursuant to Article 3 of Regulation No 17 on behalf of Mr Jacob Dietrich Wilkes of Leeuwarden, Netherlands,

Having regard to the Commission's decision of 2 December 1975 to initiate a proceeding in this case,

Having heard the undertakings and persons concerned in accordance with Article 19 of Regulation No 17 and with Regulation No 99/63/EEC of 25 July 1963 [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 19 October 1976,

Whereas :

I. THE FACTS MAY BE SUMMARIZED AS FOLLOWS

In 1954, Mr Cecil E. Watts of Sunbury-on-Thames, United Kingdom, who had recently invented the first of a series of products for cleaning and maintaining gramophone records, started a business for the manufacture and sale of these products.

The principal products now manufactured by Cecil E. Watts Ltd are as follows :

(a) Watts' 'Dust Bug'. This device is an automatic record cleaner for transcription turntables. It was the first product to be manufactured by Watts.

(b) Watts' 'Parostatik' Disc Preener. This device is used for the maintenance of new records which have not had previous anti-static treatment.

(c) Watts' 'Manual Parastat'. This device is for use with both new and old records and for restoring the quality of old records. It is also sold with a 'humid mop' which is a device to moisten the record before using the Manual Parastat.

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

(d) The Hi-Fi Parastat kit, consisting of stylus cleaner, brush and pad for use with high quality record-playing equipment.

On 8 September 1956, Mr Watts appointed Theal N.V. of Amsterdam in the Netherlands (later Theal B.V., and which changed its name on 13 April 1976 to Tepea B.V., but which is hereinafter referred to as 'Theal') as his exclusive distributor in the Netherlands. This appointment was made orally.

In connection with this appointment and at about the same time Mr Watts also expressly granted Theal the exclusive right to use in the Netherlands the trade marks in respect of all the products supplied to it by Mr Watts. This grant was also made orally.

In 1960 Mr Watts incorporated his firm as a limited company under United Kingdom law with the name Cecil E. Watts Ltd (hereinafter referred to as 'Watts'). This company took over the rights and obligations of the agreement under which Mr Watts had appointed Theal as his exclusive distributor in the Netherlands with the right to use the trade marks in respect of the products concerned.

On 24 January 1963 Theal notified to the Commission an oral agreement made with Watts on 8 September 1956. This agreement referred to Theal's appointment as exclusive distributor in the Netherlands. The agreement was described as an exclusive distribution agreement of indefinite duration under which Watts was obliged to supply Theal exclusively in the Netherlands and to pass on to Theal all orders which Watts received for the Netherlands.

Theal stated in the form of notification that the agreement contained no restrictions on the freedom to purchase from, or resell to, third parties nor did it relate to the sharing of markets. Theal further stated that the agreement did not exclude free competition within the Member States or between Member States.

No mention was made of the fact that Theal had also been granted the right to use the trade marks in question in its own right in the Netherlands.

The Commission first became aware of the grant of the exclusive right to use the trade marks in question on 11 July 1975 at a meeting with Theal and Watts. Both parties, moreover, formally stated at the hearing on 23 February 1976 that the agreement of 8 September 1956 had never been amended.

On 18 April 1969 the Commission informed Theal by letter, receipt of which it admitted, that the agreement as notified, appeared, on a preliminary examination, to come within that class of agreements which do not contain restrictions on competition other than those permitted by Regulation No 67/67/EEC. The Commission referred particularly to the fact that exemption under this Regulation did not apply when the parties in any way sought to achieve absolute territorial protection either by formal agreement or by any other means.

The letter went on to inform Theal that it appeared, on the basis of the agreement as notified and the information supplied by Theal, that there was no provision affording absolute territorial protection and that accordingly the agreement could benefit from the exemption provided by the Regulation. The Commission however at the same time stated that if, in fact, the agreement did not comply with the conditions for exemption contained in Regulation No 67/67/EEC, it should be amended accordingly, in which event the agreement would only be exempted from the date of such amendment.

Theal was requested to inform the Commission of any comments arising from the preliminary examination of the agreement. Theal did not reply and accordingly the Commission had no reason to doubt that the agreement complied with the provisions of Article 1 (1) of Regulation No 67/67/EEC.

The products manufactured in the United Kingdom by Watts to which this agreement relates have proved very successful. By 1973 approximately 56 % of total production was being exported to countries outside the common market. Within the common market sales in the United Kingdom accounted for approximately 27 % of production, in the Netherlands approximately 7 % and in Germany just over 5 %. In the other Member States sales were less significant, amounting in all to less than 5 %. According to the parties sales in the United Kingdom in 1975 represented not less than 5 %, but not more than ...(1) of the total market for record cleaning products and in the Netherlands approximately 15 %.

After setting up the firm in 1954 to manufacture and sell the products which he invented, Mr Watts entered into oral agreements with other distributors in Belgium, Denmark, France, Germany, Ireland and Italy, all of which were impliedly continued on the incorporation of his firm. According to Watts, the terms of these oral agreements are simply that the distributor will act as exclusive distributor in his territory except in the case of Germany where the two distributors are not exclusive.

Watts supplies about 20 wholesalers in the United Kingdom according to a standard inland wholesalers' price list. Watts does not supply retailers in the United Kingdom. It does, however, maintain a small mail order business for the supply of its products direct to the consumer.

(1) The undisclosed data are covered by trade secrecy.

In the United Kingdom Watts has on its own admission, at least since May 1972, sold the products to its wholesale customers on the express condition that the products were not to be exported.

The instruction leaflets included with products supplied to individual wholesalers in the United Kingdom indicated that the products had been specially packed for that wholesaler and were marked 'Not for export'.

The prohibition was enforced by Watts in that Watts withdrew supplies from the United Kingdom wholesaler, Howland-West Ltd after this company had exported Watts products to the Netherlands in May 1972. Furthermore, on 28 November 1973 Watts wrote to a Dutch firm Fortissimo of Leeuwarden, in answer to an enquiry, stating:

'We thank you for your letter of 26th inst. and have to advise you that we do not accept any orders from countries where we have established distributors and we have an agreement with all our U.K. customers that they will not export any of our products sold to them for consumption on the U.K. market'.

On 11 July 1975 Watts informed the Commission that this prohibition had been intended to protect the home market and had been discontinued when the United Kingdom became a member of the EEC because it conflicted with EEC rules on competition. Watts also produced to the Commission examples of the current instruction leaflets for dispatch to United Kingdom wholesalers which did not include any prohibition on export.

At the hearing on 23 March 1976, however, the applicant, Mr Wilkes, produced conclusive evidence that the products were still being sold in the United Kingdom in February 1976 with leaflets bearing an export prohibition. As late as June 1976 a large quantity of Watts products, each with a leaflet bearing the export prohibition, were exported from a United Kingdom retailer to a dealer in the Netherlands. These products had been manufactured and packed after 11 July 1975.

The products sold for export, which are identical to the products available for the home market, are sold in accordance with the distributors' export price list expressed in sterling, all prices being stated to be wholesale nett ex works. In 1972, export prices which hitherto had been the same as or similar to the prices on the home market, began to rise in comparison with the prices on the home market. By July 1974 there were considerable differences in price for the same product, the export price generally being higher than the domestic price, in some cases by as much as 32 %. The first rises in price coincided approximately with the imposition of the export prohibition on UK wholesalers. These differences in price were further widened by differences in currency values, particularly between the currencies of the United Kingdom and the Netherlands.

The products manufactured by Watts are all sold under trade marks registered in the United Kingdom. Watts has also obtained similar trade marks in its own name or in the name of its wholly owned subsidiary, Cecil E. Watts Export Sales Ltd, in Denmark, Germany and France. In Belgium, Luxembourg and the Netherlands, however, the trade marks relating to the products are now registered in the Benelux trade mark registry in the name of Theal in accordance with the grant referred to above. In 1971 and 1972, due to what the parties described as an administrative error, Watts and Theal had each registered the trade marks in question in the Benelux trade mark register. Watts, however, withdrew its registrations in October and November 1973, at the express request of and in agreement with Theal.

In 1972 Theal was Watts' most important exclusive distributor within the EEC, selling three times more than all the other exclusive distributors together. Watts products were also very important to Theal, representing substantially more than 25 % of its turnover. These close economic ties between them had earlier received impetus from the fact that in about 1960 Watts had agreed to put special seals on all its products supplied to Theal. These seals, bearing the Theal trade mark and the words 'Een Theal Produkt' were supplied to Watts by Theal with instructions to attach them to all Watts products supplied to Theal. The products delivered to Theal still carry such a seal.

Mr Jacob Dietrich Wilkes of Leeuwarden, Netherlands, is the proprietor of a firm known as Poort's Muziekhandel of Voorstreek 6, Leeuwarden, and his business is that of a retailer to the public for radios, record players, records and similar products, including record maintenance equipment. Up to 1972, Mr Wilkes had been a regular customer of Theal, purchasing the products of Watts for resale in his shop. In 1972, the recommended resale prices in the Netherlands were, however, substantially higher than those in the United Kingdom.

In 1972 Mr Wilkes was also the director of a business known as Audiogram B.V. of Leeuwarden which had been formed to act as wholesaler and importer for its members. Other directors were Mr P. Kardoes, of the firm Partimex Holland B.V. which owned a shop

known as King Peter in Bussum, Mr H. van der Tuin, director of the firm Willem de Jong N.V., of Rotterdam and Mr N.A. van Norden proprietor of the firm Intermezzo of Amsterdam. All these firms sold record maintenance equipment to the public.

In May 1972, Mr van Norden, acting on behalf of Audiogram, purchased a quantity of Watts products direct from Howland-West Ltd, a wholesaler in London which had purchased the products direct from Watts in the United Kingdom. The price paid by Audiogram was such that this firm was able to resell the products to Mr Wilkes at prices which put him in the position to offer these products for resale at substantially lower prices than he could for the same products purchased from Theal.

At about this time, Partimex-Holland and Willem de Jong also purchased quantities of Watts products from Audiogram and offered them for resale to the public in their shops.

On 5 September 1972 Theal wrote to Audiogram complaining that Mr van Norden of Intermezzo was selling Watts products to the public which had not been supplied by Theal.

Theal claimed that, as it was the sole owner of the trade marks for these products in the Netherlands, this act constituted an infringement of Theal's trade mark rights and was contrary to the law.

On 10 November 1972 Theal summoned Mr Wilkes to appear in summary proceedings before the President of the District Court at Leeuwarden for selling Watts products which it had not supplied and in contravention of its rights. Theal alleged in the summons that Theal alone was entitled to exploit the trade marks 'Parastat', 'Disc Preener', 'Dust Bug' and 'Watts' and that Mr Wilkes had infringed Theal's rights by marketing goods bearing these trade marks in the Netherlands which had not been supplied by Theal.

By judgment given on 20 November 1972 the president of the Leeuwarden District Court ordered Mr Wilkes at the petition of Theal to cease within 24 hours all trade in the products bearing the trade marks referred to.

Theal has obtained similar judgments against Willem de Jong on 16 January 1973 from the District Court of Rotterdam and against Partimex Holland on 5 June 1973 from the District Court of Amsterdam. Since the Commission commenced its enquiries into this case Theal has obtained a further judgment of similar nature in the District Court of the Hague on 30 May 1975 against Radio-Technisch Bureau All-Wave B.V. of Delft, and is continuing to write to retailers in the Netherlands who have purchased Watts products directly or indirectly from United Kingdom wholesalers claiming that such acts infringe Theal's trade mark rights in the Netherlands.

On 30 July 1973 Mr Wilkes summoned both Watts and Theal before the Amsterdam District Court seeking *inter alia* an order preventing Theal from enforcing the judgment of the Leeuwarden District Court and also a declaration that he had the right to deal in Watts products and that the defendants, Theal and Watts had no legal right to prevent him from so doing. In addition Wilkes claimed that the action of the defendants in using trade mark rights to prevent parallel imports conflicts with the rules on competition in the Treaty establishing the EEC. This action is still pending before the Court. In his summons, Mr Wilkes also referred to the duplicate registration of the trade marks then subsisting in the Benelux register. As a result Theal wrote to Watts on 10 December 1973 acknowledging Watts' ownership of the trade marks in question and requesting Watts to withdraw its registration on condition that Theal would transfer the rights back at any time on Watts' request. Watts relied on this letter and withdrew its own registrations in favour of Theal in October and November 1973.

In all the actions referred to above brought by Theal, the substance of the plaintiff's claim had been that it is entitled to exploit the trade marks referred to and that even the marketing of genuine Watts products in the Netherlands infringed the plaintiff's rights in those trade marks if such products were not supplied by Theal. Theal has expressly claimed that it is entitled to exercise trade mark rights obtained as a result of the exclusive distribution agreement with Watts and to prevent parallel imports from whatever source, including other Member States, into the Netherlands.

Theal has subsequently stated, however, both in pleadings before the Amsterdam District Court and to the representatives of the Commission at the meeting held on 11 July 1975 and at the hearing that in fact its complaints are that the goods sold by the various defendants were not genuine Watts products and that the substance therefore of the action is not infringement by marketing genuine goods but infringement by marketing counterfeit goods. The basis for all the judgments, however, and the defence hitherto in the action brought by Mr Wilkes, was that the goods were genuine Watts products which had not been supplied by Theal and that the sale of such goods without Theal's consent infringed Theal's rights in the trade marks which it owned.

In all the cases referred to above, the invoices, samples and other supporting documents submitted to the Commission, indicate that the goods imported for Mr Wilkes and the others were in fact genuine Watts products obtained from Howland-West and other United Kingdom wholesalers which had in turn obtained the goods direct from Watts. It is true that Theal has submitted evidence to the Commission of cases in which products were marketed in the Netherlands which may have infringed the trade mark rights of Theal on the grounds that they were either counterfeit or were different products which were being passed off as Watts products, but such cases have no bearing on the substance of this case.

In their formal replies to the summons which both defendants entered in the pleadings before the Amsterdam District Court on 21 November 1973, Theal declared that only Theal had the right to use the trade marks concerned and that Mr Wilkes had accordingly no right to sell the products bearing those trade marks unless he had obtained them through Theal.

In its reply Watts declared that it fully supported all the declarations and denials submitted by Theal.

Theal has, since April 1973, ceased to supply Watts products to Mr Wilkes, and Mr Wilkes has suffered substantial damage as a result both of this and the action brought by Theal.

II. THE EEC RULES ON COMPETITION

A. Article 85 (1)

Article 85 (1) of the Treaty establishing the European Economic Community prohibits, as incompatible with the common market, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which may have as their object or effect the prevention, restriction or distortion of competition within the common market.

Watts and Theal are both undertakings and the oral exclusive distribution agreement is an agreement, within the meaning of Article 85 (1). The agreement between the parties consists firstly of Watts' oral appointment of Theal, made on 8 September 1956, as the sole distributor for Watts products in the Netherlands, whereby Watts undertook to supply only Theal in the Netherlands and to pass on to Theal all orders received by Watts for delivery in the Netherlands. The agreement also consists of the oral grant by Watts to Theal, made at about the same time as the appointment, of the exclusive right to use the trade marks attaching to the products in the Netherlands. The agreement in the Netherlands provided Theal with absolute territorial protection, a matter which in 1956, was governed only by the applicable national law.

The export prohibition imposed on United Kingdom wholesalers enforced and strengthened the exclusivity conferred by Watts on Theal and its other exclusive distributors in the common market. In view of its special position as Watts' most important exclusive distributor in the common market, Theal was the principal beneficiary of the export prohibition.

The agreement as thus defined and performed has both as its object and effect the prevention, restriction and distortion of competition within the common market, as in combination with the effects of national law relating to trade marks, it provides Theal with the means of preventing parallel imports from the United Kingdom or any other Member State into the Netherlands.

The imposition by Watts of an export prohibition on United Kingdom wholesalers was likely to impede the freedom of action of third parties and therefore to reinforce the exclusivity enjoyed by all Watts' exclusive distributors in the common market, particularly Theal. Competition is prevented in the Netherlands by Theal's exercise of trade mark rights to ensure that only those products supplied directly to Theal by Watts are offered for resale there. Other dealers who might wish to take advantage of the favourable prices applicable in the United Kingdom are unable to purchase from wholesalers who might otherwise agree to sell to them, with the result that consumers in the Netherlands are prevented from enjoying the benefits of any advantage in price which might be passed on to them. Dealers in the Netherlands are effectively inhibited in such trade with the United Kingdom because of the serious and real risk which confronts them that Theal will take legal action against them in the Dutch courts to enforce its rights under national law in respect of the trade marks registered in its name and to obtain substantial damages and costs. The reality of this risk has been demonstrated by Theal's success in closing four outlets for Watts products in the Netherlands through the judgments it has already obtained against retailers.

In the United Kingdom wholesalers who are or have been restricted in their outlets for the products in question by the prohibition on exports imposed on them by Watts, are further restricted as a result of

Theal's conduct in opposing parallel imports into the Netherlands from the United Kingdom by the exercise of trade mark rights.

Competition is distorted within the common market as a result of the conduct of both Watts and Theal in the performance of the agreement, which has both as its object and effect the isolation of the Netherlands from the United Kingdom for these products and which makes it possible for Theal to be unaffected by the lower prices obtaining in the United Kingdom and therefore free to charge such prices for the products in the Netherlands as are completely sheltered from all effective intra-brand competition.

Furthermore, the exercise by a trade mark owner of a right he enjoys under the legislation of one Member State to prohibit the sale, in that State, of a product that has been marketed under the same trade mark in another Member State by the original trade mark owner or with his consent, is incompatible with the rules of the EEC Treaty concerning the free movement of goods within the common market where such trade marks have a common origin.

The agreement affects both competition and the free flow of trade between the Netherlands and the United Kingdom and between the Netherlands and the other Member States thereby interfering with the objective of establishing a single market between Member States. The exercise of trade mark rights and the prohibition on exports have a direct effect on market conditions and appreciably modify the market position of both non-participating undertakings and of consumers with regard to their outlets and sources of supply respectively. This is so even though the known quantities of parallel imports in this case were small, because the restriction on potential competition is considerable. In such circumstances therefore the exercise of trade mark rights and the use of export prohibitions to suppress actual or potential competition directly affect trade between Member States to an appreciable extent and consequently come within the prohibition of Article 85 (1) of the Treaty.

Article 85 (1) of the EEC Treaty accordingly applies to the agreement.

B. Article 85 (3)

By virtue of Article 85 (3) of the Treaty, the provisions of 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 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.

For the benefit of exemption under Article 85 (3) to apply, however, such an agreement must first have been notified to the Commission in accordance with the provisions of either Article 4 (1) or 5 (1) of Regulation No 17, except where the requirement to make such notification is removed by the terms of Article 5 (2) or 4 (2) of that Regulation.

The agreement is not exempt from notification under Article 5 (2) or 4 (2) (b) of Regulation No 17 because its effect is not limited to imposing restrictions on the exercise of the rights of the assignee or user of trade mark rights, since third parties are prevented from freely exporting the products from the United Kingdom and importing them into the Netherlands.

In this case, although an oral agreement was notified to the Commission in accordance with Article 5 (1) of Regulation No 17, within the time limit prescribed by Article 7 (2) of that Regulation, the information supplied in the notification was incorrect and misleading. No mention was made therein of the grant by Watts to Theal of the right to use the trade marks of Watts or that the agreement, in effect, conferred upon Theal absolute territorial protection.

The agreement as notified, therefore, did not include the entire arrangement made by the parties and the actual agreement was accordingly not properly notified.

Even if the entire arrangement had been properly notified or was not required to be notified, exemption would still be unavailable as the requirements of Article 85 (3) are not satisfied. The agreement between the parties under which Theal obtained the right to use trade marks and thereby achieve absolute territorial protection by preventing parallel imports, which protection was further strengthened by the imposition of an export prohibition by Watts, does not contribute to improving the production or distribution of goods or to promoting technical or economic progress. Any benefit accruing from such absolute territorial protection is conferred only on the parties themselves and not on the consumer who is thereby deprived of the

advantages deriving from effective intra-brand competition which might arise from increased outlets and lower prices. In the circumstances of this case where no objective justification exists for restrictions enabling the parties to suppress parallel imports, such restrictions cannot be regarded as indispensable to the attainment of the objectives referred to in Article 85 (3).

C. Regulation No 67/67/EEC

Since there is expressly excluded from the exemption provided for by Regulation No 67/67/EEC both in the preamble and under the terms of Article 3 (b) thereof, any agreement under which either party makes it difficult for intermediaries or consumers to obtain the goods to which the agreement relates from other dealers within the common market, particularly by the exercise of industrial property rights, the agreement cannot benefit from this Regulation. The letter from the Commission dated 18 April 1969 could not reasonably have led Theal to believe that the agreement came within that class of agreement to which exemption was automatically granted by Regulation No 67/67/EEC because the views expressed by the Commission were based, as at least Theal well knew, on the information contained in the notification which was, for the reasons stated above, incorrect and misleading. In any event, the conclusions of the Commission were stated expressly to be subject to the condition that the agreement contained no restrictive provisions other than those notified.

D. Article 25 of Regulation No 17

Even in 1963 the agreement restricted competition within the common market since it was intended to prevent Watts products from being imported into the Netherlands, other than by Theal, either direct from the United Kingdom or via other Member States. The Court of Justice, in its ruling in the case of Béguelin Import Co. v. G.L. Import Export S.A. (Case No 22/71, 25 November 1971, Recueil Vol. XVII, 1971-6, page 949), held that 'An exclusive distribution agreement between a producer domiciled in a third country and a distributor established in the common market is subject to the prohibition of Article 85 of the Treaty where, in law or in fact, it prevents ... these products from being imported from other Member States into the protected territory and distributed in that territory by persons other than the licensee or its customers'. The agreement is not therefore covered by Article 25 of Regulation No 17 as amended by Article 29 of the Act concerning the conditions of accession and the adjustments to the Treaties, since it does not fall within the scope of Article 85 by virtue of accession but was in fact covered by this Article even before accession.

E. Article 15 of Regulation No 17

Article 15 (1) of Regulation No 17 provides that the Commission may by decision impose on undertakings fines of from 100 to 5 000 units of account where, intentionally or negligently, they supply incorrect or misleading information in a notification pursuant to Article 4 or 5 thereof.

Under Article 15 (2) the Commission has similar powers to impose 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 fine, regard shall be had both to the gravity and to the duration of the infringement.

Under Article 15 (5) of that Regulation, fines for infringement of Article 85 (1) of the Treaty shall not be imposed in respect of acts taking place after notification to the Commission and before its decision in application of Article 85 (3) of the Treaty, provided they fall within the limits of the activity described in the notification.

On the facts of this case, therefore, the Commission is of the opinion that the imposition of fines is justified in respect of the submission of incorrect and misleading information by Theal in the notification to the Commission dated 24 January 1963 whereby the Commission was misled as to the true contents of the agreement until its attention was drawn thereto by Mr Wilkes in his application dated 30 January 1974.

The Commission is of the opinion that fines should also be imposed on both parties in respect of their territorial exclusivity agreement because of:

(a) the exercise of trade mark rights by Theal to prevent the parallel imports of the products in question, which did not fall within the limits of activity described in the notification, and

(b) the enforcement of the agreement by the prohibition on export of the products in question imposed by Watts on its UK wholesalers, which was also not notified.

Having regard to the circumstances of this case the Commission does not propose to fine Watts for being concerned in supplying false or misleading information.

In assessing the amount of the fines to be imposed on either Watts or Theal in respect of the other infringements of the Treaty, the Commission does not propose to take account of infringements subsisting before May 1972, the date on which the export prohibition was clearly in force and having an effect.

The infringement by Theal in supplying incorrect and misleading information was, if not intentional, at the very least negligent in that the attention of Theal was clearly drawn in the form of notification not only to the provisions of Article 85 (1) of the Treaty but also to the obligation to inform the Commission *inter alia* of the contents of the agreement, whether the agreement involved the sharing of markets or contained restrictions on freedom to purchase from or resell to third parties, or in any other way might have the object or effect of restricting or distorting competition.

The infringement by Theal in exercising trade mark rights to prevent the parallel imports of the products in question can only have been the result of deliberate and intentional conduct. Apart from the fact that Theal was clearly aware of the existence of the rules on competition laid down by the EEC Treaty from the very fact of notification, the contents of the letter dated 18 April 1969, which Theal admits receiving, stated in the clearest terms that exclusive distribution agreements could not obtain the benefit of exemption under Article 85 (3) of the Treaty if, in particular, the agreement in any way permitted the parties to achieve absolute territorial protection whether by formal agreement or by any other means. In the light of that full explanation, any subsequent action to prevent parallel imports into the contractual territory must be regarded as involving a deliberate and intentional infringement of the provisions of Article 85 of the Treaty.

The infringement by Watts in imposing an export prohibition was intentional. Watts must have been aware of the restrictions on competition resulting from this prohibition, particularly having regard to the fact that prices of the products in question on the home market were lower than the prices of such products for export. The export prohibition combined with the exclusivity enjoyed by most of its distributors within the other Member States, could only result in the effective prevention of the free movement of the products concerned between Member States and the suppression of parallel imports.

In assessing the amount of the fines to be imposed for an infringement of Article 85 (1), the Commission must have regard both to the gravity and duration of the infringement. With regard therefore to the duration of the infringements of Article 85 (1) the Commission takes the following facts into account:

(a) on the evidence available Theal first exercised its trade mark rights to prevent parallel imports in September 1972 and has continued to claim that right;

(b) in respect of Watts, the export prohibition was imposed from at least May 1972 onwards during a time when its effect was likely to be most felt having regard to the widening differences between prices obtaining in the United Kingdom and prices elsewhere. The Commission is satisfied that, notwithstanding the assertions of Watts, the products were still being sold in the United Kingdom bearing a printed prohibition on export in June 1976.

In so far as the gravity of the infringements of Article 85 (1) is concerned the Commission takes into account the following facts:

(a) only two undertakings are involved, neither of which enjoys a large share of the market for the products in question within the Community as a whole or within any single Member State;

(b) the nature of the product is not such that it can be regarded as necessary for the consumer or to form an essential part of his expenditure;

(c) the conduct of the parties, on the other hand, has resulted in clear restrictions on competition such as conflict with one of the basic aims of the EEC Treaty which is to establish a single market within the Community in which the undistorted forces of competition may act to the benefit of the consumer;

(d) the conduct of Watts, in imposing a prohibition on exports, clearly contributed to the establishment of absolute territorial protection for Theal in the Netherlands. The conduct of Watts in this respect is aggravated by the fact that notwithstanding repeated assurances given by Watts to the Commission that the prohibition had been discontinued, certain products were still distributed thereafter by Watts to wholesalers in the United Kingdom with a prohibition on export contained on the leaflet enclosed with each article;

(e) the loss to the consumer, although apparent has not been extreme, having regard to the type of product, its price and its lack of importance in the scale of priorities for the average consumer. Nevertheless the conduct of the parties has effectively contributed to the suppression of intra-brand competition and the potential effect that this competition could have on the level of prices for the products;

(f) Theal has consistently and repeatedly claimed to have the right to use the trade marks attaching to Watts products and has exercised those rights

before the Dutch Courts on at least four occasions, continuing to do so notwithstanding that its attention had been drawn to the rules laid down by the Treaty of Rome.

Having regard to the above considerations the Commission proposes to impose the fines totalling 15 000 units of account, amounting to 54 300 Dutch guilders on Theal and the fine of 10 000 units of account, amounting to 4 166 pounds sterling on Watts, as set out in Article 4 of this Decision.

F. Article 3 (1) of Regulation No 17

The Commission proposes, therefore, to find that the undertakings party to the agreement have infringed Article 85 (1) of the Treaty establishing the European Economic Community and, in accordance with Article 3 of Regulation No 17, by decision to require such undertakings to bring the infringements to an end without further delay by refraining from any further action towards any person or undertaking calculated to prevent the sale of Watts products imported into the Netherlands.

G. Article 192 of the EEC Treaty

This Decision shall be enforceable in accordance with the provisions of Article 192 of the EEC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

1. The oral exclusive distribution agreement made between Theal N.V. and Mr Cecil E. Watts, now between Tepea B.V. and Cecil E. Watts Ltd, including the grant of the exclusive right to use trade marks in the Netherlands, constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

2. The supplying of incorrect and misleading information in the notification dated 24 January 1963 made by Theal N.V., now Tepea B.V., infringed Article 15 (1) (a) of Regulation No 17 of 6 February 1962.

Article 2

The application for a declaration under Article 85 (3) that Article 85 (1) is inapplicable is refused in respect of the agreement referred to in Article 1 hereof.

Article 3

The undertakings to which this Decision is addressed shall bring the infringement referred to in Article 1 (1) to an end without delay. In particular these undertakings shall refrain from all further action of any kind calculated to prevent the importation into or resale in the Netherlands of any Watts products.

Article 4

1. The following fines are imposed for infringement of Article 85 (1):

(a) On Tepea B.V. a fine of 10 000 units of account, that is 36 200 Dutch guilders;

(b) On Cecil E. Watts Limited, a fine of 10 000 units of account, that is 4 166 pounds sterling.

2. In addition a fine of 5 000 units of account, that is 18 100 Dutch guilders, is imposed on Tepea B.V. for supplying incorrect and misleading information in a notification made under Article 5 of the aforesaid Regulation No 17.

Article 5

This Decision shall be enforceable in accordance with the provisions of Article 192 of the Treaty establishing the European Economic Community.

Article 6

This Decision is addressed to Tepea B.V. of Amsterdam Postbus 396, Netherlands, and Cecil E. Watts Limited of Darby House, Sunbury-on-Thames, Middlesex, England.

Done at Brussels, 21 December 1976.

For the Commission

R. VOUEL

Member of the Commission