II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 December 1976

relating to a proceeding under Article 85 of the EEC Treaty (IV/24.510 — GERO-fabriek)

(Only the Dutch text is authentic)

(77/66/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 Article 3 thereof,

Having regard to the notification to the Commission dated 8 August 1963 by GERO-fabriek, Zeist, Netherlands, in order to obtaining negative clearance in relation to Article 85 (1) of the EEC Treaty, accompanied by an application for exemption under Article 85 (3), in respect of the conditions of sale for GERO products,

Having heard the undertakings concerned 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 on 25 November 1976, in accordance with Article 10 of Regulation No 17,

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

I. THE FACTS

1. The undertaking

GERO-fabriek NV, Zeist, Netherlands, (hereinafter referred to as 'GERO'), manufactures silver-plated and stainless-steel cutlery, specializing in stainless spoons and forks. In 1963 it was the biggest of the 11 Dutch spoon and fork manufacturers and had 1 100 employees on its payroll. In 1969 over 90 % of its sales were in the Netherlands and roughly 6 % in Belgium. In the Netherlands, GERO sells to two categories of customer : firstly it deals with retailers, with whom it concludes its general terms for retail sale, and secondly, it sells directly to large buyers, such as hotels, hospitals and other institutions which, because of the special range and quantities they require, do not buy through retailers. The general terms for wholesale sale apply to these large buyers.

In Belgium, GERO sells exclusively to retailers through its wholly owned subsidiary, GERO Internationaal BV, Brussels. GERO has, however, stated that it is to appoint an exclusive distributor for Belgium.

In the Netherlands, GERO's sales accounted for approximately 60 % of the market in 1971, though this fell to 50 % by 1975. Its current share of the Dutch wholesale market is about 15 %. In contrast, in Belgium, its sales rose from 10 % of the market in 1971 to 19 % in 1974, and now stand at about 15 %. In other Member States, GERO sells only very small quantities, chiefly in Germany and France, where exclusive distributors are also to be appointed.

By 1963 about 2 400 of the 11 000 or so retailers of forks and spoons in business in the Netherlands accepted GERO's terms of sale. At present, GERO has about 1 900 customers in the Netherlands and 425 in Belgium.

2. The terms of sale as notified to the Commission

In its notification of 8 August 1963, GERO describes its general terms for retail sale as a standard form of agreement, of the type whereby an individual agreement is signed separately with each buyer. The notification also states that these terms of sale apply exclusively to supplies within the Netherlands. Since 1925 they have contained the following clause :

'20. Buyers may sell only by retail and may not without our written consent supply other dealers. Our written consent shall also be required for on-sales and/or retail supplies of our products to other countries, other than Surinam and the Netherlands Antilles. We shall not be obliged to give reasons when such consent is withheld.'

The terms of sale also contain the following clause concerning resale prices :

'In respect of all our products, we have fixed the retail sales price. Buyers shall undertake that without exception they will never, whatever the circumstances, sell our products by retail nor offer or advertise them for sale, whether direct by or through intermediaries, at prices above or below our indicated prices nor as a job lot with other articles. Sales below the fixed prices are taken to include cases where the sales price is reduced by the grant of any discount whatsoever, whether it be a cash discount or any other price concession, the grant of any premium or of a free gift in whatever form, such as the engraving of a monogram or the like free of charge and any other facility which leads to the direct or indirect reduction of the selling price or to any other benefit of like nature. Such benefits include the refund of all or part of the sales price for purchases made from the buyer on a specified day or at a specified period or periods. Any publication of whatever nature, which states that any kind of benefit as described above is to be granted in relation to the sales price must clearly indicate that such benefit does not apply to GERO-fabriek's products.

Prices will be fixed by us in a price list. The issue of a new price list automatically renders the prices in the previous list inapplicable. All buyers shall be obliged to comply with the price list. In the absence of proof to the contrary, we consider to be the most recent price list the one which we use as such at any given moment.'

In the version originally notified there was also a clause 27 which however only applied to spoons and forks which were silver-plated or of stainless material. The clause, which was deleted on 24 August 1973, read :

'27. In the case of silver-plated or stainless cutlery (defined in the normal widest sense of the word, i.e. not including knives or serving utensils), the buyer shall undertake not to buy, sell or offer for sale products from any other manufacturer ; the buyer shall only be released from this undertaking upon three months' notice being given in writing.'

At the end of the terms of sale there is a detachable coupon which bears the following words : 'We subscribe to the above terms of sale of NV GERO-fabriek, Zeist'. There is a space for the date, place, business name and signature of the dealer. Dealers are to fill this in and return it to GERO.

3. The other terms of sale

(a) *Belgium and Luxembourg*

Since 1958 GERO has been applying general terms for retail sale to sales to Belgian dealers ; these were not notified to the Commission. These terms contain, in respect of Belgium and Luxembourg, exactly the same clauses on resale prices as the terms for the Netherlands which were notified to the Commission.

In addition there is a clause 18 which reads as follows :

'18. Buyers may only sell at the retail stage and not to other dealers without our written consent. Our written consent shall also be required for on-sales and for retail supplies of our products to other countries, other than the Belgian Congo.'

(b) *The terms of sale for the wholesale trade*

The general terms of sale for the wholesale trade, which GERO applies only in the Netherlands, are printed on the back of its invoices. These, too, have not been notified to the Commission. They contain no clauses on resale prices, but they do say this :

'19. Our consent shall be required :

(a) for on-sales and supplies of our products to other countries, including Surinam and the Netherlands Antilles ;

(b) for on-sales and supplies of our products on national territory (which includes, in Europe, only the Netherlands) to hotels, hospitals and other institutions for purposes other than for normal use on national territory.

We shall not be obliged to give reasons when such consent is withheld.

20. Where the buyer is in breach of the provisions of clauses 18 and 19, he shall be liable to pay us on demand a sum, which may not be reduced, equal to 20 % of the aggregate value of our invoices for goods supplied during the 24 months preceding the breach, with a minimum of Fl 1 000 in respect of each breach. There shall be no duty upon us to prove any loss whatsoever in order to claim this sum on behalf of NV GERO-fabriek, Zeist. In addition all outstanding orders received from the buyer in these circumstances may be cancelled immediately and business relations may be terminated without further action.'

By letter dated 7 November 1975, GERO informed the Commission that the general terms for retail sale in the Netherlands also applied to its sales to wholesalers there.

4. Resale price maintenance

In order to apply its provisions on resale prices in Belgium and the Netherlands, GERO has used two price lists, one in Belgian francs and the other in Dutch guilders. The range of products contained therein is not the same for the two Member States, since the Dutch price list contains a whole series of products which do not appear in the Belgian list.

The current price lists date from September 1974 for Belgium and Luxembourg and from October 1974 for the Netherlands. Since September and October 1974, the official exchange rate has been Bfrs 14·5026 to the guilder. The rate of VAT included in the list prices is 16 % in the Netherlands and 18 % in Belgium.

Irrespective of the different tax rates, GERO's prices in the Netherlands have regularly differed by a few percentage points from their prices in Belgium. For example, without making any allowance for the higher VAT in Belgium, a set of 12 Zilmeta teaspoons (model 519.831) costs Bfrs 520 in Belgium but only Fl 34·05 in the Netherlands (a 5·3 % difference without allowing for VAT). In the majority of cases, GERO products were cheaper in the Netherlands than in Belgium.

5. The present situation

As a result of the Commission's preliminary investigations into this case, GERO has informed the Commission of its intention to amend its conditions of sale in the Netherlands (both for wholesalers and retailers) in order to remove any restrictions on competition which they might contain. GERO has also stated that it is to appoint a Belgian undertaking, Müller of Aartselaar, to be its exclusive distributor for Belgium and Luxembourg. GERO will accordingly withdraw its conditions of sale for Belgium, leaving the exclusive distributor free to fix its own prices and conditions of resale.

II. APPRAISAL

(a) *Article 85 (1)*

Article 85 (1) of the EEC Treaty 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 have as their object or effect the prevention, restriction or distortion of competition within the common market.

1. GERO and its customers, namely the dealers, either undertakings or individuals, which deal in the relevant goods, and the large buyers which use these products, are undertakings for the purpose of Article 85 (1).

2. GERO's general terms for retail sale and for wholesale sale are individual agreements made between these undertakings and may thus fall within Article 85 (1). The fact that they are standard-form agreements and that some of them are signed while others appear only on the back of GERO's invoices does not affect the situation. However, for the purpose of judging whether the statutory prohibition is directed at them, the individual agreements cannot be taken in isolation but must be considered in the light of the circumstances of fact and of law under which they were concluded.

3. These agreements, taken together, have the object and effect of perceptibly restricting and distorting competition in the common market :

(a) The prohibition of on-sales, which results from the obligation imposed by GERO on its customers only to sell at the retail stage, prevents the latter from supplying other dealers at the same distribution level who would be free to sell the goods on different terms, possibly more favourable to the consumer. Furthermore, the prohibition prevents dealers who receive the complete range of goods from supplying other dealers who are not allocated the complete range. Finally, these dealers are not entitled to supply wholesale customers.

(b) The prohibition on sales of products in other Member States without the manufacturer's consent is equivalent to a prohibition on exporting them. Similarly, the various export prohibitions contained in GERO's terms of sale also restrict the freedom of dealers concerned established in other Member States to sell and obtain the relevant goods. Hence the opportunities of these categories of dealers at the level of supply and demand are hindered, or at least substantially reduced. Furthermore, they are prevented from taking advantage of the benefits which some of them might possibly enjoy to extend their sales to other Member States. Potential customers are thus in their turn excluded from these benefits.

(c) Likewise, the system of imposed retail prices makes it impossible for dealers to fix their own retail prices by reference to their own costs and commercial policy. The free formation of prices and the ability to pass on to purchasers any possible resulting benefits are hindered or at least substantially reduced. The system is thus clearly contrary to the prohibition in Article 85 (1).

4. These restrictions may substantially affect trade between Member States. Not only do they apply to the distribution of GERO products in the Member States where the bulk of the products are sold, but they also have the object of totally hindering trade between those Member States and the others. Even if the various export prohibitions were lifted, the system of retail prices imposed on dealers would be likely to influence trade between Member States by deflecting trade flows away from the channels which they would naturally have if prices were fixed freely.

The application of imposed retail prices means that imports and export patterns are different from what they would be if prices were fixed freely. The number of dealers affected (more than 2 000) and the share of the market in the relevant goods (estimated at about 50 % for the Netherlands) are sufficiently large for the adverse effect on trade between Member States to be regarded as appreciable.

(b) *Article 85 (3)*

Under Article 85 (3), 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.

Under Articles 4 and 5 of Council Regulation No 17, agreements in respect of which the parties seek application of Article 85 (3), must be notified to the Commission. GERO's notification of the standard form of agreement is valid for all the other identical agreements entered into by GERO.

The general terms for retail sale in the Netherlands described above do not satisfy the texts of Article 85 (3), since they do not contribute to improving the production or distribution of the relevant goods nor to promoting technical or economic progress within the meaning of Article 85 (3).

The first point to be made is that the prohibition on the export of the relevant goods does not assist their distribution but on the contrary acts as a complete barrier so that no one in the other Member States can take advantage of the price benefits which may exist in the Netherlands. Likewise the obligations with regard to prices in no way assist the distribution of the relevant products or hinder the freedom of dealers to fix their own prices. The prohibition on sales to other dealers does not have the effect of improving the distribution of the relevant goods either but, on the contrary, actually restricts it, since resale of this type can help speed up and improve the availability of supplies to the consumer. Finally, it is hard to imagine what contribution could be made by this system to improving production or to promoting technical or economic progress.

Moreover, in order for these restrictions to be exempted from the prohibition on restrictive practices under Article 85 (3), the principal criterion is whether in objective terms they bring about an improvement over the situation which would have existed in their absence.

If the agreements notified are considered from this angle, it is hard to imagine in what circumstances or for what reasons competition should be allowed to act as a stimulus on the relevant markets ; the prohibition on exports, the obligations with regard to prices and the conditions of sale cannot therefore be regarded as practices which contribute to one of the positive objectives of Article 85 (3).

Finally, as regards the first test of Article 85 (3), the Commission feels that the obligations imposed by the abovementioned agreements certainly do not bring about adequate objective benefits, capable of overriding their anti-competitive effects. Since this first test is not satisfied, there is no need to consider the others in Article 85 (3). Even so, it is difficult to accept that, even supposing that these restrictions on competition did present some objective advantage, which they do not, consumers are allowed a fair share of the hypothetical benefit, since whatever cost benefits may be said to accrue cannot be passed on. Nor is it clear why these restrictions would be indispensable to the attainment of these hypothetical benefits or how competition would not be eliminated in respect of a substantial share of the relevant products, by reason of GERO's high share in the Dutch market. Accordingly the terms of sale as notified do not qualify for exemption under Article 85 (3) of the Treaty.

(c) *Article 3 (1) of Regulation No 17*

Under Article 3 (1) of Regulation No 17, where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

In the premises, the Commission proposes to find under this Article that GERO has infringed Article 85 of the EEC Treaty. The Commission accordingly proposes to order GERO to end forthwith the infringements, unless it has already done so of its own accord. Furthermore, GERO will be required to inform all its retailers and wholesalers of the contents of any decision of the Commission,

HAS ADOPTED THIS DECISION :

Article 1

Those clauses of GERO wholesale and retail sales conditions, which relate to export prohibitions on resale and resale prices, constitute infringements of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The application made by GERO-fabriek in 1963 for exemption under Article 85 (3) in respect of its retail sales conditions in the Netherlands is refused.

Article 3

GERO-fabriek shall end forthwith the infringements referred to in Article 1 unless it has already done so of its own accord. It shall also inform all its retailers and wholesalers of the contents of this Decision.

Article 4

This Decision is addressed to GERO-fabriek NV, Geroplein 1, Zeist 2740, Netherlands.

Done at Brussels, 22 December 1976.

For the Commission

R. VOUEL

Member of the Commission