II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 January 1979

relating to a proceeding under Article 85 of the EEC Treaty (IV/C-29.290 Vaessen/Moris)

(Only the Dutch text is authentic)

(79/86/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 4 thereof,

Having regard to the application made to the Commission on 11 August 1976, under Article 3 of Regulation No 17 by a Dutch company, H. Vaessen BV,

Having heard the undertakings concerned on 26 April 1978 in accordance with Article 19 (1) 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 in accordance with Article 10 of Regulation No 17 on 24 October 1978,

Whereas :

I. The facts

The facts are as follows :

1. On 11 August 1976, a Dutch company, H. Vaessen BV, Deventer, filed a complaint with the Commission against Mr Alex Moris and his company Alex Moris PVBA ('ALMO'), Schilde, Belgium, requesting a finding that they had infringed Article 85 of the Treaty establishing the EEC.

Mr Alex Moris holds Belgian patent No 610 778, issued on 15 December 1961, relating to a process and a device for use in manufacturing meat sausages, and particularly saucissons de Boulogne. No patents have been applied for outside Belgium. The company Alex Moris (hereinafter 'ALMO'), of which Mr Moris is manager and principal shareholder, manufactures and sells synthetic casings for all types of sausages, and particularly for saucissons de Boulogne manufactured according to the patented process and with the patented device. These casings are not covered by the patent.

A label giving the abbreviated business name of the company (ALMO) and a patent number is affixed to one end of each casing.

Mr Moris has given ALMO a licence to work his patent, and the company has in turn sublicensed a number of Belgian sausage manufacturers, including Vleeswarenfabrieken Impérial NV (hereinafter 'Impérial'), Lovendegem, one of the largest producers of preserved meat products on the Belgian market. The right to use the patented process, by means of the device which Mr Moris places at the manufacturers' disposal free of charge, is licensed on condition that the manufacturers undertake to obtain all their supplies of casings from ALMO.

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

2. The complainant, H. Vaessen, manufactures and sells, notably in Belgium, synthetic casings similar to those sold by ALMO. Its attempts to penetrate the Belgian market have been impeded by the exclusive purchasing commitment entered into by several Belgian manufacturers, including Impérial, with ALMO.

On 18 October 1973 Vaessen, convinced that patent No 610 778 held by Mr Alex Moris was void for lack of novelty and originality of invention at the date it was applied for (27 November 1961), sent a circular to Belgian manufacturers of saucissons de Boulogne using the patented process, alerting them against any attempt by ALMO to hold them to their exclusive purchasing agreement for casings.

3. On 4 November 1974 Mr Moris and ALMO brought an action against Vaessen for unfair competition in the Commercial Court at Antwerp.

Vaessen then brought an action against Mr Moris and ALMO in the Court of First Instance at Antwerp, seeking a declaration that patent No 610 778 was avoid and of no effect. By judgment of 17 May 1976, the Commercial Court ordered the case pending before it to be transferred to the Court of First Instance.

4. When they learned that Impérial had obtained casings from Vaessen, Mr Moris and ALMO obtained an attachment order from the Court of First Instance in Ghent, and an inventory was taken at Impérial's premises on 26 September 1973. Following this, and to avoid the consequences of an action for infringement of the patent, Impérial wrote to the plaintiffs on 28 September 1973 informing them that it was returning to its supplier the three thousand or so casings which it had received and requesting Mr Moris to supply a corresponding quantity.

To settle the litigation between them, Impérial on the one hand and Mr Moris and ALMO on the other entered into an agreement on 23 November 1973, whereby the former recognized the validity of Mr Moris's Belgian patent No 610 778 and undertook to refrain from challenging it, and further undertook to obtain exclusively from ALMO the casings used for manufacturing sausages by the patented process.

Mr Moris in consequence discontinued his action against Impérial.

5. In the course of its proceeding, the Commission informed Mr Moris and ALMO that the exclusive purchasing agreement and the no-challenge clase imposed on Impérial by the agreement of 23 November 1973 fell within the scope of the prohibition in Article 85 (1) of the EEC Treaty, and that an exemption under Article 85 (3) did not appear possible.

6. By letters dated 28 February 1977 and 27 February 1978, as well as at the hearing held on 26 April 1978, Mr Moris and ALMO gave the Commission their views, which can be summed up as follows :

(i) The oral agreements between the licensee (ALMO) and the sublicensees (certain Belgian manufacturers of meat products) require the sublicensees to obtain casings from ALMO only where they are to be used in operating Mr Moris's patented process.

(ii) Neither Mr Moris nor ALMO has ever prevented these manufacturers from obtaining casings from other suppliers in Belgium or elsewhere when the patented process is not used.

(iii) The agreement of 23 November 1973 between Moris and Impérial is a business transaction which is not contrary to Article 85 of the EEC Treaty. This agreement, the only one to have been reduced to writing, was made without any pressure being brought to bear on Impérial.

(iv) These agreements have no adverse effects on trade between Member States and have neither the object nor the effect of preventing, restricting or distorting competition within the common market.

(v) Even if it is accepted that these agreements could have some adverse effect, the Commission still itself requires that both this effect and the restrictions of competition should be appreciable (Commission Decisions in Grundig-Consten and Dru-Blondel and Commission Notice of 27 May 1970). Since ALMO's market share is below 5 % and its annual turnover is very small, the case must be regarded as being of minor importance.

(vi) The casings manufactured and sold by ALMO differ from those supplied by Vaessen. They were specifically designed and developed by Moris for the manufacture of square sausages by the patented process. It is partly because of the special qualities of these casings that most Belgian manufacturers of saucissons de Boulogne have remained faithful to ALMO even though Vaessen charges a substantially lower price for a similar product.

(vii) The label affixed to the end of each casing serves solely to detect infringements in connection with the use of the patented process.

7. By letter dated 3 April 1978 in reply to the Commission's statement of objections, Impérial stated that it entered into the agreement with Mr Moris and ALMO on 23 November 1973 in order to avoid disrupting the manufacture and sale of its products ; it added that if the Commission were to take a decision prohibiting the exclusive purchasing obligation, Impérial would abide by it.

8. Vaessen, for its part, refused to accept the argument that Article 85 was inapplicable because the case was of minor importance. It demonstrated that the tests of the Commission Notice of 27 May 1970 on agreements of minor importance are not satisfied in this case since ALMO's share of the Belgian market in casings for saucissons de Boulogne far exceeds the 5 % threshold laid down in that Notice. The market share must be calculated by reference not to the entire market for casings but to the market for casings specifically designed for saucissons de Boulogne, since the casings manufactured and sold by ALMO are for these sausages. Moreover, these products are marked with the number of the patent on which Mr Moris and ALMO rely in order to compel its sublicensed manufacturers to comply with the exclusive purchasing agreement.

It contested the originality of the casing sold by ALMO and argued that its own casing was perfectly adequate for manufacturing sausages using the process and device patented by Mr Moris. The obvious proof of this was that Vaessen had managed to sell its product to certain Belgian manufacturers using the Moris process, notably Impérial.

It objected to the practice of putting a label with a reference to a patent on a product (the casings) when the patent extend solely to the process and device used for manufacturing another product (the sausages).

It submitted accordingly that the Commission should decide that where an undertaking which is the holder or licensee of a patent makes the right to work the patent conditional upon an undertaking by the licensee or sublicensee to obtain products not covered by the patent exclusively from the licensor, competition is restricted in a manner contrary to Article 85 of the EEC Treaty.

9. The Commission's information is that the casings used for preparing saucissons de Boulogne consist of pig intestine remains, stuck together. Before Mr Moris's invention, only double-skin casings could be used because of the pressure exerted on the casing by the filling process. With the Moris process, single-skin casings can also be used for the preparation of this type of sausage.

There are now only two manufacturers of these casings operating in the Belgian market — ALMO and Vaessen. ALMO has at least two thirds of the market. This type of casing is not sold outside Belgium since saucissons de Boulogne, a Belgian speciality, are manufactured only in that country. The sausage is square in section and used to be made exclusively of horsemeat, but the rising cost of this sort of meat means that it now tends to be made with a mixture of horsemeat, beef and pork. Nevertheless the consumer still regards the sausage as basically a horsemeat product.

The economic value of Mr Moris's patent lies primarily in the substantial labour savings that are available with the patented process, which enables the number of workers to be reduced to one quarter.

10. For the purpose of this proceeding the Commission is presuming Mr Moris's patent to be valid, although it is contested by Vaessen. This is a matter which has to be settled by the national courts.

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

11. Article 85 (1) of the EEC Treaty 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.

12. ALMO and Impérial are undertakings within the meaning of Article 85 ; Mr Moris exploits his invention commercially via his company, ALMO and in this way he carries on the business of an undertaking.

13. The agreement made on 23 November 1973 constitutes an agreement between undertakings which has the object and effect of restricting competition within the common market by means of the following of its provisions :

14. The clause whereby Impérial recognizes the validity of Mr Moris's Belgian patent No 610 778 and undertakes not to challenge it is not a requirement imposed by the patent. Rather it constitutes a contrac-

tual restriction of competition (1) in that it deprives the sublicensee of the possibility, which is available to everyone else, of removing an obstacle to his freedom of action in the commercial field by means of an action for revocation of the patent. This is no less the case where the relevant authority examines an application for novelty and degree of inventiveness before granting a patent, since such an examination does not affect the right of undertakings which might profit from the non-existence of the patent to oppose it or to bring actions for its revocation.

Even if it is the licensee or sublicensee who is best placed to attack the patent on the basis of information given to him by the licensor, the public interest in the revocation of patents which ought not to have been granted requires that the licensee and the sublicensee should not be deprived of this possibility.

15. Clause 2 of the agreement, which requires Impérial to obtain supplies of casings exclusively from ALMO when it intends to use the patented process and device licensed to it by Moris, has the object and effect of restricting competition since it deprives the sublicensee of its business freedom to obtain supplies from other undertakings, perhaps on more favourable terms as in the case of its purchases from Vaessen.

This clause is likewise not a requirement imposed by the industrial property right, for its deletion would in no way jeopardize the patent holder's exclusive right to work his invention himself or through others, since the products supplied by ALMO to Impérial are not covered by the patent; the clause thus constitutes an unlawful extension by contractual means of the monopoly given by the patent.

16. The foregoing restrictions of competition have appreciable effects on the market in casings for saucissons de Boulogne, since ALMO supplies at least two thirds of the market and its customers comprise a number of large manufacturers of saucissons de Boulogne, including Impérial. Other types of casing cannot be used for these sausages and can therefore be disregarded for this purpose. For the same reasons, the Commission Notice of 19 December 1977 (2) concerning agreements of minor importance is inapplicable here.

17. The clause prohibiting Impérial from challenging the patent is an appreciable restriction of competition which may affect trade between Member States, since by placing a legal barrier in the way of the free use of the process and device if they have been wrongfully patented, it prevents Impérial from obtaining a release from its obligations towards the licensor, notably the exclusive purchasing agreement, and from obtaining supplies freely on better terms from a source in another Member State (as would be the case here); moreover, the no-challenge clause reinforces the licensor's patent right, not only against the sublicensee but also against all the licensor's competitors throughout the Community.

18. The obligation on the part of Impérial to obtain supplies of casings exclusively from ALMO prevents Impérial from obtaining supplies from competitors in other Member States, such as Vaessen in the Netherlands. It has a direct and appreciable effect on trade between the Netherlands and Belgium, as Impérial is one of the leading Belgian manufacturers of saucissons de Boulogne. Moreover, the impact of this obligation on trade between Member States must be viewed against the background of similar oral obligations which Moris has obtained from other Belgian manufacturers of these sausages, the cumulative effect of which is to modify appreciably the demand structure for the products in question so that penetration of the Belgian market by a firm from another Member State is rendered that much more difficult.

19. The clauses considered above may thus affect trade within the meaning of Article 85 (1) of the EEC Treaty, since they can directly or indirectly jeopardize freedom of trade between Member States in a manner deleterious to the attainment of the objectives of a single market between those States. Their effect on trade is appreciable in view of the size of the national market share for the relevant products held by ALMO and in view of the importance of the firms bound by the restrictive clauses.

20. Clauses 1 and 2 of the agreement accordingly fall within the scope of the prohibition in Article 85 (1) of the EEC Treaty.

III. Inapplicability of Article 85 (3)

21. The agreement is not exempted from notification by Article 4 (2) (2) (b) of Council Regulation No 17 since it contains restrictions on competition going beyond those referred to in that Article, namely the no-challenge clause and the clause imposing an exclusive purchasing obligation relating to products not covered by the patent.

(1) This has always been the Commission's policy: Decision of 9 June 1972 in Davidson Rubber Co., OJ No L 143, 23. 6. 1972; Decision of 9 June 1972 in Raymond-Nagoya, OJ No L 143, 23. 6. 1972; Decision of 2 December 1975 in AOIP v. Beyrard, OJ No L 6, 13. 1. 1976.

(2) OJ No C 313, 29. 12. 1977, p. 3 (replacing the Notice of 27 May 1970 referred to above).

22. However, the only parties to the agreement are undertakings from one Member State and it does not relate either to imports or to exports between Member States (1). The agreement accordingly enjoys the benefit of Article 4 (2) (1) of Regulation No 17, so that the fact that it has not been notified does not preclude an exemption from being granted under Article 85 (3). Even so, the application of the latter provision is excluded in this case for the following reasons :

23. The agreement contains anticompetitive clauses that do not satisfy all the tests of Article 85 (3). Neither the no-challenge clause nor the clause requiring Impérial to obtain products not covered by the patent exclusively from ALMO contributes to improving the production or distribution of the goods in question, or to promoting technical or economic progress. On the contrary, these clauses are impediments to such progress, the first because it prevents Impérial and any other manufacturers who have entered into the same commitment from being free to carry on activities within the limits of the patent claims, and the second by preventing them from obtaining casings from another supplier at a more favourable price. Moreover, the exclusive purchasing clause imposes a restriction which is not essential to the proper exploitation of the Moris patent, since it is proved that the casings supplied by Vaessen are perfectly adequate for use with the patented process and device.

24. Accordingly the licensing agreement does not qualify for exemption under Article 85 (3).

IV. Non-application of Article 15 (2) of Regulation No 17

25. Under Article 15 (2) of Regulation No 17, the Commission may, on the basis of a decision, impose fines of 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, on undertakings which intentionally or negligently infringe Article 85 (1).

26. In the course of investigation of the case it was found that ALMO is a very small firm. Instead of charging royalties, Mr Moris and ALMO have merely required customers to obtain all their casings from ALMO. The sale of casings is the sole return which they receive.

27. The Commission accordingly does not consider that it would be appropriate to fine Mr Moris and ALMO,

HAS ADOPTED THIS DECISION :

Article 1

The following clauses of the patent licensing agreement entered into on 23 November 1973 between the parties listed in Article 4 of this Decision constitute infringements of Article 85 (1) of the EEC Treaty :

1. Clause 1 of the agreement, prohibiting the licensee from challenging the patent ;
2. Clause 2 of the agreement, imposing an exclusive purchasing obligation concerning products not covered by the patent.

Article 2

A declaration of inapplicability under Article 85 (3) is refused.

Article 3

The undertakings listed in Article 4 shall forthwith terminate the infringements found in Article 1.

Article 4

This Decision is addressed to :

— Mr Alex Moris, Picardiëlaan, 22, B — 2230 Schilde ;
— Alex Moris PVBA, Picardiëlaan, 22, B — 2230 Schilde ;
— Vleeswarenfabrieken Impérial NV, Grote Baan, 172, B — 9920 Lovendegem.

Done at Brussels, 10 January 1979.

For the Commission

Raymond VOUEL

Member of the Commission

(1) Judgment of the Court of Justice of the European Communities of 18 March 1970 in Case 43/69, 18. 3. 1970, p. 127.