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(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 9 December 1981

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.307 — Fire insurance (D))

(Only the English text is authentic)

(82/174/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 85 and 87 thereof,

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

Whereas :

I

(1) The Northern Assurance Co. Ltd ('Northern') is a British undertaking which among its other activities acts as an insurer of industrial fire risks. It is represented in the Federal Republic of Germany by a branch office in Bremen, entitled The Northern Assurance Co. Ltd, London, Direktion für Deutschland.

(2) The Commission is conducting an investigation into suspected infringements of Article 85 (1) of the EEC Treaty in connection with premium recommendations for industrial fire and consequential loss insurance issued by the Verband der Sachversicherer E.V., Cologne (Association of Property Insurers — ('the VdS').

(3) In the course of this investigation the Directorate-General for Competition wrote to Northern (Direction für Deutschland) on 20 March 1981, stating the purpose of the investigation and requesting information on several matters relating to the undertaking's market position and its conduct in the Federal Republic of Germany. An identical request for information was sent at the same time to 16 other Community insurers operating in the Federal Republic of Germany, but represented there only by branch offices. The questions put to Northern, which have not so far been answered, are set out in Article 1 of this Decision. By letter dated 25 June 1981 the Directorate-General for Competition once again asked Northern (Direktion für Deutschland) for an exhaustive reply to the questions, but without success.

(4) Northern takes the view that it is not caught by Article 85 of the EEC Treaty, and that consequently it is not required to answer the questions put to it. It further states that the Commission had already received answers to questions 1 to 4 from the German Bunderaufsichtsamt für das Versicherungswesen (Federal Supervisory Office for Insurance), and that worthwhile answers to questions 5 to 7 can be supplied only by the so-called leading German insurers.

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

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(5) The information which Article 1 of this Decision now requires once again is necessary, within the meaning of Article 11 (1) of Regulation No 17, for an assessment of whether the recommended premiums mentioned are likely to affect trade between Member States, and of Northern's reaction to them. It is therefore information which Article 11 (1) empowers the Commission to obtain in order to inquire into agreements, decisions and concerted practices prohibited by Article 85 (1).

(6) 1. The premium recommendations for fire and consequential loss insurance, which the VdS decided in the summer of 1980 and promulgated to its members by letters dated 13 June and 1 August 1980 could, in the event that they were such as to affect trade between States, constitute a means of restricting competition within the meaning of Article 85 (1) of the EEC Treaty. Almost all domestic and foreign fire insurers operating in the Federal Republic of Germany belong to the VdS. No member undertaking of the VdS has dissociated itself from the non-binding premium recommendations decided by the competent bodies of the association. Anti-competitive behaviour may thus be present in two forms : (i) in the form of decisions by an association of undertakings (the VdS) which have as their object an appreciable restriction of competition in the common market, and (ii) in the form of concerted practices engaged in by the individual member undertakings of VdS, to whom the premium recommendations are addressed.

(7) 2. The premium recommendations may affect trade between States, because Community fire insurers with their offices outside the Federal Republic of Germany belong to the association of undertakings, the VdS, which has issued them. Such a likelihood would also appear to be present if several of these Community fire insurers have, as leading insurers or as co-insurers, concerted their German fire insurance business with other insurers on the basis of the premium recommendations.

(8) Community fire insurers doing business in the Federal Republic of Germany while having their head offices elsewhere are taking part in trade, that is to say economic activity, between Member States. It is irrelevant that under the Versicherungsaufsichtsgesetz (Insurance Supervision Act) they may operate in the Federal Republic of Germany only if they are represented there by a branch office, unless the tests for applying the Council Directive on co-insurance of 30 May 1978 [1] are met. Such branches may indeed be treated as independent domestic undertakings by the legislature of the country. They do not however thereby become domestic undertakings with separate legal personality for purposes of Article 85 *et seq.* of the EEC Treaty.

(9) It cannot be rejoined that the service which forms the essence of an insurer's activities, namely taking over a specified risk, is performed within one country. Although insurance contracts are concluded by the company's senior official within the country and although foreign insurers must present certain financial guarantees within the country for the observance of their contractual obligations and payments made by the foreign insurer are frequently drawn from financial resources within the country, nevertheless from the point of view of competition policy a branch office is to be regarded only as an arm of the foreign insurer. It is significant here that several times in the course of the investigation the Commission has received interim replies to its questions, which stated that the relevant German branch office had first to contact the management of the firm abroad.

(10) From a business point of view a branch office is entirely dependent on the goodwill of the foreign insurer. It is frequently responsible for the insurance business of the subsidiaries within the country of foreign policy-holders who have concluded international insurance agreements with the foreign insurer. The management of the foreign insurance firm not only determines policy for the branch office's activities ; as a foreign undertaking it also has rights and obligations conferred on it in private law by the insurance contracts the branch office concludes, regardless of the fact that the public law on the supervision of insurance business requires that under organization and book-keeping aspects the business transferred to the branch office be independent. Finally, profits made within the country accrue to the foreign insurer, and in the event of persistent losses it is the foreign insurer

[1] OJ No L 151, 7. 6. 1978, p. 25.

which must replenish the branch office's local finances from its resources abroad. Under these circumstances it would be somewhat contrived to argue that insurance undertakings with branch offices in other Community Member States do not take part in commercial dealings between those States and their own State.

(11) 3. The premium recommendations issued by the VdS may be capable of appreciably affecting trade between Member States even if the share of the German market held by foreign Community insurers is relatively small (2·12 % of gross premium income in the 1979 financial year). There is always a likelihood that trade between States will be appreciably affected when a restrictive measure applies to almost the entire volume of inter-State trade which can currently be observed or which could, in the absence of the restriction, develop in the foreseeable future.

(12) Even if, as a result of natural and legal circumstances, only minor inter-State trade flows are to be observed or can be expected, as in the present case, it does not follow that undertakings are free to take measures which seek to reduce competition within this trade on the grounds that the effect is not appreciable. The share of the German market held by the 17 Community fire insurers belonging to the VdS cannot be the decisive consideration here. It is clear that this market share represents almost the whole volume of commercial dealings between the Federal Republic of Germany and other Member States in the field of industrial fire insurance, and that no significant number of new competitors based in other Community countries can be expected to appear in the foreseeable future.

III

(13) To conduct its investigation the Commission must obtain information on the individual circumstances of the individual Community insurers belonging to the VdS who have their head offices outside the Federal Republic of Germany. This requirement is not satisfied by figures available from other sources which allow overall assessment to be made of those insurers' German business. The findings which those figures make possible are at best sufficient to suggest that the recommended premium issued by VdS constitute decisions of an association of undertakings which infringe Article 85 (1).

(14) Since the Commission is to investigate further whether the non-German Community insurers have infringed Article 85 (1) by engaging in concerted practices based on these recommended premiums, it requires the information which it has requested from them individually, and which has in fact been supplied in almost all cases.

(15) It is not true to say, as Northern does, that the Bundesaufsichtsamt für das Versicherungswesen has already provided the Commission with the replies to questions 1 to 4 in Article 1 of this Decision. The information supplied by that authority relates to the combined shares of the German market held by British, French, Italian and Dutch fire insurers, but not to those insurers' individual expenditure and premium receipts.

(16) As regards questions 5 to 7, the Commission cannot content itself with Northern's blanket assurance that it merely took note of the premiums recommended by the VdS and that it must maintain the necessary degree of flexibility in the business policy it pursues. The Commission needs to know how many insurance contracts of the kinds to which the recommended premiums refer could have been amended in the period in question (1 July 1980 to 31 March 1981), how many actually were amended, and what the amendments were.

(17) The same applies to the co-insurance business ('Beteiligungsgeschäft') in which one or more insurers act as co-insurers together with the leading insurer, who settles premium rates and conditions of insurance by agreement with them. In these cases particularly, it is important to know whether non-German Community insurers accepted, by agreement with the leading German insurers, that contracts should be amended to accord with the recommendations.

IV

(18) Articles 15 (1) (b) and 16 (1) (c) of Regulation No 17 empower the Commission by decision to impose on undertakings or associations of undertakings :

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

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

(19) In the present case the Commission needs to receive in full the information it first requested by letter of 20 March 1981. It would appear advisable, however, to allow Northern a period of reflection so that it can acquaint itself thoroughly with the legal consequences of continued refusal to supply the information. The Commission feels it would be appropriate to fix a time limit of two months from the date of notification of this Decision for the supply of the information,

HAS ADOPTED THIS DECISION :

Article 1

The Northern Assurance Company Limited, London, is required within two months of notification of this Decision to answer the following questions regarding its German business in the field of industrial fire and consequential loss insurance :

1. What was its premium income from industrial fire and consequential loss insurance in the Federal Republic of Germany in the years 1978, 1979 and 1980 ?

2. What were the average rates of premium (measured against the sum insured) under industrial fire and consequential loss insurance contracts in the years 1978, 1979 and 1980 ?

3. What was the amount of compensation paid under industrial fire and consequential loss insurance contracts in the years 1978, 1979 and 1980 ?

4. What were the administrative costs and other costs related to industrial fire and consequential loss insurance in the years 1978, 1979 and 1980 ?

5. How many contracts for industrial fire and consequential loss insurance of the kinds covered by the 'Grundsätze für die Tarifierung der industriellen und großgewerblichen Feuer- und FBU-Risiken' (principles for the rating of industrial and large-scale business, fire and consequential loss of profit risks), in the form in which those principles were stated of 3 February 1977, were current on 1 July 1980 ?

6. (a) On 1 July 1980, how many of the contracts referred to in question 5 were for more than one year ?

(b) How many of the contracts referred to at point (a) were due to expire on or before 31 March 1981 ?

(c) How many of the contracts referred to at (b) were renewed for more than one year in the period 1 July 1980 to 31 March 1981 ?

7. (a) Under how many of the contracts referred to in question 5 has the premium been reduced since 1 July 1980, and under how many has it been increased ?

(b) Under how many of the contracts referred to in question 5 could no change be made in the rates of premium before 31 March 1981, because the original premiums were still in force under such contracts ?

Article 2

This Decision is addressed to the Northern Assurance Co. Ltd, St Helen's, 1 Undershaft, London EC3P 3DQ.

Application may be made to the Court of Justice of the European Communities, Luxembourg, for review of this Decision as provided in the Treaty establishing the European Economic Community, and in particular Articles 173 and 185 thereof, within two months from the date on which the Decision is notified.

Done at Brussels, 9 December 1981.

For the Commission

Frans ANDRIESSEN

Member of the Commission