COMMISSION

COMMISSION DECISION

of 11 December 1981

relating to a proceeding under Article 15 of Council Regulation No 17 (IV/AF 511 — National Panasonic (France) SA) as amended by the Commission Decision of 21 June 1982

(Only the French text is authentic)

(82/465/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 11 and 15 thereof,

Having regard to the request for information addressed by the Commission to National Panasonic (France) SA on 25 May 1981, and the reply of the undertaking in response to that request, dated 15 June 1981,

Having regard to the Commission Decision of 4 August 1981 to initiate a proceeding in this case,

Having given the undertaking concerned the opportunity, in accordance with Article 19 of Regulation No 17 and with Commission Regulation No 99/63/EEC [2], of being heard on the matters to which the Commission has taken objection,

Having regard to the opinion of the Advisory Committee for Restrictive Practices and Dominant Positions delivered, pursuant to Article 10 of Regulation No 17, on 24 November 1981,

Whereas :

THE FACTS

A. The undertaking

1. National Panasonic (France) SA (hereinafter called 'NPF'), an undertaking with its registered office at 13-15 rue des Frères-Lumière, F-93150 Le Blanc-Mesnil, is a wholly-owned subsidiary of the Japanese undertaking Matsushita Electrical Trading Company, itself a subsidiary of Matsushita Electric Industrial Company, the leading Japanese manufacturer of electrical and electronic equipment.

2. The principal activity of NPF is the import and marketing in France of consumer electronic products made in Japan and other countries by Matsushita, including hi-fi and stereo equipment sold under the brand-names 'Technics', 'National Panasonic' and 'Panasonic'.

B. The Commission investigation

3. On 27 June 1979, the Commission carried out an investigation pursuant to Article 14 (3) of Regulation No 17 at National Panasonic (UK) Ltd, also a subsidiary of Matsushita and which carries out the same function in the United Kingdom as NPF in France.

4. The object of the investigation was to obtain information and documentary evidence concerning the suspected imposition by National Panasonic (UK) Ltd on its hi-fi dealers in the United Kingdom of a ban from exporting this product to other EEC Member States, in order to protect the distribution network in those States from the competitive effect of parallel imports.

5. During the investigation the Commission officials obtained a number of documents regarding the policy and practice of the firm concerning parallel exports of Technics and National Panasonic equipment.

6. On 24 August 1979, National Panasonic (UK) Ltd appealed to the Court of Justice of the European Communities against the Decision ordering an investigation. On 26 June 1980, the Court dismissed the appeal.

7. An examination of the documents obtained during the investigation showed that it was necessary to obtain further information in order to ascertain

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

precise details concerning the price structure for the sale of the Technics hi-fi equipment in the EEC, particularly the trade price paid by dealers and the retail selling price. In this context, the existence of recommended or advised prices in the different national markets was of fundamental importance. It was therefore decided to send a request for information to this effect to the main national marketing subsidiaries and exclusive distributors of Technics equipment in the EEC. The purpose of this request was to obtain readily comparable data, which could most conveniently be ascertained from the price lists of the subsidiaries and distributors, regarding the margins and prices applied at each state of distribution.

C. The request for information

8. On 25 May 1981, the Commission addressed to a number of the marketing subsidiaries of Matsushita in Germany, France and the United Kingdom and to its exclusive distributor in the Netherlands a request for information under Article 11 of Regulation No 17. Subsequently a request was also sent to SA National Panasonic (Belgium) NV. The request contained the usual reference to the sanctions provided for in the said Regulation in the case that the undertaking provided incorrect information.

9. The request stated that the Commission had carried out an investigation at National Panasonic (UK) Ltd on 27 June 1979 under Article 14 (3) of Regulation No 17 in order to ascertain whether that undertaking had participated in agreements or concerted practices of which the object or effect might be the prevention of parallel exports to other EEC Member States, and that an examination of the documents obtained made it necessary to obtain information concerning the marketing of Technics products in the Community.

10. In its request the Commission required *inter alia* details of the price structure in the Member State concerned. In the letter to NPF the relevant part of the request was formulated as follows :

'(Please provide details of)

(2) The price lists issued by your company since 1 January 1976 for Technics equipment.

These price lists should show

— your purchase price from the manufacturer ;

— your trade price to retailers, showing also all rebates and discounts ;

— recommended retail prices.'

(Translation from the original French.)

11. The letter stated in its penultimate paragraph that the request was addressed to NPF pursuant to Article 11 of Regulation No 17 and fixed a period of three weeks for the reply.

D. The reply of NPF

12. NPF replied to the request for information by registered letter dated 15 June 1981.

The letter, signed by the Chairman and Managing Director (Président Directeur-Général) reads :

'In reply to your request for information dated 25 May 1981, we request you to find set out hereafter the following confidential information.

(1) ...

(2) In Appendix B, you will find the price lists issued by our company since 1 January 1976 for Technics equipment. Our company does not have any issued price list showing its purchase price from its suppliers. These purchase prices are communicated to us at very close intervals and are negotiated by the department concerned.

We are at the Commission's disposal to provide precise details as to the purchase price practised at any date it likes to indicate.

(3) In Appendix C, you will find an analysis of the discounts and rebates given to our customers.

Our company does not recommend any retail prices.'

(Translation from the original French.)

13. Annex B consisted of the 12 trade price lists issued by NPF to dealers during the period covered by the Commission's request.

Annex C contained detailed information of all rebates and discounts off basic trade price given to dealers during the same period and indicated how these had been altered on several occasions.

14. NPF therefore purported to deal in turn with each of the categories of price list requested by the Commission, and either provided copies or explained why such lists did not exist. NPF stated during the hearing that the request for information had arrived at

a time when its legal advisers were already at the company's premises on another matter and that the reply to be made had been discussed with them and drafted on legal advice.

E. The retail prices of NPF in France

15. Documentary evidence consisting principally of internal management papers, reports of meetings with important customers, visit reports of area sales representatives and correspondence with dealers, however, shows :

(1) NPF recommended retail prices including 33·33 % value added tax based on a coefficient of × 1·80 on the basic trade price. Discounts were given to dealers of up to 30 % off basic trade price as that the actual profit margins were often considerably higher.

16. (2) Dealers were generally required by NPF to apply these retail prices for Technics and National Panasonic products whatever their form of distribution. Hypermarkets or discount stores had to apply the same coefficient, namely 1·80 on basic trade price, as was considered appropriate for traditional retailers.

The policy of NPF was summed up in a letter written on 22 September 1976 by the then Commercial Director : 'The point which seems to be the most important to confirm to you is the continuity of our commercial policy based on a respect of the recommended retail prices whatever the form of distribution.' (Translation from the original French.)

17. (3) It was made a condition of opening a new account with certain important hypermarkets or discount stores that they apply the coefficient of 1·80 required by NPF.

18. (4) Special arrangements were made on retail prices with the most important retail groups selling hi-fi equipment. The Darty chain specializing in electrical goods and consumer electronics equipment expanded from 19 shops in 1975 to 49 in 1980 and is established throughout France. FNAC with 12 outlets in 1979 was estimated to hold between 5 and 7 % of the French market in audio equipment. NPF negotiated with both these important retail groups the retail price which they would charge for each model in its range.

In certain cases the agreed price was below the normal retail price suggested by NPF of basic price × 1·80. The documents obtained show detailed tables giving the retail price ('prix public') to be charged by Darty and FNAC and fixed for a large number of models.

19. (5) The above policies represented the considered commercial policy of NPF and was conceived and supervised by the senior management of the company who either participated personally in such arrangements or ordered their execution and were kept informed of detailed developments by their staff.

The commercial policy of NPF as set out above continued at least until the discovery of the practices in June 1979. The Commission has no evidence as to whether this policy was continued or abandoned after that date.

20. NPF claimed that since the matters mentioned above and as a result of a greater awareness of the need to comply with EEC and national competition laws Matsushita decided to issue a 'code of conduct' to be observed by all its marketing subsidiaries in the EEC. The decision to prepare these guidelines was taken in about April of 1981. A copy of the code would be submitted to the Commission in due course. NPF did not admit the probative value of the Commission's evidence on NPF's pricing policy and expressly reserved its position in this regard.

LEGAL ASSESSMENT

21. By Article 15 (1) (b) of Regulation No 17, the Commission may, by Decision, impose upon undertakings fines of from 100 to 5 000 units of account where intentionally or negligently they supply incorrect information in response to a request made under Article 11 (3) or (5) of the said Regulation.

22. In its answer NPF stated in clear and unequivocal terms that it did not recommend any retail prices.

As the documents show, the standard practice of NPF as conceived and enforced by its senior commercial management during at least the larger part of the period covered by the Commission's request was to ensure that its dealers observed a recommended coefficient of × 1·80 on basic trade price while in the case of its principal customers the specific retail price for each model was not only the subject of a 'recommendation' but of individual agreement.

23. In its defence, NPF, while making no admissions as to the facts, claimed that it had not contravened the provisions of Article 15 (1) (b) by providing incorrect information in response to a request made under Article 11 (3). First, the statement had been voluntered by NPF and had not been given 'in response to a request' in the terms of the Regulation since the Commission in its request had specifically referred to 'issued price lists' and NPF had never in fact issued such lists. NPF's reply was not, therefore, an incorrect reply to the question which was asked.

24. Secondly, the statement made by NPF was expressed in the present tense and as there was no documentary evidence that alleged behaviour had continued up to the date of the reply, the answer given was not incorrect.

25. If, however, the Commission considered the answer 'incomplete', it should have taken a decision under Article 11 (5) specifying the detailed information it required. NPF nevertheless considered itself as being under an obligation to provide a complete answer and accordingly claimed to amend its reply to read :

'NPF has not issued lists of recommended retail prices for the period since 1 January 1976.'

26. The Commission rejects the arguments of NPF as being without substance on the facts of this case.

27. First, the question whether Article 15 (1) (b) may apply to incorrect information given by an undertaking on its own initiative and not in response to a particular question posed by the Commission in its request does not arise in the present case. The statement made by NPF regarding retail prices was directly related to the specific question asked by the Commission.

The Commission asked for details of price lists showing recommended retail prices from 1 January 1976 and NPF's reply was designed to explain that the reason why such lists could not be provided was that NPF's commercial practice was not to recommend any retail prices whatever to dealers. The incorrect statement was a direct response, and the firm's only response, to the Commission's question about retail price lists.

28. The Commission also rejects the claim that the reply was not incorrect by reason of being expressed in the present tense and so referable only to the present commercial policy of NPF on which the Commission has no evidence. It is quite clear from the context of both the Commission's request and the answer that NPF intended the Commission to believe that during the whole of the period from 1 January 1976 to the present time the continuing policy of the undertaking was not to recommend retail prices to dealers. Indeed in its reply NPF used the present tense throughout to refer to the whole of the period covered by the request.

Nor since NPF has declined to admit the facts clearly shown in its own internal documents, is there any proof that the conduct referred to has in fact been terminated. Even if the proposed code of conduct represented a real change in policy it was not even decided to issue it until about April 1981.

29. Nor does the Commission consider that the reply was simply 'incomplete but not incorrect'.

The reply given was intended to be taken as a full response to the Commission's request and would indeed have been taken as a complete reply and acted upon by the Commission in its assessment of the case under Article 85 (1) against National Panasonic (UK) Ltd had not proof to the contrary been available. Whatever the present position, the statement was intended to relate to the continuity of NPF's policy throughout the whole period since 1 January 1976.

30. Whether or not the proposed amended reply would itself constitute an incorrect answer by reason of the misleading impression it would create need not be determined by the Commission. The issue here is what NPF stated in its reply, not what it now wishes it had stated.

31. The Commission therefore considers that NPF provided incorrect information in response to a request made under Article 11 (3) of Regulation No 17. Since the facts were entirely within the knowledge of the undertaking, and indeed NPF had the advantage of legal advice at the very moment when it was considering its reply, the only conclusion to which the Commission can come is that the incorrect information was supplied deliberately with the intention of deceiving the Commission.

32. The infringement is considered to be a serious one. Differences in the recommended retail price levels in the various EEC Member States are of particular importance in the assessment by the Commission of the economic effects of a suspected export prohibition such as was believed to have been imposed by National Panasonic (UK) Ltd. Had the Commission been obliged to accept the answer given by NPF, its impression of the price structure for the sale of Technics in an important part of the EEC would have been totally incorrect.

33. The Commission therefore intends to impose a fine upon NPF. Having regard to the circumstances set out above it sets the fine at 5 000 ECU,

HAS ADOPTED THIS DECISION :

Article 1

By stating it its letter dated 15 June 1981 that it did not recommend any retail prices whatever, National Panasonic (France) SA intentionally supplied incorrect information in response to a request for information made under Article 11 (3) of Regulation No 17.

Article 2

A fine of 5 000 (five thousand) ECU, that is FF 30 906·70 (thirty thousand nine hundred and six French francs and seventy centimes) is hereby imposed on National Panasonic (France) SA.

This amount shall be paid, within three months of notification of this Decision to National Panasonic (France) SA, to the following account : Commission of the European Communities — Société Générale, Paris, No 5 770 006 5.

Article 3

This Decision is addressed to National Panasonic (France) SA, 13-15 rue des Frères-Lumières, F-93150 Le Blanc-Mesnil.

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

Done at Brussels, 11 December 1981.

For the Commission

Frans ANDRIESSEN

Member of the Commission