II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 December 1982

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.077 — Cafeteros de Colombia)

(Only the French text is authentic)

(82/860/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962 [1], first Regulation implementing Articles 85 and 86 of the Treaty, as last amended by the Act of Accession of Greece, and in particular Articles 3 and 6 thereof,

Having regard to the notification made by the Federación Nacional de Cafeteros de Colombia on 29 April 1980, and supplemented on 2 March 1981, in accordance with Article 4 of Regulation No 17,

Having decided on 20 July 1982 to open proceedings in the case,

Having given the undertaking the opportunity to make known its views on the objections raised by the Commission, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

(1) Acting upon information received about the sale of green coffee in the EEC, the Commission obtained particulars of the contracts under which the Federación Nacional de Cafeteros de Colombia (hereinafter called 'FNC') had agreed to supply coffee to its EEC customers in 1978.

(2) As a result, an inspection was carried out at the FNC's Brussels office on 25 April 1979 and the Commission received copies of the contracts which FNC had made with its customers for 1979.

(3) On 29 April 1980, FNC notified the contracts to the Commission and applied for negative clearance or exemption under Article 85 (3) of the EEC Treaty.

A. The market for green coffee

(4) The green coffee consumed in the EEC is imported from Africa and Latin America. There are three main types of green coffee, 'arabicas', 'robustas' and 'mild arabicas'. Colombia, the second biggest coffee producer in the world after Brazil, is the biggest producer of milds.

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

(5) FNC estimates the market share of Colombian coffee in the EEC to be 19·68 %. In 1978 it accounted for 33·58 % of the coffee imported by Germany, 14·69 % of coffee imports to Denmark, and 4·37 % of French, 2·34 % of Italian, 28·34 % of Dutch, 1·31 % of United Kingdom and 16·10 % of Belgian and Luxembourg coffee imports.

(6) In 1962, in view of the imbalance that had emerged between the interests of the coffee-producing and consuming countries, an International Coffee Agreement was signed under UN auspices by the producer and consumer countries. The Agreement was revised in 1968 and again in 1976.

(7) The objectives of the Agreement are *inter alia* to bring about long-term equilibrium between production and consumption and to ensure fair prices in the face of the frequently excessive fluctuations in the levels of world supply and demand.

(8) All the Member States of the European Community are parties to the International Coffee Agreement and the Community itself is a signatory.

B. The Federación Nacional de Cafeteros de Colombia

(9) In 1940 the Colombian Government set up a National Coffee Fund as an instrument for facilitating the sale of Colombian coffee both on the domestic market and overseas. Article 10 of the decree establishing the Fund provides for a corporate body to administer the Fund. The FNC, which had been in existence since 1927, was appointed to do so from the Fund's inception. FNC is a semi-statutory but private legal entity bringing together all Colombian coffee producers. Its functions were defined by Decree No 2630 of 9 November 1960. Its main task is to organize the sale of Colombian green coffee in overseas markets.

(10) Article 20 of FNC's constitution stipulates that its purpose is to defend and promote the Colombian coffee industry. One of its chief functions, stated in subparagraph 11 of that Article, is to purchase Colombian producers' green coffee and sell it on the home and overseas markets.

(11) The head office of FNC — whose staff are appointed by and responsible to the Colombian Ministry of Foreign Affairs — is at Bogota, Colombia, but it also has offices abroad, for example in the EEC in Italy, Denmark and in Belgium.

(12) FNC controls the sale of all green coffee grown in Colombia. As part of this work, it makes the annual standard contracts with coffee roasters in the EEC which are the subject of these proceedings.

(13) The contracts are the same whether the coffee is supplied by FNC itself or by a private exporter who has himself purchased it in Colombia. In both cases, the contract contains the same clauses governing resale. The contracts, however, leave the buyer free to choose his source of supply and, if he chooses to deal with a private exporter, to negotiate a mutually agreeable price.

(14) In France and Belgium, where there is a very large number of small roasting plants, FNC makes similar contracts with two distributors, SACA in Paris and Installe in Antwerp. These are allowed to supply Colombian green coffee only to roasting plants which appear on a list drawn up by FNC. However, some large coffee roasters in France and Belgium deal direct with FNC.

C. The contracts

(15) The main terms of the annual contracts which FNC makes with EEC coffee roasting plants and the named distributors can be summarized as follows.

(16) (a) The standard contracts provide for two price mechanisms, depending on the supplier.

(17) Buyers supplied direct by FNC will not pay more than 4 US cents per pound above the average price for non-Colombian milds prevailing at the date of the contract, as established by the International Coffee Agreement (ICO) Indicator Prices, the daily reference prices set by the International Coffee Organization.

(18) Buyers obtaining supplies from a private exporter will, should the average price of non-Colombian milds be below the contract price, have their price adjusted so that the price difference does not exceed 4 US cents per pound.

(19) (b) The contract also includes a price change guarantee and a scale of quantity discounts, both applicable regardless of supplier.

(20) FNC guarantees to adjust the contract price for any fall in the price of Colombian green coffee that occurs within 45 days from the date of the bill of lading.

(21) FNC's sales contracts include for each registered sale the scale of quantity discounts given on sales within certain ranges (e.g. 1 to 15 000 bags, 75 001 to 100 000 bags, 600 001 to 700 000 bags). The relevant rate of discount, which rises to 5 US dollars per bag, applies to the entire quantity ordered in the contract. Thus, it will always be in buyers' interest to purchase the maximum number of bags so as to obtain a higher rate of discount on their total purchases.

(22) These terms are extended uniformly to all coffee roasting plants and distributors concluding contracts with FNC, wherever in the common market they may be established.

(23) (c) The contracts made with coffee roasting plants contain a clause (clause 15) obliging the buyer to use the green coffee in his own roasting plant(s). This prevents buyers selling green coffee to other roasting plants. In 1978 and 1979 contracts this rule carried the express sanction of immediate termination of the contract (clause 15 in 1978, clause 14 in 1979).

(24) The contracts with the distributors also contain a clause (clause 15) stating that they may sell the coffee supplied only to a predetermined list of roasting plants in France and Belgium respectively and that these undertakings may not resell the coffee in green form.

(25) Moreover, FNC reserves the right to monitor compliance with this clause and warns that any breach will lead to immediate termination of the contract.

(26) After the notification of the above contracts of sale, the Commission wrote to FNC pointing out that the clauses referred to could be in breach of Article 85 (1) of the EEC Treaty and asking it to amend them. In reply to the Commission's letter, FNC offered to include the following clauses in its 1981 contracts :

(27) Contracts concluded directly with roasting plants :

'All coffee covered by this Agreement is intended for use in the roasting plant(s) of the buyer. In order to sell any quantity of this coffee in green form, the buyer must obtain previous authorization from FNC. In presenting his request, the buyer should indicate : name of possible purchaser, number of lot and other identification marks, quantity, and reasons for making the sale. This authorization will not be unreasonably withheld.'

(28) Contracts with distributors :

'All coffee covered by this Agreement is to be sold by the buyer in green form to a group of clients previously authorized by FNC and listed in a separate letter. If one of the authorized clients wants to resell any quantity of this coffee in green form, the buyer must obtain previous authorization from FNC. In presenting his request, the buyer must indicate names of both authorized client who wants to resell and prospective purchaser, together with number of lot and other identification marks, quantity, and reasons for making the resale. The authorization from FNC will not be unreasonably withheld.'

(29) Although the Commission pointed out to FNC that the proposed clauses still did not appear to be compatible with Article 85 (1), the final contracts for 1981 which FNC's representatives sent to the Commission pursuant to the earlier notification nevertheless contained the offending clauses.

The clauses also appear in the 1982 contracts.

(30) In reply to the Commission's statement of objections, FNC informed it on 22 September 1982 that in view of the objections it had

decided to delete the clauses prohibiting resale of Colombian green coffee as from 1 January 1983.

II. LEGAL ASSESSMENT

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

(31) 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.

(32) FNC is an undertaking within the meaning of Article 85 (1) since it sells the green coffee owned by it and makes commercial contracts with buyers of Colombian green coffee.

(33) Certain of the clauses in the contracts which FNC has made with coffee roasting plants and distributors have as their object and effect a restriction of competition within the common market, for the following reasons.

(a) *Restriction of competition*

1. Restriction on resale

(34) Clause 15 (14 in 1979) of the contracts with roasting plants and distributors requires that all the green coffee covered by the contract be used in the former case by the buyer and in the latter case by authorized roasting plants.

(35) This is tantamount to prohibiting any roasting plant owner from buying green coffee for resale in the green state — as this is expressed in the 1978, 1979 and 1980 contracts — whilst distributors may sell green coffee only to roasting plants belonging to their own group.

(36) The 1978 and 1979 contracts further state that failure to observe this rule will result in immediate termination.

In the 1981 and 1982 contracts, resale may be allowed only upon previous authorization by FNC, which amounts to the same thing for the purposes of the restriction because it gives FNC a unilateral veto.

(37) The statement in the new clause 15 that 'this authorization will not be unreasonably withheld' does not mean that FNC will relinquish its veto.

In other words, the contracts prohibit or restrict the sale of green coffee by one roasting plant owner to another or by a distributor to a roasting plant which is not authorized.

(38) The result is to eliminate, or at least appreciably restrict, any competition in the market for Colombian green coffee sold by FNC.

(39) This restriction on the commercial freedom of coffee roasters and distributors restricts competition within the European Community in a manner contrary to Article 85 (1) of the Treaty.

2. Effect in conjunction with quantity discounts

(40) FNC knew that if the contracts had allowed it, the system of quantity discounts would have encouraged roasting plant owners to make group purchases (buying for fellow plant owners as well as to cover their own requirements) in order to obtain lower prices.

(41) Group purchasing would have allowed them to obtain green coffee for their own use and sell it on the market at cheaper prices, which might have affected the price of roasted coffee.

(42) The restriction of competition analyzed in point (1) above is thus aggravated by effects on consumer selling prices.

(b) *Effect on trade between Member States*

(43) Clause 15 of the contracts involves an export ban, and hence affects trade between the Member States.

(44) By including clause 15 in its contracts, FNC makes any interpenetration of the Colombian green coffee market very difficult or even impossible. It is able to partition the market into as many isolated units as there are buyers of Colombian coffee, especially as it controls the supply of all Colombian green coffee sold to EEC roasting plants.

(45) The effect of this export ban on inter-Member State trade in green coffee is appreciable since Colombian green coffee accounts for 19·68 % of all green coffee sold to the EEC and up to a third of coffee imports to certain countries, such as the Federal Republic of Germany.

(46) This situation therefore affects trade between Member States, contrary to Article 85 (1) of the EEC Treaty.

B. Inapplicability of Article 85 (3) of the EEC Treaty

(47) Article 85 (3) of the EEC Treaty states that the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement or category of agreements between undertakings which contribute 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 impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(48) The ban on resale which is included in the contracts between FNC and coffee roasters and distributors does not contribute to improving the distribution of Colombian green coffee in the EEC, since on the contrary it reduces the outlets available to buyers of the commodity in the EEC.

(49) No such resale ban could pursue any of the other objectives referred to in Article 85 (3).

HAS ADOPTED THIS DECISION:

Article 1

Clause 15 (14 in 1979) of the annual contract concluded between the Federación Nacional de Cafeteros de Colombia and coffee roasters in the EEC, and between the said Federación and Installe and SACA, for the years 1978, 1979, 1980, 1981 and 1982 constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The application for exemption under Article 85 (3) of the Treaty establishing the European Economic Community is refused.

Article 3

The Federación Nacional de Cafeteros de Colombia must refrain from including such a clause in any contract which it concludes henceforth with coffee roasters in the EEC or with Installe or SACA.

Article 4

This Decision is addressed to La Federación Nacional de Cafeteros de Colombia, Avenida Jimenez No 7-65, Bogota, DE 1, Colombia.

Done at Brussels, 10 December 1982.

For the Commission

Frans ANDRIESSEN

Member of the Commission