II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 May 1984

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.658 — Polistil/Arbois)

(Only the French and Italian texts are authentic)

(84/282/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: First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Greece, and in particular Articles 3 and 15 thereof,

Having regard to the application for negative clearance and the notification filed jointly by the Italian company Polistil SpA and the French company Arbois-Modelud ('Arbois') on 18 May 1982, in accordance with Articles 2 and 4 of Regulation No 17,

Having decided on 19 May 1983 to open proceedings in the case,

Having given the undertakings concerned an opportunity to reply to the objections raised against them, 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 Articles 19 (1) and (2) of Regulation No 17 [2],

Having heard the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

(1) A French toy distributor reported to the Commission encountering difficulties in importing certain Italian toys into France.

(2) The Commission investigated the matter and found that an exclusive distribution agreement existed between Polistil and Arbois.

(3) During inspection visits made to the two companies' premises, pursuant to Article 14 of Regulation No 17, on 16 December 1981 and 5 March 1982 respectively the Commission received a copy of this contract. It was signed on 18 January 1978, came into effect on 1 January 1979 and expired on 31 December 1983.

(4) On 18 May 1982, Polistil and Arbois notified the exclusive distribution agreement to the Commission for negative clearance or exemption under Article 85 (3).

A. The products and the industry concerned

(5) The products concerned in the case are the Polistil range of car and motor cycle racing games, in which some of the toy cars and motor cycles are remote-controlled and run around the track on rails or along separate raised lanes.

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

(6) These games belong to a traditional family of toys that is at present in decline in all countries of Western Europe. This decline is due to the increasing impact of electronic games and to a narrowing of the age-group making up the potential market for traditional types of toys, coupled with the static birth rate in most Member States. The result has been a significant contraction in demand for these types of toys, reflected in a fall of about 12 % in Western European sales between 1980 and 1982 from about US $ 5 000 000 to about US $ 4 400 000.

B. The undertakings concerned and their respective markets

(a) *Polistil*

(7) Polistil is the biggest Italian toy manufacturer. In 1982 it had a turnover of ...(1), ... of which about 70 % was from products of its own manufacture and the other 30 % from products it had imported, notably from the Far East.

(8) About 70 % of Polistil's sales are made on the Italian market and about 30 % are exported. About half of its exports go to other EEC countries, and about a third of its intra-EEC exports are to France, where in 1982 Polistil had sales of approximately ...

(9) For the products concerned in this case Polistil's market shares in the various EEC countries in 1982 were : ... in Italy, ... in France, ... in Germany, ... in the United Kingdom, ... in the Netherlands, ... in Belgium and ... in Denmark. The value of Polistil's exports to Greece and Ireland in 1982 was ... and ... respectively (1). The company does not export to Luxembourg.

(10) In Italy, Polistil markets its products through three channels :

(i) wholesalers, who handle about 80 %, and some of whom are also importers of products from other countries ;

(ii) directly to specialist retailers, who take about 10 %, and

(iii) supermarkets and department stores, which take the other 10 %.

Polistil's export prices follow a standard price-list. The present wholesale prices for Italy are usually higher than the export prices ; the differential varies between ... and ... % and is occasionally over.

Polistil gives practically no discounts off its prices either wholesale within Italy or for export.

(11) In other EEC countries except France, Polistil sells exclusively through agents who order the products by separate deals and with which it has concluded no exclusive dealing agreements.

(12) One of the features of the toy market in Italy is the large number — over 100 — of small or very small firms in the sector. Only about 10 of them have a turnover above Lit 10 000 000 000.

(13) The crisis in the industry, already described (point 6), has hit Polistil. Its turnover in 1983 is expected to be down to ... from ... the year before. The company has been recognized as in distress by the Government and its workforce taken into the 'cassa integrazione' scheme (2).

(b) *Arbois*

(14) Arbois belongs to the CEJI-Compagnie du Jouet group ('CEJI'), which also includes the French companies Joustra, CEJI-Interlude and Jouef. All are wholly-owned subsidiaries of CEJI and operate in the French toy market.

(15) CEJI is France's biggest manufacturer in the toy industry. In 1982 it had total sales in France of ... It holds about ... % of the whole French toy market.

(16) Arbois is CEJI's importing subsidiary. It imports, manufactures and markets toys in France. Its turnover in 1982 was ..., of which ... % was accounted for by imports and the other ... % by products of its own manufacture. About ... % of its imports come from other EEC countries, principally Italy, and there mainly from Polistil, and the United Kingdom. Its purchases from Polistil in 1982 amounted to about ..., representing ... % of the French market, in the products concerned, of which CEJI holds ... %.

(1) In the published version of this Decision, some data have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

(2) Essentially a scheme whereby 80 % of the wages bill of a business recognized as in distress can be paid by the Government for up to 24 months.

(17) At present Arbois markets its products in France mainly through :

(i) self-service stores (35 %) ;

(ii) specialist retailers (20 %) ;

(iii) department stores (about 10 %). The remaining sales are by mail order, from supermarkets and to local authorities and other bodies in the distribution network including company welfare schemes.

(18) In Germany and the United Kingdom, Arbois distributes its products through sales subsidiaries. In other EEC countries it delivers and sends the bill directly to the clients together with a commission for the agent who takes the order.

(19) As in Italy, the French toy market is highly fragmented. There are over 150 manufacturers, most of which are quite small. Only 10 have sales of over FF 100 000 000.

(20) The crisis in the toy industry, already described (point 6), has affected CEJI, whose trading losses at the end of 1982 were reported to be about ..., or about ... % of turnover. Arbois's trading losses in 1982 were about ..., which is a little over ... % of CEJI's total losses.

C. The contract

(21) The main terms of the contract can be summarized as follows :

(22) (a) Polistil grants Arbois the exclusive right to sell its products, present and future, in France (Article 1 (1)). At Arbois's request, Polistil may sell to French customers direct but must pay Arbois 10 % commission on such sales (supplementary contract 1).

(23) (b) Polistil will do its best to ensure that the prices it charges Arbois allow Arbois to keep its resale prices competitive with those of similar products and to combat possible competition from foreign importers of Polistil products or Italian wholesalers (Article 1 (3)).

(24) (c) Arbois undertakes for the duration of the contract not to import into France or distribute there products capable of competing with those of Polistil (Article 3).

(25) (d) Arbois will obtain its supplies exclusively from Polistil or its affiliates, associates and/or exclusive distributors, subject to conditions (Article 12).

(26) (e) Polistil will impose on its exclusive distributors, dealers and also wholesalers a ban on selling into the contract territory (Article 14 (1)). However, Polistil will not be liable should exclusive distributors or dealers import into the territory in defiance of this ban (Article 14 (2)). This Article was deleted on 30 April 1982.

D. The measures taken against parallel imports

(a) *The Crystève Diffusion case*

(27) On 11 September 1979 Arbois wrote to Polistil complaining of parallel imports by the French undertaking Crystève Diffusion, which was offering Arbois's customers Polistil toys at prices 10 to 15 % below its own prices. It also reported that a hypermarket in the Lyons area was buying directly from a Milan wholesaler.

(28) Arbois thought that the root of the trouble was 'a problem of price structure and a lack of coordination between prices to Italian wholesalers and export prices, although it was agreed in our contract that you would set your prices to avoid snags of this sort'.

(29) Arbois asked Polistil to 'check up on all your wholesalers in order to put an immediate stop to all direct supplies to French customers', thought that 'this is a case of unfair competition tolerated by you (Polistil)' and felt it was imperative that 'your prices to Italian wholesalers are kept at least 15 % above your export prices, for all products'.

(30) On 23 October 1979 Arbois again wrote to Polistil claiming to have proof that its French customers who were ordering through Crystève Diffusion were being supplied by the Genoa firm Repetto Angelo.

(31) Arbois called on Polistil to 'take whatever action is necessary to stop this Italian wholesaler operating on the French market'.

(32) For a meeting to be held in Paris on 30 and 31 October 1979 Arbois asked Polistil to bring along 'the file on orders from Repetto in 1979, the 1980 Italian wholesale price-list and the 1980 Arbois price-list, which must be at least 15 % below the prices to Italian wholesalers to put a stop to the competition by Crystève Diffusion'.

(b) *The Timky case*

(33) On 23 May 1980 Arbois wrote to Polistil reporting that a firm called Timky was importing Polistil toys direct from Italian wholesalers and selling them to French retailers at prices that were the same as Arbois's prices to wholesalers.

(34) Arbois pointed out that this state of affairs could not continue and that it was becoming urgent for Polistil to 'introduce a new export price-list, which is the only way your agent, Arbois, will be able to compete normally against these irregular imports'.

(35) On 18 June 1980 Arbois again wrote to Polistil telling it of offers Timky had made to the Société Allumettière française and earnestly requesting it to 'make full checks on Italian wholesalers who might be supplying this importer, to put a stop to these large-scale imports without delay'.

E. Scope of the proceedings

(36) These proceedings are concerned solely with the period 1 January 1979, when the contract came into effect, to 18 May 1982, when it was notified.

II. LEGAL ASSESSMENT

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

(37) Article 85 (1) 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.

(38) Polistil and Arbois are undertakings within the meaning of Article 85 and the exclusive distribution contract they signed on 18 January 1978 is an agreement within the meaning of that Article.

(39) The contract had the object of restricting competition within the common market, in particular by virtue of the provisions of Articles 1 (3) and 14 (1) taken together.

(a) *Article 14 (1)*

(40) Under this clause Polistil agreed to 'impose on its exclusive distributors, dealers and also wholesalers a ban on selling into the exclusive territory'.

(41) This clause was clearly intended to give Arbois absolute territorial protection. It sought to prevent, on one hand, dealers in other countries, especially EEC countries, from selling Polistil products in France and, on the other hand, French dealers from obtaining supplies direct from dealers in those countries.

(42) The argument that the obligation assumed by Polistil in paragraph 1 was nullified by paragraph 2 of the same article, which absolves Polistil of any liability should parallel imports nevertheless find their way into France, is unsound. The obligation, which Polistil had freely taken upon itself, was in no way limited by the exclusion of liability.

(43) The agreement by the two parties, in a letter which Arbois sent to Polistil on 30 April 1982 and which Polistil approved, to 'consider Article 14 of the contract to be abrogated with retroactive effect as being null and void' cannot unmake the restriction which was inherent in its very object or undo the actions done under it (see section I.D).

(b) *Article 1 (3)*

(44) In this clause Polistil agreed to sell its products to Arbois at prices such that Arbois itself could keep its resale prices competitive in order, among other things, to 'combat possible competition from foreign importers of Polistil products or Italian wholesalers'.

(45) This clause restricted Polistil's freedom to set its prices to Arbois according to conditions on the relevant market, the quantities supplied and its own commercial policy.

(46) Moreover, this clause — which Arbois in fact invoked *vis-à-vis* Polistil (see section I.D) — was intended to allow Arbois not only to impede competition from products similar to those covered by the contract but also to discourage or prevent parallel imports of the latter.

(47) The argument [1] that Article 14 (1) was 'contradicted by Article 1 (3) in that Polistil's undertaking to offer Arbois prices enabling it ... to compete with parallel imports (of Polistil products) ... implied a *de facto* acceptance of parallel imports' cannot be accepted [2].

(48) The two cases reported in section I.D show that Article 14 (1), far from being contradicted and neutralized by Article 1 (3), was actually the other half of a two-pronged arrangement intended, by its combined effect, to guarantee Arbois absolute territorial protection. The real purpose of Article 1 (3) was to back up the effect of the restriction of competition in Article 14 (1).

(49) Finally, the argument adduced by Polistil that, far from opposing parallel imports, it had 'from the beginning of the (contractual) relationship done much to encourage such imports: the concessionnaire's complaints about Crystève Diffusion and Timky are the clearest proof of such behaviour' — behaviour allegedly in deliberate contravention of the clauses in the contract which were contrary to competition rules — also cannot be accepted. As the Court of Justice held in its judgment in the Consten/Grundig case, '... for the purpose of applying Article 85 (1), it is superfluous to take account of the concrete effects of an agreement once it appears that it has the object of restricting, preventing and distorting competition [3]'. There can be no doubt that Articles 1 (3) and 14 (1) had such a restrictive object.

(50) The combined provisions of Articles 1 (3) and 14 (1) of the contract in question were liable to affect trade between Member States because they sought to prevent or prohibit Polistil dealers outside the French territory, particularly Italian wholesalers, from selling inside it and thus to give Arbois an absolute territorial protection. It is recalled in this connection that in the judgment in the Miller International case [4] the Court held that Article 85 (1) of the Treaty 'does not require proof that such agreements have in fact apprecially affected such trade (between Member States), which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect'. The same judgment goes on to confirm that 'clauses prohibiting exports constitute a form of restriction on competition which by its very nature jeopardizes trade between Member States'.

(51) Arbois has argued that the effect on trade was not significant. This also cannot be accepted, in particular because of the shares of the markets concerned held by undertakings in question (points 9 and 16). In this connection, in its judgments in Miller International (loc. cit.) and the judgment AEG-Telefunken [5], the Court of Justice held that a firm holding about 5 % of the market was 'an undertaking of sufficient importance for its behaviour to be, in principle, capable of affecting trade'.

In these circumstances, there can be no disputing the fact that the provisions in question were apt to affect trade between Member States in a manner prejudicial to the attainment of a single market.

B. Inapplicability of the exemption provided for in Commission Regulation No 67/67/EEC [6]

(52) Article 1 (1) of Regulation No 67/67/EEC exempts exclusive distribution agreements from the prohibition of restrictive practices in Article 85 (1), subject to the condition laid down in that Regulation. Regulation No 67/67/EEC was repealed with effect from 1 July 1983; but its provisions continue to apply to agreements in existence before 1 January 1984, by virtue of Article 7 of Regulation (EEC) No 1983/83 [7].

[1] Letter to the Commission from Arbois's lawyers, dated 17 May 1982.
[2] The same argument as adduced in Annex 3 to the notification.
[3] Judgment of the Court of 13 July 1966 in Joined Cases 56 and 58/64, Consten/Grundig, (1966) ECR 418 at 473.
[4] Judgment of 2 February 1978 in Case 19/77 Miller International Schallplatten GmbH, (1978) ECR 131 *et seq.*
[5] Judgment of 25 October 1983 in Case 107/82 Allgemeine Elektricitätsgesellschaft AEG-Telefunken AG (not yet reported).
[6] OJ No 57, 25. 3. 1967, p. 849/67.
[7] OJ No L 173, 30. 6. 1983, p. 1.

(53) The agreement in question does not qualify for exemption under Regulation No 67/67/EEC because Articles 1 (3) and 14 (1) of the agreement impose on the parties obligations which restrict competition and which go beyond those permitted by Articles 1 (1) and 2 (1) of that Regulation. The combined effect of these two contractual provisions is also to make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the common market, which, under Article 3 (b) of the Regulation, precludes application of the general exemption.

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

(54) Article 85 (3) states that the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement between undertakings 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.

(55) To be eligible for exemption under Article 85 (3) an agreement must be duly notified in accordance with Articles 4 and 5 of Regulation No 17, unless it falls within one of the categories set out in Article 4 (2). The contract in question does not come within any of these categories and hence was not dispensed from notification.

(56) The argument advanced by Polistil that that undertaking was dispensed from notification by virtue of Article 4 (2) (a) of Regulation No 17 on the ground that it never applied Article 14 (1) of the contract and that Article 1 (3) only restricted Arbois's freedom to set its prices cannot be accepted, for the reasons set out above (point 49).

(57) By virtue of Article 6 of Regulation No 17, the contract cannot, therefore, be granted an exemption under Article 85 (3) in respect of the period with which this Decision is concerned.

(58) Moreover, the clauses in question, which sought to give Arbois exclusive territorial protection, do not satisfy the conditions laid down by Article 85 (3), particularly the first condition ; it is hard to see how those clauses could contribute to improving the distribution of the products concerned.

D. Applicability of Article 15 (2) of Regulation No 17

(59) Article 15 (2) of Regulation No 17 empowers the Commission to impose by decision a fine on undertakings of from 1 000 to 1 000 000 ECU, or a sum in excess thereof, but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings concerned, where either intentionally or negligently the undertakings infringe Article 85 (1) of the Treaty. In fixing the amount of the fine, regard is to be had both to the gravity and the duration of the infringement.

(60) The Commission believes that a fine is merited in the present case. The infringement represented by the combination of Articles 1 (3) and 14 (1) of the contract was committed deliberately or at least negligently. The two parties knew or should have known that these clauses, which had been written into the contract to prevent parallel imports and give absolute territorial protection to Arbois, were apt to constitute restrictions of competition contrary to Article 85 (1) ; the more so as the Commission and the Court of Justice have repeatedly condemned clauses seeking to guarantee absolute territorial protection.

(61) Arbois's claim that it was unaware that it was infringing the Treaty competition rules when it agreed the offending clauses and that its legal advisers failed to alert it to the fact is not sufficient to exonerate it from responsibility for an infringement, according to Court of Justice in the Miller International case (1).

(1) As previously cited in point 50.

(62) The contract which is the subject of this Decision came into effect on 1 January 1979. On 30 April 1982 the parties agreed to 'consider Article 14 of the contract to be abrogated with retroactive effect as being null and void' (point 43). The contract was notified on 18 May 1982. It expired on 31 December 1983. The duration of time which must be taken into account for the purpose of imposing a fine is therefore the period of a little over three years when the contract was in force.

(63) As far as the gravity of the infringement is concerned, the following factors have been taken into account in deciding the size of the fine to be imposed on each undertakings :

(a) the contract clauses which are the subject of this Decision constitute a serious infringement of the Treaty, because they obstruct intra-Community trade and so prevent the attainment of a single Community market, which is one of the aims of the Treaty ;

(b) the turnover achieved with the products concerned in the infringement (points 7 and 16) was relatively small, and the structure of the relevant market is competitive ;

(c) promptly after becoming aware of the Commission's action, the undertakings concerned in this Decision decided to delete Article 14 of the contract concerned and to notify the latter.

(64) On these grounds and having regard to the circumstances just mentioned, the Commission considers that fines should be imposed on Polistil and Arbois in the amounts laid down in Article 2 of this Decision,

HAS ADOPTED THIS DECISION :

Article 1

Articles 1 (3) and 14 (1) of the contract signed by Polistil and Arbois on 18 January 1978 with effect from 1 January 1979, which were designed to protect the French market from parallel imports, together constitute an infringement of Article 85 of the Treaty establishing the European Economic Community.

Article 2

1. For committing the infringement referred to in Article 1, the following fines are hereby imposed on the undertakings concerned :

— Polistil : a fine of 30 000 (thirty thousand) ECU, or Lit 41 405 700,

— Arbois : a fine of 30 000 (thirty thousand) ECU, or FF 206 491,80.

2. These fines shall be paid :

— by Polistil, into account No 26952-018 of the Commission of the European Communities at the Cassa di Risparmio delle Provincie Lombarde — Servizio Estero, Milan,

— by Arbois, into account No 5.770.0065 of the Commission of the European Communities at the bank Société Générale — Agence Internationale, Paris,

within three months of the notification of this Decision.

Article 3

This Decision is addressed to :

— Arbois-Modelud,
14-22, rue Bon-Houdart,
BP 32,
F-93700 Drancy ;

— Polistil SpA,
Corso Europa 1,
I-20020 Lainate.

This Decision shall be enforceable in the manner provided by Article 192 of the Treaty establishing the European Economic Community.

Done at Brussels, 16 May 1984.

For the Commission

Frans ANDRIESSEN

Member of the Commission