COMMISSION DECISION

of 16 December 1985

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/30.665 — Villeroy & Boch)

(Only the French and German texts are authentic)

(85/616/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the European Economic Community, and in particular Article 85 thereof,

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 Article 2 thereof,

Having regard to the application made on 25 May 1982 by Villeroy & Boch KG, Mettlach, Germany, and Villeroy & Boch Sarl, Luxembourg, for negative clearance of a network of standard form agreements for the distribution of ceramic tableware and ornaments,

Having regard to the summary of the application published [2] in accordance with Article 19 (3) of Regulation No 17,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

I. THE FACTS

A. The undertakings

1. Villeroy & Boch KG of Mettlach, Germany, and Villeroy & Boch Sarl of Luxembourg, belong to the group of the same name, which is a major producer of ceramics (sanitary and fine ceramics). The Villeroy & Boch group has a consolidated annual turnover of ... [3], all operations combined, of which ... in respect of fine ceramics (ceramic tableware and ornaments), which Villeroy & Boch markets in the Member States of the EEC and EFTA by means of a distribution network.

B. The product and the market

2. Villeroy & Boch is a large European producer of ceramic tableware and ornaments. Its production is sold mainly in Germany, the Benelux countries and France. The Villeroy & Boch network distributes 61 dinner services, of which the most reputed, numbering 21, are covered by a 15-year availability guarantee.

Villeroy & Boch's market share does not attain 10 % in any of the Community Member States, and is below 5 % in several.

3. The market in ceramic tableware and ornaments is a fragmented market in which competition is very strong. On the German market alone, numerous producers are active, of which the three leading ones together account for a third of the sales, the others sharing the remainder of the market on the basis of shares equal to or less than 5 %.

4. Since goods of high quality and limited bulk are involved, imports play an important role and can account for up to a third of annual sales on certain national markets. Each producer is thus exposed to competition from manufacturers established both in other Member States and in non-Community countries, some producers exporting more than a third of their output.

C. The network of notified agreements

5. Villeroy & Boch markets its ceramic tableware and ornaments in the common market via a network of some 3 500 specialist retailers who are supplied, depending on the country, either directly by Villeroy & Boch, or through the agency of importers or wholesalers, or both. In addition to this network, there are two specialist distribution channels: the supplying of hotels and restaurants and the distribution of publicity aids.

---

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(2) OJ No C 206, 16. 8. 1985, p. 6.

(3) Pursuant to Article 21 (2) of Regulation No 17, business secrets are not published in the *Official Journal of the European Communities.*

6. The distribution network which Villeroy & Boch has notified with a view to obtaining negative clearance or, failing that, exemption thus comprises several different standard form agreements of indefinite duration which may be terminated by either party on six months' notice. These standard form agreements are concluded by Villeroy & Boch with:

— specialist retailers *(Facheinzelhändler)*, their wholesalers and central purchasing agencies,

— suppliers specializing in supplying hotels and restaurants,

— distributors of advertising gifts *(Werbemittelunternehmen)*, who are authorized to supply only certain trade customers with a view to subsequent disposal to third parties for promotion purposes.

1. *Features common to the notified agreements*

(a) No resale price maintenance

7. The notified standard form agreements contain no provisions on the fixing of resale prices: all Villeroy & Boch resellers are free to set their own prices. Villeroy & Boch operates a system of recommended prices in some Member States of the Community.

(b) Freedom of cross-supplies between Villeroy & Boch resellers

8. Any Villeroy & Boch reseller may resell the contract goods to other Villeroy & Boch resellers in the same distribution channel. For example, authorized specialist retailers may supply contract goods to any other authorized specialist retailer.

(c) Freedom of export

9. Any Villeroy & Boch reseller may also perform the transactions referred to at (b) from a Member State of the EEC or EFTA to another Member State.

(d) No non-competition clause

10. Villeroy & Boch resellers may buy and sell similar goods from competing producers.

2. *Specific provisions of the agreements between Villeroy & Boch and specialist retailers (EEC dealership agreement)*

11. Villeroy & Boch has concluded selective distribution agreements with some 3 500 specialist retailers established in the various Member States, who are supplied, depending on the country concerned, by way of direct deliveries from Villeroy & Boch and/or through the agency of importers or wholesalers. The main terms of the agreements are as follows:

(a) Goods excluded from the channel

12. Publicity aids and goods intended for hotels and restaurants, which are covered by two specialist distribution channels, are excluded by Villeroy & Boch. These articles are clearly differenciated from dinner sets intended for private consumers.

(b) Closed distribution network (dealership agreement)

13. Specialist retailers may supply only private customers or other specialist retailers authorized by Villeroy & Boch, irrespective of the user's Member State of establishment.

(c) Selection criteria

14. Only retailers authorized by Villeroy & Boch are admitted to the distribution network in accordance with the selection criteria outlined below. In response to certain observations made by the Commission, Villeroy & Boch has made some of its criteria more flexible. These can now be summed up as follows:

— The retailing of tableware, principally articles of high quality in a shop easily accessible to the public, specializing in such goods or having a specialist department.

The admission criteria relative to the specialization of the retail shop is deemed to be fulfilled where the retailer predominantly sells the range of any large tableware producer.

The standard agreement originally stipulated that the sales outlet should not be isolated from other shops and should be as centrally situated as possible. Villeroy & Boch has relaxed this requirement along the above lines in response to observations made by the Commission's departments,

— The retailer must display a sufficiently wide and varied range of Villeroy & Boch products and other products of comparable quality capable of satisfying the demands of discriminating consumers. The extent and variety of the range depend on the size and location of the sales outlet,

— Displaying of Villeroy & Boch goods in an attractive manner, setting them apart visually from other makes.

Villeroy & Boch articles must not be surrounded by products likely to detract from their appearance,

— Obligation to keep sufficient stocks of Villeroy & Boch sets to be able to satisfy normal demand,

— A technically trained and professional staff,

— Checking of goods before selling them to the public,

— Usual after-sales service (replacement of articles and provision of advice to customers wishing to supplement a service),

— Obligation to promote Villeroy & Boch products via publicity, advertising and other customary means.

3. *Agreements between Villeroy & Boch and the wholesale trade*

15. Villeroy & Boch has concluded two types of distribution agreement with the wholesale trade (wholesalers and central purchasing agencies). The feature they have in common is that they restrict the resale of goods by the wholesale trade to resellers authorized by Villeroy & Boch. The wholesale trade is therefore prohibited from reselling either to unauthorized retailers or to private customers.

4. *Agreements between Villeroy & Boch and suppliers of goods to hotels and restaurants*

16. Villeroy & Boch delivers goods to suppliers specializing in this specific branch of the tableware trade only for resale to hotels and restaurants. It reserves the right to supply such trade customers direct.

5. *Agreements between Villeroy & Boch and firms which distribute advertising gifts*

17. Villeroy & Boch delivers goods to certain firms specializing in the distribution of advertising gifts exclusively for resale to trade customers, who subsequently pass them on to third parties as promotional giftware.

18. The Commission has received no observations from interested third parties following publication of the notice required by Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

19. 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.

20. The notified standard form agreements governing relations between Villeroy & Boch and its various resellers lay down the details of cooperation between legally independent undertakings and are agreements between undertakings within the meaning of the abovementioned provision.

21. The relevant product market in which the notified distribution network operates is that of ceramic tableware and ornaments (fine ceramics). The various types of ceramic tableware (earthenware and porcelain dinner services) are to be considered as similar having regard to their properties, their use and their price, which do not differ significantly. Ceramic ornaments may in this case be included in the same market inasmuch as they are accessory to dinner services, and made of the same material.

22. Although selective distribution agreements necessarily affect competition in the common market (judgment of the Court of Justice in Case 107/82, *AEG-Telefunken* [1983] ECR 3151, ground 33), some products or services, which are not simple products or services, possess certain characteristics which prevent them from being sold properly to the public without the intervention of specialist distributors. To this extent, selective distribution systems constitute an aspect of competition which accords with Article 85 (1) provided that resellers are chosen on the basis of objective qualitative criteria commensurate with the requirements of the distribution of the products concerned and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion (Court of Justice, Case 31/80, *L'Oréal* [1980] ECR 3775, grounds 15 and 16).

23. To that extent, the notified distribution agreements cannot be considered to restrict competition if it is established that the selection of resellers is based on criteria necessarily conditioned by the specific nature of the contract goods.

24. Inded, since Villeroy & Boch has made some of the clauses of the selective distribution agreements with its specialized retailers more flexible, *inter alia* by deleting, at the Commission's request, the clause concerning the central location of retail outlets, which was likely to exclude from the network distribution channels capable of satisfying the producer's qualitative requirements without actually being situated in the centre of areas of consumption, it now makes admission to its network of specialist retailers subject only to general technical and professional conditions regarding retail outlets, which are objectively reasonable and suited to ensuring the sale of its products under favourable conditions.

25. The sale under appropriate conditions (cf. Court of Justice, Case 26/76, *Metro* [1977] ECR 1875, ground 37) of quality ceramic tableware requires first of all that they be displayed and sold through shops in the trade or having a specialized department, specifically equipped for the sale of these articles and having a trained staff.

To the extent that the Villeroy & Boch distribution system is open to outlets having a specialized department, it is not, as a matter of principle, liable to exclude certain modern forms of distribution.

26. The relevant products are durable consumer goods of a composite nature — each dinner service includes a wide variety of different pieces — whose sale is not exhausted in one simple transaction but is on the contrary repetitive, as broken items are replaced or additional items are acquired. Consequently, the long life of the products concerned justifies the legitimate interest of the producer in entrusting their sale only to retailers who are prepared to undertake after-sales service so as to ensure continuity of supply to the customer.

27. The displaying of Villeroy & Boch goods in an attractive manner and their separation both from other makes and from types of product which might harm Villeroy & Boch's brand image are designed simply to improve the appearance of, and assist in identifying, Villeroy & Boch products and avoid any confusion with similar makes and any equating of Villeroy & Boch products with inferior products capable of detracting from a product line on which Villeroy & Boch wishes on the contrary to confer a certain prestige. This obligation in no way prevents Villeroy & Boch specialist retailers from selling competing products.

28. The principle that the producer should himself verify the qualifications of specialized retailers admitted to the network is necessary to ensure that the selective distribution system is uniform and remains closed. Inasmuch as it is accessory to the main obligation of specialization incumbent on the retailer, and contributes to ensuring compliance with that obligation, the principle that the producer should himself control the access of specialized retailers to the network does not go beyond what is necessary to maintain the network.

29. As regards specifically the obligation to display a sufficiently wide and varied range of Villeroy & Boch products and the correlative duty to keep adequate stocks, these cannot appreciably restrict competition within the meaning of Article 85 (1), since the very competitive structure of supply on the relevant market, the absence of any sales target obligation imposed by Villeroy & Boch on its specialist retailers as well as the absence of any non-competition clause, this being not only inherent in the system but also desired by Villeroy & Boch itself, ensure that Villeroy & Boch specialist retailers may conduct their sales policy independently and that other producers have unimpeded access to these retailers:

— none of the numerous producers operating on the market holds a market share over 15 % and none is therefore in a position to make its retailers dependent on its products. With a market share of less than 10 % in all Member States, Villeroy & Boch does not enjoy a position of strength with regard to its competitors in view of its modest market share in the Community or with regard to its retailers, such that it is able, through the abovementioned clauses, to limit their freedom to concentrate their activity on the brands which are for them the most profitable. Moreover, selective distribution networks similar to that of Villeroy & Boch are not widespread, so that distribution of ceramic tableware does not incur the risk of becoming dependent on rigid distribution structures in which each producer would try to reserve the activity of his retailers to its exclusive benefit,

— far from tending to the exclusive presentation of Villeroy & Boch articles, the Villeroy & Boch selective distribution system is on the contrary based on the joint selling of competing reputed brands, against which Villeroy & Boch wishes to measure the prestige of its reputation. The notified system aims so little at being exclusive that every specialist retailer is deemed to fulfil the admission criteria relative to the specialization of the retail outlet by the mere fact that he predominantly sells the range of products of any large tableware producer,

— therefore Villeroy & Boch specialist retailers are by no means prevented from also selling competing goods when they see an interest in doing so. This is all the more likely since Villeroy & Boch specialist retailers are not under any duty either to achieve any fixed turnover in Villeroy & Boch's articles or to order predetermined quantities of such articles at regular intervals.

30. Thus, even if the obligation to promote sales of Villeroy & Boch goods cannot strictly be regarded as qualitative selection criteria compatible with

Article 85 (1), they are not to be considered in this case as giving rise to any appreciable restriction of competition. The general requirement of a commitment *(Einsatz)* to the make Villeroy & Boch, involving the display of Villeroy & Boch emblems, the giving out of Villeroy & Boch catalogues, advertising, sales promotions and the other usual promotional activities, do not prevent Villeroy & Boch specialist retailers from benefiting from competition between the various makes.

31. In a market which is as fragmented at the level both of production and of distribution, it is out of the question for the agreements between Villeroy & Boch and specialist retailers to facilitate, through the medium of common distribution networks, a collusion between producers aimed at excluding competing firms from the market: the number of producers is too great, and the circle of distributors is too open and ill-defined for such a practice to be possible.

32. On the contrary, in as highly competitive market, the joint supply by specialist retailers of dinner services of comparable quality but of different makes cannot but enhance inter-brand competition. As a result of the concentrated and refined display of competing products, the consumer is able to determine which product will give him the best value for money, and, since the retailer is under no obligation to achieve a minimum turnover for Villeroy & Boch products, he is able to give customers impartial advice. To the extent that customers may consider as of secondary importance the services which accompany the sale, in a selective distribution system, they will be able to choose articles from competing producers who do not practice selective distribution, thus expressing their preference regarding the marketing strategy adopted by the producer.

33. While strengthening inter-brand competition, the operation of the selective distribution network cannot restrict intra-brand competition by means of collusion between specialist retailers with a view, for instance, to preventing Villeroy & Boch from freely determining its channels of distribution or ensuring compliance with the prices recommended by Villeroy & Boch. Such an eventuality is possible only where the number of retailers is relatively small. That is not the case here. Moreover, Villeroy & Boch has not granted exclusive sales territories to its retailers and it would not be impossible for it to counteract any concerted pressure from its distributors by supplying new authorized retailers.

34. The selectivity of the distribution system under review is also based on the commitment entered into by specialist retailers to resell the contract goods only to private customers or to other specialist retailers authorized by Villeroy & Boch. As the objective qualitative selection criteria and the sales promotion obligations are considered compatible with Article 85 (1), the said commitment does not itself appreciably restrict competition in the present case.

35. If the obligation on authorized retailers not to sell to unauthorized retailers is recognized as being lawful, the same must be true of the obligation on wholesalers and central purchasing agencies to supply only Villeroy & Boch retailers, inasmuch as it constitutes at the wholesale level the reflection of the selectivity of the retail distribution system.

36. The corresponding prohibition on the supplying of private customers by wholesalers and central purchasing agencies does not constitute a restriction of competition within the meaning of Article 85 (1). On the contrary, competition would be distorted if wholesalers, whose costs are in general proportionally lower precisely because of the marketing stage at which they operate, competed with retailers at the retail stage, in particular on supplies to private customers (Case 26/76, *Metro* [1977] ECR 1875, ground 29).

37. The clause in the standard form agreements between Villeroy & Boch and suppliers of goods to hotels and restaurants which limits to the latter the resale of the contract goods is justified by the special nature of such resellers' operations and the different range of products which they supply. Since the resale of dinner services in bulk not intended for private customers is involved, it is reasonable that such specialist resellers should not be able to dispose of the contract goods either to authorized retailers or to private customers.

Strictly speaking, this entails no restriction of competition since the make-up and appearance of the dinner services are different from those of household dinner services.

38. The same considerations apply to the standard form agreements between Villeroy & Boch and distributors of advertising gifts. Owing to their specific purpose, which is the resale to trade customers of individual items not included in dinner services for subsequent disposal to third parties for publicity purposes, these agreements

form part of a commercial channel quite different from that through which dinner services are supplied to private consumers. Consequently, the obligation on distributors of advertising gifts to resell only to such trade customers does not constitute a restriction of competition.

39. The network of notified distribution agreements does not contain any obligation on the part of Villeroy & Boch resellers having as its object or effect any appreciable prevention, restriction or distortion of competition within the common market within the meaning of Article 85 (1), and it is not therefore necessary to examine whether trade between Member States may be affected.

Consequently, there are no grounds, on the basis of the facts in the Commission's possession, for action on its part under Article 85 (1) of the Treaty. The Commission can therefore grant the network negative clearance under Article 2 of Regulation No 17.

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action pursuant to Article 85 (1) of the EEC Treaty in respect of the network of standard form agreements between Villeroy & Boch and its resellers which form the subject-matter of this Decision.

Article 2

This Decision is addressed to Villeroy & Boch KG, Mettlach (Federal Republic of Germany) and Villeroy & Boch Sarl (Grand Duchy of Luxembourg).

Done at Brussels, 16 December 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission