II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 December 1987

relating to a proceeding under Article 85 of the EEC Treaty (IV/31.017 — Fisher-Price/Quaker Oats Ltd — Toyco

(Only the English text is authentic)

(88/86/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 Spain and Portugal, and in particular Articles 3 and 15 thereof,

Having regard to the application made to the Commission by Duffy Group Ltd, Orwell Shopping Centre, Wellington Road, Templeogue, IRL-Dublin 12, on 12 August 1983, alleging infringements of competition rules by Quaker Oats Ltd,

Having regard to the Commission's decision of 11 July 1986 to initiate proceedings in this 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],

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

Whereas :

I. THE FACTS

(1) The case concerns restrictions on parallel imports of Fisher-Price toys from the United Kingdom to Ireland between 1982 and 1985.

A. THE UNDERTAKINGS

(a) *Quaker Oats/Fisher-Price*

(2) Quaker Oats Company Inc. of Chicago, United States of America, specializes in the manufacture and sale of grocery products and toys. In 1983 the toys business represented about 20 % of the total group sales. In 1986, that proportion had diminished to approximately 13 %. It has subsidiaries in many countries in the world and in most Member States of the European Communities.

(3) Fisher-Price is a division of the Quaker Oats Company Inc. It manufacatures and sells toys. There is a local Fisher-Price division operating as part of the local Quaker Oats subsidiary in most Member States. The Quaker Oats subsidiary in the United Kingdom is Quaker Oats Ltd.

(4) The European operations of Fisher-Price are coordinated by Fisher-Price Europe which is, in legal and fiscal terms, a division of Quaker Oats Ltd.

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

(5) A further division of Quaker Oats Ltd, Fisher-Price UK, is in charge of sales in the United Kingdom where it sells mostly direct to retailers, and in Ireland where it has appointed a local exclusive distributor, Macaulay. Furthermore, Fisher-Price UK is responsible for sales in Denmark.

(6) Turnover for Fisher-Price products in the Community (excluding Spain and Portugal) in 1983 (fiscal year) was US$ 67 411 000.

In 1984 (fiscal year), the turnover was US$ 59 779 000. The net profit after tax of Fisher-Price Europe for the year ending 30 June 1984 was US$ 4 157 000 as compared with US$ 5 333 000 in 1983, US$ 3 831 000 in 1982 and US$ 10 664 000 in 1981.

The turnover of Quaker Oats Inc. was US$ 3 670 million for the world in 1986 and US$ 3 520 million in 1985.

(b) *Toyco*

(7) Toyco Ltd (hereinafter called 'Toyco') is a buying group located in Northern Ireland (United Kingdom), specializing in trade in toys. Toyco is a member of Toymaster Ltd, a central buying group in the United Kingdom. In early 1983, Toyco had 22 members, three of which were Irish, namely, Duffy Group, Tony Duffy and Duffy Furlong.

Toyco's turnover in 1984 amounted to £ 2 200 000, of which Fisher-Price products accounted for £ 130 000.

Toyco has various types of activities. In some cases, it acts as an agent. It transmits the orders of its members and deliveries and payments are made direct by suppliers and retailers, respectively.

In other cases, it acts as a wholesaler. The retail members place their orders with the buying group — the goods ordered are then delivered to the buying group which dispatches them to the retailers, invoices the retailers in its own name and pays the suppliers.

As far as the orders of the Irish members for Fisher-Price products are concerned, Toyco acted as a wholesaler. The goods were delivered to Toyco and resold to the Irish retailers. The invoices were then issued by Toyco, sent to the Irish retailers and paid by them to Toyco. Fisher-Price did not recognize the three Irish members as clients. Consequently, no direct delivery or payment could be made from Fisher-Price to the three Irish members but only from Fisher-Price to Toyco who then delivered the goods and received payment.

(c) *The Duffy Group*

(8) The Duffy Group Ltd of Dublin is an Irish compny spezializing in trade in toys. It has six outlets in the Dublin area.

Duffy Group's turnover in 1984 amounted to £ Irl 656 000 of which Fisher-Price accounted for £ Irl 39 000.

(9) In 1979, this company created a subsidiary in Northern Ireland (United Kingdom) called Duffy Group NI Ltd, whose aim was to purchase toys in the United Kingdom to export them to Ireland. For this purpose, Duffy Group NI became a member of the Toyco buying group and so could buy Fisher-Price products at a considerable saving.

These products were then dispatched to Duffy Group Ltd in Dublin. The system applied until Fisher-Price refused to deliver goods to Toyco as long as any of its members exported them to Ireland.

B. The product and the market

(10) Fisher-Price manufactures and distributes a wide range of toys. However, the company is particularly represented in the pre-school toy market, i.e. products aimed at children in the nought to five age bracket.

(11) The share of Fisher-Price in the total toys market in the EEC (excluding Spain and Portugal) is approximately 3 %. This share differs from one Member State to another and from one (sub) market to another. In the United Kingdom and Ireland, the share of Fisher-Price in the total toy market in 1984 was 3 %. Fisher-Price is among the leading brands, especially for pre-school toys. On this sub-market, its share in the United Kingdom and Ireland amounts to 9 %.

(12) Prices for Fisher-Price products have differed between Member States. In particular, the difference between United Kingdom prices and those charged by Macaulay in Ireland was wide enough between 1981 and 1985 to encourage Irish dealers to purchase in the United Kingdom, and especially in Northern Ireland, although the benefit of this trade was progressively diminishing.

With reference to the 20 best-selling Fisher-Price products in Ireland, the difference was, depending on the products, as high as + 35 % in 1981, + 24 % in 1982, + 30 % in 1983, + 24 % in 1984 and + 18 % in 1985.

C. The measures taken against parallel imports

(13) In a letter dated 28 April 1981, the Fisher-Price UK territory manager for Northern Ireland made it clear to Toyco that 'it is an express condition of (our) agreements with buying groups that orders are delivered direct to the retail outlets concerned, and invoices sent to the buying group's head office for payment.' Fisher-Price, being represented in Ireland by an exclusive distributor, suggested in the same letter that the Duffy Group Ltd, located in Ireland, 'contact (our) agents in Eire, W.D. Macaulay of Dublin, so that he (Mr Duffy) can purchase direct from them.'

(14) In a letter of 25 November 1982, Toymaster Ltd assured Fisher-Price UK of having put pressure on Toyco to cut off orders from its Irish members. According to this letter, Toymaster Ltd received from the director of Toyco his 'unqualified assurance that no further products will be shipped to any of the people (you) mention — (the three Irish members)'.

(15) In a letter to the director of Toyco, dated 23 November 1982, Fisher-Price UK warned that 'in the absence of a concrete assurance from you (Toyco) that you will not supply Toyco members in Southern Ireland, I (Fisher-Price general sales manager) shall have no alternative but to close the Toyco buying group account.'

From November 1982 to August 1985, Toyco, under increased pressure from Fisher-Price UK, was no longer prepared to accept any orders from its Irish members for Fisher-Price toys.

(16) It seems that the restrictions on exports between the United Kingdom and Ireland came to an end following a letter from Fisher-Price Europe to Toyco, dated 5 August 1985, informing it that Fisher-Price 'will never again refuse to supply any customer, be they a buying group or otherwise, who in turn wishes to supply retailers or wholesalers in Southern Ireland or any other EEC country.'

Furthermore, a memo, dated 19 August 1985, was sent by Fisher-Price Europe to all 'sales force, key account managers, sales managers, telesales, sales administration, credit management...' to explain to them the Fisher-Price commercial policy within the Community *vis-à-vis* the EEG competition laws.

(17) Consequently, restrictions on trade of Fisher-Price products between the United Kingdom and Ireland seem to have occurred over at least the period November 1982 to August 1985.

Having regard to the persisting price differences in the period under consideration it may be concluded that parallel exports from the United Kingdom to Ireland would have been substantially higher had it not been for the aforesaid restrictive practices.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(18) Both Quaker Oats Ltd and Toyco are undertakings within the meaning of Article 85 (1). As far as Toyco is concerned, its activities with the Irish members were those of a wholesaler and not of a buying agent. This is clear from the following facts:

— the invoices were made out and the goods delivered by Toyco to the Irish members,

— Toyco had a buying-group account at Fisher-Price which was different from the individual members' accounts. This group account was mentioned in the letter from Fisher-Price to Toyco dated 23 November 1982.

However ambiguous Toyco's activities may be, it is not necessary to analyse in more detail whether, as Quaker Oats Ltd put forward in the hearing, Toyco acted as an agent because, in any case, as far as the Irish members were concerned, Toyco clearly acted as a wholesaler.

Although these facts are confirmed by copies of invoices which are in the possession of the Commission, they are implicitly confirmed by Quaker Oats Ltd. If Toyco were not a wholesaler, Quaker Oats Ltd would have delivered directly to the buying group's members. In the case of the three Irish members, Quaker Oats Ltd would then have simply refused to supply these three retailers in order to protect Macaulays, its exclusive distributor in Ireland. It would not have needed to threaten Toyco to 'close its account' as it did.

(19) The Commission concludes that the conduct of Quaker Oats Ltd on the one hand, and Toyco on the other, constituted an agreement under Article 85 (1) relating to the toy market. Faced with the alternative of ceasing to deal in Fisher-Price products or ceasing to supply its Irish members, Toyco agreed to Quaker Oats Ltd's proposal. The fact that Toyco consented under strong pressure and even against its own economic interest is not an obstacle to a finding of an agreement (see the Commission Decision of 25 November 1980, *Johnson and Johnson* [1] and the Judgment of the Court of Justice in joined Cases 32/78 and 36-82/78 — *BMW Belgium* [2]).

[1] OJ No L 377, 30. 12. 1980, p. 16.
[2] (1979) ECR, p. 2435.

(20) Being the equivalent of an export ban, the agreement had as its object and its effect the restriction and the distortion of competition within the common market to an appreciable degree, as it was designed and implemented so as to prevent Irish dealers from importing Fisher-Price products from another Member State.

(21) Quaker Oats Ltd is a major manufacturer of toys. The three Irish members of Toyco cut off from their regular Fisher-Price supplies in the United Kingdom represent a non-negligible part of the Irish market. Moreover, the agreement in question, beyond its direct effects on the three distributors, must have had also a general persuasive effect on other potential parallel importers and placed real and severe obstacles in the way of trade beween the United Kingdom and Ireland. It had a direct and actual influence on trade between Member States. It is therefore concluded that Article 85 (1) applies.

B. Article 85 (3)

(22) Under Article 85 (3) of the EEC Treaty, the Commission may, under specific conditions, grant undertakings an exemption from the prohibition laid down in Article 85 (1). The said exemption, however, may be granted only if the Commission has been duly notified of the agreement reached between undertakings. The agreement between Quaker Oats Ltd and Toyco was not so notified and does not fall under Article 4 (2) (1) of Regulation No 17 because it relates to exports between Member States.

(23) In any case, the agreement in question would not have qualified for an exemption since it imposes a most serious restriction which is not at all indispensable to a proper sales system and is clearly likely to be detrimental to consumers in a substantial part of the common market.

C. Article 15 (2) of Regulation No 17

(24) By virtue of Article 15 (2) of Regulation No 17, the Commission may impose fines, within the limits set by that Article, where, either intentionally or negligently, the undertakings have infringed Article 85 (1). In assessing any fine, the Commission must take into account all relevant factors, and in particular the gravity of the infringement and its duration.

(25) The Fisher-Price management in Quaker Oats Ltd acted intentionally. The infringement involved straightforward actions to separate one national market from another within the Community. It lasted a considerable time. It started in November 1982 and was only brought to an end in August 1985.

The Commission, therefore, considers that a fine should be imposed on Quaker Oats Ltd

(26) Toyco, on the other hand, was reluctant to restrict its business trade with Ireland for evident economic reasons. It agreed to stop supplies to its Irish members only after having been put under strong pressure by an ultimatum from Quaker Oats Ltd. Having due regard to these considerations and to the fact that Toyco is a small business probably handicapped by the loss of the Duffy Group membership and by the loss of the Fisher-Price trade with Ireland, the Commission considers that no fine should be imposed on Toyco.

(27) As far as the gravity of the infringement is concerned, the following factors have been taken into account in evaluating the size of the fine to be imposed on Quaker Oats Ltd. The export ban has to be considered as a serious infringement and the Commission has to take into account the considerable period of time of its existence, although its effects have been progressively reduced. On the other hand, the Commission has taken into account the implementation by Quaker Oats Ltd of a compliance programme for the whole of the European Economic Community, although only following Commission inspections in June 1985,

HAS ADOPTED THIS DECISION:

Article 1

The agreement between Quaker Oats Ltd and Toyco Ltd, aimed at restricting parallel imports from the United Kingdom to Ireland, constituted an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

A fine of 300 000 ECU is hereby imposed on Quaker Oats Ltd. The fine shall be paid into:

(a) account No 59000204, Commission of the European Communities, Brussels (for payment in ECU), Lloyds Bank plc, The Manager Payments Section, Overseas Centre, Birmingham, PO Box 63, 38a Paradise Street, UK-Birmingham B1 2AB;

(b) account No 108.63.41, Commission of the European Communities (for payment in pounds sterling), Lloyds Bank plc, Overseas Dept., PO Box 19, 6 Eastcheap, UK-London EC3P 3AB,

within three months from the date of notification of this Decision to Quaker Oats Ltd. After three months, interest shall automatically be payable at the rate charged by the

European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted plus 3,5 percentage points, i.e. 10,25 %.

Should payment be made in pounds sterling, the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 3

This Decision is addressed to :

— Quaker Oats Ltd,
Bridge Road,
Southall,
UK-Middlesex UB2 4AG,

— Toyco Ltd,
38 Main Street,
Larne,
County Antrim,
Northern Ireland.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 18 December 1987.

For the Commission
Peter SUTHERLAND
Member of the Commission