II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 December 1989

relating to a proceeding under Article 85 of the EEC Treaty

(IV/32.265 — Concordato Incendio)

(Only the Italian text is authentic)

(90/25/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 2, 6 and 8 thereof,

Having regard to the notification and application for negative clearance submitted on 4 February 1988 by the Concordato Italiano Incendio Rischi Industriali concerning its articles of association and the agreement which entered into force on 1 January 1988,

Having regard to the summary of the notification published (2) pursuant to Article 19 (3) of Regulation No 17,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. The notification

(1) On 4 February 1988, the Commission was notified of an agreement which entered into force on 1 January 1988 concerning the activities of a non-profit making association between insurance companies known as the 'Concordato Italiano Incendio Rischi Industriali'. Further details were subsequently sent concerning a tariff forthe calculation of required premiums and the general terms and conditions resulting from the activities of the Concordato.

The purpose of the notification was to obtain a negative clearance or, failing this, exemption under Article 85 (3) of the Treaty.

At the request of the Commission certain modifications were made to the notified text, in order to replace the obligation to comply the tariff and the conditions of the policy by a recommendation and to guarantee the anonymity of enterprises who having derogated from the general conditions are obliged to inform the Concordato. The amended agreement was then approved by a general meeting of the members on 2 May 1988, and is currently being applied.

The list of members comprises 28 companies whose registered place of business is in Italy and which, at the time of the notification, held at least 50 % of the market in the sub-sector of industrial fire insurance and 23 % of the fire insurance sector in general. For example, the four leading members of the Concordato hold 28 % of the industrial fire insurance market whilst, of the 111 non-members, the four leading companies hold 23 % of the industrial fire insurance market.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 259, 12. 10. 1989, p. 3.

(a) *Structure and aims*

(2) The objective of the Concordato is to implement the principles governing insurance by providing members with the means of establishing sound management practices and improving the quality of service.

The activities of the Concordato concern industrial fire insurance as defined by the industrial fire insurance tariff for risks in Italy, and supplementary fire insurance cover, whether or not provided for in the industrial fire insurance tariff, including consequential loss insurance.

(3) In pursuance of its objectives, the Concordato carries out technical activities, including:

— definition of insurance criteria,

— drawing-up, for general use, of industrial fire insurance statistics for the calculation of required premiums,

— updating of required premium rates and all other calculation procedures,

— the determination with the member concerned of premiums for risks which by their size or nature were not envisaged in the tariff,

— study of preventive measures and foreign markets.

(b) *Operational procedures*

(4) Members wishing to establish risk quotations are invited to base them on the required premium rates of the fire insurance tariff, plus commissions and general costs calculated on the basis of the viability of each member.

Members can make use of a model fire insurance policy which provides standard definitions and general terms and conditions.

(5) Members may derogate from the standard general conditions. If, however, the statistics are liable to be affected by such derogations, the Concordato must be informed.

Coinsurance risk distribution is open to non-member firms.

(c) *Participation*

(6) All undertakings authorized to do business in Italy may participate in the Concordato, even if they are not established in Italy.

There are two categories of member: 'Concordataires' and 'Members', according to whether the premium income in the year preceding the application for membership reaches a given level which is fixed every two years by the general meeting and which corresponds to around 2 % of the market. Ordinary members are automatically members of the general meeting but, unlike the Concordataires, do not participate in other bodies. At the time of the notification there were 19 'Concordataires' and nine 'Members'.

(7) In the event of changes to the agreement relating to the Concordato, members who voted against the changes at the general meeting which adopted the changes may withdraw from membership of the Concordato.

The agreement entered into force on 1 January 1988 for a period of two years and is tacitly renewable. Members wishing to withdraw from the Concordato must inform the chairman in June of the year in which the agreement expires. The chairman informs the other members of the withdrawal; other members have the right, in that event, to cancel their membership in September.

(d) *Bodies of the Concordato*

(8) The bodies of the Concordato are:

— the general meeting,

— the chair (chairman and vice-chairman),

— the executive board,

— the central bureau,

— the board of auditors.

(9) The general meeting

General meetings are held at least twice a year; they have sole power to consider amendments to the basic agreement establishing the Concordato. Proposals are adopted by an absolute majority of the votes cast by the members present or represented.

(10) The chair

The chairman and vice-chairman are chosen by lot in turn from the Concordataire member companies. Their term of office is two years. They may not be from the same member company or companies belonging to the same group.

(11) The executive board

The board is composed of:

— members with a given premium income [1],

— Concordatiaries not represented on the board by a company in the same group,

— the chairman and the director of the central bureau.

Members not sitting on the board may attend meetings but may not vote. The chairman calls board meetings at least four times a year. It adopts all decisions concerning the activities of the

[1] Currently set a Lit 6 000 million, or about 2 % of the market.

Concordato. Decisions are adopted by an absolute majority of companies present or represented at the time of the vote.

(12) The central bureau

The central bureau is composed of employees of the Concordato and constitutes the latter's administrative framework.

(e) *Sharing of operationg costs*

(13) Operating costs are shared on the following bases :

— 20 % shared equally by each Concordataire member with an industrial fire insurance premium income of at least 20 % of the total premium income earned by each member in the preceding year from direct fire insurance business in Italy,

— 20 % shared equally by all members,

— 60 % borne by all members according to premium income.

B. Comments of third parties

No observations were made by third parties after publication of a notice pursuant to Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1) of the Treaty

1. *The undertakings*

(14) Pursuant to Article 85, the insurance companies that are members of the Concordato are undertakings and the Concordato is an association of undertakings.

2. *Agreements between undertakings*

(15) The notified agreement constitutes an agreement between undertakings. The activities of the Concordato relating to the fixing of required premium rates and the standard general conditions are based on the decisions taken by its general meeting and its other organs, and are decisions by associations of undertakings within the meaning of Article 85 of the Treaty.

3. *Restrictions of competition*

(16) The restrictions of competition intended by the notified texts stem from the decisions taken by the association as regards :

— the invitation to members to take as a basis for their tariff rates the required premium rates resulting from the industrial fire insurance tariff which are communicated to them by the Concordato. The required rates are based on statistics compiled by the organs of the Concordato on the basis of data concerning losses notified by members,

— the recommendation that members use the definitions and general terms and conditions drawn up by the Concordato.

(17) These restrictions limit competition between members as they tend to make uniform two essential components of their business practices :

— the required premium on which the tariff rate is based, and

— the general terms and conditions.

(18) Although the agreement does not actually make it compulsory to use the required premiums and simply invites members to do so, it is nevertheless a restriction on members. The whole purpose of the Concordato recommendation to use required premiums (and the standard conditions) is to standardize the main aspects of insurance for this type of risk. Participation in the Concordato, with its objectives and financial commitments, would be pointless if its members did not intend to use the results of its activities and follow up the decisions of its bodies. Furthermore, the agreement provides expressly that the required premium for risks not covered by the industrial fire insurance tariff will be calculated by the board with the approval of the member. The very fact of providing specifically for risks not included in the industrial fire insurance tariff and of fixing a required premium confirms that there is a restriction on risks covered by the industrial tariff. The fact that the recommendation to use the Concordato's required premium extends to non-tariff risks further increases the restriction of competition. There are no risks for which members autonomously fix the required premium and, as a result, they are considerably influenced when determining their tariff rates.

(19) The fact that members are free to derogate from the general conditions laid down by the Concordato does not eliminate the restrictive nature of the commitment since, in such cases, members are required to notify any derogations if they are likely to affect the statistics compiled in the interests of members. It is clear, however, that in these conditions even the derogations from the general conditions will be taken into acount when calculating the required premium.

(20) In conclusion, even if each member is free to decide independently, according to considerations bearing on his own commercial policy, on the loading margin (general costs, commissions, profit) to be added to the required premium in order to

form the tariff rate, the notified recommendation nevertheless has the object and effect of restricting competition between undertakings which would normally be competitors.

4. *Effect on trade between Member States*

(21) The agreement is liable to affect trade between Member States in so far as foreign companies operate on this market in Italy. Trade is directly affected if they are members of the Concordato or in the case where a member approaches them for coinsurance, and can be indirectly affected if they do not become members. Even if they are in principle free to determine their own rates and terms, they are in practice obliged to take account of the common policy of members of the Concordata which together represent at least 50 % of the market.

(22) Furthermore, trade between Member States can also be affected in as much as even if the industrial fire insurance tariff relates solely to property situated in Italy, some could be owned by Community undertakings outside Italy.

B. Article 85 (3) of the Treaty

The notified agreement, tariff and general terms and conditions satisfy the four conditions for the application of Article 85 (3) of the Treaty.

1. *Improving production or distribution*

(23) In order to pursue the activity of industrial fire insurance, a considerable knowledge of the sector is required, as regards both assessment of the risk and prevention of the latter.

(24) The activities of an organization, like the Concordato, which is designed to give its members the means of operating efficiently and improving the quality of service, by :

— defining insurance criteria,

— drawing up industrial fire insurance statistics and calculating required premiums for general use,

— updating the required premiums rates and other calculation procedures,

— fixing, with the member concerned, the required premiums for risks which, because of their size or their nature, are not included in the tariff,

by facilitating the acquisition of essential specialized knowledge, may be regarded as a means of improving the production of the insurance service by its members. The definition of basic cover and the establishing of a reference rate for required premiums may also be regarded as helping to improve the distribution of that service by facilitating recourse to coinsurance.

(25) In addition, the technical assistance and resources made available by the Concordato facilitate access by certain undertakings to a market such as industrial fire insurance which would otherwise have been acquired only with the greatest difficulty. Easier access is at least potentially capable of resulting in a larger number of operators on the market, which makes it possible both to increase the aggregate capacity of the market and the number of undertakings competing against each other, thereby improving the production and distribution of the insurance service.

2. *Benefits to users*

(26) A fair share of the benefit resulting from the activities of the Concordato goes to consumers.

Consumers are thus able to deal with insurance companies which, through the specialized knowledge made available by the Concordato, can offer policies adapted to every requirement as regards the assessment of the risk and prevention and calculation of the premium.

The existence of standard conditions makes it easier for consumers to compare the terms offered by various firms and come to a decision in full knowledge of the facts. In effect, the consumers, due to the existence of the premium tariff and standard conditions, can compare and choose not simply in relation to the commercial premium which is being requested of them but also the extent of the coverage and all other services, which an insurance company is supposed to provide, notably services as regards prevention and evaluation of damages.

3. *Indispensability of the restrictions*

(27) The recommendation that members use the required premiums and the general conditions established by the Concordato is necessary to attain the objectives of the agreement. Both recommendations are the logical follow-up to the activities of the Concordato, whose aim is on the one hand to facilitate access to the industrial fire insurance market and on the other to provide members with the means of establishing sound management practices and a better quality of service. From that perspective it seems essential to invite the members, some of whom have very limited experience in this sector, to use the said means. Only if they know that the premiums and the standard conditions will be applied, or at least used as reference points, have the operators in the sector, insurers or insured, a

proper basis for evaluating the management or the quality of the service offered. The obligation to notify derogations from the standard insurance terms when they are likely to affect the statistics makes it possible to guarantee the uniformity of the statistics and is justified for the same reasons. In this respect, the restrictions imposed on the undertakings concerned are limited to what is strictly necessary.

4. *Elimination of competition*

(28) The notified agreement does not afford the members concerned the possibility of eliminating competition in respect of a substantial part of the insurance services in question. On the one hand, members are free to fix their tariff rates for any risk in respect of their own loading rates, and on the other they are free to depart from the recommendations of the Concordato and may replace or adapt the standard terms of the Concordato to suit a particular case, provided they notify any changes liable to affect the statistics. The system as it stands therefore leaves considerable scope for competition between the members. Furthermore, although their share of the fire insurance and industrial fire insurance market is large, it must be taken into account that the members are in strong competition with other very powerful insurance companies. The Concordato is therefore not in a position to eliminate competition in a substantial part of the market in question.

C. Applicability of Articles 6 and 8 of Regulation No 17

(29) The notification of the agreements to obtain a decision in application of Article 85 (3) was submitted by the Concordato on 4 February 1988; pursuant to Article 6 (1) of Regulation No 17, the Commission decision enters into effect on 4 February 1988.

To determine the period of validity of the decision in accordance with Article 8 (1) of Regulation No 17, account must be taken of the nature of the market in the sector in question and, in particular, of the limited effect of the Concordato on competition within the common market. A period of 10 years is justified on these grounds,

HAS ADOPTED THIS DECISION:

Article 1

Is is hereby declared, pursuant to Article 85 (3), that the provisions of Article 85 (1) of the EEC Treaty are hereby declared, for the period from 4 February 1988 to 3 February 1998, inapplicable to the agreement notified on 4 February 1988 and to the industrial fire insurance tariff and standard general conditions attached thereto.

Article 2

This Decision is addressed to the Concordato Italiano Incendio Rischi Industriali, whose registered office is at Corso Vittorio Emanuele 22, Milan.

Done at Brussels, 20 December 1989.

For the Commission

Leon BRITTAN

Vice-President