II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 December 1989

relating to a proceeding under Article 85 of the EEC Treaty

(IV/32.202-APB)

(Only the French and Dutch texts are authentic)

(90/33/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 Article 2 thereof,

Having regard to the application for negative clearance submitted on 1 December 1986 by the Association Pharmaceutique Belge, Brussels, concerning a standard agreement of indefinite duration for the distribution to pharmacies of certain parapharmaceutical products,

Having regard to the summary of the application for negative clearance published pursuant to Article 19 (3) of Regulation No 17 [2],

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

Whereas :

I. THE FACTS

(1) The Association Pharmaceutique Belge (APB) notified a standard agreement of indefinite duration on 1 December 1986 which it has concluded or plans to conclude with Belgian or foreign manufacturers or the general representatives of foreign manufacturers in Belgium (hereinafter 'the manufacturer(s)'). The agreement was amended during the procedure. The agreement concerns the distribution to pharmacies of parapharmaceutical products in Belgium. It grants the right to affix a stamp of quality on the packaging of parapharmaceutical products which the APB has tested for conformity. Belgian and foreign manufacturers undertake in exchange to supply stamped products only to pharmacies in Belgium.

A. The parties to the agreement

1. *The APB*

(2) The APB was set up to protect the interests of pharmacists' trade associations and their members carrying out the activities of pharmacist, and to coordinate their activities. Article 5 (1) of the APB's articles of association limits membership to such associations. 28 associations are members of the APB. They represent 4 696 member-pharmacists out of a total of 5 173 pharmacies in Belgium.

(3) The APB has a science laboratory and a number of specialized services. Among the latter is the Control of Medicaments Service (Service de Contrôle des Médicaments (SCM)), which is responsible for running the laboraty. The laboratory, which is officially recognized, chiefly analyses proprietary medicinal products. The analysis, carried out on behalf of pharmacists in Belgium, offers a guarantee to the patient that the product has been checked. This check is in addition to the statutory checks carried out at the manufacturing stage.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 210, 16. 8. 1989, p. 6.

(4) The SCM, however, also analyses parapharmaceutical products not required to undergo any specific tests. These represent some 15 % of the products anaylsed in SCM laboratories. Most of the checks involve pre-registration analyses of non-medicinal products which manufacturers will be authorized to distribute with the APB guarantee stamp in accordance with the provisions of the standard agreement. Registration follows a predetermined procedure. After registration, the SCM may also carry out random checks of products subject to contract. It may also, however, carry out sample checks of products not under contract.

(5) The purpose of the SCM analysis is to establish that the product in question corresponds to the data provided by the manufacturers and that it satisfies legal and administrative requirements. Its checks are therefore conformity tests. They do not guarantee that the products analysed in its laboratories possess the beneficial qualities their manufacturers may attribute to them.

2. *The manufacturers of parapharmaceutical products*

(6) By the end of 1987, the APB had concluded standard agreements with [...](1) manufacturers covering [...] parapharmaceutical products. Of the [...] Belgian and foreign manufacturers, [...] also produce proprietary medicinal products.

(7) As regards foreign manufacturers, the APB concludes standard agreements with them or with their general representatives in Belgium. The representatives are either subsidiaries or agencies of the foreign manufacturer, or independent distributors.

B. The market

1. *Parapharmaceutical products*

(8) According to the APB, parapharmaceutical products are substances or compounds which do not correspond to the legal definition of a medicinal product. They are in any event products which, by virtue of their composition, utilization or presentation, are compatible with the dignity of the profession of pharmacist.

(9) It should be noted, however, that such products are not sold solely through pharmacies. A large proportion is sold in Belgium through supermarkets, hardware stores (drogueries), beauty shops and other specialized shops. In addition, products sold throught the different distribution networks are not always comparable and are usually aimed at different target groups. Parapharmaceutical products sold in supermarkets or grocery shops are usually priced differently from those in pharmacies and are generally aimed at a different clientele.

(10) A pharmacist is also free to sell goods not generally regarded as parapharmaceuticals (e.g. combs, sweets, feeding bottles, etc.), if he considers that they do not affect the dignity of his profession. Furthermore, not all parapharmaceutical products sold in Belgian pharmacies are covered by APB contracts.

(11) Thus the criterion of the pharmacist's dignity does not seem to play a decisive part in the definition of a parapharmaceutical product. The words 'parapharmaceutical products' tend to be used more to describe a mixed bag of products relating directly or indirectly to health care.

(12) They can be divided roughly into three main categories: toiletries and cosmetics, dietary products, and special foods (baby foods and vitamins).

(13) There are no specific rules for parapharmaceutical products as a category. They are, however, subject to various rules concerning their manufacture and marketing. The laws governing foodstuffs, cosmetics or plant-protection products may apply according to the type of parapharmaceuticals in question.

2. *Distribution of parapharmaceuticals in pharmacies*

(14) The number of pharmacies in Belgium, currently totalling 5 173, and their distribution throughout the country is regulated by the public authorities on the basis of the number of inhabitants. The opening or transfer of a pharmacy, or merger of two or more, requires prior authorization from the Ministry for Public Health and Family Affairs. Virtually no new authorizations to open a pharmacy are given any longer because of the stability of the population in Belgium.

(15) In order to defend their interests, Belgian pharmacists formed a number of professional unions all of which, apart from one which represents cooperative pharmacies, are represented by the APB. The

(1) In the published version of the Decision, some information has hereinafter been onmitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets

cooperative union, l'Office des Pharmacies Coopératives de Belgique (Ophaco), has also authorized the SCM to check pharmaceutical and parapharmaceutical products.

(16) All pharmacists in Belgium must be registered with the Ordre des Pharmaciens which exercises disciplinary authority and represents the profession. It ensures compliance with the ethical rules of the profession, which prohibit pharmacists from advertising or granting discounts and require them in general to refrain from any form of unfair competition.

(17) In 1986, Belgian pharmacies had a turnover of Bfrs 57 500 million. Approximately 87 % of this figure was obtained from the sale of medicinal products, and 9 % from the sale of products under contract. Income in this sector has dropped in recent years.

C. The stamp agreement

1. *Justification*

(18) Since 1885, pharmacists in Belgium have been legally responsible for all the products they sell. It is therefore for them to check the quality of made-up preparations and ensure that proprietary products correspond to the stated contents. All Belgian pharmacists, including those affiliated to the Ophaco, have entrusted the SCM with the task of carrying out the checks without thereby being relieved of their individual responsibility.

(19) Legal responsibility is not, however, limited to medicinal products but covers all items sold in pharmacies. The brief given to the SCM has therefore been extended to cover parapharmaceutical products. The stamp agreement system enables the SCM to carry out prior and/or sample checks on these products.

(20) The system, set up by and for pharmacists, does not cost the manufacturers anything, apart from the costs of the examination prior to registration (Bfrs 10 000). In exchange for the SCM checks, the authorization to affix the APB stamp and the opportunity to sell their products in pharmacies, manufacturers undertake not to sell the stamped product other than to pharmacies. The manufacturer is however free to sell the same product in the same packaging under the same name, but without a stamp, through other distribution networks.

2. *The content of the agreement*

(21) Article 1 gives manufacturers the right to place the APB mark of guarantee — the stamp — on their parapharmaceutical products. Under Article 3, manufacturers have this right only if the products have been checked and approved by the SCM.

(22) In exchange for that right, Article 2 requires manufacturers to sell the parapharmaceutical products bearing the stamp only through pharmacies.

(23) Article 17 prohibits manufacturers from adopting conditions of sale that are discriminatory or incompatible with the normal activities of pharmacists. Manufacturers must make their products available to all pharmacists through wholesalers. According to the APB the latter obligation does not mean that the manufacturer would be prohibited to sell his products directly to pharmacists.

(24) Article 11 lays down the procedures for affixing the APB stamp. Furthermore, under that Article, manufacturers undertake to affix the stamp in a visible place on the packaging and not to overlay or mask it under any circumstances.

(25) The APB maintains that this clause is designed to prevent a manufacturer from selling to outlets other than pharmacies products not apparently bearing the stamp but whose packaging would indicate the presence of the stamp. Such ambiguity could mislead consumers as to the value and origin of the APB guarantee stamp and allow other distributors to benefit unduly from the SCM checks.

(26) Pursuant to Article 16, the contract is valid for an indefinite period, unless one of the parties decides to terminate it with 12 months' notice.

D. The procedure

(27) The original version of Article 2 (1) of the contract notified on 1 December 1986 prohibited the manufacturer from selling the product concerned (whether stamped or not) through distribution channels other than pharmacies.

(28) The original version of the contract was the subject of a statement of objections dated 26 October 1988. In its statement, the Commission informed APB that Article 2 (1) infringed Article 85 (1) of the EEC Treaty since it prevented manufacturers from selling the products under contract through networks other than pharmacies, even if the products did not have the APB stamp. Not only did such exclusive sales in pharmacies affect the

manufacturer's freedom of choice as regards product marketing method, it also restricted competition between pharmacies and other distributors, the latter being unable to obtain supplies directly from the manufacturers bound by contract. Pharmacies were thus protected from all direct competition from other distributors in respect of the distribution of the contract product. The notified version of the agreement thus restricted competition in the distribution of parapharmaceutical products in Belgium.

(29) Furthermore, the exlcusivity clause contained in the original version of the agreement prevented the agreement from qualifying for exemption under Article 85 (3). The exclusivity clause meant that consumers had no choice of distribution network for the contract product in question. The fact that consumers benefit from the improvement in distribution resulting from the SCM checks is not sufficient to compensate for the limitation placed on choice. Furthermore, exclusivity was not indispensable to the attainment of the improvement.

(30) In response to the statement of objections of 26 October 1986, the APB amended Article 2 (1). In the new version of Article 2, described above in point 22, manufacturers may sell the same product, in the same packaging and under the same name, but without a stamp, through distribution channels other than pharmacies.

(31) At the same time as it amended Article 2 (1), the APB also added to Article 11 the requirement that manufacturers place the APB stamp in a visible manner on the packaging without overlaying or masking it under any circumstances.

(32) When it notified the amendment, the APB stated that Article 11 did not affect the right of a manufacturer to sell products without a stamp or products on which the stamp is no longer visible to outlets other than pharmacies.

II. LEGAL ASSESSMENT

(33) The standard agreement concluded between manufacturers of parapharmaceuticals or their general representatives and the APB is an agreement between an undertaking and an association combining trade associations. The APB protects the interests of Belgian pharmacists. In concluding the agreement, it is acting in the interests and on behalf of the pharmacists in question. The concluding of the agreements by the APB thus reflects the concerted wish of Belgian pharmacists to commit themselves collectively to a manufacturer.

(34) The standard agreement gives producers the right to affix the APB mark of guarantee on their parapharmaceutical products which, subject to a prior check, have received the approval of the SCM.

(35) In exchange for that right, the stamp agreement, as amended after the statement of objections of 26 October 1988, requires manufacturers 'to sell the products covered by the agreement only in pharmacies, if they bear the APB stamp.'

(36) Thus in the amended stamp agreement, manufacturers are no longer required to sell their products, which have been approved by the SCM and may therefore bear the APB stamp, exclusively in pharmacies. They are free to sell the same products in the same packaging and under the same name, but without the stamp, through distribution networks other than pharmacies.

(37) In addition, unlike the previous version of the stamp agreement in which producers undertook to sell the contracted product direct or through intermediaries only to pharmacies, the amended version no longer imposes any direct or indirect obligations on wholesalers as regards the channel through which the products in question are distributed.

(38) For these reasons, the new agreement — unlike the previous version to which the Commission objected on the ground that it established a system of exclusive distribution to pharmacies which affected the freedom of the manufacturer to choose the most appropriate marketing method — no longer requires certain products, especially pharmaceutical products checked and approved by the APB, to be distributed solely to pharmacies, since manufacturers and wholesalers are completely free to sell the products through other distribution channels.

(39) The APB represents the interests of pharmacists' trade associations and their members. The APB is an association which is statutorily open only to those associations. The effect of the statutory limitation on potential members of the APB is that only pharmacists may contribute to and benefit from the SCM checks.

(40) Consequently, all undertakings other than pharmacies are excluded *a priori* from participation in the stamp agreement system, even if an undertaking wishes to contribute financially to the smooth operation of the SCM quality testing of parapharmaceutical products. The exclusion gives pharmacies a competitive advantage. They alone may obtain the quality stamp.

(41) However, there is nothing to prevent other distributors from creating their own control system and seal of quality. Furthermore, the quality of parapharmaceutical products is only one means of competition among others. From the competition standpoint, other distributors normaly have different customers from those of pharmacies and a different pricing policy.

(42) In such circumstances, the restriction of competition resulting from exclusion from the control-system control system cannot be regarded as appreciable. Thus one of the conditions for the application of Article 85 (1) is not satisfied.

(43) Publication in the *Official Journal of the European Communities* as required by Article 19 (3) of Regulation No 17 did not give rise to any representations from third parties,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action under Article 85 (1) of the Treaty in respect of the stamp agreement notified and amended by the Association Pharmaceutique Belge.

Article 2

This Decision is addressed to the Association Pharmaceutical Belge.

Done at Brussels, 14 December 1989.

For the Commission

Leon BRITTAN

Vice-President