II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 28 November 1990

relating to a proceeding under Article 85 of the EEC Treaty

(IV/32.877 — Bayer Dental)

(Only the German text is authentic)

(90/645/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EEC Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the Commission's Decision of 6 March 1989 to initiate proceedings in this case upon its own initiative,

Having given Bayer AG the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19 (1) of Regulation (EEC) No 17, in conjunction with Commission Regulation (EEC) No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

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

Whereas :

I. THE FACTS

A. Introduction

(1) This Decision is based on a proceeding initiated by the Commission upon its own initiative after learning of Article XIV of Bayer Dental's General Conditions of Sale and Delivery for the Federal Republic of Germany (dated 1 March 1988) because it took the view that this provision amounted to an express prohibition of exports of Bayer Dental preparation.

B. The Undertaking

(2) Bayer Dental is a legally dependent division of Bayer AG with its head office in Leverkusen, Germany. It distributes the dental products manufactured by Bayer. The products in question are auxiliary substances used in dentistry. The 1987 annual report indicated a total turnover for the Bayer Group of DM 37,1 billion, with Bayer AG accounting for DM 16,7 billion, the group's health branch a total of DM 5,552 billion and the dental branch DM 180 million. Turnover in the dental branch therefore amounts to 3,26 % of turnover in the health branch. Total turnover for dental products in the European Community was some DM [. . .] [3] in 1987. Half of this amount was realized in Germany.

(3) A number of suppliers of varying size are active on the overall market in dental products. Bayer is one of the larger ones, but does not have a dominant position.

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

[3] In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation (EEC) No 17 concerning non-disclosure of business secrets.

C. **The distribution system**

(4) Alongside Bayer Dental, two wholly owned subsidiaries export from Germany. The sale of dental products in the individual Community Member States is carried out by associated companies. Only Denmark is supplied direct by the three German companies.

(5) Price list No 32 for the wholesale by Bayer Dental of dental/medical products in the Federal Republic of Germany (dated 1 March 1988) contains the following Article XIV:

'XIV. Resale

1. Original packages of the seller which carry a registered trade mark may be supplied to a third party only in unopened form.

2. The seller's preparations are intended for distribution solely in the Federal Republic of Germany, including West Berlin. Their resale abroad may, in the country concerned, be prohibited because they contravene registration regulations, and may lead to claims for damages because they infringe industrial property rights.'

It is this Article which is the subject of the proceeding.

(6) On 15 September 1988 the Commission sent a request for information to Bayer AG relating exclusively to the provisions of Article XIV cited above. Questions 1, 2 and 3 of this request were as follows:

'1. How do you reconcile paragraph 1 of Article XIV (Resale) with the Judgments of the Court of Justice in Cases 102/77 [1978] ECR 1139 and 3/78 [1978] ECR 1832?

2. How do you reconcile the first sentence of paragraph 2 of Article XIV with the principle of the free movement of goods, according to which anybody obtaining your products should be free to distribute them throughout the Community?

3. What industrial property rights, as referred to in the second sentence of paragraph 2 of Article XIV, provide a legal basis for claims for damages in the case of supplies being made to other Member States of the European Community? Since this question presupposes that these cannot be rights held by Bayer AG or one of its subsidiaries, please indicate all known industrial property rights of your competitors which might give rise to such claims.'

In its reply of 27 October 1988, Bayer AG adopted a position which is described in broad outline at point D below. In reply to question 3 asking it to indicate the industrial property rights of competitors abroad, Bayer AG made the following statement:

'As pointed out above, we assume no guarantee of immunity from the foreign rights of third parties because we have not examined those rights. We are therefore unable to give any concrete indication of such rights of third parties. They may, in particular, take the form of national rights relating to trade marks, patents of utility models.'

(7) In price list No 33 for the wholesale of dental/medical products, valid from 1 February 1989, Article XIV was replaced by an amended Article XV. Bayer AG also amended Article XV in its price list valid from 1 July 1990. The amended version does not include a prohibition on repackaging. It makes it clear that exports are permitted. Any liability arising from a defect of title in respect of such exports is unequivocally excluded, The proceeding is not concerned with this new version.

D. **The position adopted by Bayer AG**

(8) In its written and oral statements concerning the matters to which objection had been taken, Bayer AG took the view, in general, that the Commission could not take action against the now amended Article under the threat of fines simply because it considered it to be unclearly formulated, without proving that competition had actually been restricted.

The main arguments advanced by Bayer AG against the Commission's position on the individual elements of the former Article XIV are as follows:

It claimed that the Commission had failed to recognize that the prohibition against opening original packages expressed in paragraph 1 related only to 'original packages which carry a registered trade mark' and not to the original box indicated in the price list. The 'original box' did not carry any registered trade mark. The practical application of this prohibition was consistent with the Judgment of the Court of Justice in Case 102/77, Hoffman-La-Roche v. Centrafarm (1). The sole intention of Bayer AG was to prevent the original state of its products from being altered through repackaging. Moreover, the principle of drug safety dictated that the original package should remain intact until it reached the final consumer so that the manufacturer and product could be identified. The

(1) ECR 1139, [1978].

Commission did not indicate either in its objections or in talks on 18 May 1989, so the argument continues, that it had anything against that practice. Bayer AG felt that, for that reason alone, it ought to be given a fresh opportunity to make its views known should the Commission decide to take a more restrictive line.

At the hearing on 19 June 1989, Bayer AG presented a number of sample packages and explained its practice in their respect. This practice was, it claimed, relatively liberal. In no case had Bayer AG as yet taken action against a dealer, e.g. for having removed tubes from an individual package and packing them differently.

According to the submissions made by Bayer AG, the two sentences of paragraph 2 of Article XIV are intended merely to rule out any civil liability under Section 434 of the German Civil Code, which requires the seller to provide the buyer with the purchased item free of any rights of third parties. Bayer AG was unable to verify whether, in the case of export by one of its purchasers, its products would infringe registration regulations or industrial property rights in the country of destination. It showed by reference to specific cases that difficulties over industrial property rights abroad had arisen in the past with its own exports. Bayer AG therefore believed that it was obliged, for contractual reasons, at least to warn potential exporters that they might face similar difficulties when exporting Bayer products.

Furthermore, it could not be argued that Article XIV had been introduced in order to circumvent the Community's competition rules. It had featured in Bayer's General Conditions of Sale and Delivery for many years, perhaps since before the entry into force of the Treaty.

Moreover, prices for dental products were freely determined throughout Europe, and Bayer's prices were almost the same everywhere in Europe. Bayer therefore had not the slightest interest in preventing parallel trade in these products.

Bayer AG also pointed to the fact that the disputed Article XIV formed part of the General Conditions of Sale and Delivery, which covered a wide range of commercial transactions and products. It therefore had to be kept general to a certain degree.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(9) Purchase and delivery contracts are concluded by Bayer with dealers, i.e. with undertakings. Article 1 of Bayer Dental's General Conditions of Sale and Delivery makes these conditions part of the purchase contract. Article XIV is part of the General Conditions of Sale and Delivery of 1 March 1988. These conditions govern all matters relating to a contract of sale. They are applied to each contract routinely and in their entirety. The buyer consents tacitly to the individual conditions, including the prohibitions in Article XIV of repackaging (paragraph 1) and export (paragraph 2). Consequently, these provisions do not represent unilateral conduct, but form part of the total contractual relationship between manufacturer and dealer. This constitutes an agreement within the meaning of Article 85 (1) of the EEC Treaty (cf. Judgement of the Court of 11 January 1990 in Case 277/87, Sandoz, paragraphs 10 to 12.

(10) Article XIV is intended to restrict or distort competition within the common market. This is clear from the combined contractual conditions for resellers of Bayer Dental preparations contained in Article XIV. The purpose of these conditions is to prevent any resale whatsoever following repackaging, and resale outside the Federal Republic of Germany. This conclusion follows not from the subjective statements of the parties concerning the aim they were pursuing, their intentions or their motives, but from the objective circumstances.

(11) To begin with, the first paragraph of Article XIV prohibits original packages of the seller which carry registered trade marks from being supplied to a third party in opened form. Its wording runs counter to the Judgment of the Court of Justice in Case 102/77, cited above in recital 8, because it leaves out of account forms of repackaging which do not affect the original state of the dental preparations. The provision is apt to awaken in the minds of resellers so much doubt as to their actual

rights that they will refrain from reselling repacked products. In so doing, the prohibition pursues the object of restricting competition.

(12) Since Bayer is reproached solely for the restrictive object of the prohibition of repackaging and not for its actual conduct, the statements of Bayer AG at the hearing that in practice it tolerates the removal of tubes from their individual packages and that, irrespective of the wording of paragraph 1, it generally tolerates all forms of repackaging which do not alter the original state of its products, are irrelevant. There was therefore no reason for the Commission to give Bayer AG another hearing on this matter before adopting this Decision.

Moreover, the finding set out in recital 11, like the following findings on the two sentences of Article XIV, paragraph 2, does not affect Bayer's right to protect its trade marks within the framework of the applicable legal order, especially the relevant case law of the Court of Justice.

(13) The first sentence of the second paragraph of Article XIV, cited in recital 5 states, by implication, that the preparations are not intended for sale abroad. Since the schedule numbers of preparations offered for sale abroad, and consequently the packaging, are sometimes the same (compare the price lists of Bayer Dental Norden for Denmark, of 4 January 1988, and the 'Lista de Precios' of Bayer Dental Portugal, 1988), the German dealer must take this sentence to be a prohibition on selling the preparations abroad.

(14) He will be strengthened in this view by the second sentence of paragraph 2. The reference to contravention of registration regulations, of infringement of industrial property rights, and claims for damages draw attention to the considerable risks and penalties which might arise in the case of export. The wording is so vague that it is not made clear whether the claims connected with infringement of industrial property rights are possible claims of third parties or of Bayer AG itself.

(15) In view of this wording, the explanation put forward by Bayer AG that the second paragraph of Article XIV is intended merely to rule out any civil liability under Section 434 of the German Civil Code is not convincing because there is not a single word which refers to that aim. It is beyond dispute that liability arising from a defect of title can be ruled out by contract *(Münchner Kommentar zum Bürgerlichen Gesetzbuch,* Volume 3, second edition, 1988, note 11 on paragraph 434, p. 65, and Palandt, *Bürgerliches Gesetzbuch,* 48th edition, 1989, note 1 (B) on paragraph 434, p. 483). A look at Bayer Dentals General Conditions of Sale and Delivery shows that Bayer formulated the rest of its conditions in quite unequivocal fashion.

It is therefore incomprehensible that Bayer AG should not have directly excluded the possibility of liability arising from a defect of title.

Furthermore, Bayer AG was at first unable, when asked by the Commission, to specify any foreign rights of third parties. Of the few specific examples it finally gave in its reply to the statement of objections and at the hearing, only two related to Member States of the European Community. Since Bayer AG sells its dental preparations in all European countries either directly or via associated companies, it is reasonable to assume that it should have a precise knowledge of the industrial property rights of third parties which may be or have been invoked against export sales in the individual countries.

Finally, the Commission doubts whether Bayer AG is under any legal obligation to inform persons reselling its goods of the legal difficulties of carrying out exports. The Commission presumes that the persons concerned are traders from the sector who can be assumed to know about any difficulties which may arise.

(16) All this goes to show that the purpose of Article XIV is to use prohibitions of resale to restrict the freedom of action of resellers of Bayer Dental products where exporting is concerned, because of the fear of being exposed to claims for damages.

Effect on trade between the Member States

(17) The provision was also liable to affect trade between the Member States. Bayer Dental products are marketed in the Community and worldwide. According to figures supplied by Bayer AG, some ... % (DM ...) of total turnover of its dental branch in 1987 (DM 180 million) was realized in the European Community, including the Federal Republic of Germany, half (DM ...) in the Federal Republic itself and half in the other Member States. On top of this fairly substantial turnover comes the fact that Bayer AG, with a total turnover of DM 16,7 billion, is not just a major chemicals company but also a significant supplier on the market in dental products. Another point to be borne in mind is that it sells its dental products in the other Member States through local associated companies or, in the case of Denmark, through supply by

German subsidiaries, and that it is therefore able to coordinate its own prices and delivery conditions throughout the Community. In view of that fact parallel imports take on a particular importance. However, as stated above, Article XIV has as its very object to prevent exporters from making parallel exports from Germany. That object alone is enough to make it basically liable to affect trade between the Member States because it cannot be ruled out that parallel exports would occur much more frequently without the said provision than with it.

Bayer's counter-argument that it has no interest in preventing parallel trade in dental products because prices for them are almost the same throughout Europe must also be dismissed. According to the Judgments of the Court of Justice in Case 19/77, Miller International Schallplatten v. Commission [1] and in Case 107/82, AEG/Telefunken v. Commission [2] arguments of that nature cannot generally suffice to exclude the possibility that restrictions of competition may appreciably affect intra-Community trade, because market and price conditions might change at any time.

B. **Article 85 (3)**

(18) Pursuant to Article 4 of Regulation 17, an exemption cannot be granted in this case because Bayer Dental's General Conditions of Sale and Delivery have not been notified to the Commisison.

Nor are they exempt from notification pursuant to Article 4 (2) of Regulation No 17 since Article XIV affects imports and exports between the Member States.

Moreover, the Commission could not have granted an exemption for Article XIV even if notification had taken place because, as indicated, its object is to prevent exports.

(19) As stated above (recital 7), Bayer AG submitted price list No 33 for 1989 with the new Article XV after being informed of the Commission objections and amended that Article after its hearing so that the Commission no longer sees any reason to intervene.

C. **Article 3 of Regulation No 17**

(20) The point at issue in this case is essentially one of law. Whilst the Commission finds against Bayer that Article XIV has the purpose, when objectively considered, of restricting exports of the products concerned, the Commission also takes into account the fact that restriction is not expressed clearly and unequivocally, and that, consequently, Bayer AG continues to hold that Article XIV did not infringe Article 85. A decision is necessary to clarify the position in law and to prevent any future infringement of the same or a similar kind. The Commission has a legitimate interest in finding that Article XIV infringed Article 85 (1) (Judgment of the Court of Justice in Case 7/82, GVL [3].

HAS ADOPTED THIS DECISION:

Article 1

Article XIV of the General Conditions of Sale and Delivery of price list No 32 of 1 March 1988 for the wholesale by Bayer Dental of dental/medical products in the Federal Republic of Germany is hereby found to have infringed Article 85 (1) of the EEC Treaty because its object was to prevent resale after repackaging and resale outside the Federal Republic of Germany.

Article 2

This Decision is addressed to

Bayer AG,
Bayerwerk,
D-5090 Leverkusen.

Done at Brussels, 28 November 1990.

For the Commission
Leon BRITTAN
Vice-President

[1] ECR 151, [1978].
[2] ECR 3201, [1983].
[3] ECR 483 [1983].