COMMISSION DECISION

of 7 October 1992

imposing a fine pursuant to Article 15 (1) of Council Regulation No 17 on CSM NV (Case IV/33.791 — CSM — ex IV/33.638 — Sugar)

(Only the Dutch text is authentic)

(92/500/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 14 and 15 thereof,

Having given the undertaking in question the opportunity to make known its views of the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation 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],

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

Whereas :

I. THE FACTS

(1) By decision of 6 December 1990, adopted pursuant to Article 14 (3) of Regulation No 17, the Commission ordered CSM NV (hereinafter referred to as CSM) to submit to an investigation. The decision was notified to CSM on 12 December 1990. In the body of the decision it was explained that the verification was ordered because the Commission had been informed of allegations that NV Centrale Suiker Maastschappij had participated in arrangements or concerted practices with certain other Community producers concerning the marketing of sugar.

The Commission officials charged with the investigation began carrying it out immediately after the decision had been notified. This included examination of the 12 documents specified in Annex I [3]. The Commission officials intended to take copies of those documents which related to the exchange of information between CSM and Suiker Unie concerning the purchasing of sugar beet, as well as the passing on of information eminating from Tiense Suikerraffinaderij NV which involved its purchase prices for sugar beet. However, CSM prevented them from doing so. It stated that it was not prepared to give copies of the documents in question because it could not reasonably be argued that the documents could prove any fact covered by the subject matter of the investigation, as specified in the written authorization presented by the abovementioned Commission officials.

The Commission officials took minutes of the above. These were signed by CSM. Extracts from the documents allowing only their identification were annexed to the minutes.

The investigation was continued on the following day, 13 December 1990. In the course of that day, CSM stated that it was now prepared to allow copies to be taken of four of the abovementioned 12 documents. It stated that it had been mistaken about the content of the four documents. The Commission officials took copies of them and confirmed this in writing (Annex II to this Decision) [3].

On 19 May 1991 the Commission decided to initiate a proceeding against CSM pursuant to Regulation No 17. On 13 June 1991 a decision was adopted pursuant to Article 16 (1) of Regulation No 17 imposing a periodic penalty payment on CSM and a statement of objections sent in the context of the abovementioned proceeding.

On 14 June 1991, as a result of the Commission Decision imposing a periodic penalty payment, CSM declared its readiness, although protesting that it had no choice, to allow the Commission to make copies of the documents referred to in Annex I to the Decision and not included in Annex II.

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

[3] This Annex has not been published.

These copies were made at the offices of CSM on 2 July 1991.

On 12 July 1991 the Commission received a reply under the abovementioned proceeding. CSM declined a hearing.

(2) By letter of 21 December 1990 CSM asked the Commission to return the copy of a business document concerning sugar-beet prices which the Commission officials had taken during the investigation. The grounds advanced for the request were the same as those given in the statement recorded in the abovementioned minutes.

The Commission provisionally refused this request since the inquiries in the proceeding which led to the investigation at the premises of CSM have not yet been completed. It could not, consequently, be established with certainty that the document was not relevant to the investigation. In any case, the document is not, according to the Commission, one that is obviously not related to the subject matter of the investigation as specified in the decision of 6 December 1990.

II. LEGAL ASSESSMENT

1. Article 14 of Regulation No 17

Pursuant to Article 14 of Regulation No 17, the Commission may, in carrying out the duties assigned to it by Article 89 and by provisions adopted pursuant to Article 87 of the Treaty, undertake all necessary investigations into undertakings. To this end, the officials authorized by the Commission are empowered, *inter alia,* to examine the books and other business records of the undertaking and to take copies of or extracts from these books and business records.

Pursuant to Article 14 (3) of the same Regulation, undertakings are required to submit to investigations ordered by decision of the Commission.

The decision of 6 December 1990 requires CSM to allow the Commission officials charged with the investigation to examine the business records specified by them and to take copies of such business records. CSM failed to comply with this requirement in respect of all of the documents listed in Annex I.

The fact that, in the case of the documents in Annex II, on the second day of the investigations, and in the case of the other documents, after receiving the Commission Decision imposing periodic penalty payments, CSM nevertheless allowed the Commission to take the necessary copies where it had previously refused to let it do so, has no bearing on this infringement. The obligation incumbent on an undertaking to submit to an investigation ordered by a decision adopted pursuant to Article 14 (3) of Regulation No 17 is not satisfied even if the undertaking's refusal to let officials charged with the investigation by the Commission to exercise their powers is only temporary. Any other interpretation would jeopardize the effectiveness of the investigation.

CSM's view that the documents in question cannot prove any facts covered by the subject matter of the investigation, as specified in the Commission's decision of 6 December 1990, is unacceptable. It cannot be deduced either from Article 14 of Regulation No 17 of from the abovementioned Commission decision that the undertaking's obligation to cooperate in the investigation is limited to supplying such documents as it considers relevant. It has consistently been held in the case law of the Court of Justice of the European Communities that it is for the Commission to determine which business records must be presented for examination and from which any copies of extracts are to be taken (Cases 155/79, AM&S v. Commission [1] and 46/87, Hoechst v. Commission [2]; confirmed, with regard to requests for information under Article 11 of Regulation No 17, by Case 374/87, Orkem v. Commission [3]).

CSM however considers that an undertaking's obligation to cooperate in an investigation is limited by the subject matter and purpose of the investigation as defined in the Commission decision. CSM concludes that it is up to the undertakings themselves to judge the extent to which they are required to cooperate. Both of these positions are supported, in CSM's view, by the abovementioned Hoechst judgment.

The Commission does not call into question that in the first instance it is up to the company itself to assess its rights in the framework of a verification in the case of dispute. However, at issue is the question how an undertaking should assert its rights. The answer is that the undertaking cannot take matters into its own hands but must apply to the Court of First Instance of the European Communities, which alone is competent to supervise the Commission's conduct.

Of course, the Commission officials charged with the investigation have only such powers as are specified in Article 14 of Regulation No 17 and in the investigation decision. They are under an obligation not to examine business records, or to stop examining such records, if they are obviously or in the Commission officials' opinion not related to the subject matter of the investigation.

However, such documents are not, in the Commission's opinion, involved in this instance. Nor does CSM's minuted statement justifying its refusal to have copies taken, provide any evidence that the relevant documents are obviously not related to the subject matter of the investigation as specified in the decision of 6 December

[1] [1982] ECR 1575.
[2] [1989] ECR 2859.
[3] [1989] ECR 3283.

1990. The exchange of information concerning the purchasing of sugar beet, which is itself a major component in the cost price of the final product, could, by virtue of Commission Decision 82/895/EEC (1) in Case UGAL/BNIC, constitute an infringement of the competition rules of the EEC Treaty in relation to the marketing of sugar.

However, only the Court of First Instance of the European Communities is entitled to review the lawfulness of an investigation decision and of the associated actions by the Commission officials charged with the investigation. If those officials take copies of or extracts from business records which, in the opinion of the undertaking concerned, are not related to the subject matter of the investigation, the undertaking can ask the Commission to return the copies or extracts taken. The undertaking is also able to apply to have the investigation decision declared void. At all events, the Commission is not allowed to make use of evidence which it acquired on the basis of an unlawful investigation decision or outside the scope of any such decision (orders of the President of the Court of Justice of 26 March and 28 October 1987 in Cases 46/87R (2) and 85/87R (3)).

2. **Article 15 of Regulation No 17**

Pursuant to Article 15 (1) (c) of Regulation No 17, the Commission may by decision impose on an undertaking a fine of from 100 to 5 000 units of account where, intentionally or negligently, the undertaking refuses to submit to an investigation ordered by decision issued in implementation of Article 14 (3).

CSM has not submitted, within the meaning of that provision, to the investigation ordered by the Commission by decision of 6 December 1990, since it prevented the Commission officials charged with the investigation (as explained above) from taking copies of the documents referred to in Annex I.

Consequently, the Commission considers that there are grounds for imposing a fine on CSM. In setting the amount of this fine, account is taken of the fact that, on the second day of the investigation, CSM at its own initiative allowed the Commission officials to take copies of the four documents referred to in Annex II. It is therefore assumed that in respect of these documents the infringement of Article 14 of Regulation No 17 occured through negligence. Moreover, it cannot be disputed that CSM otherwise cooperated in the investigation. On the other hand, CSM intentionally prevented copies of the other documents from being taken, and allowed such copies to be taken only when threatened with the imposition of periodic penalty payments. Even if CSM had been mistaken about the content and extent of its obligations, in respect of these further documents there can be no question of negligence since CSM acted in full knowledge of all relevant facts,

HAS ADOPTED THIS DECISION:

Article 1

CSM NV failed to submit fully to the investigation ordered by the Commision in its decision of 6 December 1990 adopted pursuant to Article 14 (3) of Regulation No 17 by temporarily preventing the taking of copies of the documents specified in Annex I.

Article 2

A fine of ECU 3 000 is hereby imposed on CSM NV.

Article 3

The fine imposed by Article 2 shall be paid, within three months of notification of this Decision, to the following bank account:

No 310-0933000-43,
Banque Bruxelles Lambert,
Agence européenne,
Rond-Point Schuman 5,
B-1040 Brussels.

After the expiry of that period, interest shall be automatically payable at the rate charged by the European Monetary Cooperation Fund for transactions in ecus on the first working day of the month in which this Decision was adopted, plus 3,5 % percentage points, i.e. 14,25 %.

Article 4

This Decision is addressed to:

CSM NV,
Nienoord 13,
NI-1112 XE Diemen.

Done at Brussels, 7 October 1992.

For the Commission
Leon BRITTAN
Vice-President

(1) OJ No L 379, 31. 12. 1982, p. 1.
(2) [1987] ECR 1549.
(3) [1987] ECR 4367.