



EUROPEAN COMMISSION
Competition

CASE AT.40291 – Aquatrend

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003 and Commission Regulation (EC) 773/2004

Article 7(2) Regulation (EC) 773/2004

Date: 21/01/2016

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EUROPEAN COMMISSION

Brussels, 21.01.2016
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AQUAtrend, s.r.o.
Hričovská 221
010 01 Žilina
SLOVAK REPUBLIC

Subject: Case AT.40291 - Aquatrend
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear [...],

- (1) I am writing to inform you that the European Commission (the "Commission") has decided to reject your complaint against Epuro Polska Sp. z o.o. ("Epuro"), pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.¹

1. THE COMPLAINT

- (2) By letter dated 13 February 2015, you requested the Commission to launch an investigation into the allegedly unreasonable business conditions in the dealings of Epuro, a supplier of water treatment systems, with your firm, Aquatrend s.r.o. ("Aquatrend"). You alleged that certain of Epuro's business practices breached Articles 101 and 102 TFEU.
- (3) In particular, you allege that Epuro breached Article 102 TFEU by: (i) imposing an exclusive purchasing obligation on Aquatrend; (ii) unilaterally terminating your co-operation agreement and subsequently refusing to sell its products to your company; (iii) collecting the contact details of other Slovak companies from Aquatrend with the intention of entering into agreements with those companies after terminating the co-operation agreement with Aquatrend; and (iv) refusing to sell products to your company, including spare parts necessary to repair products under warranty.
- (4) You further allege that Epuro has breached Article 101 TFEU, although you do not substantiate this allegation.

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

- (5) By letter of 14 July 2015, the Commission informed you of its preliminary assessment of your complaint and its intention to reject your complaint. In response, you made additional observations by letter of 30 July 2015. In respect of the allegation summarised at paragraph 3(i), you point to Article 14(1) and (3) of Aquatrend's co-operation agreement with Epuro in support of your allegation that the latter had imposed an exclusive purchasing obligation on your firm. Your additional observations do not add any new elements relating to the allegations listed at paragraph 3(ii), (iii), and (iv).
- (6) Your additional observations did not lead the Commission to change its assessment of your complaint, which the Commission accordingly rejects pursuant to Article 7(2) of Regulation 773/2004 for the reasons set out below.

2. THE NEED FOR THE COMMISSION TO SET PRIORITIES

- (7) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. It has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.²
- (8) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may take into consideration whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement. In addition, the Commission may consider the scope of the investigation required. If it emerges that an in-depth investigation would be complex and time-consuming and the likelihood of establishing an infringement appears limited, this will weigh against further action by the Commission.
- (9) The Commission may also take into account whether a national court or national competition authority might be well-placed to examine the allegations made.

3. ASSESSMENT OF YOUR COMPLAINT

- (10) After a thorough examination of your complaint and subsequent observations, in light of the above considerations, and for the reasons set out below, the Commission has concluded that there are insufficient grounds for conducting a further investigation into your claims.

3.1. The likelihood of establishing the existence of an infringement

- (11) The likelihood of finding an infringement of the EU competition rules in this case appears limited.
- (12) A finding that Article 102 TFEU has been breached must necessarily be predicated upon the existence of a dominant position, which in turn must rest on a robust definition of the relevant market.

² OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.

- (13) In your additional observations you propose to define the relevant product market as the market for the *"equipment for the treatment of drinking and process water and the maintenance of this filtration equipment,"* and you reiterate your submission stated in your complaint that the relevant geographic market would cover at least Slovakia, the Czech Republic, Italy, and Spain. However, the Commission observes that you provide no justification or analysis in your complaint or in your subsequent observations to support your proposed product and geographic market definitions, or to exclude other potential broader definitions. There also appear to be no major economic or regulatory obstacles for manufacturers of water treatment systems to supply, or for customers to purchase, water treatment systems across the EU. It is notable in this regard, that in its merger review practice in respect of related products – namely water and waste-water treatment systems and components - the Commission considered the geographic market to be at least EEA-wide.³
- (14) In sum, the Commission considers that there appears to be no reason to exclude that the geographic market could be considered to cover a number of EU Member States, or be EEA-wide.
- (15) In your complaint, you state that, as the leading vendor of equipment for treating water (including drinking water), Epuro holds a high market share and is therefore able to control the manufacture, supply or sale of goods on the relevant market. However, in your complaint, you do not make any assessment of the relevant geographic and product markets, nor do you provide market share estimates, or examine other factors such as the structure of competition, Epuro's relative market power, possible negative effects on prices, supply, product quality and variety or innovation, among others,⁴ that might be used to establish dominance. The Commission therefore is of the view that, at this stage, it cannot conclude whether Epuro might be dominant on a relevant market.
- (16) Although it has no evidence to support the notion of dominance, the Commission has nonetheless gone on to consider your allegations of abuses within the meaning of Article 102 TFEU.
- (17) In this respect, you firstly claim that Epuro has breached Article 102 TFEU by imposing an exclusive purchasing obligation on Aquatrend. Such an obligation may be thought of as a requirement not to purchase from third parties goods which compete with the contract goods. In this regard, the European Courts found in *Hoffmann-La Roche* that *"An undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [102] of the Treaty [...]"*⁵ However, the co-operation agreement concluded between Epuro and Aquatrend and annexed to your complaint

³ Case IV/M.1514 - Vivendi/US Filters, Decision of 29.04.1999, Case COMP/M.6388 – Ecolab/Nalco Holding Company, Decision of 08.11.2011.

⁴ Guidelines on Vertical Restraints (OJ C 130, 19.05.2010, p. 1), paragraph 97. See also Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24.2.2009, p. 7), paragraphs 11-12.

⁵ Judgment in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 89.

seems to contain no clause prohibiting Aquatrend from purchasing alternative brands of the equipment referred to in Article 14(3) of the agreement: namely, water softeners, iron removers, and carbon filters. Indeed, by obliging Aquatrend to "*not advertise at the same time [Epuro's water treatment products] together with rival equipment of other producers, irrespective of the medium in which the advertising is presented*"⁶ it appears to be implicitly accepted in the agreement that Aquatrend may (separately) market such equipment (although not advertise it together with Epuro products). It is also notable that you have provided no evidence showing that Aquatrend was restricted from selling the products of competing suppliers. Given that Aquatrend itself, as a party to the contract with Epuro, has not produced such evidence, the Commission considers it unlikely that further investigation would uncover elements supporting your claim.

- (18) In your additional observations, you submit that Article 14(3) of the co-operation agreement prohibited Aquatrend from purchasing alternative brands of equipment, since it obliges Aquatrend to "*purchase Equipment exclusively from [Epuro]*." However, as noted above, the "equipment" referred to in Article 14(3) of the agreement only relates to Epuro's line of equipment (as defined in the agreement itself⁷); the provision seems to contain no prohibition on Aquatrend preventing it from purchasing and selling alternative brands of equipment. You also point to Article 14(1) of the agreement which stipulates that "*[t]hroughout the duration of this Agreement, [Aquatrend] shall not engage in any activities referred to below [...]*" arguing that this prohibition also refers to the provision of Article 14(3) of the agreement. The provision of Article 14(1) of the agreement, however, appears to relate only to the activities listed therein, and not to Article 14(3).⁸
- (19) You secondly claim that Epuro committed an abuse within the meaning of Article 102 TFEU by unilaterally terminating its co-operation agreement with Aquatrend. However, it is not unusual for distribution or co-operation agreements to provide for one party to be able to unilaterally terminate the agreement, and this will not normally be considered abusive within the meaning of Article 102 TFEU (although, depending on the manner of termination, it might fall foul of national laws governing commercial contracts).
- (20) You thirdly claim that Epuro had engaged in collection of contact details of Aquatrend's business partners with the alleged aim of taking over distribution itself. However,

⁶ Article 2A1(j) of the co-operation agreement.

⁷ The 'Definitions' section of the co-operation agreement defines "Equipment" as "the line of water softeners, iron removers, and carbon filters supplied by [Epuro]."

⁸ Article 14 'Additional provisions' of the co-operation agreement stipulates:
 "14.1. Throughout the duration of this Agreement, the Dealer shall not engage in any activities referred to below unless the Producer gives written consent thereto, otherwise they shall be null and void:
 a) the Dealer shall not attempt to obtain any of the Producer's suppliers or clients;
 b) the Dealer shall not employ or engage in any manner whatsoever persons employed by or working for the Producer, shall not encourage them to terminate their working relationship with the Producer or to stop carrying out activities on behalf of the Producer.
 14.2. Furthermore, the Dealer shall not engage in any actual or legal activities which could have an adverse influence on the activities and/or reputation of the Producer.
 14.3. The Dealer shall purchase Equipment exclusively from the Producer.
 14.4. [...].
 14.5. [...]."

although it cannot be fully excluded that such a practice could potentially fall foul of national rules on "fair competition" or of the terms of the contract in question, it would generally not be considered to be abusive in itself within the meaning of Article 102 TFEU.

- (21) You fourthly claim that, following the termination of your business relationship, Epuro committed an abuse by refusing to sell products to Aquatrend, including spare parts necessary to repair products under the manufacturer's warranty. In support of your claim you refer to Article 2A.1(m) of the co-operation agreement, which sets out Aquatrend's obligation to provide warranty and post-warranty service. Regarding the primary products, I would also observe that it is usual commercial practice for a supplier operating a selective or exclusive distribution system not to provide products to firms such as Aquatrend that are no longer authorised distributors. More generally, any undertaking, whether dominant or not, should in principle have the right to choose its trading partners and to dispose freely of its property. Only in exceptional cases can a refusal to supply be considered as an abuse (*e.g.*, if the input is indispensable and the refusal would likely lead to the elimination of effective competition and to consumer harm).⁹
- (22) Regarding the spare parts and warranty claims, I would observe that the co-operation agreement itself obliged Aquatrend to honour these only while the agreement was in force (the obligation is included in "Article 2A. Dealer's Obligations" which lists the dealer's obligations "[t]hroughout the duration of this Agreement"¹⁰). Given that the agreement has been terminated, Aquatrend appears to no longer be under a contractual obligation to continue to carry out work under Epuro's warranty scheme.
- (23) As regards the question as to whether the new distributors would honour the warranty claims of customers to whom you had sold products, you provide no evidence that they do not do so.
- (24) You also allege that Epuro has breached Article 101 TFEU, but do not explain which part of its behaviour you consider to be implicated and how. It is therefore difficult to comment on this allegation in detail, but I would nonetheless note that there is no presumption that exclusive distribution agreements are caught by the prohibition set out in Article 101(1) TFEU. Even if one were to assume that the agreement between Epuro and Aquatrend was so caught, you have not demonstrated that any hardcore restrictions were in place such as would prevent this agreement from benefiting from exemption,

⁹ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24.2.2009, p. 7–20), paragraph 74 *et seq.*

¹⁰ Article 2A 'Dealer's obligations' of the co-operation agreement stipulates:
"Throughout the duration of this Agreement, the Dealer shall:
[(a)-(l)];
(m) maintain a high-quality guarantee and post-guarantee service for the equipment sold;
[(n)-(o)]."

either on an individual basis or (assuming that the relevant market share threshold was not exceeded) pursuant to Block Exemption Regulation 330/2010.¹¹

- (25) In sum therefore, the Commission considers it unlikely that further investigation of your claims would reveal a breach of the EU competition rules.

3.2. The scope of the investigation required

- (26) If the Commission were to carry out a further investigation into your claims, it would, among other things, be obliged to delineate the relevant geographic market and investigate the various brands of water treatment equipment and their respective characteristics in order to define the relevant product market(s). It would further be required to collect information in order to assess the economic and structural conditions on the relevant market, gather data to determine Epuro's market share and investigate its business practices. As regards Article 101 TFEU, the Commission would be required to undertake a full assessment of the functioning and the likely effects of the agreement between Aquatrend and Epuro, in its particular economic context. In order to acquire the necessary information and data, the Commission would need to send a number of requests for information to multiple companies. The resources and time necessary to prepare this step and to review and assess the information received would be considerable, and would moreover, place a significant administrative burden on the companies involved.
- (27) In conclusion, such an in-depth investigation would require considerable resources and would appear disproportionate in view of the apparently very limited likelihood of establishing the existence of an infringement.

3.3. National courts and authorities appear to be well-placed to handle the matters raised

- (28) Lastly, the Commission observes that national courts would appear to be well placed to handle the dispute between Epuro and Aquatrend, which appears mainly to be of a commercial nature, and to be focussed on the Slovak territory.
- (29) In your additional observations, you argue that Epuro's business practices and their effects have a Community dimension, and that it should therefore be for the Commission to investigate them. However, the arguments submitted in your additional observations relate essentially to the interpretation of the terms of the co-operation agreement between Epuro and Aquatrend in the light of national law, which is a matter that the national courts appear well-placed to examine. The national courts would also be able to deal with any anti-trust issues arising from your dispute.

4. CONCLUSION

- (30) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further

¹¹ Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1-7).

investigation into the alleged infringements and consequently rejects the complaint pursuant to Article 7(2) of Regulation No. 773/2004.

5. PROCEDURE

5.1. Possibility to challenge this Decision

- (31) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. Confidentiality

- (32) The Commission reserves the right to send a copy of this Decision to Epuro. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.¹² If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform [...] or [...]. Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to Epuro.
- (33) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission

*Margrethe VESTAGER
Member of the Commission*

¹² See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.