

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/32.408 — TEKO)

(Only the German text is authentic)

(90/22/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 4, 6 and 8 thereof,

Having regard to the application submitted on 11 August 1987 by the Technisches Kontor für die Maschinen-B-U-Versicherung GmbH for negative clearance or for exemption under Article 85 (3) of the EEC Treaty of the agreement and the cooperation put into effect relating to machinery loss of profits insurance and of the addendum on the inclusion of space insurance,

Having published a summary of the agreement and of the cooperation put into effect between the relevant undertakings based thereon (⁽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

- (1) On 11 August 1987, the Technisches Kontor für die Maschinen-B-U-Versicherung (TEKO) notified

an agreement on cooperation in machinery loss of profits insurance concluded on 6 March 1981 by 17 of the companies concerned (three companies joined later) initially for one year, but automatically renewed from year to year unless express notice of termination is given (six months before expiry). As from 1 June 1988, space insurance was included in the agreement by an addendum dated 11 August 88.

- (2) TEKO is a limited company, the registered office of which is in Düsseldorf. Its shareholders are six insurance undertakings. In addition, TEKO cooperates with three other pool members and 11 other so-called 'friendly' companies. TEKO has a small staff. There are no staffing links with the various companies.

1. Cooperation in machinery loss of profits insurance

- (3) TEKO was established in 1954 for the purpose of joint and mutual reinsurance of machinery loss of profits insurance risks and the advising of the companies concerned in the conclusion and handling of such insurance. Machinery loss of profits insurance is insurance against financial loss incurred through the interruption of business due to the failure of technical equipment and machinery as a result of unforeseen occurrences (technical defects). There are 49 undertakings operating in the machinery loss of profits insurance market in the Federal Republic of Germany. In 1988, there were

(⁽¹⁾) OJ No 13, 21. 2. 1962, p. 204/62.

(⁽²⁾) OJ No C 203, 8. 8. 1989, p. 2.

4 462 contracts, 1 049 of which were processed through TEKÖ (including 186 new contracts in 1988). Total premium income amounted to DM 74,192 million in 1988. Of this, DM 14,879 million was accounted for by TEKÖ, giving it a market share of approximately 20 %.

concerned. However, the companies may also decide not to make such a request and may calculate the premium themselves, although in practice they do so only in exceptional cases. In such cases, TEKÖ is free to refuse the bringing in of a policy into the joint reinsurance if the conditions agreed by a company or the premium appear insufficient.

- (4) The TEKÖ companies (pool members and 'friendly' companies) may, if they wish, bring the policies concluded by them into TEKÖ for reinsurance. There is no obligation to bring such policies in; the companies are free to reinsure themselves individually outside TEKÖ. They may also participate in other similar reinsurance pools. However, as a general rule they make use of the joint reinsurance and seek reinsurance outside TEKÖ only in exceptional cases. For the purposes of the joint reinsurance of all the business brought in, two reinsurance treaties were concluded on the open market on behalf of the TEKÖ companies. These two treaties are administered by TEKÖ.
- (5) Under the reinsurance treaties the TEKÖ companies have to assume a retained portion of liability (graduated in accordance with possible maximum loss). This retention is (mutually) reinsured among the pool members in accordance with an agreed formula. The 'friendly' companies are not involved in this. They merely bring policies to TEKÖ for reinsurance, retaining an amount of liability themselves (at least DM 25 000 per risk, up to 10 % of possible maximum loss), while the pool members bring 100 % of their policies into TEKÖ.
- (6) The individual TEKÖ companies receive from the reinsurers a reinsurance commission amounting to a given percentage of that portion of the direct insurance premium brought in by them which accrues to the reinsurers. With regard to the part of the premium corresponding to the amount of liability retained by the TEKÖ companies, the ceding companies also receive a reinsurance commission amounting to a given percentage of the premium.
- (7) There are no joint premiums and conditions. The individual companies are free to calculate the direct insurance premium and to decide on the insurance conditions for the policies concluded by them. They may, if they so wish, ask TEKÖ to carry out a risk assessment and premium calculation (gross premium) in each individual case. In such cases, TEKÖ's staff examines the available documents on behalf of the companies and, if necessary, carries out a visit to the plant or works with the company concerned. However, the companies may also decide not to make such a request and may calculate the premium themselves, although in practice they do so only in exceptional cases. In such cases, TEKÖ is free to refuse the bringing in of a policy into the joint reinsurance if the conditions agreed by a company or the premium appear insufficient.
- (8) Risk assessment and premium calculation carried out by TEKÖ at the request of the companies in individual cases are predominantly based on a comparison with previous contracts which have been brought into TEKÖ and which concern similar risks. Due to the small number of contracts which are spread among various branches of industry and a great number of different machines there is insufficient statistical material for the calculation of rates of premium and different premium components. The only references are therefore the (gross) premiums and conditions agreed in similar contracts and the development of claims in these contracts.
- (9) If a company requests a premium calculation by TEKÖ, it must apply the premium determined by TEKÖ (this is a minimum premium, which may be exceeded) and the conditions stipulated by it, if it wishes to make use of the joint reinsurance. However, it is free to pass on to the policy holder in full or in part the reinsurance commission. It is also possible for the companies to pay part of the premium back to policy holders if loss experience is favourable. They are also free to reject the offer drawn up by TEKÖ and to go elsewhere for their reinsurance.
- (10) The individual companies carry out claims processing themselves, but must report the claims to TEKÖ, which may, if so requested by the companies, assist in claims processing in individual cases. TEKÖ's main activity in this respect consists in taking measures to minimize claims such as having damaged machinery repaired or obtaining replacement machinery.

2. Cooperation in space insurance

- (11) As from 1 June 1988, space insurance (satellite insurance) was included in the cooperation arrangements by an addendum dated 11 August 1988, and the original agreement was extended, although only four of the TEKÖ companies (Albingia Versicherungs-Aktiengesellschaft, Victoria-Feuer-Versicherungs-Aktiengesellschaft, The Northern

Assurance Company Limited and Haftpflichtverband der Deutschen Industrie VAG) are involved in this aspect. This additional agreement runs until 31 December 1989 and is extended automatically from year to year unless six months' notice is given before expiry.

- (12) Previously the companies concerned had not so far operated on the market as providers of space insurance and did not have any market shares. They will insure space risks (mainly from the Federal Republic of Germany and from France, but also from elsewhere in Europe) on the basis of co-insurance, with each having a share of 25 %. The total capacity amounts to DM 11,5 million. Consequently, insurance can be envisaged only with or in addition to other insurance companies. Four contracts have subsequently been concluded since the start of the cooperation arrangement.
- (13) The insurance contracts are concluded either by the companies themselves or by TEKO in the name and for the account of the companies. If so requested by the companies, TEKO carries out premium calculation and risk assessment, in agreement with the reinsurers as far as premiums are concerned.
- (14) TEKO settles the reinsurance for the companies and concludes facultative reinsurance contracts on the market in their name. Such contracts are administered by TEKO. Any claims must be notified immediately to the reinsurers and may be settled only in agreement with them.
- (15) No comments were received from third parties following publication of a notice pursuant to Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1) of the Treaty

1. *Agreement and concerted practice between undertakings*

- (16) The notified agreement on cooperation in machinery loss of profits insurance, supplemented by the addendum on the inclusion of space insurance, is an agreement between undertakings within the meaning of Article 85 (1) of the Treaty. In so far as the companies actually cooperate on the basis of the agreement, and in particular as a rule basis their direct insurance contracts on the premiums and conditions calculated by TEKO, and bring the contracts into the joint reinsurance arrangements, what is involved is also a concerted practice.

2. *Restriction of competition*

- (17) The agreement and the cooperation put into effect between the companies based on the agreement

have as their object and effect the restriction of competition in machinery loss of profits insurance and in space insurance, with regard to both direct insurance and reinsurance.

(a) *Machinery loss of profits insurance*

(aa) *Restriction of competition with regard to direct insurance*

- (18) As far as direct insurance is concerned, the restriction of competition arises from the organization of TEKO as a joint information and advisory body, and in particular from the risk assessment and premium calculation carried out by TEKO, which in practice results in coordination of the market behaviour of the companies concerned. Since it is only in exceptional cases that the companies calculate their own premiums and conditions and since contract negotiations are usually based on an offer established by TEKO, they apply identical or comparable premiums and terms in identical or comparable situations, with the result that they do not in this respect enter into competition with one another.
- (19) The finding of a restriction of competition is not invalidated by the fact that TEKO is also involved in joint reinsurance and that, in view of the link between direct insurance and reinsurance, it is usual for reinsurers to have some influence over the market behaviour of direct insurers. TEKO's coordination activity goes well beyond the influence of reinsurers that is otherwise customary on the market, since reinsurers generally confine themselves to checking the premiums and the terms and conditions worked out by direct insurers and neither calculate the direct insurers' offers for them at the outset nor serve as a permanent joint information and advisory body for a specific group of undertakings.

- (20) Furthermore it is not possible to argue, in rebuttal of the finding of a restriction of competition, that without recourse to TEKO, particularly for the purpose of risk assessment and premium calculation, the companies concerned would not be able to offer machinery loss of profits insurance. It is true that the assistance provided by TEKO saves the companies concerned labour and costs and that this makes it easier for the smaller companies in particular to insure the relevant risks. However, in view of the fact that quite a number of other companies, including smaller companies, also operate on the market, it must be assumed that the companies could carry out at least a substantial proportion of the business alone, or that other informal means of cooperation and of exchanging experience would be possible on a case-by-case basis.

(bb) Restriction of competition with regard to reinsurance

- (21) As far as reinsurance is concerned, the restriction of competition results from the fact that joint reinsurance contracts are concluded on the market for all the contracts brought into TEKÖ. Since the companies concerned bring virtually all the direct insurance contracts concluded by them into the joint reinsurance arrangements and in only very limited exceptional cases take out reinsurance outside TEKÖ, they do not as a rule enter into competition with one another as regards demand for reinsurance protection.

(b) Space insurance

(aa) Restriction of competition with regard to direct insurance

- (22) The agreement on cooperation in space insurance, under which the companies concerned insure space risks on a co-insurance basis and thus apply uniform premiums and terms and conditions, also means that the companies do not enter into competition with one another. Even if, in view of the particular nature of the risks and the level of the sums insured, space risks can in general be underwritten only on a co-insurance basis, it would be possible for the individual companies to participate on a case-by-case basis in co-insurance contracts with various third party undertakings on the basis of differing premiums and terms and conditions and thus to enter into competition with one another. They do not do so and rely instead on cooperation in the form of a permanent and institutionalized co-insurance pool.

(bb) Restriction of competition with regard to reinsurance

- (23) As far as reinsurance is concerned, the restriction of competition arises once again from the conclusion of joint reinsurance contracts, as a result of which the companies concerned refrain from seeking individually and independently of one another reinsurance for the part of the risks underwritten that is apportionable to them and accordingly from entering into competition with one another.

3. Appreciability of the restriction of competition

- (24) The appreciability of the restriction of competition ascertained is evident, as far as machinery loss of profits insurance is concerned, from the combined market share of 20 % held by the undertakings concerned. As far as space insurance is concerned, despite the small market share involved, it cannot be ruled out that the restriction of competition is appreciable in view of the aggregate turnover of the

four companies concerned, which amounts to approximately DM 4 000 million and thus far exceeds the threshold value of ECU 200 million specified in the notice on agreements of minor importance which do not fall under Article 85 (1) of the Treaty⁽¹⁾.

4. Effect on trade between Member States

- (25) The agreement and the practice based thereon are liable to affect trade between Member States, since both reinsurance and space insurance are provided on a cross-frontier basis at European or international level and since a large proportion of the contracts is generally placed on the London market. Furthermore, a branch of a company having its head office in another Member State of the Community is involved in the agreement.

B. Article 85 (3) of the Treaty

- (26) The agreement notified and the concerted practice based thereon fulfil the conditions for exemption under Article 85 (3) of the Treaty.

1. Improvement in the distribution of goods

The Cooperation between the companies concerned within the framework of TEKÖ results in substantial rationalization and cost-saving in machinery loss of profits insurance. In view of the small number of contracts, the individual companies do not have staff with the specialized experience required for the conclusion and processing of direct insurance contracts in this sphere nor are they able individually to negotiate favourable terms and conditions for reinsurance. Without the cooperation, insurance of such risks would therefore entail much higher expenditure and costs for them. By cooperating through TEKÖ, by contrast, they are able to make use of the specialized knowledge and experience of TEKÖ's staff and at the same time, by jointly concluding reinsurance contracts, obtain more favourable terms and conditions. For the smaller companies in particular, which themselves conclude only a few contracts per year, the insurance of the relevant risks is thus made considerably easier. In addition, the partial assumption of the reinsurance allows the individual pool members to participate to a certain extent in the contracts of all the other companies and hence to broaden and spread evenly their portfolio.

- (27) The recent cooperation in space insurance similarly results in rationalization, since, through the cooperation within TEKÖ, the TEKÖ staff can now also

⁽¹⁾ OJ No C 231, 12. 9. 1986, p. 2.

develop know-how in space insurance, know-how which will be available to the companies concerned. At the same time, more favourable terms and conditions for reinsurance can be negotiated jointly through TEKÖ.

2. Fair share of the resulting benefit for consumers

- (28) The rationalization achieved through the cooperation, in particular the know-how acquired by TEKÖ's staff, also benefits consumers, i.e. parties contracting insurance. It ensures that appropriate insurance arrangements are found for individual risks and in particular, apart from premium calculation and risk assessment, that proper thought is given to loss prevention, which is often difficult because of the differing nature of individual risks. The involvement of TEKÖ's staff in claims adjustment also means that appropriate measures are taken to minimize losses. Furthermore, in view of the keen competition on the markets in question, it may be assumed that the resulting cost advantages are passed on at least in part to policy holders in the form of lower premiums, or by passing on part of the reinsurance commission or through premium refunds where loss experience is favourable.

3. Indispensability of the restriction of competition

- (29) The agreement notified and the practice based thereon do not contain any restrictions that are not indispensable to the attainment of the abovementioned objectives. As far as machinery loss of profits insurance is concerned, it should be emphasized that the companies concerned are required neither to request risk assessment and premium calculation by TEKÖ nor to bring the direct insurance contracts concluded by them into the reinsurance, and that they are free to calculate premiums and terms themselves and/or to reinsure themselves outside TEKÖ, as indeed they do in exceptional cases. The rule that TEKÖ may refuse the bringing in of a policy into the joint reinsurance if the premium and terms agreed by a company appear to be inadequate, and in particular if they differ from an offer previously calculated by TEKÖ, is indispensable to the proper implementation of the joint (mutual) reinsurance. Since the companies concerned share risks and premiums to some extent, it must be ensured that premiums and terms are appropriate and that individual companies do not engage in loss-making business at the expense of the others.
- (30) Lastly in view of the particularities of the relevant market and the way in which TEKÖ operates, the calculation of premiums is also necessary. While

with respect to general premium recommendations issued by federations or associations of undertakings only net premium rates are necessary and justified, the calculation carried out by TEKÖ in individual cases for the companies concerned has to be judged in a different way. TEKÖ does not issue recommendations on tariffs but indicates in every individual case the premium at which a risk can be brought into the common reinsurance. Because of the small number of contracts and the diversity of risks there is insufficient statistical material for the calculation of net premium rates and other premium components, and since the calculation is therefore based on previous contracts and the (gross) premiums agreed under them, a calculation of net premiums would not be possible. It has also to be taken into consideration that, even where they apply the premium calculated by TEKÖ, the companies are free to pass the reinsurance commission on in whole or in part to the policy holder or to refund part of the premium where loss experience is favourable, which from the policy holder's point of view is equivalent in effect to a reduction in the premium calculated by TEKÖ.

4. No possibility of eliminating competition

- (31) The companies concerned do not, in view of their market share, have the possibility of eliminating competition in respect of a substantial part of the insurance in question, since there is sufficient competition from other undertakings. Furthermore, competition is also possible between the companies concerned to a certain extent, particularly in so far as they are able to pass on part of the reinsurance commission to policy holders or refund them part of the premium.

C. Articles 6 and 8 of Regulation No 17

- (32) In accordance with Article 6 (1) of Regulation No 17, this Decision is applicable from the day of notification, i.e. 11 August 1987.

Given the structures of the relevant markets and the effects of the cooperation by the companies concerned within the framework of TEKÖ, exemption is granted pursuant to Article 8 (1) of Regulation No 17 for 10 years.

- (33) In order that the Commission may during the exemption period check whether the conditions for exemption continue to be fulfilled, TEKÖ must be required to inform the Commission of all amendments and additions to the agreement notified and of the involvement of any other companies,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable for the period from 11 August 1987 up to and including 10 August 1997 to the agreement notified on 11 August 1987 and the concerted practice concerning cooperation in machinery loss of profits insurance and to the addendum on the inclusion of space insurance.

Article 2

The Technisches Kontor für die Maschinen-B-U-Versicherung shall inform the Commission of any amendments and additions to the agreement notified and of the involvement of any other companies.

Article 3

This Decision is addressed to the following undertakings:

Technisches Kontor für die Maschinen-B-U-Versicherung,
Hüttenstraße 1,
D-4000 Düsseldorf 1;

Agrippina Versicherung Aktiengesellschaft,
Riehler Straße 90,
D-5000 Köln 1;

Albingia Versicherungs-Aktiengesellschaft,
Ballindamm 39, Europahaus,
D-2000 Hamburg 1;

Bayerische Versicherungskammer,
Bayer. Versicherungsverband,
Tattenbachstraße 2,
D-8000 München 22;

Colonia Versicherung Aktiengesellschaft,
Colonia-Allee 10-20,
D-5000 Köln 80;

Erste Allgemeine Versicherungs-AG,
Direktion für Deutschland,
Sonnenstraße 31,
D-8000 München 2;

Haftpflichtverband der Deutschen Industrie VAG,
Riethorst 2,
D-3000 Hannover 51;

Hessen-Nassauische Versicherungsanstalt,
Bahnhofstraße 69,
D-6200 Wiesbaden;

Iduna Allgemeine Versicherung Aktiengesellschaft,
Neue Rabenstraße 15-19,
D-2000 Hamburg 36;

Mannheimer Versicherung Aktiengesellschaft,
Augusta-Anlage 65,
D-6800 Mannheim 1;

Nordstern Allgemeine Versicherungs-Aktiengesellschaft,
Gereonstraße 43-65,
D-5000 Köln 1;

The Northern Assurance Company Ltd,
Direktion für Deutschland,
Herrlichkeit 6,
D-2800 Bremen 1;

Nürnberger Allgemeine Versicherungs-AG,
Rathenauplatz 16-18,
D-8500 Nürnberg 21;

Provinzial Feuerversicherungs-Anstalt der Rheinprovinz,
Friedrichstraße 62-80,
D-4000 Düsseldorf 1;

R+V Allgemeine Versicherung AG im Raiffeisen-Volksbankenverband,
Taunusstraße 1,
D-6200 Wiesbaden 1;

Sparkassen-Versicherung Allgemeine Versicherung AG,
Löwentorstraße 65,
D-7000 Stuttgart 50;

Thuringia Versicherungs-Aktiengesellschaft,
Adenauerring 7,
D-8000 München 83;

UAP International Allgemeine Versicherung-AG,
Neumarkt 15,
D-6600 Saarbrücken 1;

Victoria Feuer-Versicherungs-Aktiengesellschaft,
Victoria Platz 1,
D-4000 Düsseldorf 30;

Westfälische Provinzial-Feuersozietät,
Broederichweg 58,
D-4400 Münster;

Württembergische Gemeinde-Versicherung A.G.,
Tübinger Straße 43,
D-7000 Stuttgart 1;

Done at Brussels, 20 December 1989.

For the Commission

Leon BRITTAN

Vice-President