

II

(Act whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 27 November 1985

relating to a proceeding under Article 85 of the EEC Treaty
(IV/30.846 – Ivoclar)

(Only the German text is authentic)

(85/559/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 Greece, and in particular Article 4 thereof,

Having regard to the notification filed on 1 February 1983 by Ivoclar AG, Schaan, Liechtenstein, seeking exemption of its standard exclusive distribution agreement,

Having regard to the Commission Decision of 30 October 1984 to initiate proceedings in this case,

Having regard to the summary of the notification published ⁽²⁾ in accordance with Article 19 (3) of Regulation No 17,

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

Whereas:

I. FACTS

1. On 1 February 1983, Ivoclar AG, of Schaan (Liechtenstein), notified to the Commission a standard exclusive distribution agreement which it intends to apply in all EEC countries. Ivoclar initially

asked for a declaration that the agreement was exempted from Article 85 (1) of the EEC Treaty by Commission Regulation No 67/67/EEC ⁽³⁾. Later it made it clear that if necessary it also applied for exemption by way of individual decision under Article 85 (3) of the Treaty.

A. The undertaking

2. Ivoclar AG is a medium-sized firm which, with its subsidiaries, manufactures and sells dental supplies (in particular, artificial teeth made from resin or porcelain, materials for making veneers, prostheses, crowns, bridges and for taking impressions, and dental surgery and laboratory equipment). It supplies through national subsidiaries 25 distributors in the Federal Republic of Germany, 26 in France, a like number in Italy, one each in Belgium, Denmark, the United Kingdom, Ireland and the Netherlands, and two in Luxembourg. It intends to introduce the notified standard exclusive distribution agreement progressively in all EEC countries. It presently applies the notified agreement in the Federal Republic of Germany and in France.
3. Ivoclar claims that its manufacturing processes are based on especially close collaboration with centres of dental research and that its products are of very high quality. This is especially true of its main product line, artificial teeth. Unlike most other suppliers, Ivoclar does not produce its teeth to average patient specifications, but tailors the masticatory surfaces of the teeth and their position in the prosthesis to the individual patient. This involves the use of special

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 297, 8. 11. 1984, p. 14.

⁽³⁾ OJ No 57, 25. 3. 1967, p. 849/67.

precision instruments and requires a high standard of workmanship from the dental technician and dentist making and fitting the dentures. Through research Ivoclar has also developed special methods for the polymerization of plastics for dentures and for making bridges which yield cost savings and greater durability. To ensure that the products and methods it has developed are used correctly so as to maximize their advantages, Ivoclar has to provide intensive training and counselling both of distributors and of users (dentists and dental technicians). For this purpose it employs specially trained staff to give training courses at distribution depots, dentists, laboratories, colleges and universities and to carry out regular inspections of depots and generally look after them.

4. Ivoclar faces competition from a large number of other suppliers. Dentsply International Inc. of the USA (with subsidiaries in most Member States) is the market leader in the Community market for artificial teeth, with a market share of up to . . . ⁽¹⁾ (Federal Republic of Germany). Other significant competitors are Vita Zahnfabrik, Lindauer Zahnfabrik (a subsidiary of Bayer AG), Kulzer GmbH (a subsidiary of Degussa AG), Major SA and Candulor AG. Ivoclar is one of the leading common market suppliers of plastic artificial teeth. In 1984 its market share was around . . . in the Federal Republic of Germany, France, Italy, Benelux and Denmark. In other Member States, Ivoclar's share of the artificial teeth market varies between . . . (United Kingdom) and . . . (Greece). For other products concerned by the notified agreement Ivoclar's market share is generally below . . . in all Member States.

B. The notified agreement

5. The notified agreement sets out the conditions on which Ivoclar and its subsidiaries supply their distributors. It forms the basis of Ivoclar's distribution system in the EEC, consisting of a limited number of selected exclusive distributors designated as 'SR depots'. The main provisions of the agreement are as follows:
6. Each SR depot is allotted a main sales territory in which it must try to ensure the best possible distribution of Ivoclar products. The size of the territories is such that the potential volume of demand can be expected to generate a minimum turnover in Ivoclar products sufficient to sustain a properly staffed and equipped depot.

7. Within the allotted territory only the SR depot may set up further distribution points. Ivoclar may only supply a further SR depot or its distribution points in the territory of the sales of the original SR depot and its distribution points in any two calendar years should show a marked decline or fall short of the level to be expected in the prevailing market conditions because of inadequate exploitation of the territory.
8. An SR depot may do business outside its main territory but may not establish any branch in the territory of another SR depot.
9. The SR depots are selected for admission to the network on the following criteria (which are set out in detail in an Ivoclar circular):
 - (a) The distributor must have adequately qualified and trained staff capable of instructing, advising and generally looking after the purchasers of Ivoclar products (dentists, dental technicians, dental clinics, etc.).
 - (b) The distributor must maintain complete stocks of all Ivoclar products including a full range of teeth in all available colours and shapes and a stock of spare parts for Ivoclar appliances and equipment. The stocks must be large enough to enable all orders to be filled promptly.
 - (c) The distributor must be able to display a representative cross-section of Ivoclar products and to provide rooms and facilities for any demonstrations Ivoclar wishes to hold for dentists and dental technicians.
10. The SR depot accepts the following further obligations:
 - (a) To sell Ivoclar products only to dentists, dental technicians, laboratories, universities and hospitals. It may not supply dealers nor other dental depots. However, it is allowed to supply other authorized SR depots.
 - (b) To use its best endeavours to secure the widest possible distribution of Ivoclar products. In particular, it agrees to organize lectures and demonstrations for potential purchaser groups and to carry out sales promotion by visiting customers and sending out circulars and advertising material.
11. Ivoclar undertakes to give effective support to the sales efforts of SR depots by demonstrations, lectures, courses, training sessions for sales representatives, promotion through brochures and advertising and by the quality of the products it supplies.

⁽¹⁾ Pursuant to Article 21 (2) of Regulation No 17, business secrets are not published in the *Official Journal of the European Communities*.

12. The distribution agreement has an initial term of three years and seven months, automatically renewable for further five-year periods unless terminated upon one year's notice. In the event of changes in the personal or legal circumstances liable to jeopardize the purpose of the agreement, Ivoclar is entitled to terminate the agreement from the end of any quarter upon six months' notice.
13. Where, in the territory of an SR depot which has served the territory for over 10 years Ivoclar supplies a different or an additional SR depot, the second SR depot must pay the first a compensation payment of 1 % of the first depot's sales of Ivoclar products over the past 10 years. This does not apply where the original SR depot is giving up its distributorship without Ivoclar having given it reasonable ground to do so or Ivoclar itself has terminated it because the original SR depot breached its obligations under the agreement.

C. Comments from third parties

14. No comments were received from third parties in response to publication of a summary of the notified agreement in accordance with Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1)

15. The notified standard exclusive distribution agreement which Ivoclar concludes with distributors in the EC has the **object and effect** of restricting competition within the common market.
 - (a) The authorized SR depots have virtual **exclusive distribution rights** for Ivoclar products in their main sales territories. Other SR depots are not allowed to establish branches there. Ivoclar may only supply other SR depots or their distribution points in the territory if the principal SR depot's sales of Ivoclar products in two consecutive calendar years fall short of the level that could reasonably be achieved by a distributor showing a proper degree of application in selling the products. The supply of a different or additional SR depot in the territory of an SR depot which has served the territory for over 10 years is subject to payment of a compensation payment to the original depot. Thus, Ivoclar's choice of the distributors supplied, the possibility of market entry for new depots and the spatial extent of the business activities of authorized SR depots are restricted.

(b) Authorized SR depots may supply Ivoclar products only to certain classes of customer. They are barred from supplying them to depots not authorized by Ivoclar or to dealers. This restricts the commercial independence of SR depots in relation to the resale of Ivoclar products.

(c) SR depots are not allowed to establish any branch for Ivoclar products outside their territories. This is a territorial restriction on the activities of SR depots.

16. Since the notified standard exclusive distribution agreement will govern the commercial relations between a manufacturing company and its subsidiaries and distributors in all EC countries, it is by its very nature likely to affect trade between Member States. Given Ivoclar's relatively strong position within the common market, the restrictions of competition and their effect on trade between Member States are likely to be appreciable.

B. Regulation **No 67/67/EEC and Regulation (EEC) No 1983/83**

17. Regulation No 67/67/EEC and Commission Regulation (EEC) No 1983/83 ⁽¹⁾ grant a block exemption from Article 85 (1) of the EEC Treaty for exclusive distribution agreements satisfying certain specified conditions. Article 7 of Regulation (EEC) No 1983/83 provides that agreements which were in force before 1 July 1983 and which satisfy the exemption conditions of Regulation 67/67 continue to be covered by that Regulation until 31 December 1986.
18. Ivoclar's exclusive distribution agreement does not satisfy all conditions of the above two Regulations. Its restriction on the classes of customer SR depots may supply (see 15 (b) above) goes beyond the restrictions permitted by Articles 1 and 2 of both Regulations and in recital 8 of the preamble to Regulation (EEC) No 1983/83 the Commission clearly states that obligations which limit the exclusive distributor's choice of customers are not exempted under the Regulation.
19. Article 2 (3) (c) of Regulation (EEC) No 1983/83, concerning sales promotion, allows the prohibition of sales to unsuitable dealers (see paragraph 20 of the Commission notice of 13 April 1984 ⁽²⁾ concerning Regulations (EEC) No 1983/83 and (EEC) No 1984/83). However, this position does not apply in

⁽¹⁾ OJ No L 173, 30. 6. 1983, p. 1.

⁽²⁾ OJ No C 101, 13. 4. 1984, p. 2.

the present case. SR depots are not only forbidden from selling to 'dealers' but also to other specialized dental depots, which have not been chosen by Ivoclar. This is so even where these other dental depots, in principle, fulfil the qualitative criteria for the sale of Ivoclar products, or at least would when their staff had received suitable training. Thus the Ivoclar distribution system combines elements of exclusive distribution with the selection of customers in accordance with qualitative and quantitative criteria. In so far as suitable clients will be unable to purchase or resell the products, the distribution system does not fulfil the condition for a block exemption under Regulations No 67/67/EEC and (EEC) No 1983/83.

C. Article 85 (3)

20. The notified exclusive distribution agreement contributes to a substantial improvement in the distribution of Ivoclar products.

(a) Ivoclar is able to concentrate its sales effort and particularly its training and education programme and advisory services on a manageable number of distribution outlets. The training and continuing education programme and advisory services provided by Ivoclar, at the cost of considerable expenditure on staff and resources, play an important role in its distribution system. Supplying a much larger number of distributors would be detrimental to its objective of ensuring competent distribution of its products and involve needless extra expense.

(b) The restriction of distribution to authorized SR depots meeting certain professional standards helps to ensure that Ivoclar products are used properly and to best effect having regard to their specific qualities and advantages. It also ensures that the users (dentists, dental technicians, etc.) can be supplied promptly in line with their own customers' (the patients') requirements and are adequately informed about the correct use of Ivoclar products. The prohibition of resales to unauthorized distributors has the same object.

(c) The restriction of distribution to the authorized SR depots also creates the conditions for the distributors to exploit the market intensively and to maximize the sales of Ivoclar products. The obligations on SR depots to maintain comprehensive stocks and to carry out sales promotion are a corollary of this restriction.

(d) The restriction of the SR depots' active business to their main sales territories encourages the depots to concentrate their sales effort on their allotted territories and hence to improve the distribution of Ivoclar products.

21. The advantages of Ivoclar's functional and appropriate distribution system outweigh the negative effects on competition of the extensive territorial protection enjoyed by the SR depots, the corresponding restriction on their doing business actively elsewhere and the restriction of the network to authorized SR depots. The network of depots ensures that orders for any Ivoclar product can be fulfilled promptly and efficiently.

22. The exclusive distribution agreement does not contain any restrictions that go beyond what is necessary to achieve these objectives.

(a) The extensive territorial protection given to SR depots (and its corollary, the ban on establishing branches in the main sales territory of another SR depot) is necessary because without it SR depots would hardly be willing to make the substantial commitments of staff and of resources tied up in stocks that are required of them or to engage in intensive and active sales promotion for Ivoclar products (including giving their own presentations). This sales commitment is also rewarded by the compensation payment which new SR depots have to pay the depot previously serving the territory in consideration of the work the original depot has done to penetrate the market. In the special circumstances, the compensation payment appears to be a justifiable protection of the old SR depot. The new SR depot takes over a clientele, that its predecessor has built up over more than 10 years of market development. Moreover, the amount of the compensation payment would appear an adequate recompense for the previous performance of the old SR depot, and represents no serious barrier to entry for the new SR depot.

(b) The restriction of distribution to SR depots and the associated restriction on the classes of customer to whom depots can sell is necessary for an efficient distribution of the products. The specific advantages of the products and processes (individual tailoring of teeth and prostheses to the patient, greater durability and cost savings with Ivoclar crowns and dentures) can only be fully realized if the distributor carries a full range (particularly of artificial teeth in all available colours and sizes), is fully informed about Ivoclar products and processes and is able to give the users of the products and processes (dentists, dental technicians, etc.) expert advice and instruction.

These requirements can only be met by authorized Ivoclar distribution depots, which are regularly serviced by Ivoclar with training and advice. Other distributors, which would be dependent on supplies from SR depots, would not be able to fulfil these requirements, especially the obligation to carry complete stocks, if only because of inadequate sales volume. The restriction of its distribution network to depots which must fulfil certain necessary requirements for the distribution of these products enables Ivoclar to guarantee a successful market penetration of its products, intensive exploitation of the market by the SR depots and the efficient operation of the network.

23. Consumers are allowed a **fair share of** the benefit resulting from the improvement in the distribution of Ivoclar products. This applies equally to the immediate purchaser (dentist, dental technician etc.) and to the final consumer (patient). The distribution system ensures that the full range of Ivoclar products is available to users at short notice for their dental treatment and that the products are used properly so as to maximize their specific advantages for the patient.

24. The exclusive distribution agreement does not afford the possibility of eliminating competition for a substantial part of the products in question. Ivoclar faces stiff competition from other manufacturers, some of which are larger and have considerably more financial backing. These other manufacturers are not hindered in their dealings with distributors within the contract territory. Parallel imports and sales between distributors are not ruled out but only restricted to depots belonging to the distribution network. This is justified by the special characteristics of Ivoclar products. No absolute territorial protection is given. The Ivoclar distributors are further free in their price policy.

D. Article 8 (1) of Regulation No 17

25. Under Article 8 (1) of Regulation No 17, an exemption may be granted for a limited period only. In view of the term of the notified agreement and the scientific and technical development in the industry, a period of exemption of 10 years is appropriate. This period should begin from the date of formal notification of the exclusive distribution agreement, 1 February 1983,

HAS ADOPTED THIS DECISION:

Article 1

1. Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable to the standard exclusive distribution agreement dated 1 December 1982 of Ivoclar AG governing its supply of SR depots in the Community.

2. The exemption shall apply from 1 February 1983 until 31 January 1993.

Article 2

This Decision is addressed to Ivoclar AG, FL-9494 Schaan/Liechtenstein.

Done at Brussels, 27 November 1985.

For the Commission
Peter SUTHERLAND
Member of the Commission