

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 7 December 1982

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.070 — National Panasonic)

(Only the English text is authentic)

(82/853/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⁽¹⁾, and in particular Articles 3 and 15 thereof,

Having regard to the investigations carried out on 27 June 1979 in accordance with the Commission Decision of 22 June 1979 at the premises of National Panasonic (UK) Ltd.

Having regard to the Commission Decision of 26 April 1982 to initiate proceedings,

Having regard to the written reply to the statement of objections received on 6 June 1982 in accordance with Articles 2 and 3 of Regulation No 17,

Having regard to the opinion delivered by the Advisory Committee on Restrictive Practices and Dominant Positions on 22 September 1982 in accordance with Article 10 of Regulation No 17,

Whereas :

I. THE FACTS

A. The nature of the proceeding

- (1) This proceeding is directed at the export prohibition imposed by National Panasonic (UK) Ltd,

on one of its authorized dealers in the United Kingdom.

B. The undertakings

(a) *Matsushita Electric Industrial Company Ltd (MEI) of Japan*

- (2) MEI is a leading Japanese manufacturer of a wide variety of products, including consumer electronic products, with a total turnover in 1980 exceeding \$ 13 500 million. MEI has 39 overseas manufacturing subsidiaries and associated companies.

(b) *Matsushita Electric Trading Company Ltd (MET) of Japan*

- (3) MET is a majority owned subsidiary of MEI which operates the export and import division of the Matsushita Group. MET has 32 marketing subsidiaries and associated companies outside Japan. MET's sales outside Japan for 1980 amounted to \$ 3 610.9 million of which⁽²⁾ was realized from the sale of consumer electronic products in the EEC.

(c) *National Panasonic (UK) Ltd (NPUK)*

- (4) NPUK is the wholly owned marketing company of MET responsible for the import of MET consumer products in the United Kingdom and their distribution to dealers. In the year ending

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ In the published version of the Decision some figures have hereinafter been omitted pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

September 1980 NPUK's turnover was £ 62 808 566, and sales of hi-fi equipment accounted for

- (5) Although no written agreements exist between NPUK and its dealers, it nevertheless operates a network of authorized dealers throughout the United Kingdom, and each dealer has to comply with certain criteria to be allowed into the network. Details of this were supplied in a statement of facts given to the Commission on 11 February 1982 by NPUK. Moreover these conditions were frequently referred to during regular visits to dealers by representatives of NPUK.

(d) *Audiotronic Holdings Ltd (Audiotronics)*

- (6) Audiotronics was, between 1976 and 1978, a large distribution group of hi-fi and similar products in the United Kingdom with whole saling retailing, importing and exporting interests. In the United Kingdom it owned a chain of retail shops, which traded under the name of Laskys. In Belgium and the Netherlands it owned a similar chain of shops trading under the name of Allwave. In France it was also involved in the running of another chain of shops trading under the name of King-Musique. The turnover for the whole group in 1976 was nearly £ 22 million of which more than £ 3 million was produced from exports from the United Kingdom. In 1977 its turnover was £ 36 344 000 of which more than £ 4 million was produced from exports, and in 1978 its total turnover was more than £ 30 million of which over £ 3 million was produced from exports.

C. The products

- (7) MEI manufactures and MET distributes a wide variety of products including consumer electronic equipment, home appliances, communication measuring and business equipment, semiconductors, tubes and lighting equipment, industrial equipment and batteries.
- (8) As part of its range of consumer electronic products, MEI manufactures both video and audio equipment for home entertainment under the trade names 'National', 'Panasonic' and 'Technics'.
- (9) This case is concerned with hi-fi and similar audio equipment which forms the upper range of the audio products supplied by MEI and sold mostly under the 'Technics' brand. 'Hi-fi' implies high fidelity in sound reproduction

which can be measured according to various standards. Although the term is imprecise and is not consistently used by all manufacturers, it is used to describe the best and most expensive products in any manufacturer's range which were, between 1976 and 1978, usually supplied in systems form consisting of separate components such as amplifier, tuner, cassette deck, record player and loudspeakers.

D. Distribution and sales of MET products within the EEC

- (10) MET has two manufacturing companies and 10 marketing companies within the EEC including one associated company. In most Member States import and distribution is handled exclusively by one of these marketing companies but, in the Netherlands, notably, this business is carried out by an independent company. MET has no central organization for marketing in the EEC and it supplies each marketing company and independent distributor directly.
- (11) Details of total revenues for sales of consumer electronic products supplied by MET in 1976, 1978 and 1980 to its main distributors in the EEC are set out below as are the amounts of those totals realized from the sale of hi-fi equipment sold under the 'Technics' trade name. These countries cover the most important market in hi-fi equipment.

(a) *Total revenues from sales of consumer electronics products supplied by MET (million ECU)*

	B	F	D	NL	UK
1976					
1977					
1978					
1979					
1980					

(b) *Revenues from sales of hi-fi equipment (sold under the 'Technics' trade name) (million ECU)*

1976
1977
1978
1979
1980

NB: The turnover in products described as, or which might be regarded as equivalent to, hi-fi equipment sold under other MET trade names are not included in (b) above.

- (12) According to the estimates available total wholesale revenues from the sale of all products which are defined as hi-fi equipment in the EEC amounted to 675 million ECU in 1976 and to 737 million ECU in 1978.

E. Price differentials in the EEC

- (13) Throughout the relevant period prices of the products concerned were lower in the United Kingdom than in France, Germany, the Netherlands and Belgium.
- (14) From March 1976 to the end of that year, prices of all relevant products to large and small dealers were lower in the UK. The price difference varied from a minimum 11 % for certain ranges to 41 % for others.
- (15) In 1977, there were average price differences to large and small dealers making prices lower in the United Kingdom than they were in Germany and the Netherlands by up to 22 %. Although these price differences did not occur between the United Kingdom and France during this period, there was an average price difference of 21 % between the United Kingdom and Belgium from April to September 1977.
- (16) In 1978 although not all prices for relevant products were lower in the United Kingdom than in France, Belgium, Germany and the Netherlands, price differences did exist for certain models making some products 30 to 35 % cheaper in the United Kingdom.

F. Export of MET hi-fi products from the United Kingdom

- (17) Between at least 1976 and 1978, the conditions under which MET hi-fi products were marketed in the five Member States referred to above were conducive to the re-export of these products from the United Kingdom to the other Member States concerned and other countries in Europe. At least one of NPUK's authorized dealers, Audiotronics, was exporting commercial quantities of MET hi-fi products to other countries in Europe including Belgium, Germany and the Netherlands. Audiotronics' total exports

of audio products for all products, including MET hi-fi equipment, amounted to £ 3 million in 1976. In 1977 the total exports of Audiotronics amounted to £ 4.656 million and in 1978 to £ 3.117 million. While in 1976 Audiotronics exported MET hi-fi products to the value of £ 17 024, and in 1977 to the value of £ 406, it exported MET hi-fi products to the value of £ 52 159 in 1978.

- (18) During the course of a visit by officials of the Commission in 1977 to the business premises of Audiotronics, the Commission obtained copies of documents indicating that Audiotronics had been prevented by NPUK from re-exporting MET hi-fi products to other Member States.

G. The Commission investigation

- (19) On 27 June 1979, in accordance with a Decision adopted on 22 June 1979, the Commission carried out an investigation at the business premises of NPUK at which the available business records were examined and copies of a number of documents were obtained.
- (20) These documents indicated that NPUK was operating a marketing policy which imposed on its authorized dealers a number of restrictions including a prohibition on exports to other Member States.
- (21) On 24 August 1979 NPUK applied to the Court of Justice for the annulment of the Decision of 22 June 1979 and for the return or destruction of all documents taken or notes made by the officials of the Commission at the time of the investigation on 29 June 1979 and for an undertaking from the Commission not to make further use of such documents or notes.
- (22) On 24 June 1980 the Court of Justice dismissed the application of NPUK as unfounded.

H. The findings of the Commission's investigations

(a) NPUK and Audiotronics

- (23) The visit to Audiotronics in 1977 disclosed that on 8 September 1976 its managing director had sent an internal memorandum to the export department of the company stating that he had agreed, with immediate effect, not to export trade quantities of Technics and National products to Europe other than to Allwave shops.

- (24) On 20 September 1976, in response to an enquiry from Euro Electric of Brussels, a wholesale importer of electric and electronic goods for resale throughout the EEC, Audiotronics replied that 'owing to manufacturer's agency agreement we are no longer able to export Technics equipment'.
- (25) Audiotronics stopped exporting Technics or other MET products to independent dealers in about September 1976 and made almost no exports throughout 1977.
- (26) NPUK claimed in its reply to the statement of objections that this was due to a shortage of supplies of Technics equipment from Japan but this claim is not supported by the facts.
- (27) Audiotronics' sales figures show that it started exporting in 1978 in much larger quantities than in 1976. Documents obtained at the time of the Commission's inspection also show that NPUK knew that Audiotronics had recommenced its exports of Technics products.
- (28) It would appear that NPUK had contacted at that time the buyer at Audiotronics' group headquarters, not only concerning re-exports but also regarding the supply of an unauthorized dealer, Audio Marketing Ltd, which traded under the name of Sarays and was well known for its discounting practices. In response, the Managing Director of Audiotronics, wrote to the Managing Director of NPUK on 2 May 1978 to apologize for 'incidents' having occurred with dealers, and stating that firm instructions had been issued to ensure that Audiotronics would no longer re-export Technics products.
- (29) The Managing Director of NPUK acknowledged this letter on 3 May 1978 and accepted Audiotronics apologies stating his satisfaction at receiving its assurances in this matter. On the copy of this letter discovered at the premises of NPUK there was a manuscript note which indicated that the letter from Audiotronics was sent at the request of NPUK.
- (30) An internal memorandum was issued by NPUK on 11 May 1978 setting out instructions to find out which dealers were selling goods on the continent at discounted prices and stating that Audiotronics is to be kept 'under surveillance'. Such exporters are referred to under the heading of 'Pirate exporting from UK to Europe'.
- (31) Shortly after this, Audiotronics ceased all parallel exports to other Member States except for small quantities dispatched for Italy and Ireland.
- (32) By the end of 1978 Audiotronics had closed its export department and ceased effectively to export any hi-fi or similar products to other Member States.
- (b) *Export of MET products by other dealers*
- (33) The Commission obtained additional evidence that another dealer, Audio Marketing of London, exported small quantities of Technics material in 1977. As a result this firm received visits from representatives of NPUK who 'warned us of the outcome if we exported any goods to the EEC countries. All four gentlemen made it quite clear that if such information came to light, all supplies for the products would cease from their company'.
- (34) Similarly, the Commission was informed that another dealer, Radford of Bristol, exported Technics equipment to Belgium, Germany and the Netherlands from 1976 to 1979 and were told in 1976/77 by their local Technics representative not to export Technics equipment overseas.
- (35) In their answer to the Statement of objections, NPUK have included statements denying that these approaches were made by the representatives concerned.
- (36) However, the import/export manager of NPUK issued a memorandum on 16 January 1978 requesting that a number of dealers, including Audio Marketing should be 'kept under surveillance for possible exporting to Europe'.
- (37) On 18 January 1978, the import/export manager of NPUK issued a further memorandum which, although referring to exports to Austria, further set out rules to prevent exports by dealers from taking place. This memorandum is headed 'Black market export from UK to Europe'. It contains a list of 'suspect dealers' which include both Radford and Audio Marketing.
- (38) The import/export manager of NPUK's internal memorandum of 11 May 1978 also mentions both Radford and Audio Marketing amongst other dealers as being one of the dealers 'to be kept under surveillance' in this matter.
- (39) At a meeting of NPUK management on 27 June 1978 the minutes record that, for Technics

products, 'the prevention of pirate accounts, discounting and re-export still continuing'.

I. The imposition of a 'code of conduct' by MET

- (40) In September 1981, Matsushita (MET) informed the Commission that it had taken urgent steps to regulate its policies in the EEC in an effort to ensure that such policies would comply with the provisions of the EEC Treaty and would be implemented by all its subsidiaries in the EEC.

Following a complete review of its marketing and distribution policies MET accordingly prepared a 'code of conduct' to be implemented at senior management level. The new rules provide for a Community wide guarantee system and a compliance programme for distribution of MET products in strict conformity with EEC rules on competition.

II. LEGAL ASSESSMENT

A. The applicability of Article 85 (1) of the EEC Treaty

- (41) Article 85 (1) of the EEC Treaty prohibits, as incompatible with the common market, all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.
- (a) *The undertakings*
- (42) National Panasonic (UK) Ltd and Audiotronics Holdings Ltd are both undertakings within the meaning of Article 85 (1) of the Treaty.
- (b) *The agreement*
- (43) Notwithstanding the absence of any formal written agreements signed by the parties, a relationship nevertheless existed between NPUK and its dealers in the United Kingdom under which the terms and conditions of supply were clearly understood. NPUK does not contest the existence of such agreement, and has furnished evidence of this in the form of a description of the criteria upon which dealers were appointed.
- (44) The arrangement, therefore, under which NPUK supplied each of its dealers in the United Kingdom, and in particular Audiotronics, constituted in each case, notwithstanding its lack of formality, an agreement within the meaning of Article 85 (1) of the Treaty.
- (45) The existence of an export prohibition as part of that agreement is made clear by the evidence found by the Commission. Audiotronics' internal memorandum of 8 September 1976 states that an agreement had been reached not to export trade quantities of Technics and National products to Europe other than to Allwave shops. Likewise, agreement between the parties is shown by the wording of Audiotronics' telex to Euro Electric on 20 September 1976.
- (46) Moreover, the exchange of correspondence between NPUK and Audiotronics in 1978 demonstrates that the two companies had reached an agreement on the export situation.
- (47) This evidence demonstrates that NPUK was seeking to implement an agreement with Audiotronics notwithstanding the fact that the arrangement relating to export prohibitions did not form part of a written agreement.
- (c) *The restrictions on competition*
- (48) An export prohibition, even if it is imposed after the event on a dealer with the manufacturer or the distributor previously thought unlikely to export and in order to prevent further exports from being carried out, nevertheless has as its object and effect a restriction of competition within the common market. Its object is to prevent dealers and their subsequent purchasers in other Member States from reselling the products in question and thus from competing with other established dealers. In that such a prohibition also limits the area within which such products may be offered for resale, it has the effect also of tending to isolate that part of the market and thereby to create divisions in the common market. Such artificial partitioning of the common market hinders the establishment of a single market among Member States which is a fundamental objective of the EEC Treaty.
- (49) The Commission is satisfied that NPUK as part of its overall policy towards dealers did impose upon Audiotronics in 1976 and 1978 a prohibition on the export of MET hi-fi products which NPUK had supplied to Audiotronics for resale. The memorandum issued by Audiotronics in 1976 clearly demonstrates that it had agreed that Audiotronics should stop re-exporting in 1976, and this is further confirmed by Audiotronics' telex to Euro Electric.
- (50) The effectiveness of the export ban at that time is further demonstrated by the fact that Audiotronics had to turn down orders from dealers abroad during 1976, and in fact almost entirely ceased exporting Technics equipment throughout 1977. No evidence is shown that such exports were to any extent prevented

because of a shortage of supplies from Japan and indeed when Audiotronics did recommence exports in 1978, NPUK intervened to prevent this from happening again.

(51) This is shown by the conduct of NPUK in 1978 as recorded by the internal documents which were discovered and by the exchange of letters between Audiotronics and NPUK in June 1978.

(52) Furthermore, the fact that NPUK did intend to prevent Audiotronics from exporting Technics products to other Member States is supported by the evidence that NPUK had a number of dealers under surveillance and was clearly prepared to go to great lengths to prevent any dealer from exporting MET hi-fi to other Member States. Such an embargo on exports is clearly an appreciable restriction of competition. NPUK's internal documents indeed use such terms as 'pirate exporting' and 'black market export from UK to Europe' in respect of the exports of such dealer.

(53) This prohibition on exports was motivated by trade price differences during the relevant period which made it attractive for parallel importers to seek supplies in the United Kingdom at low prices.

(54) Therefore, the export ban enabled NPUK to protect its authorized dealers from outside competition, but also ensured the dealers a secure margin on sales.

(d) *The effect on trade between Member States*

(55) An export prohibition, by its very nature, is liable to affect trade between Member States. By imposing such a prohibition NPUK prevented trade from developing between the United Kingdom and other Member States in a manner which would otherwise undoubtedly have taken place having regard to the opportunities which existed for such business. Trade prices were lower in the United Kingdom than in other EEC Member States during the relevant period either as a whole in 1976 or for certain items and under certain conditions in 1977 and 1978. Moreover, Audiotronics felt that there was a considerable market for exports since, despite NPUK's behaviour in 1976, it resumed exporting in 1978. Dealers' interest in exporting is further demonstrated by the fact that other

United Kingdom dealers were exporting MET hi-fi equipment at that time

(56) The restriction therefore had an appreciable effect not only on actual trade but also on the trade which might have taken place if the prohibition had not been imposed.

B. Inapplicability of Article 85 (3)

(57) Article 85 (3) of the Treaty provides that the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement which contributes to improving the production or distribution of goods, or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and which does not :

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives ;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(58) For the benefit of exemption under Article 85 (3) to apply, however, such an agreement must first have been notified to the Commission in accordance with the provisions of either Articles 4 (1) or 5 (1) of Regulation No 17, except where the requirement to make such notification is removed by the terms of Articles 4 (2) or 5 (2) of that Regulation, which do not cover prohibition on export. The agreement in question, however, was not notified to the Commission.

(59) Even if the agreement had been notified to the Commission, exemption would still be unavailable as the requirements of Article 85 (3) are not satisfied. An express prohibition on export cannot afford any of the advantages which would objectively justify such a restriction on competition

C. Article 15 (2) of Regulation No 17

(60) Under Article 15 (2) of Regulation No 17, the Commission may impose fines of from one thousand to one million units of account, or a sum in excess thereof, but not exceeding 10 % of the turnover in the preceeding business year of each of the undertakings participating in the

- infringement where, either intentionally or negligently, they infringe Article 85 (1) of the Treaty. In fixing the fine, regard shall be had both to the gravity and to the duration of the infringement.
- (61) On the facts of the case, the Commission is of the opinion that the imposition of fines is justified in respect of the prohibition on exports imposed by NPUK as a condition for the supply of MET products to dealers.
- (62) The Commission considers that NPUK deliberately infringed Article 85 (1) by imposing an export prohibition on Audiotronics in 1976 and again in 1978. It was aware of the difficulty of protecting its dealers while parallel exports were taking place and wanted to curtail such adverse effects.
- (63) NPUK should have been aware that such a prohibition is a serious infringement of the Treaty.
- (64) With regard to the duration of the infringement, as it relates to Audiotronics, the Commission is satisfied that the prohibition extended from at least September 1976 to the end of 1978 when Audiotronics ceased exporting hi-fi products.
- (65) With regard to the gravity of the infringement the Commission must, in assessing the amount of the fine to be imposed, take account of the deliberate nature of NPUK's conduct towards Audiotronics and the action it was prepared to take to trace dealers which transgressed its policy and the sanctions it was prepared to use against such dealers to enforce such policy. In that the prohibition on export was imposed in the first instance to assist other distributors of MET products, NPUK must have been aware that one of the results of its policy would be the fragmentation of the common market as it related to at least MET hi-fi products. The conduct of NPUK was deliberately intended to prevent intrabrand competition within a major part of the common market and the effects that such competition was likely to have on the level of prices for such products. The price differences at the time of the infringement made it attractive for parallel exports to take place and NPUK was perfectly well aware of the fact that had they not intervened, Audiotronics might well have continued exporting MET products.
- (66) The Commission considers that such deliberate conduct designed to frustrate the aim of establishing a common market for the products in question justifies the imposition of a substantial fine.
- (67) Regard must, however, also be taken of the fact that MET has taken urgent steps to regulate the overall marketing policies of its subsidiaries in the EEC. In consultation with the Commission, MET has adjusted its guarantees so that consumers may have their purchases serviced throughout the Community irrespective of where in the common market such purchases were made. MET has also conducted an audit of its legal practices in the Community and has issued codes of conduct to all its subsidiaries in the EEC which have the authority of the parent company.
- (68) This constructive attitude adopted by the management of MET since at least September 1981, has been taken into account in assessing the amount of the fine. The undertakings concerned have adopted a comprehensive practical detailed and carefully considered antitrust compliance programme, with appropriate legal advice.
- Such action must be considered a positive step which contributes to an awareness at all levels of the group of the daily impact of competition policy. It tends to ensure that senior management is in a position to control the behaviour of the whole group in the market place and thereby to establish effective internal rules for the compliance with EEC competition law.
- (69) In taking this action of MET into account, therefore, the further examination of the grounds for imposing a fine in the amount which would otherwise have been justified has not been made.
- HAS ADOPTED THIS DECISION :
- Article 1*
- The agreement between National Panasonic (UK) Ltd and Audiotronic Holdings Ltd consisting in the prevention from September 1976 until the end of 1978 of exports of Technics equipment out of the United Kingdom, was an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.
- Article 2*
- A fine of 450 000 ECU (£ 263 790) is hereby imposed on National Panasonic (UK) Ltd.
- This fine shall be paid into Lloyd's Bank Ltd, Overseas Department, PO Box 19, 6 East Cheap, UK-London

EC P3AB, account No 1086341, in the name of the Commission of the European Communities within three months from the date of notification of this Decision to National Panasonic (UK) Ltd.

Article 3

This Decision shall be enforceable, in accordance with Article 192 of the Treaty establishing the European Economic Community.

Article 4

This Decision is addressed to :

National Panasonic (UK) Ltd, 300/318 Bath Road,
UK-Slough SL1 6JB, Berkshire.

Done at Brussels, 7 December 1982.

For the Commission

Frans ANDRIESSEN

Member of the Commission
