COMMISSION DECISION

of 21 December 1977

relating to a proceeding under Article 85 of the EEC Treaty (IV/29.418 — spices)

(Only the French and English texts are authentic)

(78/172/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Regulation No 17 of 6 February 1962 [1], and in particular Articles 1 and 3 thereof,

Having regard to the Commission Decision of 24 June 1977 to initiate a proceeding on its own initiative under Article 3 (1) of Regulation No 17,

Having heard the undertakings concerned in accordance with Article 19 (1) of Regulation No 17 and with Regulation No 99/63/EEC [2],

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions of 23 November 1977 obtained pursuant to Article 10 of Regulation No 17

Whereas :

I. THE FACTS

Description of products

1. The products in question are packaged spices intended for domestic consumption ; that is to say, all ingredients which can be added to food to improve its flavour and/or aroma and which appear in the 'spice' catalogues issued by the different producers.

There are very few spices in the true sense of the word (such as pepper, nutmeg, cloves, vanilla, cinnamon, curry and saffron). All spice firms on the market offer a range of at least 40 to 50 varieties of spices in a broader sense, including various mixtures.

The Belgian market in spices for domestic consumption

A. *The producers*

2. The Belgian spice market is expanding very rapidly. Total sales by producers in 1976 amounted to approximately Bfrs 325 million as against approximately Bfrs 247 million in 1975, representing an increase of 32 %.

The number of producers on the market is limited and four producers Brooke Bond Liebig (hereinafter referred to as 'Liebig'), India, Ducros and Topo, share between them approximately 85 % of the market, the remaining 15 % being shared among a number of minor producers.

In 1975 the American company McCormick, a major spice producer operating under an established trademark, attempted to penetrate the Belgian market. Its sole distributor for Belgium was the undertaking Resta of Ternat, which imported McCormick spices from France and the United Kingdom. In March 1977 McCormick decided to withdraw, as it had failed to make more than a minimal impact on the market.

3. The Liebig group has been operating on the Belgian market since 1969 through its subsidiary, Brooke Bond Liebig Benelux NV. This company, which in 1975 acquired control of Erica by purchasing 75 % of its shares, packages and sells more than 50 different spices under the Liebig and Erica labels.

Spices account for more than 20 % of total Liebig sales on the Belgian market. Its other products include Oxo in liquid and cube form, meat extracts, stock cubes, corned beef, catering and industrial products.

In 1976 sales of Liebig and Erica spices on the Belgian market amounted to Bfrs 122·1 million. This figure represents 39 % of the Belgian market, almost twice that of the second producer, and an increase of 20 % in Liebig sales of spices over the previous year ; this share of the market is almost double that of the second largest producer.

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

4. Of the other producers, the French company, Ducros, has been operating on the Belgian market since 1971 under its own trade mark.

The Belgian companies, India and Topo, sell some of their products under their own label and some under the label of the distributors listed below (see paragraph 6).

B. *Distribution*

5. In 1975 there were in Belgium approximately 24 000 foodstores engaged in the distribution of dried foodstuffs (1), which includes spices, with a total combined turnover in dried foodstuffs of about Bfrs 178 000 million. 3 839 of these foodstores were self-service foodstores which represented only 16 % of the total but had a total combined turnover sales of dried foodstuffs of about Bfrs 130 600 million, i.e. about 73 % of total sales of dried foodstuffs. The largest self-service shops were the 712 supermarkets and the 72 hypermarkets (2) which together represented 3 % of the total number of foodstores, but whose combined turnover in dried foodstuffs amounted to Bfrs 92 500 million or 52 % of total sales (3).

6. The three largest chains of self-service foodstores are GB-Inno-BM (hereinafter referred to as 'GB'), Delhaize Frères et Cie Le Lion (hereinafter referred to as 'Delhaize Frères') and Sarma-Penney Limited (hereinafter referred to as 'Sarma'). These distributors have a share of spice distribution which is at least as large as their share of dried foodstuffs as a whole. In 1975 their total combined purchases of spices from Liebig and other producers amounted to approximately Bfrs 73 million (taxes not included) which represents approximately 30 % of the total spice sales of all the Belgian producers. These spices were sold through approximately 300 outlets or just over 1 % of all foodstores. In 1976 the total value of all spices purchased by these distributors was Bfrs 93 million which accounted for 28 % of the total combined sales of spices of all producers in Belgium.

7. In 1975 and 1976 the approximate quantities of spices purchased from both Liebig and the other producers by these three distributors were as follows:

(in units)

Distributors	1975		1976	
	Liebig	Other producers	Liebig	Other producers
GB				
Delhaize Frères				
Sarma				

8. In 1976 the turnover achieved by Liebig for Liebig products was made up as follows:

Distributors	Sales (million Bfrs)	% of Liebig spice sales
GB, Delhaize Frères, Sarma		59·0
Other retailers operating under the agreements referred to below (paragraph 15)		3·3
Other retailers		37·7
Total		100·0

(1) Excluding such items as meat and dairy produce, flour, bread, biscuits and cakes.

(2) A hypermarket is defined as a self-service retail store with a selling area of at least 2 500 m²; whereas a supermarket has at least 400 m².

(3) These statistics are taken from the annual survey of the Belgian Distribution Committee on self-service foodstores as reported in 'Distribution d'aujourd'hui' of November 1976.

Sales under agreement of Liebig spices to the above-mentioned three major distributors and to the other retailers, amounting respectively to Bfrs 53·3 million and Bfrs 3 million, account for approximately 17 and 1 % of all spice sales on the Belgian market.

Sales under agreement of Erica spices, which are not sold to the three major distributors amounted in 1976 to approximately Bfrs 3 million, which represents 2·4 % of Liebig's total spice sales on the Belgian market and accounts for approximately 1 % of this market.

9. Impulse buying and sales promotion account for a large proportion of consumer purchases of the many spices available. The items are not on the shopping list but are most often bought only after they have caught the customer's eye. It is for this reason that most spices are sold in spacious self-service foodstores (particularly hypermarkets and supermarkets), which are the only ones to possess large display units located at spots most likely to encourage impulse buying (such as on shelves at eye-level, near the basic necessities such as oil, salt, vinegar and sugar).

10. Liebig prices both to the distributor and to the consumer, are generally much higher per unit of weight than those of other makes. The difference in prices to the distributor is on average between 150 and 200 %. Because of the size of the distributor margin on Liebig spices, the difference in the retail price for Liebig spices and those of other producers is also very considerable.

Liebig distribution agreements

11. Liebig has concluded distribution agreements with the main Belgian distributors, GB, Delhaize Frères and Sarma and with some 80 distributors (either independent or members of distribution chains). A summary of the main terms of the agreements made with the principal Belgian distributors and which are the subject of these proceedings is set out below.

12. The distributor undertakes to sell only Liebig spices apart from its own brands in all its existing and new shops. In the case of GB and Sarma, sales under such own brands are restricted to the most common varieties ranging, according to the agreement, from 12 to 18. In addition, Delhaize Frères is also entitled to sell other brands of spices which are not included in the Liebig range or are packaged completely differently, as well as spices advertised in the publicity magazine 'Shopping', on condition that they are displayed separately.

The distributor further undertakes:

(a) to sell at the prices affixed at the time of production on condition that these are observed also by all other retailers;

(b) to display Liebig spices in a number of illuminated display units of a particular size.

These display units are fitted with five shelves of which the top three are reserved for Liebig spices and the bottom ones for the distributor's own brand.

The spices must be placed above items with a quick turnover, such as sugar, salt and oil.

At Delhaize Frères and Sarma shops the prices of the Liebig spices are not to be displayed on the shelves, since 'it has been proved that the housewife has no idea of spice prices' (Sarma).

13. In return Liebig undertakes to grant certain rebates and to guarantee a profit as follows:

(a) an end-of-year rebate of 10 % on total spice purchases (in the case of Sarma, a single premium on purchases corresponding to consumer sales of Bfrs 8 million, excluding VAT);

(b) for Delhaize Frères and GB a sales incentive premium calculated by comparing the increase in the sales figures for the year in question over those for the previous year, as follows:

Increase	*Premium*
10 %	3 %
20 %	4 %
30 %	5 %

(c) a profit guarantee which, in the case of GB, amounts to Bfrs 12 million for the first year, Bfrs 13 million for the second and Bfrs 14 million for the third. For Delhaize Frères it is Bfrs 7 million and for Sarma it is a sum equivalent to the profit resulting from consumer sales of Bfrs 8 million, excluding VAT.

Therefore, for Delhaize Frères and GB, if the difference between the net purchasing price from Liebig and the consumer price, excluding VAT, plus the rebates and premiums is less than the agreed amount, Liebig will pay the difference. In fact this guarantee has never been called upon since from the first trading year the turnover exceeded the threshold for the guarantee.

Finally, Liebig undertakes to install the display units, to supply a complete back-up service, in particular to supply 'direct' so that the distributor does not have to maintain large stocks, to install sales promotion material and to enforce the normal sales price, in particular by affixing prices at the time of production (see paragraph 12 (a) above).

14. The agreement with GB was concluded in 1973 for three years, whereas the agreements with Delhaize Frères and Sarma were for one year. In the case of Sarma, the agreement is renewable each year unless six weeks notice of termination is given. So far no notice has been given, and therefore this agreement is still in force. Although the other two agreements have not been renewed in writing, the Commission's enquiries have established that these agreements remain in force.

II. APPLICATION OF ARTICLE 85 (1)

15. Under Article 85 (1) the following shall be prohibited as incompatible with the common market : all agreements between undertakings, decisions by associations of undertakings and concerted practices 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.

16. The agreements concluded by Liebig with GB, Delhaize Frères and Sarma are such as to restrict competition.

17. The obligation in the agreements with GB, Delhaize Frères and Sarma to sell only Liebig products, apart from spices under their own brands, is likely to prevent the purchase and sale of brands other than Liebig by the distributors concerned.

This obligation is reinforced by significant financial benefits in that the rebates referred to in paragraph 13 and the system of resale price maintenance afford a minimum gross profit of 35 % on the resale price which may amount to almost 60 % of the purchase price paid by the distributor. Furthermore, a certain profit is expressly guaranteed in the contracts.

The major part of this high financial return is primarily intended to compensate these undertakings for excluding sales of spices competing with those of Liebig. This financial return therefore also restricts competition.

18. The terms of these agreements are such as to prevent the distributors concerned from exercising their freedom of choice in respect of the purchase and resale of spices by binding them to a single supplier, except in respect of those spices sold under their own brand. Furthermore, they are also such as to restrict competition between spice producers by prohibiting the producers of other brands from selling their own spices through the distributors in question.

19. There are terms in the agreements with the three main distributors expressly allowing them to sell their own brands. However, other terms in these agreements should be noted, in particular the following :

(a) the number of spices which can be sold under the GB and Delhaize Frères labels is restricted in the agreements respectively to between 12 and 18 as compared with 55 under the Liebig label ;

(b) the distributor's own brands have to be displayed in the special units below the Liebig spices. Given the specific way these branded spices are sold in self-service stores, this represents an advantage for the sale of Liebig products displayed on the top three shelves ;

(c) two distributors (Delhaize Frères and Sarma) are not permitted to display Liebig prices on the shelves where these are higher than those of their own brands, which makes it difficult for the housewife to compare prices and can even give the impression that the prices shown for the distributor's own spices also apply to the Liebig products.

20. Furthermore, the exceptions to the obligation to sell only Liebig products apart from the distributor's own brand provided for in the agreement with Delhaize Frères do not destroy the assertion that competition is restricted. As regards the sale of other brands which include varieties of spices outside the Liebig range, this could, in practice, only apply to uncommon varieties, since Liebig's own range is large enough to cover all the normal requirements of large stores. The producer of such special varieties would not, therefore, on the basis of such varieties alone, be in a position to compete with a producer offering the whole of the normal range. As far as the possibility of selling other items separately by promotion in a publicity campaign is concerned, the impact in terms of competition is minimal.

21. The restriction of competition between the various brands of spices is significant.

The main brans of spices for domestic consumption are marketed in very large ranges which can only be adequately introduced and sold in large self-service stores. The large self-service store offers the best setting for the sale of spices, since it is the only place where a large number of consumers can see, familiarize themselves with and purchase new varieties. This is particularly true in the case of new mixtures.

Moreover, the presentation of such a range requires space, proper equipment, supporting services (particularly rotation) and a publicity effort which an independent retailer can rarely provide. Furthermore, since the need of the customer of the independent retailer is limited to small quantities and to the most common varieties and the sales technique is very different from that of self-service stores, such a retailer is generally not interested in offering the entire range. This is supported by the figures given in paragraph 6 which show how much of the total volume of spice sales is accounted for by large self-service stores. It is further demonstrated by the case of Liebig itself, whose spice sales to the three major distributors account for 59 % of Liebig's overall turnover in spices in Belgium.

The Agreements in question are of a type which prevents the sale under suitable conditions of brands other than Liebig in those large self-service stores which are by far the most important in Belgium. The importance of these stores is borne out by the fact that although they represent only 1 % of the total number of food retailers in Belgium, they account for 30 % of the distribution of spices in the Belgian market.

Those distributors which are debarred from competition, though few in number, nonetheless account individually for a sizeable proportion of distribution. The Liebig competitors would make a more pronounced and effective impact and be in a position to expand sales to a greater degree if they had access to the few major distributors rather than having to deal with a large number of smaller retailers.

It therefore follows that if a producer is prevented from introducing his brands into the premises of the distributors concerned, his opportunities to canvass for sales and above all to launch his product on the Belgian market are appreciably restricted.

In addition to all the obstacles referred to above, account must also be taken of the importance of the producer benefiting from the restriction of competition. By virtue of its share of the market of the product in question, and its long standing reputation both for spices and other basic foodstuffs, Liebig occupies a very important position of supply in comparison with other producers, which makes even more significant a restriction impeding potential competitors from penetrating the Belgian market, and preventing any expansion by producers already established in this market.

For the above reasons, competition for spice brands other than Liebig already established on the Belgian market is seriously impeded by the agreements in question and potential competition from producers who wish to penetrate the market is frustrated even further.

22. The effects of the restriction on competition between brands are all the more significant as the application of resale prices for Liebig spices allows no competition amongst Liebig products.

23. The restriction on competition described above has a significant effect on trade between Member States, in that it affects the pattern of trade by impeding spice producers from other Member States who are already established on the Belgian market from developing their sales on this market as they could do if there were no such restrictions concerning the most important foodstores in the country.

The effects of this restriction are even more marked in the case of a producer from another Member State wishing to penetrate the Belgian market. They could hinder the creation of a pattern of trade within the Community which other producers such as McCormick would be able to foster.

III. APPLICATION OF ARTICLE 85 (3)

24. Article 85 (3) states that 'the provisions of paragraph 1 may, however, be declared inapplicable in the case of :

— any agreement or category of agreements between undertakings ;

— any decision or category of decisions by associations of undertakings ;

— any other concerted practice or category of concerted practices ;

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 benefits, 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.'

25. The agreements in question do not fall within the scope of Commission Regulation No 67/67/EEC of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements [1]. The system of price-fixing contained in all the agreements constitutes a restriction of competition which is not permitted by Regulation No 67/67/EEC and therefore the application of this Regulation is excluded.

[1] OJ No 57, 25. 3. 1967, p. 849/67.

Moreover, these agreements do not contain an undertaking by the distributors concerned to purchase the relevant products only from Liebig for resale. They only contain an undertaking not to sell brands of Liebig's competitors, subject to the right to sell under their own brand names spices bought from other producers. Moreover, these agreements have the effect of excluding other brands without providing the undertakings concerned or consumers with the advantages normally expected from an exclusive agreement.

26. Furthermore, the agreements which have been made by the subsidiary of a company established and operating in the United Kingdom and which moreover have not been notified to the Commission, do not qualify for exemption from Article 85 (1) by virtue of Article 85 (3).

Evén if the agreements had been notified, the Commission considers that they would still not fulfil the requirements set out in Article 85 (3). In the first place, the agreements do not contribute to improving the distribution of the products. On the contrary, they could even have adverse effects on distribution, in that they prevent the distribution of several brands at the exact point where such distribution could be made in the most favourable conditions, i.e. in large self-service stores.

Even supposing that there was an improvement in distribution in this case, the Commission does not consider that consumers would be allowed a fair share of any resulting benefit. As demonstrated above, most spice users are not only prevented from choosing from a number of different brands, and thus being able to opt for the cheapest brands, but also, as a result of the resale price maintenance system, they lose the advantages of competition between spices of the same brand at the distribution stage.

The obligation under their respective contracts to observe resale price maintenance does not permit the three distributors concerned to pass on to the consumer any part of the substantial financial advantages which they derive under their agreements.

IV. APPLICATION OF ARTICLE 3 (1) OF REGULATION No 17

27. Under Article 3 (1) of Regulation No 17, where the Commission upon application or upon its own initiative finds that there is infringement of Article 85 (1) of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

The Commission finds under this Article that the obligation imposed on the distributors described in paragraph 12 above constitutes an infringement of Article 85 of the EEC Treaty.

The Commission accordingly requires the Liebig group and the companies GB, Delhaize Frères and Sarma to terminate the infringement forthwith,

HAS ADOPTED THIS DECISION:

Article 1

The provision in the distribution agreements for Belgium made by the Brooke Bond Liebig Ltd group, through its subsidiary Brooke Bond Liebig Benelux NV with GB-Inno-BM SA, Établissements Delhaize Frères et Cie. Le Lion SA and Sarma Penney Ltd, prohibiting the latter undertakings from selling on their premises spices other than those produced by Liebig and those sold under their own brands, constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The undertakings named in Article 3 shall forthwith terminate the infringement referred to in Article 1.

Article 3

This Decision is addressed to:

— Brooke Bond Liebig Limited, London,
— Brooke Bond Liebig Benelux NV, Antwerp,
— GB-Inno-BM SA, Brussels,
— Delhaize Frères et Cie. Le Lion SA, Brussels,
— Sarma Penney Ltd, Brussels.

Done at Brussels, 21 December 1977.

For the Commission

Raymond VOUEL

Member of the Commission