

COMMISSION DECISION

of 14 June 1973

relating to proceedings under Article 85 of the EEC Treaty (IV/14.111 — Du Pont de Nemours Deutschland)

(Only the German text is authentic)

(73/196/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 Council Regulation No 17 ⁽¹⁾ of 6 February 1962, and in particular Article 2 thereof;

Having regard to the notification submitted as a precaution only on 31 January 1963 pursuant to Regulation No 17 by 'Adox Fotowerke Dr. C. Schleussner GmbH', a company established under German law at Frankfurt-on-Main (Germany), in respect of standard contracts for the sale of photographic products which it applied on the German domestic market;

Having regard to the publication in the *Official Journal of the European Communities* No C 122 of 24 November 1972 of the Summary of the notification pursuant to Article 19 (3) of Regulation No 17;

Having regard to the Opinion delivered on 27 March 1973 by the Advisory Committee on Restrictive Practices and Monopolies pursuant to Article 10 of Regulation No 17;

I

Whereas the notification submitted as a precaution only by Adox Fotowerke Dr. C. Schleussner GmbH in 1963 concerned contracts regularly awarded by that company since 1958 in Germany to specialized dealers, both wholesale and retail, wishing to sell one or more categories of the products it then manufactured (photographic films, paper and equipment; photochemical products; sensitive products for radiography; accessories, etc);

Whereas under the terms of those standard contracts, concluded for a year with tacit renewal, German

dealers undertook to observe strictly Adox's general conditions of sale for the category of products concerned, on pain of their deliveries being stopped, their annual rebates being withheld or financial penalties being imposed; whereas in particular they expressly agreed to respect the prices and distribution networks specified by the manufacturer and to ensure that these were respected by others; whereas Adox, for its part, undertook to apply without exception its system of fixed prices, as provided for in the German law;

Whereas Adox's general conditions of sale, as they stood in 1963, included in particular:

- (a) the requirement that both wholesalers and retailers should strictly apply the resale prices fixed by the manufacturer for each group of purchasers, irrespective of the origin of the products, and that they should not grant any discount whatsoever, whether directly or indirectly;
- (b) the requirement that wholesalers should only supply retailers in Germany able to provide service to the branch's usual customers and who in turn should undertake to comply with the prices and distribution networks specified by the manufacturer;
- (c) the requirement that retailers should deliver only to consumers, to the exclusion of any other dealer, and that they should not sell abroad without the manufacturer's permission;

Whereas in November 1969 the applicant company — which had meanwhile become Du Pont Fotowerke Adox GmbH — discontinued of its own accord the fixed price system which it had been using on the German market and amended its general conditions of sale, in particular by abolishing the export ban imposed on its German dealers; whereas in February 1971, following an intervention by the Commission, it also abolished the bans on wholesalers reselling to other wholesalers and on retailers reselling to other retailers;

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62; OJ Special edition 1959-62, November 1972, p. 87.

Whereas these general conditions of sale, thus amended, are being applied for products supplied by the 'Photographic Department' of Du Pont de Nemours (Deutschland) GmbH which, in July 1971, took over Du Pont Fotowerke Adox GmbH; whereas cameras are no longer included in those products as the latter company ceased to manufacture them in 1965;

Whereas the Commission has not received any comments from third parties in response to the publication of the summary of the notification;

II

Whereas, under Article 2 of Regulation No 17, a negative clearance may be granted if the Commission finds, on the basis of facts in its possession, that there are no grounds under Article 85 (1) of the EEC Treaty for action on its part in respect of the standard contracts and general conditions of sale in question;

Whereas those standard distribution contracts, as well as the general conditions of sale, which are of course subject to agreement between the supplier and each of its purchasers, are agreements between undertakings within the meaning of Article 85;

Whereas the standard distribution contracts which were concluded between specialized dealers and Fotowerke Dr. C. Schleussner GmbH, Du Pont Fotowerke Adox GmbH or Du Pont de Nemours (Deutschland) GmbH no longer contain any obligation apart from the undertaking entered into by dealers to observe the manufacturer's general conditions of sale;

Whereas the present wording of 'General Conditions of Delivery and Payment for Photochemical Products' and 'General Conditions of Delivery and Payment for Equipment and Spare Parts' applied by the 'Photographic Department' of Du Pont de Nemours (Deutschland) GmbH both contain similar clauses relating, *inter alia*, to the placing of orders, the way of quoting prices, consignments, retention of ownership, conditions of payment, complaints, place of jurisdiction, etc.;

Whereas the conditions of sale for photochemical products contain the additional requirement that dealers should provide customers with the usual service of the branch and supply articles only in their original packaging; whereas the conditions of sale for equipment and spare parts also stipulate that the warranty against manufacturing defects shall in all cases extend over a period of six months;

Whereas none of the aforementioned clauses is a direct or indirect restriction against competition among either distributors or consumers within the

meaning of Article 85 (1) of the Treaty; whereas in particular, dealers, whether wholesale or retail, may deliver their goods to any purchasers, including purchasers outside German territory, at prices which they themselves have freely determined;

Whereas, consequently, the facts in the possession of the Commission do not show that the standard contracts and conditions of sale in question have as their object or effect the prevention, restriction or distortion of competition within the Common Market within the meaning of Article 85 (1) of the EEC Treaty; whereas, since one of the conditions for applying that paragraph is not satisfied, negative clearance may be granted;

III

Whereas the standard contracts and conditions of sale as worded prior to February 1971 fell within the provisions of Article 85 (1) because they contained clauses which restricted competition and which might affect trade between Member States, in particular:

- (a) a ban on exporting by wholesalers and retailers without the manufacturer's permission;
- (b) a ban on resales at the same level of distribution, as regards exports within the EEC;
- (c) a requirement to respect prices fixed by the manufacturer, as regards goods re-imported into Germany from other Member States of the EEC;

Whereas such clauses, which were the only ones prohibited under Article 85 (1) and were unlikely to be exempted under the provisions of Article 85 (3), were finally all eliminated in February 1971;

Whereas the agreements in question consequently satisfy the requirements of Article 7 (1) of Regulation No 17; whereas, in fact, those agreements, which were in existence when the said Regulation No 17 (13 March 1962) entered into force and which were notified within the time limits fixed in Article 5 (1) of that Regulation, do not satisfy the requirements of Article 85 (3) of the Treaty, but whereas Du Pont Fotowerke Adox GmbH has amended the said agreements so that they no longer fall within the prohibition contained in Article 85 (1); whereas, as far as the versions of the contracts prior to modifications are concerned, the prohibition contained in Article 85 (1) applies only to the period fixed by the Commission;

Whereas in this respect account should be taken of the fact that the abovementioned company abolished of its own accord two of the three restrictive clauses mentioned above and abolished the third clause as soon as the Commission so requested; whereas these circumstances are sufficient to justify the non-application of the prohibition contained in Article 85 (1) for the entire period preceding the amendments;

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in the possession of the Commission, there are no grounds under Article 85 (1) of the Treaty establishing the European Economic Community for action on its part in respect of the standard contracts and general conditions of sale which are being applied by Du Pont de Nemours (Deutschland) GmbH for the distribution of products from its 'Photographic Department'.

Article 2

The prohibition contained in Article 85 (1) shall not apply to the versions of the standard contracts and general conditions of sale applied by Adox Fotowerke Dr. C. Schleussner GmbH, and then by Du Pont Fotowerke Adox GmbH during the period between 13 March 1962 and February 1971.

Article 3

This Decision is addressed to Du Pont de Nemours (Deutschland) GmbH, Hochstrasse 43, Frankfurt-on-Main (Germany).

Done at Brussels, 14 June 1973.

For the Commission

The President

François-Xavier ORTOLI
