

COMMISSION DECISION

of 21 November 1975

relating to a proceeding under Article 85 of the EEC Treaty
(IV/256—Bomée—Stichting)

(Only the Dutch text is authentic)

(75/781/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 3 thereof;

Having regard to the notification to the Commission of 31 October 1962 by Messrs Van Bentum and Van Dam respectively Chairman and Secretary of Bomée-Stichting, The Hague, with a view to obtaining negative clearance in relation to Article 85(1) of the EEC Treaty, accompanied by an application for exemption under Article 85(3), in respect of the Statutes of the Association and the conditions of sale for Bomée products;

Having regard to the application pursuant to Article 3 of Regulation No 17 made on 7 July 1975 by Maxis BV, Muiden, the Netherlands;

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 delivered pursuant to Article 10 of Regulation No 17 on 25 September 1975,

WHEREAS:

I. The facts

The Bomée-Stichting is a trade association, with legal status under Dutch law, formed in The Hague on 17 November 1937 for an indeterminate period. Its object is to promote the orderly marketing of branded

goods of this description in the interests both of manufacturers and importers and of wholesalers, retailers and consumers. The association seeks to attain this objective by all legal means; in particular by facilitating concerted practices by the firms in this sector, by fixing the Bomée conditions, by collaborating in the drafting and enforcement of individual sales conditions and by setting up a special tribunal for the sector (Article 3 of the Bomée Statutes).

Its members are Dutch manufacturers and importers of perfumes, toiletry articles and cosmetics, of which most, about 60, belong to the association. They sell Bomée articles through approximately eight wholesalers whom they appoint. Several thousand retailers controlling approximately 6 500 sales-points supply the consumer. The Bomée members are also grouped in three other associations: Mepacos (importers and manufacturers), Vegrocos (wholesalers) and SPD (retailers). Representatives of these associations are on the Bomée Board of Directors. They deal in most of the main brands, Balmain, Dior, Chanel, Rubinstein, Ricci, Nivea, Pond's Valdélis, 4711, Revlon, Lanvin, Lancôme and Rochas; roughly half of all Bomée articles are imported into the Netherlands from other EEC Member States. In 1974, Bomée's share of the Dutch market was about 70 % in cosmetics, about 40 % in toiletries and about 90 % for perfumes.

The members of the association have adopted uniform conditions for the sale of Bomée articles. The association ensures that they are complied with strictly, both by its members (who also undertake to require their customers to comply) and by wholesalers and retailers who accept them. Acceptance becomes effective when a member has a brand added to the published list Bomée articles. Eight days after publication, compliance with the Bomée conditions for goods bearing that brand become compulsory (Clauses 2 and 3 of the 1972 Bomée conditions).

As a rule, any wholesaler or retailer who buys an article which is subject to the Bomée conditions must thereafter comply with the Bomée conditions and, where appropriate, require his customers to comply with them, in respect of all such articles which he acquires thereafter by whatever means (Clause 3(2)).

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

As they stood when notified in October 1962, the 1953 Bomée-Stichting conditions had the main aim of enforcing resale price maintenance and ancillary measures, such as those regulating the supply of dealers through recognized distribution channels.

After the Dutch authorities had rejected Bomée-Stichting's application under Dutch law for exemption from the prohibition on resale price maintenance agreements⁽¹⁾, the association had to delete all RPM clauses from its conditions of sale. Individually, however, several members have RPM clauses in their own conditions of sale.

On 5 May 1972 Bomée-Stichting notified the Commission of the text of the new conditions which became operative on 3 January 1972.

Although the RPM clauses had been deleted, together with the clauses which, in the 1953 edition, banned all members other than manufacturers or importers from importing the relevant articles into the Netherlands without the consent of the appropriate manufacturer or importer, the 1972 conditions (Bomée-voorwaarden 1972) still contained the following clauses :

- wholesalers may supply Bomée articles only to retailers (Clause 10 (3));
- retailers may sell Bomée articles only to the consumer (Clause 10 (5));
- wholesalers may obtain Bomée articles only from manufacturers or importers who are members of the association (Clause 11 (1));
- retailers may obtain Bomée articles only from manufacturers or importers who are members of the association or from wholesalers appointed by such manufacturers or importers (Clauses 11 (2));
- any dealer other than a manufacturer or importer who imports a Bomée article must inform the association, specifying the country of origin (Clause 11 (3));
- wholesalers and retailers may be obliged to return their stocks of Bomée articles to the manufacturer or importer if the latter lodges a request with the association's tribunal (Rechtspraakcommissie) (Clause 19 (1)).

⁽¹⁾ Decision of 27 July 1966, upheld on appeal by the College van Beroep voor het Bedrijfsleven on 22 May 1968.

In response to a statement of objections addressed to it by the Commission on 22 June 1973 stating that these clauses were incompatible with the rules on competition in the European Community, Bomée-Stichting amended its conditions of sale with effect from 19 December 1974 (Bomée-voorwaarden 1974).

This new version contains the following stipulations :

- member manufacturers and importers are prohibited from supplying Bomée articles to firms other than wholesalers and retailers who have accepted the Bomée conditions (Clause 10 (1));
- wholesalers who have accepted the Bomée conditions are prohibited from supplying Bomée articles to firms other than retailers who have accepted the Bomée conditions (Clause 10 (3a));
- retailers who have accepted the Bomée conditions are prohibited from supplying Bomée articles to other firms, being confined to consumer sales (Clause 10 (5a)).

However, Clause 10 (3a) and (5a) is supplemented by paragraphs (3b) and (5b), which provide that these conditions do not apply to deliveries to firms established outside the Netherlands.

The conditions of sale contain the following further stipulations :

- wholesalers who have accepted the Bomée conditions may obtain Bomée articles only from manufacturers or importers who are members of the association (Clause 11 (1));
- retailers who have accepted the Bomée conditions may obtain Bomée articles only from manufacturers or importers who are members of the association or from wholesalers appointed by such manufacturers or importers (Clause 11 (2)).

However, Clause 11 is supplemented by a new paragraph (3) to the effect that the obligations imposed by paragraphs (1) and (2) do not apply where the goods are obtained from firms established outside the Netherlands.

The association's tribunal may order disciplinary measures against any person who does not comply with these mandatory provisions (Clause 20).

On 8 July 1975 Bomée-Stichting wrote to inform the Commission that it was amending Clause 1 (2) so that the definition of Bomée articles would extend only to products marketed 'in the Netherlands'. This modification became effective on 25 August 1975.

On 7 July 1975 the firm Maxis BV of Muiden lodged a complaint with the Commission in respect of the Bomée conditions. As the firm was unwilling to comply with the Bomée conditions, it had experienced difficulties in obtaining Bomée products.

II. Applicability of Article 85(1) of the EEC Treaty

Article 85(1) of the EEC Treaty prohibits, 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.

The conditions of sale jointly framed and applied by all the members of Bomée-Stichting constitute a decision by an association of undertakings within the meaning of Article 85(1).

Clause 10(1), (3) and (5) and Clause 11 of this decision of the trade association have as their **object and effect** the restriction of competition within the common market since they are designed to ensure that all trade passes exclusively through the distribution channels collectively recognized by the parties. The resulting restrictions have noticeable effects on the relevant markets in view of the number and size of the firms involved and of the large range of world-renowned articles and products on the Bomée list. Furthermore, these are standard conditions to which an unlimited number of firms may become party.

Clause 10(1) of the 1974 Bomée conditions, whereby manufacturers and importers who are members of the association may supply Bomée articles in the Netherlands only to wholesalers and retailers who have accepted the Bomée conditions, means that other dealers are unable to obtain Bomée articles from the manufacturers or importers and that the manufacturers and importers are prevented from supplying dealers who have not accepted the Bomée conditions. The effect of this is to restrict the business freedom of manufacturers, of importers and of dealers who have not accepted the Bomée conditions.

Clause 10(3) of the 1974 Bomée conditions, under which wholesalers who have accepted the Bomée conditions may supply Bomée articles in the Netherlands only to retailers who have accepted the Bomée conditions, and Clause 10(5), under which these retailers may sell Bomée articles in the Netherlands only to the consumer, prevent wholesalers and retailers from supplying other Dutch dealers at the same stage of distribution as themselves, who would be free to resell the products on terms that might be better for the consumer. Similarly they cannot supply other Bomée wholesalers, and wholesalers cannot supply the consumer.

Clause 11 of the 1974 Bomée conditions, under which wholesalers must obtain Bomée articles only from member manufacturers and importers and under which retailers may only obtain them from manufacturers or importers or their appointed wholesalers, restricts the freedom of wholesalers and retailers to buy from other Dutch suppliers.

The investigation of this case discloses that these restrictions on competition form a coherent and carefully adjusted system which is collectively applied and imposed by the members on wholesalers and retailers, and which clearly has as its object and effect the elimination of competition between the market participants concerned and other dealers and to ensure that as far as possible trade in Bomée articles in the Netherlands is channelled through the manufacturers, importers, wholesalers and retailers participating in the Bomée system. The effect of these restrictions is to consolidate existing distribution structures and the positions of the undertakings concerned on the relevant markets in such a way that new market entrants and firms which refuse to accept the Bomée conditions, such as Maxis BV, find it difficult to penetrate the market. The Bomée system makes it particularly difficult for market positions to be modified by the free play of competition.

The scope of the appraisal is not affected by the consideration that the Bomée conditions have been modified since 19 December 1974 in order to permit the parties to purchase the products concerned in other Member States for resale. The amendment of the Bomée product description which came into force on 25 August 1975 and which limited this description to those products marketed in the Netherlands, served only to clarify the initial easing of the conditions. Neither modification takes the 1974 Bomée conditions out of the scope of the prohibition contained in Article 85(1). Serious obstacles still exist, particularly with regard to the marketing in the Netherlands of those products which are imported by the members themselves. These products may not be distributed freely by importers, wholesalers and retailers (the traders on the relevant market), but only through the

prescribed distribution channels. Importers are not free to deliver to any wholesaler or retailer and neither the member wholesalers nor retailers may sell their merchandise within their respective groups. Therefore the means by which imported products penetrate the Dutch market are not the result of individual decisions by the parties on the different distribution levels, but are influenced by the restrictive agreements which the parties have concluded with their competitors.

The restrictive clauses referred to above may substantially affect trade between Member States within the meaning of Article 85 (1) of the Treaty in that they apply to goods which are mainly imported from other Member States and sold in the Netherlands. Trade flows may therefore be deflected from their natural course and trade between Member States affected⁽¹⁾.

They further have the effect of consolidating the division of the common market into national markets, which goes against the economic interpenetration aimed at by the Treaty, in that they make it difficult for manufacturers and dealers in other Member States to do business on the Dutch market⁽²⁾.

In view of the size and number of the firms which belong to Bomée-Stichting, of the large number of dealers who accept the Bomée conditions, and of the range and reputation of the branded articles to which the conditions apply, the restrictive clauses discussed above have a substantial effect on trade between Member States in a manner detrimental to the creation of a single market.

Although the adverse effect upon trade between Member States is mitigated by the opportunity, first given on 19 December 1974 and later confirmed on 25 August 1975, for the wholesalers and retailers concerned to obtain supplies direct from other Member States, this relaxation of the rules does not compensate for the collective and cumulative effect of the restrictions referred to above, to which the admission of the products imported into the Netherlands by the members themselves remained subject.

Clause 10 (1), (3) and (5) and Clause 11 of the 1974 Bomée conditions accordingly fall within the scope of Article 85 (1) of the Treaty establishing the EEC.

⁽¹⁾ See decision by the European Court of Justice on 15 May 1975 in Case No 71/74, FRUBO.

⁽²⁾ See decision by the European Court of Justice of 17 October 1972 in the Case No 8/72, Vereeniging van Cementhandelaren.

III. Applicability of Article 85 (3) of the EEC Treaty

Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement between undertakings or any decision by associations of undertakings 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.

The 1974 Bomée conditions cannot be exempted under Article 85 (3) as they do not satisfy these tests.

First, they do not contribute in any way to improving the production or distribution of goods or to promoting technical or economic progress. Analysis of the restrictive clauses and the explanation supplied by representatives of the association have made it clear that the principal aim of the Bomée system is to give the member firms, through a set of collective measures, the assurance that the largest possible share of sales of the relevant products in the Netherlands will be handled by them. The restrictions consisting of exclusive sale and purchasing commitments do not contribute to improving the distribution of the relevant product. These restrictions, on the contrary, provide a market protection arrangement so that other dealers are excluded from a distribution network which helps to ensure that as far as possible the production and import of Bomée articles in the Netherlands is reserved for Bomée members.

Furthermore, virtually all licensed manufacturers and concessionaire importers of well-known branded products in the Netherlands belong to Bomée-Stichting. Outsiders are too few and too small to exert any real influence on the market, especially as the products they are offering are not so widely distributed as Bomée articles. In any event competition should exist not only between member and non-member dealers selling articles under different brands, but also between different dealers in articles of the same brand, and, as has been seen, it is this latter form of competition that the Bomée system sets out to eliminate.

Accordingly, the restrictive clauses in the 1974 version of the Bomée conditions of sale do not qualify for exemption under Article 85 (3) of the EEC Treaty.

IV. Applicability of Article 3 (1) of Council Regulation No 17

Article 3 (1) of Regulation No 17/62 provides that where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 of the EEC Treaty, it may by decision require the undertaking or associations of undertakings concerned to bring the infringement to an end.

As it is clear from the facts set out herein that Bomée-Stichting is in infringement of Article 85 of the EEC Treaty, it should accordingly be required to bring the infringement to an end without further delay,

HAS ADOPTED THIS DECISION :

Article 1

Clause 10 (1), (3) and (5) and Clause 11 of the 1974 Bomée conditions as contained in the final version dated 25 August 1975 constitute an infringement of

Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The application to Bomée-Stichting for extension under Article 85 (3) is refused.

Article 3

Bomée-Stichting shall bring the infringement to an end forthwith by ceasing to apply the offending clause referred to in Article 1.

Article 4

This Decision is addressed to Bomée-Stichting, Bezuidenhoutseweg 193, PO Box 2185, 's Gravenhage, the Netherlands.

Done at Brussels, 21 November 1975.

For the Commission

A. BORSCHETTE

Member of the Commission