



EUROPEAN COMMISSION

CASE AT.40169 – MACO

ANTITRUST PROCEDURE

**Council Regulation (EC) 1/2003 and
Commission Regulation (EC) 773/2004**

Article 7(2) Regulation (EC) 773/2004

Date: 11/03/2016

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Brussels, 11.3.2016
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HASTA, s.r.o.
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Slovak Republic

Subject: Case AT.40169 – MACO
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear Madam/Sir,

(1) Thank you for your letter of 12 February 2015, in which you submitted observations on the Commission's preliminary assessment of your complaint against Mayer & Co Beschläge GmbH ("MACO").

(2) Your written submission, however, has not led to a different assessment of the complaint. The Commission accordingly rejects your complaint pursuant to Article 7(2) of Commission Regulation (EC) 773/2004¹ for the reasons set out below.

1. THE COMPLAINT

(3) By letter of 17 September 2013, you requested the Commission to investigate certain of MACO's practices in the field of manufacturing and distribution of peripheral fittings for windows and doors, which you consider to breach Article 101 and Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). On 26 November 2013, you provided additional information by email. In sum, you alleged that:

(a) MACO has a dominant position in the relevant market;

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

- (b) Under your contract with MACO for the distribution of its products in Slovakia and the Czech Republic, MACO forced you to purchase the contract goods at a price higher than the resale price and to subsequently sell them at a price lower than the wholesale price you paid to MACO. MACO would then issue credit notes to cover the difference and in addition award you a turnover bonus. You allege that by so doing, MACO reserved the right to set resale prices;
- (c) MACO requested information on the turnover of each of your customers, and when you refused, MACO contacted the customers directly and offered them prices lower than the prices MACO charged to you;
- (d) MACO engaged in "market discrimination" because it charged you higher prices for the contract goods than it did to other business partners; and
- (e) MACO offered you a distributorship for the Polish market on the condition that:
 - (i) you would not supply the contract goods to MACO customers who were already or were going to be supplied by other MACO business partners, and (ii) you would not re-export the contract goods outside Poland.
- (4) On 29 January 2014, with your consent, the Commission sent MACO a non-confidential version of the complaint, and on 19 February 2014, MACO submitted its comments thereon.
- (5) By letter of 6 March 2014, you made an additional written submission to the Commission, containing observations on MACO's comments of 19 February 2014 and restating the main points of your complaint.
- (6) On 23 June 2014, MACO provided further clarifications in a conference call with officials from the Directorate General for Competition of the European Commission.
- (7) In its comments, MACO considered that:
 - a) It does not hold a dominant position on any market;
 - b) The credit notes referred to in your complaint were requested by you, on your own initiative. Each year, MACO agreed with you a purchase price that should have been sufficient for you to resell to your customers with a profit. In the context of overall falling demand, however, some customers negotiated lower prices with you, leading you to ask MACO to retroactively reduce prices for the goods involved and to ask MACO for credit notes to maintain your margin;
 - c) MACO has been moving away from using dealers to distribute its products towards the direct supply of certain window manufacturers through its national subsidiaries. Direct distribution brings about cost advantages that may be passed on to high-volume customers through lower prices;
 - d) MACO does not set resale prices for its dealers. It only agrees with window manufacturers on maximum purchase prices for MACO's products, and dealers are free to offer lower purchase prices to the window manufacturers;
 - e) MACO never agreed with your firm on the contractual terms for the proposed dealership for Poland.

- (8) By its letter of 29 January 2015 pursuant to Article 7(1) of Regulation 773/2004 (the "Article 7(1) letter"), the Commission informed you of its intention to reject the complaint.
- (9) In your response of 12 February 2015, you make the following additional observations (the "Observations"):
- (a) As regards MACO's alleged dominant position, you repeat your claim that, given MACO's consistently high market share, there are barriers to market entry and that MACO has a dominant position in the relevant market. Furthermore, you claim that MACO's alleged dominance should be assessed at the time it was applying the allegedly abusive business practices;
 - (b) As regards the relevant product market, you consider that MACO's alleged abuse relates to a range of window mountings and that the complaint sets out the scope of the relevant product market;
 - (c) As regards the geographic scope of the relevant market, you indicate that you have direct experience with MACO's business practices in the markets of Slovakia, the Czech Republic and Poland, but you do not rule out a possible wider definition of the geographic market and you leave it to the professional assessment of the Commission to correctly identify the relevant geographic market;
 - (d) You state that the comments made by MACO were inaccurate, in the sense that: (i) the information MACO required on HASTA's customers and their purchasing power allowed MACO to supply them directly at prices with which HASTA could not compete; and (ii) HASTA did not initiate the issuing of the credit notes, this was done by MACO;
 - (e) You state that you declined the proposed cooperation agreement for the Polish market because you considered that it would infringe EU competition law;
 - (f) You dispute the Commission's conclusion that this could be a matter for the relevant national courts since, in your opinion, the practices in question have a Community dimension and the public interest argues for an intervention by the Commission with its particular powers.

2. THE NEED FOR THE COMMISSION TO SET PRIORITIES

- (10) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. The Commission has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.²
- (11) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but one element the Commission may consider is whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement.

² OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.

- (12) In addition, the Commission may consider the scope of the investigation required. If it appears that carrying out an in-depth investigation would be complex and time-consuming, and the likelihood of establishing an infringement appears limited, this will weigh against further action by the Commission.
- (13) Finally, the Commission may take into account whether a national court might be well-placed to examine the allegations made.

3. ASSESSMENT OF YOUR COMPLAINT

- (2) After a preliminary assessment of your complaint in light of the above considerations, for the reasons set out below, the Commission does not intend to conduct an in-depth investigation into your claims.

3.1. The likelihood of establishing the existence of an infringement

- (14) The likelihood of establishing the existence of an infringement of Article 101 and/or 102 TFEU in this case appears limited.
- (15) In your complaint and your subsequent submissions, you allege that MACO has or had (at the time it was applying the allegedly abusive business practices)³ a dominant position in the relevant market and that it abused that position by imposing unfair trading conditions on you, poaching customers, fixing prices and discriminating against you, in breach of Article 102 TFEU. You also allege that MACO proposed that you become its distributor for Poland under conditions which would have infringed Article 101 TFEU.

Article 102 TFEU

- (16) The assessment of a possibly dominant market position of MACO requires first that the relevant product market is defined. In your complaint, you do not suggest a relevant product market definition, indicating only, in a general way, that MACO is a manufacturer and distributor of comprehensive peripheral fittings for windows and doors.
- (17) The Commission notes that MACO manufactured and supplied to you a wide range of products but you do not specify, either in the complaint or your Observations, whether the alleged infringements relate to all or only some of the products that MACO manufactures and distributes. This implies that many potential product market definitions (e.g., for separate components or for any collection of components intended to be processed together into a particular type of window and/or door fitting) could be envisaged, even if the Commission were to assume that the alleged infringements relate to all the fittings you listed in the complaint (an issue that you do not address any further in either the complaint or your Observations).
- (18) Similarly, it is unclear whether the relevant geographic market should be national, regional, EU-wide or worldwide in scope. You indicate that such a market definition

³ While you do not specify exactly the period concerned in the Complaint or in the Observations, the accompanying documentation dates from 2008-2010.

could encompass Slovakia, the Czech Republic, Poland, Germany and Austria, since to your knowledge MACO sells its products in those EU Member States. However, in both the complaint and your Observations, you allow for the possibility that the geographic market might be larger. The Commission notes that MACO appears to sell its products in many other EU Member States, as well as outside the EU⁴, so the geographic market might be EU-wide or wider.

- (19) The Commission observes, however, that regardless of the precise market definition, it would appear difficult to argue that MACO held a dominant position (either presently or in the recent past). In particular, MACO appears to have as competitors a number of companies that operate in several EU Member States (e.g., [...]). If the relevant geographic market is indeed EU-wide or wider, MACO's market share is unlikely to rise to the level which would confer market power to it. MACO itself has stated that its market share is below [15-25]%⁵, regardless of how the relevant geographic market is defined, while you have not provided any market share information that would contradict this estimate. As regards your individual position, it appears that you were able to terminate your business relationship with MACO and switch suppliers to a competitor.
- (20) All of these elements and the absence of evidence to the contrary, suggest that MACO is rather unlikely to hold or have held (at the time it was applying the allegedly abusive business practices) a dominant position in the relevant market, however defined.
- (21) In the absence of a dominant position, the behaviour you allege could not be considered an infringement of Article 102 TFEU, and therefore, the Commission does not assess further whether MACO's behaviour could be considered abusive.

Article 101 TFEU

- (22) As regards your allegation that MACO reserved the right to set resale prices, the Commission notes that this appears unlikely, based on the elements you brought forward. It is not clear how the alleged sale of the contract goods at a price lower than the wholesale price, with credit notes issued by the supplier to cover the difference, combined with MACO's demands for detailed information on sales to customers, would limit your ability to independently set your resale prices.
- (23) As regards the distribution agreement for Poland that MACO proposed to you and the conditions that it was to contain, the Commission notes that, according to you, this distribution agreement was not agreed upon. To the extent you wish to argue that MACO may have infringed Article 102 TFEU by refusing to enter into the agreement for distribution in Poland without the proposed clauses, the Commission refers to its observations in paragraphs (16)-(21) above, in particular to the point that it is rather unlikely that MACO has (or had) a dominant position on any plausible relevant market.
- (24) As regards the agreement, since you never became a distributor of MACO in Poland, the allegedly anticompetitive conditions were never actually (or even implicitly) in place and were never part of your overall commercial relationship with MACO. It is for that

⁴ www.maco.at, under "Vertriebsnetz".

⁵ And at least clearly below [20-30]% in the Slovak market (see MACO's comments on the complaint, 19 February 2014).

purpose irrelevant whether it was you or MACO who decided not to enter into the agreement.

- (25) Therefore, in the absence of an actual (express or tacit) agreement containing the allegedly anticompetitive conditions, it is unlikely that the Commission could establish that there was an infringement of Article 101 TFEU.⁶

3.2. The scope of the investigation required

- (26) An in-depth investigation by the Commission would require considerable resources and would very probably be disproportionate in view of the limited likelihood of establishing the existence of an infringement.
- (27) With respect to your allegations under Article 102 TFEU, the Commission would have to conduct a comprehensive analysis of the relevant product and geographic market(s) involved, which appears to likely include a large variety of products manufactured by MACO. The Commission would also have to conduct an in-depth and complex analysis into MACO's alleged dominance at the time of the alleged abuse. This would entail, among other things, determining the market shares of MACO and of the other companies active on the relevant product and geographic market(s), verifying the existence of any barriers to entry for new competitors and whether there is significant countervailing buyer power. This analysis would have to cover a time-span of several years, beginning more than five years ago.
- (28) Should the Commission conclude that MACO was dominant, an in-depth investigation into the alleged anticompetitive conduct would require the Commission to examine in detail MACO's business relationship with its distributors in several EU Member States. This would likely necessitate extensive requests for information and possibly inspections at the premises of MACO, its national subsidiaries and its distributors in the relevant Member States.
- (29) With respect to your allegations under Article 101 TFEU, the Commission would have to dedicate resources to try to obtain evidence of the existence of an agreement on allegedly anticompetitive terms, which you yourself assert never existed.
- (30) It therefore appears to the Commission that a further investigation into your allegations would be disproportionately burdensome, given the low likelihood of finding an infringement.

3.3. National courts appear to be well-placed

- (31) National courts could be well-placed to deal with the issues raised in your complaint. National courts are fully competent to apply EU competition rules to any dispute that comes before them.
- (32) The allegations in your complaint relate principally to a commercial dispute between you and MACO regarding a distribution relationship that has already ceased to exist for several years, and there is no indication that MACO is currently pursuing the allegedly anticompetitive conduct on the market, against you or other market participants.

⁶ Nor of Article 102 TFEU (see paragraph (23) above, last sentence).

- (33) Insofar as you claim that your business relationship with MACO ended as a result of its allegedly anticompetitive behaviour and that this caused damages for you, this could very well be assessed and remedied by a national court. This is not negated by the circumstance that the alleged behaviour may have taken place in more than one Member State.

4. CONCLUSION

- (34) In view of the above considerations, the Commission, in the exercise of its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringements and consequently rejects the complaint pursuant to Article 7(2) of Regulation No. 773/2004.

5. PROCEDURE

5.1. Possibility to challenge this Decision

- (35) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. Confidentiality

- (36) The Commission reserves the right to send a copy of this Decision to MACO. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.⁷ If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform [...]. Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to MACO.
- (37) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission

Margrethe VESTAGER
Member of the Commission

⁷ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.