

COMMISSION DECISION

of 30 March 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/30.804 — Nuovo CEGAM)

(Only the Italian text is authentic)

(84/191/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, First Regulation implementing Articles 85 and 86 of the EEC Treaty⁽¹⁾, as last amended by the Act of Accession of Greece, and in particular Articles 4, 6 and 8 thereof,

Having regard to the notification submitted on 22 June 1983 by the Association Nuovo Consorzio Centrale Guasti alle Macchine (Nuovo CEGAM), Milan, in accordance with Article 4 of Regulation No 17, seeking a declaration under Article 85 (3) of the Treaty that the basic instruments of the Association are exempt from the provisions of Article 85 (1),

Having regard to the summary of the application published in accordance with Article 19 (3) of Regulation No 17⁽²⁾,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. Procedure

(1) The proceeding in this case was initiated as a result of an investigation into the insurance industry under Article 85 of the EEC Treaty which the Commission had begun on its own initiative. On 16 February 1983 the Commission sent a statement of objections to the Italian association of engineering insurers Nuovo Consorzio Centrale Guasti alle

Macchine (New Central Engineering Insurers' Association) ('Nuovo CEGAM'), in which it informed the Association's representatives that there was a *prima-facie* case against it which could result in adoption of a decision under Article 3 (1) of Regulation No 17. The object of the foundation of the Association and the effect of its activities appeared to be to restrict or distort competition within the common market for the class of insurance concerned. The statement of objections said the Agreement had anti-competitive effects at three levels :

At the *direct insurance* level, the Agreement meant that a large number of insurance companies, which otherwise would have been in competition with one another, had virtually ceased to compete on premiums and contract conditions, thereby reducing the variety of insurance services offered to the consumer.

At the *coinsurance* level, while in the absence of an agreement, the choice of coinsurance would have been an open one, the Agreement restricted members' choice of coinsurers since they were obliged to choose other members of the Association for this purpose.

In *reinsurance*, the anti-competitive effect of the Agreement was twofold : first, it restricted members' choice of reinsurers ; secondly, it restricted the reinsurer's freedom to set his own premium rates and contract conditions, both in his business with members of the Association and in his business transacted within Italy with non-members.

The Agreement was also liable to affect trade between the Member States in that the rules of the Association :

- were applicable to risks situated abroad as well as on Italian territory,
- affected the coinsurance operations of insurance companies outside Italy,

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 281, 18. 10. 1983, p. 3.

- affected reinsurers outside Italy by preventing members from choosing reinsurers other than those with which the Association was under contract and by imposing contractual restrictions on the latter's activity on the market.

The Commission informed Nuovo CEGAM that it was considering finding an infringement of Article 85 (1) of the Treaty and ordering it and the individual undertakings involved to bring the infringement to an end, and that fines might be imposed.

(2) In reply to the statement of objections Nuovo CEGAM informed the Commission on 11 April 1983 that, whilst it did not accept that the Association's activities breached Article 85 (1) of the Treaty, it was nevertheless prepared to amend its basic documents to accommodate the Commission's objections.

(3) On 22 June 1983 Nuovo CEGAM notified its basic instruments, viz.:

- Statutes (Statuto),
- Convention (Convenzione) and
- Quota and Threshold Agreement (Trattato quota ed eccedente), for negative clearance or alternatively exemption under Article 85 (3).

B. The market

(4) In Italy the development of engineering insurance — which provides cover against the risks, direct and indirect, of breakdown of or damage to all manner of machinery, plant and equipment used in factories, on building sites, etc. — has lagged behind that of the other major branch of insurance of industrial risks, industrial fire insurance.

Whereas there is a long tradition of industrial fire insurance and a steady demand for fire insurance cover from industry, the volume of engineering insurance business transacted by those companies that are engaged in this

market is relatively modest, and certainly a long way below the level found in other Member States.

(5) According to the companies which notified the agreements in question, the causes of this relative underdevelopment lie partly in the obsolescence of much industrial plant and the paucity of high-technology investment in Italy, and partly in the lack of an insurance tradition in the sector.

Its corollary is the backwardness of technical assistance services provided by insurance companies, especially for accident prevention.

Another feature of the engineering insurance sector in the Community is the fragmentation of the market largely along national lines. The efforts that have been made at various levels to integrate the insurance market have had little impact on this sector. It has not been greatly affected either by the abolition of restrictions on freedom of establishment in direct non-life insurance by Council Directive 73/240/EEC (1) or by the judgments that the Court of Justice has handed down on freedom to provide services, particularly that in Case 33/74 (2),

According to the 1982 edition of the Directory of Italian Insurance Companies published by the National Association of Insurance Companies (ANIA), around 60 insurance companies and about 10 branch offices of companies with headquarters outside Italy do some engineering business in Italy.

Only about 30 of these do significant amounts of engineering business, however.

Between 1978 and 1980, premium income from this class of business in Italy ran to between Lit 17 000 and 20 000 million. By 1981 it had reached about Lit 23 500 million.

(1) OJ No L 228, 16. 8. 1973, p. 2.

(2) Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de metaalnijverheid, [1974] ECR 1299.

C. The undertakings

(6) Faced with the situation described in B above and realizing that only companies with a high degree of specialization could hope to compete on the market for engineering insurance, a number of Italian and foreign insurance companies decided to form an association, with the aim of promoting and developing this class of business.

The first such association, called Consorzio Centrale Guasti alle Macchine, was formed in 1956. The New Association, with which this Decision is concerned, was established on 1 January 1972, renewed at the beginning of 1979 and again extended in 1982.

Since the Commission intervened as reported in A above, the Association has amended its basic instruments and has extended the present Agreement to 31 December 2000.

Lists of the Association's present members and reinsurers, taken from the 1983 version of its Statutes and the Quota and Threshold Agreement with reinsurers, are given in Annexes I and II to this Decision.

Members of the Association together hold about 26 % of the Italian engineering insurance market. Their premium income from this business between 1978 and 1981 (on all risks — Italian and non-Italian, EEC and non-EEC) ranged from Lit 3 900 million (1978) to Lit 5 500 million (1981).

Although the volume of claims in this class of business can vary considerably from one year to the next and a year's results can be badly affected if one or two really big claims come up from among the bulk of relatively small risks insured, in the period 1978 to 1981 the volume of claims, paid or outstanding, on policies written by members of the Association was fairly stable. The ratio of premium income to claims rose from 1,18 in 1978 to 2,04 in 1981.

D. The agreements

(7) Nuovo CEGAM has notified to the Commission the following basic instruments of the Association :

- the Statutes (Statuto),
- the Convention (Convenzione) and the
- Share and Threshold Agreement (Trattato quota ed eccedente), which has a key function in the operation of the Association since it governs the relations between its direct insurer members and reinsurers. The main clauses of these instruments are set out below.

The Statutes

(8) The Association, called the 'Nuovo CEGAM', has its headquarters in Milan and its objects are defined in the preamble as :

- '(a) action to disseminate and promote insurance against risks of machinery breakdown or damage, including consequential indirect risks, risks during installation, and construction accidents ;
- (b) updating and analysis of technical and actuarial data to improve performance in this class of business ;
- (c) provision, whenever necessary, of technical assistance to members on underwriting and claims settlement.'

The Association's organs are :

- (a) the President,
- (b) the General Meeting, and
- (c) the Executive Committee.

Under Article 9, one of the tasks of the General Meeting is to approve technical documentation for members' use in their underwriting of risks, which is prepared by a Study Committee for proposal to the member companies. The documentation contains tariffs of basic premiums.

The General Meeting also sets up a Technical Committee for assessing and rating particular risks.

The Association's Secretary, who is appointed by the General Meeting, has among his tasks the job of 'coordinating the work of the Study and Technical Committees'.

Under Article 19, any member failing to discharge his obligations towards the Association may be expelled by vote of the General Meeting.

The Convention

(9) The members of the Association also sign a Convention which supplements and elaborates on the Statutes.

The provisions of particular relevance for the purposes of this Decision are the following:

- (a) preamble: the Association may enter into special agreements with outside companies, termed 'associates', the effect of which is to extend to them the Association's rules. Associates must cede to the members by way of co- and reinsurance the portion of risks they assume in excess of their net retention of 10 %;
- (b) Clause 1: all business in the relevant class of insurance involving property located in Italy is subject to the Convention. The tariffs of basic premiums proposed by the Association must be used by members in fixing their final commercial premium rates for such business, which they do in the light of the particular circumstances surrounding the risk;
- (c) Clause 2: states the general principles that the members agree to observe in placing reinsurance:
underwriting limits, distinction between risks in Italy and abroad, option to retain more than the standard 10 %;
- (d) Clause 4: a Study Committee to be set up to amend and update the Association's rules and the general and special policy conditions;
- (e) Clause 8: lays down the maximum commissions members may pay their own commercial organizations.

The Quota and Threshold Agreement

(10) The Agreement contains the rules applicable to reinsurance. The Agreement's main provisions are as follows:

(a) Clause 1

- All risks underwritten by members are to be reinsured in accordance with the Agreement.
- The rates of premium and the conditions of the reinsurance are as agreed for the original insurance.

— Risks not provided for in the tariffs and/or exceeding the maximum capacities laid down in the Agreement are to be reinsured on conditions and at premium rates which the Association will negotiate with its principal reinsurer, Münchener Rückversicherungsgesellschaft.

(b) Clause 2

— The Agreement covers all engineering insurance written by members alone or with others or ceded to them for co- and reinsurance by associates.

(c) Clause 3

— Risks situated in Italy are automatically subject to the Agreement.
— Risks situated abroad and assumed by members alone or with others or ceded to them for co- and reinsurance by associates may be covered by the Agreement where the insured resides in Italy or is controlled by an Italian company.

(d) Clause 4

— Lists the types of risks excluded. Such risks may be included in the cover provided subject to the Association's prior agreement.

(e) Clause 6

— Members are required to retain a share of the risk equal to 10 % of the sum insured and may not reinsurance this portion with others.
— They may retain a bigger share within certain limits.

(f) Clause 8

— The maximum commission payable by the reinsurer to the ceding insurer is laid down, the actual percentage of which depends on the size of the additions to the basic premium that are contained in the final premium.

(g) Clause 9

— Reinsurance is at the same rate of premium and on the same general and special conditions and other terms as the original insurance written by the ceding insurer.

(h) Clause 11

— Reinsurers are bound by any amendments and discounts applied by ceding insurers.

E. Comments of third parties

(11) The Commission did not receive any comments from third parties in response to an Official Journal notice summarizing the agreements.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(12) 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.

Article 85 is equally applicable to agreements on services and to agreements on goods.

(13) The founding of the Association Nuovo CEGAM constitutes an agreement between undertakings and the activities of the Association are based on decisions by its organs, which constitute decisions by an association of undertakings.

(14) In scrutinizing the said agreements and decisions for restrictive elements, regard must be had to the objects and effects of the rules of the Association both as regards direct insurance and reinsurance.

(15) Under the Agreement, a large number of direct insurers, who but for the formation of the Association would be in full competition with one another, have established machinery under which, on the basis of statistical information on claims experience communicated by the members to the Association's organs, a common tariff of basic premiums for various types of risk is drawn up which the members agree to apply. In this way the members of the Association have voluntarily foresworn the right which they had prior to the Agreement to fix independently the basic rates of premium which they use in calculating the actual commercial rates of premium which they charge the insured. For risks not expressly

covered by the Association's tariffs or exceeding certain limits, members are no longer free to calculate basic rates of premium themselves but must abide by the decision of the Association's competent committee. Although members are able to fix their own final premiums by adding to the basic premium a margin for expenses, commission and profit which they see to in their best commercial interest, the Agreement nevertheless unquestionably has the object and effect of restricting the competition that would otherwise exist between the firms concerned.

(16) The members' freedom of choice is restricted by the obligation to place all their reinsurance with reinsurers who are parties to the Quota and Threshold Agreement.

The reinsurers, in their turn, are restricted in their freedom to conclude contracts by the obligation to accept the premium and the general and special conditions and other terms agreed by the ceding insurer in the original insurance contract, and by the obligation to accept all amendments and discounts.

The same can be said of the obligation imposed on reinsurers to accept all risks underwritten by members.

All the above restrictions are accepted by reinsurers as part of a package deal in return for being guaranteed all the members' reinsurance business. Members are also guaranteed that any more favourable terms which the reinsurers might agree with other ceding insurers not belonging to the Association will automatically be extended to them.

These various restrictions establish a web of interlocking relationships between insurers and reinsurers which are calculated to cement their mutual ties and in the final analysis to act as a barrier to the entry of outsiders on to the market.

(17) The Agreement is liable to affect trade between Member States in that the Association's rules :
— apply to risks situated both on Italian territory and abroad,

- affect reinsurers outside Italy by preventing business being given to reinsurers other than those party to the Quota and Threshold Agreement and by imposing contractual restrictions on commercial behaviour.

It is also to be noted that reinsurance companies based outside Italian territory in another EEC Member State are parties to the Agreement.

(20) The consumers of insurance services can also be said to receive a fair share of the benefit resulting from the formation and operation of the Association, since the promotion work being undertaken by Nuovo CEGAM in the Italian insurance industry is helping to enlarge its capacity, thereby widening the choice available to the consumer and offering him a technically more advanced product, on terms that are competitive with those of other companies operating on the market.

(21) A number of clauses that the Commission considered unacceptable in the previous version of the Agreement have been deleted from the version now notified. This applies in particular to :

- the clause giving the organs of the Association power to fix tariffs of final premiums which the member companies were bound to apply,
- the limits on the duration of policies,
- the obligation on members to choose other members as co-insurers,
- the obligation on the reinsurers not to agree more favourable reinsurance terms or premiums on the Italian market outside the Association.

(22) The restrictions remaining in the notified version of the Agreement do appear to be indispensable to the attainment of the Association's objectives.

(18) Article 85 (3) of the EEC Treaty states that the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement between 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.

(19) The engineering insurance market in Italy is characterized by weak demand and relatively limited supply. To do business in this sector the insurer needs highly specialized resources, for such is the technological element of the risks insured that an intimate knowledge of the particular industry concerned is required both for assessing and rating the risk and preventing its occurrence.

In such a situation, the formation of an association such as Nuovo CEGAM in order to acquire the specialist expertise essential for effective performance in the sector (statistical information, studies of risk, prevention techniques), and to ensure adequate reinsurance support, can be considered to be a means of improving the production and distribution of insurance services and of promoting technical and economic progress.

Without a standard basic tariff the Association would have found it harder to achieve its aims of improving production and distribution, in view of the technical expertise and wide claims experience required in transacting this class of insurance business.

(24) In considering the exclusive obligation undertaken by the Association's members to place their reinsurance business with particular reinsurers, it is important to bear in mind the role which reinsurance contracts play in insurance. Reinsurance is a key operational consideration in the commercial calculations of an insurance company and one which must normally be settled before the direct insurer underwrites a particular risk: before assuming that risk the insurer must know whether and on what terms he can obtain reinsurance for it.

Obligatory reinsurance under an agreement by its very nature involves an automatic reciprocal obligation on the reinsured and the reinsurer to offer and accept all risks specified in the Agreement. In the case in question, considering the specificity of the market in this class of insurance business outlined in paragraphs 4 and 5 above, it is unlikely that the direct insurers would obtain reinsurance terms equivalent to those under the Agreement if they did not agree to give all their business to reinsurers who are party thereto.

It is highly unlikely, also, that direct insurers could obtain the same terms negotiating individually with the reinsurers as they have done by negotiating as a body in the Association.

It should also be borne in mind that all parties to the Agreement have an opportunity once a year to withdraw from it.

(25) The agreements do not afford the parties the opportunity of eliminating competition for a substantial part of the insurance services in question.

The Association's members together hold about 26 % of the Italian market for engineering insurance and are in competition with a number of other powerful insurance companies, the biggest of which alone has 25 % and the top three together (not including any member of Nuovo CEGAM) 46 %.

Consequently, the Association is not able to eliminate competition in the sector.

C. Articles 6 and 8 of Regulation No 17

(26) The present state of the market for engineering insurance and the relatively small impact the

Association has on competition in that market justify the grant of an exemption for 10 years.

(27) To enable the Commission to check that the conditions of the competition rules continue to be fulfilled throughout the period of the exemption, the parties should be required to inform it once a year of any amendment of the agreements notified or of the conclusion of any new agreement between them, such information requirement being without prejudice to the need for the parties to notify, under Article 4 (1) of Regulation No 17, any changes in the subject matter or membership of the exempted agreements if they wish to continue to enjoy the exemption.

The parties should also be required to send the Commission annually a report containing statistical information on the activities of the Association,

HAS ADOPTED THIS DECISION :

Article 1

Pursuant to Article 85 (3) of the Treaty establishing the European Economic Community, the provisions of Article 85 (1) are hereby declared inapplicable for the period 22 June 1983 to 21 June 1993 to the following agreements:

- the Statutes (Statuto) of the Association Nuovo CEGAM, approved by an Extraordinary General Meeting of the Association on 18 May 1983,
- the Convention (Convenzione) of the Association Nuovo CEGAM, approved by the same Meeting,
- the Quota and Threshold Agreement (Trattato quota ed eccedente), in the form notified on 22 June 1983, between the members of the Association Nuovo CEGAM and the reinsurers listed in the schedule to the Agreement.

Article 2

The undertakings to which this Decision is addressed shall inform the Commission once a year of any amendment of or addition to the notified agreements and of the conclusion of any new agreement between

them. They shall also send the Commission annually a report containing statistical information on the activities of the Association.

I, and the reinsurance companies which are parties to the Quota and Threshold Agreement with the Association, listed in Annex II.

Article 3

This Decision is addressed to the Association Nuovo Consorzio Centrale Guasti alle Macchine, Milan, the member companies of the Association, which are parties to its Statutes and Convention, listed in Annex

Done at Brussels, 30 March 1984.

For the Commission

Frans ANDRIESSEN

Member of the Commission

ANNEX I***Members of the Association***

1. Assitalia — Le Assicurazioni d'Italia
2. Milano Assicurazioni
3. Compagnie riunite di assicurazione
4. La Fondiaria
5. Italiana incendio, vita e rischi diversi
6. La Pace — Assicurazioni e riassicurazioni
7. RAS — L'Assicuratrice italiana
8. Società cattolica di assicurazione
9. Società reale mutua di assicurazioni
10. Toro Assicurazioni
11. UAP Italiana
12. Nationale suisse — Compagnia italiana di assicurazione
13. La Previdente
14. ITAS — Istituto Trentino-Alto Adige per assicurazioni
15. Winterthur — Compagnia italo-svizzera di assicurazioni
16. CARD — Compagnia di assicurazioni rami danini
17. Compagnia latina di assicurazioni

ANNEX II**Reinsurers party to the Quota and Threshold Agreement with the Association**

1. Assitalia — Le Assicurazioni d'Italia
2. Milano Assicurazioni
3. Compagnie riunite di assicurazione
4. La Fondiaria
5. Italiana incendio, vita e rischi diversi
6. La Pace — Assicurazioni e riassicurazioni
7. RAS — L'Assicuratrice italiana
8. Società cattolica di assicurazione
9. Società reale mutua di assicurazioni
10. Toro Assicurazioni
11. UAP Italiana
12. Nationale suisse — Compagnia italiana di assicurazione
13. La Previdente
14. ITAS — Istituto Trentino-Alto Adige per assicurazioni
15. Winterthur — Compagnia italo-svizzera di assicurazioni
16. CARD — Compagnia di assicurazioni rami danni
17. Compagnia latina di assicurazioni
18. Unione italiana di riassicurazione
19. La Vittoria riassicurazioni
20. Reale riassicurazioni
21. La Consorziale
22. Compagnie suisse de réassurances
23. Gerling Konzern Global
24. Münchener Rückvers.-Ges.