

## II

(Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 5 June 1991

relating to a proceeding under Article 85 of the EEC Treaty

(Case No IV/32.879 — Viho/Toshiba)

(Only the English text is authentic)

(91/532/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 Article 85 and 86 of the Treaty (1) as last amended by the Act of Accession of Spain and Portugal, and in particular Article 15 (2) thereof,

Having regard to the application for a finding of an infringement submitted on 6 September 1988, pursuant to Article 3 (1) of Regulation No 17, by Viho Europe BV,

Having regard to the Commission Decision of 21 March 1990 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (2),

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

## I. FACTS

## Nature of the proceeding

- (1) This proceeding concerns the existence of an export prohibition in agreements between Toshiba

Europa (I.E) GmbH (TEG) and some of its exclusive distributors of photocopiers in the EEC, and certain behaviour of TEG in impeding parallel trade in the EEC. The proceeding began with a complaint lodged by Viho Europe BV on 6 September 1988.

## The parties

- (2) 1. Toshiba Corporation of Japan (Toshiba) is a leading manufacturer of a wide variety of electronic products, with a consolidated turnover in 1989 exceeding \$26 900 million ;
2. Toshiba Europa (IE) GmbH (TEG) of Germany is a wholly owned subsidiary of Toshiba Corporation set up initially to distribute Toshiba's 'Information and Communication Systems' products in Germany. These products consist principally of electronic office products, notably photocopiers, with which the business in the common market began, lap-top personal computers, printers, and facsimile machines.

In 1989 the consolidated turnover of TEG was [...] (3), of which photocopiers accounted for [...];

(1) OJ No 13, 21. 2. 1962, p. 204/62.

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

(3) In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

3. Viho Europe BV of the Netherlands distributes office equipment and related products, especially within the EEC.

### The product

- (3) The products to which this Decision refers are electrostatic and plain paper copying machines (hereafter referred to as photocopiers) distributed by TEG.

### The market

- (4) As outlined in the Commission's Olivetti-Canon Decision<sup>(1)</sup>, because not all photocopiers are sufficiently interchangeable to compete with each other in terms of price, speed (copies per minute), physical characteristics, and other facilities, manufacturers and suppliers use some form of market segmentation.

The market principally concerned by this case is the low-end range of photocopiers, usually defined as machines capable of producing up to 30 copies per minute.

- (5) In the low-end range market detailed figures for 1988<sup>(2)</sup> show Toshiba to have the fifth-largest market share in Western Europe at 6,9 % with 65 900 units sold. Canon was the clear market leader with a 24 % market share; there were many other competitors.

### Distribution of Toshiba photocopiers in the European Communities

#### The agreements

- (6) With the exception of Greece, where Toshiba has directly concluded an exclusive distribution agreement with an independent distributor, and Germany, where TEG itself undertakes distribution, TEG concluded exclusive distribution agreements for individual Member States with independent distributors between 1975 and 1986. Some of these agreements were terminated as distributors were replaced by TEG sales subsidiaries.
- (7) The initial distribution agreements drawn up by TEG included an export prohibition stating that the distributor 'shall not sell nor export, whether directly or not, the products to other countries than the territory without Toshiba's consent in writing', or a substantially similar wording.
- (8) In 1982, a revised model exclusive distribution agreement was drawn up in which the export prohibition was eliminated. Agreements concluded from 1982 were in this revised form. The agreements which already existed at this time however were not modified.
- (9) It has been established that the following distribution agreements of TEG contained an export prohibition clause:

Country	Distributor	Date of agreement	Date of termination
Belgium	Eres NV	1. 5. 1976	—
Ireland	Magnus Office Equipment Ltd	27. 5. 1980	—
Netherlands	Handelsondernehmung Reprotechniek BV	1. 1. 1975	—
Portugal	Hoechst Portuguesa SARRL	1. 2. 1981	—
Denmark	Møller & Landschulz Aktieselskab	4. 2. 1980	18. 12. 1986
Italy	Tiber SpA	1. 3. 1977	30. 4. 1987
United Kingdom	International Office Products Ltd	28. 7. 1975	18. 7. 1984

#### The implementation of the agreements and other practices

- (10) TEG claimed initially that there seemed to have been no course of conduct implementing the export prohibition contained in the agreement and that TEG and its distributors never engaged in a policy or acts to apply or use these provisions. However, subsequently, an internal review of its files dating between 1982 and 1989 carried out by TEG revealed a small number of instances where it

was clear that an export prohibition was put into effect by some distributors, with TEG being aware of this. There is also some evidence of TEG itself querying parallel trade. The evidence found by TEG in its files is described below.

- (11) In a letter in December 1984, TEG's Belgian distributor Eres NV (Eres) intervened with one of its dealers in Arlon to stop it exporting to Luxembourg, stating that Eres is forbidden to export machines to Luxembourg. Eres goes on to ask the dealer to stop delivering to Luxembourg, or otherwise they would be obliged to terminate the business relationship.

<sup>(1)</sup> OJ No L 52/31, 26. 2. 1988, p. 51.

<sup>(2)</sup> Source: Dataquest. Statistics for Western Europe are considered to be indicative of the market shares held in the EC.

A copy of this was sent to TEG, with a letter declaring that Eres was prepared to stop selling to the dealer concerned. Eres goes on to say that care has to be taken in writing to the dealer because of EEC law.

(12) In July 1985, the Dutch distributor Reprrotechniek informed TEG that it had refused to supply quantities of toner to the complainant, Viho, stating that it was important that TEG informed 'all importers in Europe of this man and his company'. TEG immediately complied with this request by sending a copy of Reprrotechniek's telex to at least some of the other distributors, adding that cooperation would be appreciated.

(13) In September 1986, TEG received a complaint from the Danish distributor appointed in 1986, Esselte A/S (Esselte) about a copier 'imported by a pirate'. In it Esselte hoped that TEG could stop the traffic of private importing of Toshiba machines, because it was inconvenient for both Esselte and its dealers. The letter refers to a previous meeting between TEG and Esselte in which the matter had been discussed. There is evidence that TEG was able to identify the machine as having originally been sold to a dealer in Hamburg, but it is not known whether this was further followed-up.

(14) In October 1988, Esselte, apparently referring to a complaint received about a sale in Germany of a copier originally sold to Esselte, informed TEG of the circumstances of the sale. A letter from Esselte to the dealer concerned was enclosed. This states that Esselte had been informed by TEG that the dealer had sold a copier to Germany. 'We are fighting very hard against the pirate importing of Toshiba machines to Denmark, and as it is of interest to all the dealers, we suggest that it does not take place in the future. If you wish to sell to Germany, please inform us about it and we will be able to arrange service contact for you. In that way, Toshiba Germany and Toshiba's dealers will be informed of it'.

In November 1988, TEG wrote to Esselte referring to the earlier correspondence, complaining about four copiers which were offered to German dealers from Denmark at apparently low prices. The letter asked Esselte to intervene with the dealer in question.

(15) In July 1987, the former Italian distributor, Tiber SpA (Tiber), approached the Spanish distributor Otesa SA (Otesa), appointed in April 1983, with a request for spare parts. Tiber's distribution agreement had been terminated in April 1987, and is

subject to dispute which continues. Otesa refused to supply stating that the contract it had with TEG specifically forbade it to send goods to other countries.

Otesa sent TEG a copy of this exchange, and referred to a telephone conversation on the subject.

Whilst it is true that the written agreement with Otesa did not contain an export prohibition clause, Otesa nevertheless understood their contract to contain such a clause and TEG knew that it had this understanding. This contract was terminated in December 1988.

#### *Price variation between the Member States*

(16) From information provided by TEG, there exists a degree of price variation between the Member States.

In 1988 for example, based on TEG's estimates there was a variance of [...] between the highest and lowest prices to dealers in the various Member States on model BD 3110, [...] for model BD 5110, and [...] for model BD 8412.

Comparative figures for price differentials for these models (1) were [...] respectively for 1987, and [...] respectively for 1986. There was no fixed pattern as to which Member States had the lowest or highest prices, except in 1987 when the prices in France were consistently the lowest, and prices, in Luxembourg were consistently the highest.

The prices to dealers in adjoining Member States also showed significant variations. Prices to dealers in Luxembourg were higher than to dealers in Belgium for the models noted for example, the differences ranging from [...] in 1988, and similar figures for the previous two years examined.

#### *Termination of the infringement*

(17) TEG acknowledges that the wording of the agreements infringes Article 85 (1), and accordingly on 2 June 1989 wrote to the Belgian, Dutch and Portuguese distributors which continued to have agreements containing an infringing provision, proposing appropriate modifications. On 25 January 1990 TEG similarly wrote to the Irish distributor. By 29 January 1990 all four distributors had acknowledged the modification to their agreements, which eliminated the infringing provision.

(1) Figures for model BD 5610 instead of BD 5110, a similar model which went out of production in 1988.

On 26 January 1990 TEG also wrote to its Danish distributor clarifying what its contractual obligations were with regard to sales outside Denmark so as to avoid any misunderstanding.

- (18) Furthermore, Toshiba Corporation has drawn up a wide-ranging EEC competition law compliance programme for its EC subsidiaries in order to help ensure future compliance with the competition rules.

## II. LEGAL ASSESSMENT

### A. Article 85 (1)

- (19) TEG and its exclusive distributors in the Community are undertakings within the meaning of Article 85, and the contracts between them are agreements within the meaning of that provision.
- (20) An export prohibition clause was inserted in seven agreements, four of which continued in force until after the review prompted by the Commission. The object was to restrict competition by preventing parallel imports and to give territorial protection to the distributors within the particular Member States allocated to them, and to TEG or the exclusive distributor appointed directly by Toshiba elsewhere in the common market.

Such clauses in themselves infringe Article 85 (1). The Court of Justice has held in several judgments<sup>(1)</sup> that agreements which prohibit exports within the common market by their very nature restrict competition within the meaning of Article 85 (1), and that once it has been shown that this is the object of an agreement, it is not necessary to prove that the restriction has actually been put into effect.

As is noted above, there is also some evidence of an export prohibition being put into effect.

- (21) Article 85 (1) therefore applies to those agreements between TEG and its exclusive distributors which contained an export prohibition.
- (22) Similarly, notwithstanding that the written agreements between TEG and the Danish distributor Esselte and the Spanish distributor Otesa did not contain an export prohibition clause, the evidence demonstrates that there was an understanding that such an export prohibition should apply. Whilst there was such an understanding, these therefore also constitute agreements to which Article 85 (1) applies.
- (23) Toshiba's products have a not insignificant part of the market in the EEC for the low-end range of copiers. Differences in prices for these products

exist between Member States, thereby leading to conditions in which parallel trading might take place. In these circumstances, it is concluded that the restrictions in question are capable of appreciably affecting trade between Member States.

### B. Article 85 (3)

- (24) The agreements in question between TEG and its exclusive distributors which contained an export prohibition were not notified to the Commission, and such a restriction on exports does not come within the exceptions envisaged in Article 4 (2) of Regulation 17. No exemption decision in application of Article 85 (3) may therefore be taken.

In any event, even had there been a notification, these agreements could not have been declared exempt from the application of Article 85 (1) since the restriction on exports does not appear to be indispensable to any improvement in distribution, and is likely to be detrimental to consumers.

### C. Article 15 (2) of Regulation No 17

- (25) In the light of the considerations set out above, the Commission considers there are grounds for finding that TEG has infringed Article 85 (1).
- (26) Under Article 15 (2) of Regulation No 17, the Commission may impose fines of from ECU 1 000 to ECU 1 million or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where, either intentionally or negligently, they infringe Article 85 (1) of the EEC Treaty. In fixing the amount of the fine, regard must be had both to the gravity and to the duration of the infringement.

The Commission considers that the imposition of a fine on TEG is justified in the present case. There is no evidence that the exclusive distributors had any input into the drafting of the agreements which they entered into with TEG, and on the basis of the facts it is considered that TEG stands largely responsible for the behaviour which resulted.

- (27) The Commission considers that TEG infringed Article 85 (1) in including export prohibition clauses in its agreements concluded with distributors between 1975 and 1981, and was at least negligent in not removing these clauses from agreements which then existed when a new, non-infringing, model agreement was drawn up in 1983.

Furthermore, even after the drawing up of a non-infringing model agreement based, it would seem, partly on the realization by Toshiba that the export prohibitions were not in conformity with EC law,

<sup>(1)</sup> In particular, Joined Cases 56 and 58/64 — Consten and Grundig [1966] ECR 299, Miller [1978] ECR 131.

there is evidence of a small number of instances between 1984 and 1988 where an export prohibition was put into effect, in one instance notwithstanding that the distribution agreement in question contained no such clause. TEG was aware of this, and as late as November 1988 is known to have itself queried parallel trade between Germany and Denmark. These instances would seem to have been at variance with the Toshiba group policy on parallel trade during this period and thereafter.

(28) In determining the amount of the fine to be imposed on TEG, the Commission has taken into account, in particular, the following factors:

1. The infringement relates to the obstruction of the achievement of a fundamental objective of the Treaty, the integration of the common market.
2. Community law is very clear in this area.
3. The infringements are of long duration. The longest infringing provision, that contained in the agreement with Reprotechniek, dated from 1 January 1975. The infringements were only brought to an end following the Commission's investigation of the allegations in Vihó's complaint.
4. TEG is part of a large group of companies, with a large turnover, and is a significant player in the market for photocopiers in the EEC.
5. TEG was extremely cooperative during the investigation of the case.
6. Toshiba has now drawn up, and introduced from October 1989, a wide-ranging EEC competition law compliance programme for its EC subsidiaries, including TEG, in order to help ensure future compliance with the competition rules.

(29) Implementation of this compliance programme is designed, *inter alia*, to familiarize relevant employees with the group's policy to comply with the letter and the spirit of EEC competition law, and to make sure that they are adequately motivated to adhere to the policy.

The Commission considers that Toshiba's action in this direction has been very constructive.

(30) In general terms, the Commission considers that management has the responsibility to establish

effective internal rules for compliance with EEC competition law. The nature and extent of such rules will vary from enterprise to enterprise, and also from one part of an enterprise to another. Effective implementation and monitoring is essential to achieve a stated compliance objective,

HAS ADOPTED THIS DECISION:

*Article 1*

Toshiba Europa (IE) GmbH (TEG) has infringed Article 85 (1) of the EEC Treaty by including an export prohibition in agreements with its exclusive distributors.

*Article 2*

A fine of ECU 2 million is hereby imposed on TEG.

This fine shall be paid within three months of the date of notification of this Decision to the account of the Commission of the European Communities, No 310-0933000-43, Banque Bruxelles-Lambert, Agence Européenne, 5 Rond-Point Robert Schuman, B-1040 Brussels.

After three months, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, that is 13,25 %.

*Article 3*

This Decision is addressed to:

Toshiba Europa (IE) GmbH,  
Hammer Landstraße 115,  
D-4040 Neuss.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 5 June 1991.

*For the Commission*

Leon BRITTAN

*Vice-President*