

Decision

Infringement of the rights of the defence and of essential procedural requirements	3307
Breach of the principles of good administration	3408
Applicability of Article 85 (1) of the Treaty	3409
Non-application of Article 85 (3) of the Treaty	3412
The fines	3414
Costs	3418

OPINION OF MR ADVOCATE GENERAL
VERLOREN VAN THEMMAAT
DELIVERED ON 29 JUNE 1983¹

*Mr President,
Members of the Court,*

In the 11 applications now before the Court, the applicants seek a declaration that the Commission Decision of 17 December 1981 relating to a proceeding under Article 85 of the EEC Treaty (Official Journal, 1982, L 167, p. 39) (hereinafter referred to as "the Decision") is void. In their applications against that Decision, the applicants rely on eight submissions, each of which I intend to consider in turn below. Before I do so, I shall briefly summarize the main facts of the case.

1. The principal facts

The Nationale Vereniging der Waterleidingsbedrijven [National Association of Water Suppliers, hereinafter referred to as "NAVEWA"], which has its registered office in Brussels, is a non-profit-making association consisting of 31 water-supply undertakings. Under Royal Decrees of 1965 and 1966, those undertakings were entrusted with responsibility for the quality of the water

supplied by them. Their common interests are safeguarded by NAVEWA which, with that end in view, amongst other things, also carries out conformity checks to determine whether washing machines and dishwashers which are to be connected to the water-supply network satisfy the requirements for the prevention of contamination of drinking water which are prescribed for those appliances by the Royal Decrees just mentioned.

Those checks were developed in three stages after 1965. Originally, they were carried out on the premises of the consumer who had purchased the appliances. Subsequently, they were transferred to the manufacturer's or the importer's premises and effected by the use of conformity lists setting out the authorized types of appliances. Later, that method too came to be regarded as unwieldy, which prompted NAVEWA to introduce a system of conformity labels. Under that system, the conformity check was to be carried out by the manufacturer or the importer, and the labels supplied by NAVEWA were affixed to the appliances as proof of conformity. NAVEWA was to confine itself to

¹ — Translated from the Dutch.

carrying out random checks. Negotiations aimed at establishing the system in question were conducted by NAVEWA *inter alios* with the Electriciteitsgemeenschap [Electricity Board, hereinafter referred to as 'the CEG'], an association of trade interests including manufacturers and importers of electrical appliances, and with the Federatie van de Handel in Elektrische Apparaten [Federation of Traders in Electrical Appliances, hereinafter referred to as 'the FHEA']. On 13 December 1978 the Agreement Concerning the Use of the NAVEWA-ANSEAU Conformity Label for Washing Machines and Dishwashers (hereinafter referred to as 'the Agreement') was concluded. The Agreement was signed by NAVEWA on the one hand and by a large number of manufacturers and importers affiliated to the CEG or to the FHEA on the other, including all the applicants in these joined cases.

The purpose of the Agreement is to guarantee the quality of drinking water (Article 1) by the use of conformity labels for washing machines and dishwashers (Article 2). The CEG is to act as representative of all the affiliated undertakings, in so far as they are manufacturers or sole importers (Article 4). It is to issue the labels (Article 5). NAVEWA is to supervise compliance with the provisions relating to conformity laid down in the "Special Rules" (Article 8). NAVEWA is to advise its members to take account of the purpose and terms of the Agreement and to inform the consumer thereof (Article 10). The CEG sold the labels only to manufacturers and to official importers.

In November 1980, the Commission initiated a proceeding under Article 85 of the EEC Treaty and on 15 December 1980 it sent a statement of objections to the signatories of the Agreement. In its statement of objections, the Commission

indicated its intention to establish that the purpose and the effect of the Agreement were to make parallel imports of washing machines and dishwashers into Belgium impossible or at least very difficult. On 17 December 1981 the Commission adopted the contested Decision. In that Decision it was stated that a number of articles contained in the Agreement and in the Special Rules were regarded as constituting infringements of Article 85 (1) of the EEC Treaty (Article 1), the parties were required to bring the infringements to an end and to inform the Commission thereof (Article 2) and a fine was imposed (Article 3). The fines imposed were as follows: 9 500 ECU on the applicants in Cases 101 and 104/82; 38 500 ECU on the applicants in Cases 96, 97, 99, 100 and 102/82; and 76 500 ECU on the applicants in Cases 98, 105, 108 and 110/82.

2. The position of parallel importers

As I have stated, the Decision is directed essentially against the fact that parallel imports of washing machines and dishwashers into Belgium are rendered impossible, or at least very difficult, as a result of the implementation of the Agreement. In order to facilitate consideration of the submissions put forward by the applicants against that Decision, I shall begin by summarizing the facts, as established, concerning the position of parallel (unofficial) importers.

In the *first* place, it is clear from the manner in which the Agreement came into being — and is not denied by the applicants — that parallel imports were a source of concern to the CEG and the FHEA. According to paragraph 20 of the

Decision, the FHEA's principal objection to the system of conformity lists was that parallel importers could benefit from the checks carried out by official importers without having to contribute to the costs involved. It is clear from paragraph 22 that the CEG strove to obtain markedly more favourable treatment for its members. At the meeting on 23 October 1978, the CEG stated that the proposed Agreement would provide a "weapon" against parallel imports since it alone was authorized to issue the labels which would be supplied exclusively to official importers. As regards NAVEWA, it must be observed that the working party of legal experts which drafted the Agreement was clearly aware of the possible adverse consequences for parallel importers and observed that importers who were not members of the CEG should also be enabled to obtain the labels (paragraph 21).

Secondly, the structure of the Agreement accords a different status to parallel importers from that accorded to official importers. The purpose of the Agreement is to establish an indissoluble link between conformity checks on washing machines and dishwashers and the supply of labels. Admittedly, the possibility of individual checks by NAVEWA is not excluded, although in that respect the position of official importers differs from that of unofficial importers. Under Article 2 (1) of the Special Rules (paragraph 17), official importers are entitled to technical assistance 100 times each year. For any further assistance they are to pay approximately BFR 4 000 per half-day, in the course of which approximately 10 appliances may be inspected. In the case of unofficial importers, assistance may be obtained only against payment and the costs thereof are higher, amounting to BFR 10 000. It was not specified whether that was the cost of inspecting each appliance

individually or of each type of appliance. Since the Commission has rightly pointed out that conformity lists have been abolished, the implication is that every unofficial importer must in any case incur those costs for the types of appliances sold by him. Under the Agreement, moreover, the CEG alone is authorized to issue the labels and it has made no secret of the fact that it intends to sell them only to affiliated importers.

Thirdly, it is not contested that, as regards the implementation of the Agreement, the CEG despatched standard letters in which dealers seeking information on the procedure to be followed in order to obtain the labels were requested to declare and to submit proof that they were sole importers. It is clear from the facts set out in paragraphs 29 and 30, which are also uncontested, that the CEG actively opposed parallel imports. Mention must also be made of the fact (paragraph 35) that, as a result of that policy, foreign manufacturers decided to appoint official importers in Belgium. Furthermore, NAVEWA has played an active part in ensuring that the labels are affixed to the appliances and has informed dealers and consumers of the consequences of the absence of such labels.

3. First submission: infringement of the rights of the defence

The applicants with the exception of Miele (Case 110/82) contend in their first submission that the Commission has infringed the rights of the defence and essential procedural requirements, in particular those contained in Articles 2

(1) and 4 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearing of interested parties and third parties (Official Journal, English Special Edition 1963-64, p. 47). In support of their contention, the applicants maintain that the statement of objections refers to the restrictive effect of the Agreement on trade and to the restriction of parallel imports, whilst in paragraph 56 of the Decision reference is made to the discriminatory treatment of parallel importers. It follows that the Decision is concerned with another issue on which the applicants were not afforded an opportunity of making their views known in advance, which constitutes an infringement of the rights of the defence.

In the first place, it must be pointed out in relation to that argument that, in the last sentence of the same paragraph, the Commission refers to the checking or prevention of parallel imports resulting from the different treatment of official importers and parallel importers. Furthermore, on page 21 of the statement of objections, the Commission expressly refers to a situation in which parallel imports of washing machines and dishwashers into Belgium are made impossible or very difficult, which is a clear reference to discriminatory conduct. The applicants also came to the same conclusion as is apparent from the last sentence on page 12 of their reply to the statement of objections in which it is made clear that the purpose of the Agreement is to transfer responsibility for carrying out conformity checks to manufacturers and official importers and to them alone.

clarity, that the two expressions cannot be used to describe the same conduct alleged against them since there cannot be any question of discrimination against unofficial importers. In their reply, the applicants contend that there was no question of access to conformity labels being refused or restricted, since official importers had no intention whatsoever of refusing to issue them. Quite apart from the correctness of that contention, it can in any case be established that the Agreement, in particular as a result of the status which the CEG is accorded therein, does not make the labels available to parallel importers on the same conditions as those which apply to official importers and it therefore makes parallel importers susceptible to pressure exerted by the manufacturer and by the official importer of the manufacturer's goods. The very existence of that possibility is, according to the established case-law of the Court on this point, sufficient to allow it to be concluded that there is a restriction on trade between Member States. In that connection, I would refer to the Court's judgment in Joined Cases 56 and 58/64 *Consten and Grundig* [1966] ECR 299 and to its judgment to the same effect concerning restrictions imposed under public law on parallel imports in Case 8/74 *Dassonville* [1974] ECR 837, paragraphs 8 and 9 of the decision. The Decision is therefore consistent with the statement of objections, as the Commission itself correctly points out on pages 8 and 9 of its rejoinder. Thus, the conditions prescribed by Article 4 of Regulation No 99/63, as interpreted by the Court in its judgment in Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661 at p. 691, are satisfied.

The applicants also submit, in an argument which is not outstanding for its

The first submission must therefore be dismissed.

4. Second submission: breach of the principles of good administration

This submission, put forward by NAVEWA (Case 108/82), consists of two parts.

First, NAVEWA contends that the Commission failed to ascertain, either at all or to a sufficient extent, what steps NAVEWA was prepared to take in order to meet the Commission's objections to the Agreement. During the hearing on 11 March 1981, NAVEWA offered to amend the Agreement and on 24 April 1981 it forwarded to the Commission a draft "Special Agreement" regulating the availability of labels for importers who were not parties to the Agreement. One of the conditions contained in that draft was the payment of BFR 50 000 by way of guarantee. By letter of 19 May, the Commission asked for further information and thus did not rule out the possibility that the infringements complained of might be remedied. However, it took the view that further inquiries were necessary. On 15 June, NAVEWA forwarded to the Commission a copy of what had now become the final draft of the "Special Agreement". That appears to be the last occasion on which the parties were in contact until 17 December 1981 when the Commission adopted the Decision in question. During the oral procedure, the Commission stated that it had not made any further efforts in that regard since it was not convinced that NAVEWA was genuinely prepared to amend the Agreement. As regards the arguments advanced by the applicants, it must in the first place be observed that it cannot rely on the principle of the protection of legitimate expectation. The Commission had expressly stated that it needed to

conduct further inquiries. Its misgivings regarding the applicants' willingness to terminate the infringements cannot be regarded as baseless in view of the fact that the Special Agreement was not implemented until after the Commission had adopted its Decision. In more general terms, it is correct to state that, in the light of the principles of good administration, the Commission must conduct an independent inquiry in order to determine whether there is a genuine readiness to terminate infringements of Article 85 established by it. It would be contrary to the nature of the infringement procedure under Article 85 to require that any infringements of that article, which are prohibited even in the absence of a prior decision on the matter, should always be terminated by negotiations between the parties and the Commission.

Secondly, the Commission is alleged to have acted improperly, inasmuch as on 17 December 1981 the operative part of the contested legal measure which was notified to the parties by telex message or by telegram was, at the same time, communicated to the press, whilst the full text of the Decision was not communicated to NAVEWA until 21 December. The applicants claim to have suffered considerable damage during that period as a result of the ensuing publicity. This part of the second submission also fails. As the Court has already held in Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661 at p. 692, publicity given to a decision may even contribute to ensuring the observance of the rules of competition contained in the EEC Treaty. Furthermore, the Commission's conduct did not lead to the public disclosure of any business secrets, so that there can be no question of an infringement of Article 21 of Regulation No 17.

5. Third submission: no agreement between undertakings

NAVEWA (Case 108/82) also contends that there is no "agreement between undertakings" within the meaning of Article 85 (1) of the Treaty. This submission is based on two considerations: NAVEWA is a trade association which does not itself carry on any economic activity and it can only make recommendations to its members.

The first consideration was rejected as irrelevant by the Court in its judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 88 of the decision. Instead, the decisive question is whether the activities of NAVEWA or those of its members are aimed at bringing about the consequences referred to in Article 85. That question forms the subject-matter of the fourth submission. Still less tenable is NAVEWA's argument to the effect that it can only make recommendations to its members. It is not denied that under Article 10 (1) of the Agreement, NAVEWA is under an obligation to make recommendations, but the fact remains that such recommendations may exert a profound influence on competition. The Ghent, Antwerp and Brussels water undertakings have adhered to the recommendations made. Accordingly, the criterion referred to by the Court in paragraph 89 of the judgment to which I have just referred, to the effect that the influence exerted on competition by the recommendations of a trade association is decisive, has been met.

6. Fourth submission: no restrictive effect on competition

NAVEWA (Case 108/82) and Miele (Case 110/82) contend that the

Commission has failed to demonstrate convincingly that the Agreement has a restrictive effect on competition. This submission too consists of two parts: that the sole purpose of the Agreement is to protect public health and that not all the contracting parties intended to restrict competition.

As regards the first part of this submission, it is sufficient to observe — in the light of the considerations mentioned in paragraph 2 — that the Agreement is based on a system of checks which may be implemented only by the use of labels and that they may be supplied exclusively by the CEG. That association has made no secret of its intention to make the labels available only to importers who are affiliated to it. According to paragraph 28 of the Court's decision in Joined Cases 31 and 36 to 82/78 *BMW Belgium* [1979] ECR 2435, those circumstances may be regarded as indicating an intention on the part of the contracting parties to the Agreement to treat parallel importers, at the very least, less favourably than CEG members. Both the CEG and NAVEWA were fully aware that any appliances not bearing the labels were unsaleable.

As regards the second argument, it must be stated forthwith that, pursuant to Article 8 (2) of the Agreement, NAVEWA undertook to notify dealers in appliances not bearing a conformity label that their appliances did not satisfy the requirements for connection to the water-supply system. The applicants were therefore aware that parallel imports of such appliances would become unsaleable unless the dealers assumed responsibility for carrying out the checks

and for the costs thereof. Whether the parties were aware that the conclusion of the Agreement constituted a breach of the prohibition laid down by Article 85 (1) is irrelevant. On that point, I would refer the Court to paragraph 44 of the last-mentioned decision. Accordingly, the applicants' fourth submission also fails.

7. Fifth submission: no appreciable restrictive effects on competition

Since it is established that the Agreement has a restrictive effect on competition, it serves no purpose, according to the Court's judgment in Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, to conduct an investigation into the restrictive consequences of such an arrangement. In that connection, the argument advanced by Miele (Case 110/82) to the effect that the problems experienced by parallel importers derive from disparities between the laws of the Member States is not relevant. The existence of such problems in no way entitles the applicant to tighten those restrictions on trade by infringing Article 85.

8. Sixth submission: no appreciable influence on trade between States

It was clear from my discussion of the first and fourth submissions that it may be said that the Agreement exerts an influence on trade between Member States. NAVEWA's argument to the effect that such influence is not appreciable has already been refuted by the Commission on the basis of the figures set out on pages 45 and 46 of its

defence. Since, moreover, it is established that implementation of the Agreement as a whole may prevent parallel imports it is difficult to maintain this submission.

9. Seventh submission: wrongful failure to apply Article 85 (3)

All the applicants claim that there was no obligation to notify the Agreement pursuant to Article 4 (2) of Regulation No 17. Accordingly, the Commission could not refuse to apply Article 85 (3) by reference to the fact that the Agreement had not been notified. The applicants contend that both of the conditions prescribed by Article 4 (2) of Regulation No 17 are applicable to them. Only undertakings from one Member State are parties to the Agreement and, furthermore, the Agreement does not relate either to imports or to exports between Member States.

The Commission's reasoning on that point is set out in paragraph 62 of its Decision. In its view, subparagraph (1) of Article 4 (2) of Regulation No 17 is inapplicable — which is to say that the Agreement *does* relate to imports and exports — because there is discrimination between manufacturers and official importers on the one hand and unofficial importers on the other as regards the right to obtain conformity labels. That is the genuine argument and not, as the applicants contend in their application, that the Commission considers Article 4 (2) of Regulation No 17 to be inapplicable because the Agreement does not qualify for exemption under Article 85 (3) of the Treaty. In its defence, the Commission expressly refers to this shift in the arguments. In its Decision, moreover, the Commission makes no mention of the

fact that a Belgian subsidiary of BBC Hausgeräte GmbH is a party to the Agreement. That argument was advanced only during the proceedings.

Therefore it is necessary to determine whether the Agreement does or does not in fact relate to imports or to exports between Member States. According to the judgment of the Court in Case 43/69 *Bilger v Jehle* [1970] ECR 127 at p. 135, that expression must be interpreted more narrowly than the provision concerning trade between Member States contained in Article 85 (1), namely in the sense that an agreement does not relate to imports or to exports if it is an agreement “the execution of which does not require the goods in question to cross national frontiers”.

It was clear from my discussion of the fourth submission, considered earlier, that the purpose of the Agreement is to hinder parallel imports of washing machines and dishwashers into Belgium. In my opinion, therefore, the Agreement has a direct effect on imports, even though that is not immediately apparent from its wording. That interpretation is also consistent with the formulation, cited by the Commission, which was adopted by the Court in its judgment in Case 63/75 *Roubaix-Wattrelos* [1976] ECR 111 in which the requirement that an agreement must “relate either to imports or to exports” is regarded as a consequence of the degree of harmfulness of an agreement. In my view, therefore, the Agreement did not fall within Article 4 (2) of Regulation No 12 and thus could not qualify for exemption under Article 85 (3) of the Treaty since it was not notified in time.

The applicants also contend that the Commission’s refusal to apply Article 85

(3) is not supported by a proper statement of reasons. The Commission’s reasoning on that point, which is set out in paragraphs 61 to 63 inclusive of its Decision, is admittedly concise, although it does indicate in general terms the reasons for which exemption could not be granted. Such a statement of reasons was expressly regarded as acceptable by the Court, as is apparent from paragraph 66 of its decision in Joined Cases 209 to 215 and 218/78 *van Landewyck and Others v Commission*. Thus, even if the Court should take the view that the Agreement qualifies for exemption from the requirement of notification, this part of the submission must still fail.

Accordingly, the seventh submission must also be rejected.

10. Eighth submission: imposition of the fines

As regards the fines imposed, all the applicants with the exception of Miele (Case 110/82) contend that since there was no obligation to notify the Agreement, no fine can be imposed. If the Agreement in question did require notification — and I agree with the Commission that it did — this part of the submission must fail. However, I should like to make an observation in that regard. The applicants contend that immunity from fines in the case of agreements which do not require notification stems from the requirement of legal certainty. That argument is untenable since the last sentence of Article 4 of Regulation No 17 expressly allows even agreements which do not require notification to be notified in order to ensure certainty. Under the system established by Regulation No 17, it is clearly intended that that possibility

shall, even in the case of agreements which do not require notification, permit reliance on Article 15 (5) of the regulation.

In the second part of this submission, the applicants contend that there was no intent or negligence, as referred to in Article 15 (2) of Regulation No 17, particularly on the part of those undertakings which did not attend all or any of the meetings at which the Agreement was drawn up. However, I agree with the Commission that since the purpose of the Agreement is clearly to restrict competition, the contracting parties also expressed that intention by signing it. I would add that, according to the Court's judgment in Case 45/69 *Boehringer v Commission* [1970] ECR 769 at p. 805, the imposition of fines is not restricted to cases in which infringements of the rules on competition are committed deliberately.

Thirdly, the applicants with the exception of Miele contend that the amount of the fine was incorrectly determined and, more particularly, that there was a considerable disparity between the amount of the fine and their share of official (CEG) imports. That contention is undoubtedly correct. Thus, within the group of undertakings on which a fine of 38 500 ECU was imposed, there appears to be a difference between the market shares of CEG members which varies from 8.75 % for washing machines and 6.29 % for dishwashers (in Case 96/82) to 1.76 % and 0.60 % respectively (in Case 99/82). In paragraph 73 of its Decision, the

Commission stated that in addition to the collective responsibility of the undertakings as a result of their collaboration in the drawing-up of the Agreement and of their participation therein, there were two further factors which were significant, namely the particular context in which the infringement was committed and the individual positions of those undertakings on the relevant market. In reply to questions put to it by the Court, the Commission explained how the fines had been calculated. It seems from the answers given by the Commission that first of all, the total amount of the fine was fixed at 1.5 % of the value of imports of washing machines and dishwashers from other Member States into Belgium, namely 1 015 000 ECU and 67 000 000 ECU respectively. In its judgment in Case 45/69 *Boehringer v Commission* [1970] ECR 769 at p. 806, the Court expressly approved such a method of calculation in order to determine the collective liability of the members of a prohibited cartel. That amount was subsequently shared amongst the undertakings on the basis of the number of labels ordered from NAVEWA. It became apparent during the oral procedure that the phrase "positions of those undertakings on the relevant market" which is used in the Decision must be understood as referring to the interest which the undertakings concerned had in the implementation of the Agreement, as reflected in the number of labels ordered by them. Viewed in those terms, the connection between the fine and the number of labels ordered and the resulting division of the undertakings into three groups must be regarded as acceptable. Thus, there is no inconsistency between the criteria applied by the Commission and the amounts of the fines imposed, although a slightly more detailed statement of the reasons on which the calculation was based would not have come amiss. By that observation, however, I am in no way denying that the Commission is empowered, in calcu-

lating the fines, to take into account additional factors such as the degree of responsibility involved and the gravity of established infringements of the Treaty, which cannot be expressed in mathematical terms. The Commission, by including NAVEWA in the highest category of fines in view of its central role in the drawing-up and the

implementation of the Agreement, has not, in my view, especially in the light of those additional factors, exceeded its power to impose fines under Article 15 of Regulation No 17.

Thus, in my opinion, the applicant's eighth submission also fails.

11. Conclusion

Since all the applicants' submissions have been weighed and found wanting, I am of the opinion that the application must be dismissed and that the applicants must be ordered to pay the costs.