

COMMISSION DECISION**of 12 December 1983****relating to a proceeding under Article 85 of the EEC Treaty (IV/30.389 — Nutricia/de Rooij and IV/30.408 — Nutricia/Zuid-Hollandse Conservenfabriek)****(Only the Dutch text is authentic)****(83/670/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 Treaty ⁽¹⁾, as last amended
by the Act of Accession of Greece, and in particular
Articles 3 (1) and 6 thereof,

Having regard to the notifications made to the Com-
mission on 30 June and 17 July 1981 by NV Ver-
enigde Bedrijven Nutricia, Zoetermeer, in accord-
ance with Article 4 of Regulation No 17, of the
agreements it had signed with Drs F. A. de Rooij,
Amersfoort, on 31 August 1979 and with Zuid-Hol-
landse Conservenfabriek, Breda, on 6 June 1980,

Having regard to the applications submitted to the
Commission on the same dates by Nutricia for
exemption of the agreements under Article 85 (3) of
the EEC Treaty,

Having regard to the Commission Decision of
3 November 1982 to initiate proceedings in these
cases,

Having given the undertakings concerned the
opportunity of replying to the objections which the
Commission had raised against them, in accordance
with Article 19 (1) of Regulation No 17 and Com-
mission 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 consultation with the Advisory Committee on
Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

- (1) The notifications concern non-competition clauses contained in agreements for the sale by NV Verenigde Bedrijven Nutricia, hereinafter called 'Nutricia', of two of its subsidiaries, Remia BV to Drs de Rooij and Luycks Producten BV to Zuid-Hollandse Conservenfabriek BV, hereinafter called 'Zuid'; (the undertakings sold will hereinafter be referred to as 'Remia' or 'New Remia', and 'Luycks' or 'Luycks-Zuid', depending upon whether the reference is to before or after the acquisitions notified to the Commission).
- (2) Nutricia, which produces health and baby foods, had bought the two subsidiaries in 1974. Remia, which had prior to 1974 belonged to the de Rooij family, made sauces, margarine and materials for the baking industry. Luycks also produced sauces as well as pickles and condiments, especially vinegar and mustard.
- (3) Upon the acquisition of Remia and Luycks, Nutricia centralized the sales functions while retaining initially the original production facilities. The sales functions were carried out on behalf of the Nutricia Group by four sales divisions, of which two were the Luycks sales division, which sold sauces, pickles and condiments and the Remia sales division which sold oils and fats and exported all the group's products.
- (4) After a few years of profitable operation, Luycks moved into loss in 1977 and Remia in 1978. Nutricia reorganized its production facilities upon the advice of consultants, by concentrating sauce production in Remia while leaving the production of pickles and condiments with Luycks (which also received the pickles production of another of Nutricia's subsidiaries). The reorganization was to

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/72.

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

be undertaken partly in the hope that Nutricia would the more readily find buyers for Remia and Luycks, since it wished to get back to its core business of health and baby food.

- (5) Remia was sold to Drs de Rooij on 31 August 1979 and Luycks on 6 June 1980 to Zuid. Zuid is a wholly-owned subsidiary in the Campbell Group, the largest North American producer of canned and packet soups. The group is of lesser stature in Europe but had decided to expand its European operations. Campbell has six wholly or partly owned subsidiaries in the EEC: in the United Kingdom, France, the Netherlands, Germany, Italy and Belgium.

The markets

- (6) Detailed and comparable statistics for the sauce and pickles markets are not readily available. Although often dominated by large companies, there are many small producers and the tendency in most EEC countries, including the Netherlands, towards concentration in the grocery trade has put a significant share of the trade into 'own brands', that is, products manufactured anonymously but carrying the brand name of the grocer rather than of the manufacturer. Manufacturers' market shares cannot therefore always be known with precision.
- (7) The products are not difficult to manufacture and the technology is well known. From a technical point of view, entry is easy. Not all sauces and not all pickles and condiments are substitutable one for the other and there are in addition wide regional differences in tastes and consumption patterns.
- (8) Leaving aside 'own brands' products, both sauces and pickles are distributed through two channels: the retail consumer market and the market for large consumers, that is to say, hotels, restaurants and hospitals.

The retail consumer market is characterized by packaging in small sizes and generally larger margins, to off-set higher promotion costs. The branded products rely upon consumer recognition and loyalty and upon stimulation

of consumer interest. Innovation is rare but when it occurs it is supported by extensive promotion. As a result, small firms are at a disadvantage in selling branded goods. Aggressive promotion of a brand can create an awareness of the product generally as well as of the promoted brand in particular, although its principal aim, in which it may succeed, is to change consumers' preferences and therefore market conditions.

The large consumer market is characterized by large-size packaging, keen purchasing (and hence lower margins) but low promotion costs.

- (9) Nutricia estimated in 1978 that Remia would have ... % ⁽¹⁾ of the Dutch large consumer market for sauces, while Luycks would have ... % of that market plus ... % of 'own brand' sales. If the 1977/78 marketing plan took account of eight competitors in that market, the four biggest suppliers have a combined share of 65 %. At that time, Luycks estimated that it had ... % by volume of the Dutch sales of silver onions, ... % of the gherkins, ... % of the mustard and ... % of vinegar sales. The estimated share of sales had not changed much by 1980/81 (after the sale to Zuid).

Trade between Member States

- (10) For the three principal products groups the Netherlands is responsible for a considerable proportion of the intra-Community trade, with imports in 1982 of 11 million ECU and exports of 37 million ECU (see Table). In 1977 and 1978, Luycks exported to Germany sauces valued at Fl ... (... ECU) and Fl ... (... ECU) respectively, a substantial increase of 65 %.

⁽¹⁾ In the published version of this Decision, some figures have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

TABLE

Netherlands' share of intra-Community trade in sauces and pickles

(1982)

	Pickled gherkins and cucumbers		Tomato sauce		Other sauces and relishes	
	Volume (tonnes)	Value ('000 ECU)	Volume (tonnes)	Value ('000 ECU)	Volume (tonnes)	Value ('000 ECU)
Intra-EEC imports	27 661	18 352	38 840	33 031	49 666	78 450
Imports into the Netherlands from EEC	4 059	2 734	4 421	4 212	2 531	4 427
%	14,67	14,89	11,38	12,75	5,09	5,64
Intra-EEC exports	27 207	18 982	47 416	42 719	39 904	62 329
Exports from the Netherlands to EEC	11 685	7 561	13 400	12 878	10 823	16 903
%	42,94	39,83	28,26	30,14	27,12	27,11

Source: Statistical Office of the European Communities, NIMEXE.

The position of New Remia

- (11) Upon acquisition in 1979, New Remia had the potential advantage of established market shares, especially in the large consumer market and it was particularly strong in the retail consumer market for chip sauces. It lacked a sales force for the retail consumer market, for the sales forces had been centralized. New Remia did take over some of the existing Nutricia sales force and if it did not take over all, that appears to have been the choice of New Remia.
- (12) Established brand names are important and, as will be seen, New Remia was licensed to use the Luycks trade mark for a period, which it could use to retain those customers of Luycks loyal to the brand name while introducing a replacement brand name. The name New Remia chose as its replacement brand name was 'Macmillan', a mark used by Remia up to about 1977 as a 'B' (down-market) brand. Nutricia was of course unable to assign the mark 'Luycks' to New Remia because it wished to continue to use the mark on pickles and condiments. The Commission notes that New Remia abandoned the use of the 'Luycks' mark without a period of overlap with 'Macmillan', which could possibly have

assisted the clientèle to accept the substitution of one mark for another.

- (13) In 1981/82, New Remia had about ...% by tonnage of sales of chip sauce (including the retail consumer sector but excluding 'own brand') and its nearest competitors had according to the parties' own estimates about ... and ...% respectively. New Remia is either not, or only marginally, represented on the sub-markets for other types of sauces, namely salad cream, mayonnaise, tomato ketchup and other table sauces. Half the market for mayonnaise is held by two other firms and half that for salad cream by three.
- (14) New Remia appears to have kept Luycks' earlier market share in the 'own brand' market following the sale, but it has been less successful in retaining the Luycks market share in the branded consumer markets. Its sales appear to have been seriously affected by the need to change the trade mark over two years. New Remia appears to have failed to win over all Luycks' old customers to the 'Macmillan' brand.

The position of Luycks-Zuid

- (15) Little information was offered by Luycks-Zuid about its current position. Nutricia was advised by consultants before the sale to Zuid was decided upon, that the original pickles

and condiments line made and sold by Luycks was probably not viable unless other pickles could be added to the range. This advice may have been sound, because Luycks-Zuid now wishes to manufacture sauces. Until now Luycks-Zuid has not succeeded in increasing its market share (. . .).

The Agreement of 31 August 1979 selling Remia BV to Drs de Rooij ('the Sauce Agreement')

- (16) The Sauce Agreement provided in clauses 3 and 4 that from 1 October 1979 Nutricia would transfer its shares in Remia BV to Drs de Rooij, together with the exclusive right to sell consumer products manufactured by or on behalf of Remia and the exclusive right to sell in the Netherlands sauces manufactured by or on behalf of Luycks, whose compliance with the latter clause Nutricia guaranteed. The sauces referred to were sauce for chips, mayonnaise, salad dressing, garnishing sauce, paprika sauce, saté sauce, tomato ketchup, curry sauce, fricadelle sauce, barbecue sauce and blends of those sauces. Under clause 5 of the Sauce Agreement, Nutricia undertook not to engage, directly or indirectly, until 30 September 1989, in the production or sale of sauces on the Dutch market and to ensure that Luycks also complied with this restriction. There were certain transitional rights for Luycks to manufacture and sell sauces for export and on the Dutch market to a very limited extent, but these expired on 1 July 1980.
- (17) Under clause 6 of the Sauce Agreement, Drs de Rooij was given a non-exclusive right to use the trade mark 'Luycks' for the listed sauces for two years ending on 1 October 1981 in respect of sales to the hotel and catering trade.
- (18) According to New Remia, the non-competition clause was inserted in the Sauce Agreement mainly because of the special nature of the sales and marketing organization which existed at Nutricia at the time of the Agreement and which the sale of the business altered.

The Agreement of 6 June 1980 selling Luycks Producten BV to Zuid ('the Pickles Agreement')

- (19) The Pickles Agreement in fact contains two agreements: a Stock Purchase Agreement

whereby Nutricia sold the Luycks business to Zuid as from 4 July 1980 and a Joint Venture Agreement which transferred the centralized sales division from Nutricia to a joint venture company for one year to 1 June 1981.

- (20) As the Luycks company as a subsidiary of Nutricia had not had its own sales force, this arrangement enabled Luycks-Zuid to derive maximum benefit from the assets it had acquired. The non-exclusive distribution and sales activities of the joint venture concerned only the Dutch market and exports to Belgium and Germany. Zuid was to dispose of its interest in the joint subsidiary on 1 June 1981.
- (21) Clause IX.1 of the Stock Purchase Agreement required Nutricia not to engage, directly or indirectly, for five years in any production or sale of pickles or condiments in 'European countries', on pain of a penalty quantified in the Agreement. Nutricia retained the right to sell in bulk certain products, but this right specifically excluded the retail and large consumer markets. Clause V.1.f extended to Luycks-Zuid the restriction contained in clause 5 of the Sauce Agreement.

II. LEGAL ASSESSMENT

A. Article 85 (1) of the EEC Treaty

- (22) Article 85 (1) prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.
- (23) The Sauce and Pickles Agreements were between undertakings within the meaning of Article 85 (1). Drs de Rooij, who signed the Agreement on the sale of Remia as the future proprietor of that business, is also an undertaking within the meaning of that Article.

(24) Clause 5 of the Sauce Agreement, whereby Nutricia agreed not to engage in the production or sale of sauces on the Dutch market for 10 years and undertook to extend the same restriction to Luycks, prevents competition within the common market both between the parties and between the renouncing party and other competitors.

(25) Clause V.1.f of the Pickles Agreement which extended to Luycks-Zuid the restriction on Nutricia under the Sauce Agreement and Clause IX.1 thereof by which Nutricia undertook not to produce or sell pickles for five years in any 'European country' also prevent competition within the meaning of Article 85 (1).

Nevertheless, it is not every restriction of competition of this type which falls within Article 85 (1).

(26) The Commission has already, in its Decision 76/743/EEC Reuter/BASF⁽¹⁾, concluded that when the sale of a business involves the transfer not only of material assets but also of goodwill and clientèle, it may be necessary to impose contractual restrictions of competition on the seller. The contractual restriction upon competition by the seller is then a legitimate means of ensuring the performance of the seller's obligation to transfer the full commercial value of the business.

(27) However, the protection accorded to the purchaser cannot be unlimited. It must be kept to the minimum that is objectively necessary for the purchaser to assume, by active competitive behaviour, the place in the market previously occupied by the seller. If the objective minimum appears in any given case insufficient as a result of earlier management decisions on the part of the purchaser, that is not a reason for extending the period of protection; nor should the seller be prevented from re-entering the market after that period (whatever it may be) when he is no better off *vis-à-vis* the purchaser than any other newcomer.

(28) It is not possible to set any length of time as universally suitable as a period of protection. Each non-competition period must be judged in its context.

Relevant pointers as to the term which can be said to be objectively necessary for such clauses include:

- (a) the time it will take the purchaser of a business to build up a clientèle;
- (b) how frequently consumers in the relevant market change brands and type (in relation to the degree of brand loyalty shown by them);
- (c) how long it takes before new products entering the market or new trade marks are accepted by the consumer;
- (d) for how long, after the sale of the business, the seller, without a restrictive clause, would be able to make a successful comeback to the market and regain his old customers.

(29) The duration of accompanying arrangements such as the temporary right for the purchaser to use the seller's trade marks or sales forces may also constitute a useful pointer to the sort of period required for all the seller's goodwill and clientèle to be transferred to the purchaser.

(30) The geographical scope of a non-competition clause also has to be limited to the extent which is objectively necessary to achieve the abovementioned goal. As a rule, it should therefore only cover the markets where the products concerned were manufactured or sold at the time of the agreements.

The restrictions in the Sauce Agreement

(31) In the present case, the Commission also takes account of the fact that the products concerned do not involve high technology, and that there are no other barriers which would entitle the purchaser to particular protection. The parties obviously thought that two years would be long enough for New Remia to use the 'Luycks' trade mark while introducing its own mark and gaining customer loyalty. This new customer loyalty

⁽¹⁾ OJ No L 254, 17. 9. 1976, p. 40.

could nevertheless be readily undermined if Nutricia (Luycks-Zuid) had been able to come back on the market after a mere two-year absence using the 'Luycks' mark. A further two-year period would seem objectively necessary to enable New Remia to consolidate its hold on its new clientèle. In these circumstances, and having regard to the internal evidence of the parties' views at the time of the contract, four years would appear to be the upper limit. Certainly, a 10-year period is not objectively necessary and the provisions concerned in the Sauce Agreement in so far as fall within Article 85 (1). To the extent that the sales staff not transferred represented, with their trade connections, part of the goodwill that was being transferred, that part was renounced and protection cannot be claimed for it.

- (32) The extension to Luycks-Zuid of Nutricia's 10-year restriction cannot stand if the restriction cannot stand *vis-à-vis* Nutricia. It is correct that Nutricia had indicated an intention to leave the market, whereas Luycks-Zuid had an intention to enter the pickles market and the two are related. In addition, the extension of the clause could be said to protect a relatively small firm against the subsidiary of a large group. However, the Campbell Group is not anywhere prominent in the relevant sauce market, whereas New Remia has the largest single share of the Dutch market. An efficient new competitor might, in any case, be able to establish a viable position on the market.

The restrictions in the Pickles Agreement

- (33) The territory to which the non-competition clause in the Pickles Agreement applied was 'European countries'. This covers the whole of the European Community, although Luycks at the time of Agreement was operating in only three of the Member States. A restriction going beyond the territory in which the seller had operated is too wide and therefore unnecessary. Nutricia had no reputation in the

other Member States which would have made it unfair on the purchaser if the seller had started operating in those States.

- (34) The five-year term incorporated in the Pickles Agreement appears not to be objectively necessary. The sale involved a simple transfer of clientèle and goodwill. The parties recognized that Luycks-Zuid needed only one year to replace for itself the sales arrangements which Nutricia had provided to Luycks when Luycks was Nutricia's subsidiary. Taking into consideration the need for Luycks-Zuid to enjoy a supplementary period in order to consolidate its hold on the custom, but remarking also the stronger economic position of the Campbell Group, a period of protection of Luycks-Zuid from competition from Nutricia and New Remia of two years would appear sufficient.
- (35) The Commission therefore considers that the contractual restrictions on competition of the duration agreed in the Sauce and Pickles Agreements and of the geographical effect in the latter considerably exceed what is necessary to ensure the transfer of the full commercial value of the businesses sold to the purchasers and that the agreement of such contractual conditions in the present case constitutes to that extent a restriction on competition within the meaning of Article 85 (1).
- (36) The Sauce and Pickles Agreements affect or are likely to affect trade between Member States within the meaning of Article 85 (1).
- (37) In the circumstances, the undertakings by Nutricia and later by Luycks-Zuid not to engage in the production of sauces in the Netherlands had an effect upon intra-Community trade because it removed Luycks-Zuid from the cross-border sauce trade with Germany from 1 July 1980, when its transitional rights of manufacture and sale ended. That trade had been worth . . . ECU to it in 1978, which is not a negligible trade. Furthermore, the restriction upon sales of sauces by Luycks-Zuid in the Netherlands would prevent the Campbell Group, a new competitor, from using its subsidiary as an importer for

saucers made elsewhere in the EEC. The Campbell Group had clearly acquired Luycks as part of its plan to expand in the EEC and the restriction was likely to affect trade between Member States at the latest when the trade mark 'Luycks' again became exclusively available to Luycks-Zuid on 1 October 1981, in respect of saucers.

- (38) Prior to its acquisition by Zuid, Luycks had sold its pickles in Belgium, the Netherlands and Germany. Whatever Nutricia's current intentions, it had shown itself capable of undertaking an export trade in pickles and from 1 June 1981 it had, in the absence of further agreement, a sales force capable of selling pickles. The removal for a considerable length of time of a competitor who has the skills and market relationships to enter or re-enter intra-Community trade is likely to affect trade between Member States.

B. Article 85 (3) of the EEC Treaty

- (39) Article 85 (3) provides that Article 85 (1) may be declared inapplicable in the case of any agreement which contributes to improving 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; nor (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- (40) If the non-competition clauses go beyond what is objectively necessary for a transfer of the full commercial value of the business sold, an exemption can only be considered under special circumstances. In particular it must be shown that the clauses are indispensable to guarantee the attainment of objectives, other than the mere need of the purchaser further to consolidate his purchase, which may legitimately be pursued under Article 85 (3).
- (41) In the present case, the parties have failed to make out a case for applying Article 85 (3) to the two notified agreements. The Commis-

sion, too, fails to see what advantage inclusion of the two clauses restricting competition for a term and/or geographical area in excess of the maximum necessary for a transfer of the full commercial value of the businesses sold could have in terms of improving the production or distribution of goods or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. The two abovementioned major contractual restrictions of competition provide no appreciable objective advantages to offset the serious disadvantages for competition in the relevant markets. For these reasons, an exemption under Article 85 (3) cannot be considered.

C. Article 3 of Regulation No 17

- (42) Article 3 of Regulation No 17 empowers the Commission, where it finds that there is an infringement of Article 85 (1) of the Treaty, to require the undertakings concerned to bring that infringement to an end,

HAS ADOPTED THIS DECISION:

Article 1

The non-competition clause laid down in clause 5 of the Agreement of 31 August 1979 between NV Verenigde Bedrijven Nutricia and Drs F. A. de Rooij constitutes from 1 October 1983 an infringement of Article 85 (1) of the EEC Treaty.

Article 2

The non-competition clause laid down in clauses IX.1 and V.1.f of the Agreement of 6 June 1980 between NV Verenigde Bedrijven Nutricia and Zuid-Hollandse Conservenfabriek BV, constitutes from 4 July 1982 an infringement of Article 85 (1) of the EEC Treaty. The same clause constitutes from the date of its stipulation an infringement of

Article 85 (1) of the EEC Treaty in so far as it applies to a geographical area larger than the Belgian, Dutch and German markets.

Article 3

The applications for exemption under Article 85 (3) of the EEC Treaty in respect of the agreements referred to in Articles 1 and 2 are hereby refused.

Article 4

NV Verenigde Bedrijven Nutricia, Drs F. A. de Rooij, Remia BV, Zuid-Hollandse Conservenfabriek BV and Luycks Producten BV shall cease forthwith to apply the clauses referred to in Articles 1 and 2.

Article 5

This Decision is addressed to:

- NV Verenigde Bedrijven Nutricia, Zoetermeer,
- Drs F. A. de Rooij, Den Dolder,
- Remia BV, Den Dolder,
- Zuid-Hollandse Conservenfabriek BV, Zundert, and
- Luycks Producten BV, Diemen.

Done at Brussels, 12 December 1983.

For the Commission
Frans ANDRIESSEN
Member of the Commission