

COMMISSION

COMMISSION DECISION

of 2 December 1988

relating to a proceeding under Article 85 of the EEC Treaty (IV/223, Transocean Marine Paint Association)

(Only the English and Dutch versions of this text are authentic)

(88/635/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 Spain and Portugal, and in particular Articles 4, 6 and 8 thereof,

Having regard to Decision 67/454/EEC ⁽²⁾ whereby the Commission gave an exemption pursuant to Article 85 (3) of the Treaty to the Transocean Marine Paint Association, valid until 31 December 1972,

Having regard to Commission Decision 74/16/EEC ⁽³⁾, as amended by Decision 75/649/EEC ⁽⁴⁾, extending the exemption until 31 December 1978,

Having regard to Commission Decision 80/184/EEC ⁽⁵⁾ extending the exemption until 31 December 1986,

Having regard to the application for further extension made on 7 January 1988,

Having regard to the summary of the application for extension ⁽⁶⁾ published in accordance with Article 19 (3) of Regulation No 17,

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

Whereas :

I. THE FACTS

- (1) The Transocean Marine Paint Association (Transocean) is an association of medium-sized marine paint manufacturers founded in 1959 with

the object of manufacturing marine paints of identical composition and distributing and advertising them under the same trademark in a large number of countries so as to establish a world-wide distribution and after sales service network and hence improve the prospects for competition with other, substantially larger, marine paint manufacturers.

- (2) The following firms are currently members of the Association (listed in chronological order of membership) :

F.A.C. van der Linden GmbH & Co., Germany
Pacific Products, Inc., Philippines
Veneziani Zonca Vernici SpA, Italy
Durmus Yasar & Sons, Turkey
Pars-Pamchal Chemical Co., Iran
Copalin SA, Greece
Toa Paint Co. Ltd, Japan
Healing Industries Ltd, New Zealand
YCee Marine Supplies Ltd, Hong Kong
Colorin SA, Argentina
Industria de Pinturas Adolfo Stierling Ltda, Chile
Technoquimica SA, Peru
Copalin Paint Factory, Egypt
Healing Industries Pty Ltd, Australia
Asian Paints (SP) Ltd, Fiji
Techno-Química SA, Brazil
Epiglass (S) Pte Ltd, Singapore
Transocean Iberica SA, Spain
Vapocure Taiwan Ltd, Taiwan
Fabrica de Tintas Marilina SA, Portugal
Kossan Chemical Industries, Malaysia
National Paints Factories Co., United Arab Emirates
Neo-Shine Varnishes, India

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 163, 20. 7. 1967, p. 10.

⁽³⁾ OJ No L 19, 23. 1. 1974, p. 18.

⁽⁴⁾ OJ No L 286, 5. 11. 1975, p. 24.

⁽⁵⁾ OJ No L 39, 15. 2. 1980, p. 73.

⁽⁶⁾ OJ No C 113, 29. 4. 1988, p. 4.

- (3) A number of companies have left Transocean. In particular, the Association now has no member in the United States of America or in the United Kingdom. The total sales of the members and affiliates of Transocean have decreased from 15 million litres in 1978 to 8 million litres in 1986. Total sales of the members and affiliates represent some [...] ⁽¹⁾ of the world market.

Individual members' market shares within the Community range from a negligible percentage in some countries to [...] in others. The combined market share of the Association throughout the Community is currently less than [...]. The structure of the market has not changed radically since the last Decision renewing the exemption in 1979. The members of the Association that remain have more or less the same market share as in 1979. The competitive structure of industry has remained similar with the effects of stagnation still being felt throughout the industry.

- (4) Transocean's main competitors are International Marine Coatings, Hempel, Jotun, Sigma Coatings, Chogoka and Berger Paints. These competitors are more important than Transocean both in aggregate terms and on individual markets.

- (5) The present request for the extension of the exemption first granted by Decision 67/454/EEC pertains to the articles of association and three supplementary agreements as amended in 1987. The general scheme of the Association remains as described in the abovementioned Decision.

- (6) The modifications of the articles of association and of the three supplementary agreements seek mainly to improve the protection of the trade marks and the know-how of Transocean. Under the new articles of association trade marks shall be registered by the central administrative office of the Association and each member and affiliate will be granted a licence according to a standard form #CO1419# (Article 9 (1)). The trade marks shall be the property of the Association (Article 9 (3)). Prosecution of infringements of the trade marks is the responsibility of each member or affiliate in the country allocated to him (Article 9 (4)). The nature of the territorial exclusivity conferred upon each member or affiliate is now expressly defined to prohibit active sales canvassing outside allocated territories (Article 5 (1)). Passive sales are not prohibited.

⁽¹⁾ 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.

The old articles of association provided for the payment of a commission when a member supplied services for another member. This commission has now been eliminated.

- (7) Other changes to the articles of association have been made but are purely of a stylistic nature. The former articles of association and by-Laws have been incorporated into a single document in order to obviate repetition.

Apart from the changes outlined, the substance of the articles of association remains unchanged.

- (8) Three supplementary agreements are also notified. These are the membership agreement, the affiliation agreement and the licence agreement. These agreements are all new and define the relationship between Transocean and its members and affiliates and between the members and affiliates *inter se*.

- (9) The membership agreement defines the rights and obligations of each member in relation to Transocean. The terms of the agreement correspond to the terms of the articles of association. The member is granted the right to manufacture the products, to use the know-how and the trade marks but only in relation to the products as defined (Article 2). Active sales canvassing outside each member's territory is forbidden (Article 3) with each member being given territorial exclusivity. If a member makes improvements to the products he must inform Transocean and if such improvements cannot be used independently of the know-how or patents Transocean shall make the information available to all the members and affiliates free of charge (Article 5). If the improvement can be used independently, then the member must offer it to Transocean and its members on a licence basis at an agreed royalty for a reasonable period (Article 5). Each member undertakes to keep all know-how secret, even after the expiry of the term of the agreement (Article 6). Transocean is primarily responsible for the registration of trade marks and each member shall register as a user in his respective territory (Article 7). Each Member shall take steps to prevent infringement of know-how and trade marks and shall proceed against the infringer in his territory at his own cost. Should he fail to do so Transocean shall proceed against the infringer at the cost of the member (Article 8). The transfer, assignment or disposal of the rights of the member is forbidden except in the event of concluding the standard licence agreement with an affiliate as described below. In any event, the right to enter into the licence agreement is subject to approval by Transocean (Article 9). A new member is required to pay an admission fee to cover costs incurred by Transocean in the preparation of his

membership (Article 10). An annual contribution is to be paid by each member (Article 11). Each member shall pay to Transocean a single non-recurring royalty as reimbursement for expenses incurred in relation to the acquisition and maintenance of the know-how (Article 12). The membership agreement automatically terminates when the member ceases to be a member of Transocean (Article 13). Upon termination the member shall cease to have any rights to use the trade marks and know-how (Article 14).

- (10) The affiliation agreement sets out the rights and obligations of affiliates. The status of an affiliate is different from that of a member in that the former cannot transfer, assign or sublicense his rights under the articles of association (Article 4) and pays no membership fee but an annual contribution to Transocean (Article 7). In other respects the affiliation agreement is materially similar to the membership agreement referred to above. A further difference in the status of the affiliate is that he must conclude a licence agreement as notified.
- (11) The licence agreement is the agreement between the affiliate on the one part and Transocean and the member on the other, by which the know-how and trade marks are transferred from the latter to the former. The licence agreement is similar in all material respects to the membership agreement except that the affiliate shall pay to the member concluding the licence a royalty at the end of each quarter on the net sales value of all products sold by the affiliate (Article 7).
- (12) Third parties have made no objections subsequent to the publication made under Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

- (13) The agreements notified have to be considered as a whole and not separately. They are agreements within the meaning of Article 85 (1). They are restrictive of competition within the meaning of that Article in that they are agreements between actual or potential competitors. They oblige the members of the Association to concentrate their efforts in the field of production and distribution within the allotted territory and limit the possibility of expanding their activities actively to territories allocated to other members. The members are also precluded from joining a similar organization relating to marine paints. As there are several

members from within the Community the agreements are likely to affect trade between Member States.

- (14) The exemption given by the Community can be extended, pursuant to Article 8 (2) of Regulation No 17, as the requirements of Article 85 (3) are still satisfied. The pooling and coordination of the individual distribution networks of member firms is a suitable and indeed necessary means of enriching the range of goods on offer, improving sales structures in the marine paint industry and promoting intensive competition with the major marine paint manufacturers. The existence over the years of the sales and service network for Transocean paints has increased the availability of the products, with a resultant benefit to consumers.
- (15) The restrictions of competition resulting from the current version of the Transocean Articles of Association, membership agreement, affiliation agreement and licence agreement are indispensable for the attainment of these objectives. The territorial protection stipulated is not absolute, for passive sales outside the allotted territory are permitted; no commission is payable in the event of a sale outside the territory of a member or affiliate. The admission fee, annual contribution and non-recurring royalty payments by a member to Transocean reimburse the latter for the expenses incurred in the running of the association and in the acquisition and maintenance of know-how. The stipulations on improvements are also indispensable to the uniform application of advances made in the field of marine paint throughout Transocean.
- (16) A share of less than [...] of a market in which there are larger and more powerful suppliers of similar products does not give the power to eliminate competition in respect of a substantial part of the relevant goods.
- (17) Experience of the application of Commission Decision 80/184/EEC has shown that the obligations imposed therein are appropriate in order to enable the Commission to assess the effects of cooperation between Transocean members in a rapidly changing market for compatibility with the rules on competition in the Treaty.
- (18) The declaration of exemption should accordingly be renewed for 11 years to 31 December 1998 and the obligations of Decision 80/184/EEC should again be attached,

HAS ADOPTED THIS DECISION:

Article 1

The declaration of exemption in accordance with Article 85 (3) of the EEC Treaty, which the Commission issued by Decisions 67/454/EEC, 74/16/EEC and 80/184/EEC concerning the Agreement of 1 January 1959 establishing the Transocean Marine Paint Association, is hereby renewed from 1 January 1988 to 31 December 1998 in respect of the version amended most recently in 1987.

Article 2

This Decision is subject to the following obligations:

1. The Commission shall be informed without delay of the following matters:

- (a) any amendment or addition to the agreements;
- (b) any decision taken by the board of directors or the result of any arbitration held, pursuant to the restrictive provisions of the agreements, and in particular Articles 5 and 9 thereof;
- (c) any change in the composition of membership;
- (d) any link and any changes in such links, present or future, constituted by means of a financial participation amounting to 25 % or more of the share capital or by way of common directors or managers:
 - (aa) between members of the Association; or
 - (bb) between a member of the Association and another enterprise in the paint sector, provided that such non-member carries on business directly or indirectly within the Community in the paint sector, that is to say undertakes business in one or more member States directly or through a subsidiary undertaking or by means of a joint venture.

2. A report shall be submitted by the Association annually to the Commission on the activities of the Association and in particular on improvements in the production and marketing of marine paint products achieved.

Article 3

This Decision is addressed to the Transocean Marine Paint Association for the attention of the Secretary-General, Mr W.G. van Aalst, Mathenesserlaan 300, NL-3021 HV Rotterdam, and to its members as follows:

F.A.C. van der Linden GmbH & Co.,
Fritz Reuter Straße 32,
PO box 1208,
D-2153 Hamburg-Neu Wulmstorf;

Copalin SA,
16 Salaminias Street,
GR-11855 Athens;

Veneziani Zonca Vernici SpA,
Via Malaspina 8,
PO box 550,
I-34147 Trieste;

Transocean Ibérica SA,
Ctra. de Balis, Km. 1,
(Paracuellos del Jarama),
PO box 62058,
ES-Madrid 28080;

Fábrica de Tintas Marilina SA,
Rue Infante D. Henrique 421,
PO box
P-4436 Rio Tinto (Porto);

Pacific Products Inc.,
6th Fl. Insular Life Building,
Ayala Avenue, Makati,
PO box 46,
Metro Manila,
Philippines;

Healing Industries Pty Ltd,
27 Leslie Street,
Lakemba NSW 2195,
Australia;

Asian Paints (SP) Ltd.,
7-9-11 Ruve Place,
Tavakubu,
PO box 694,
Lautoka,
Fiji;

YCee Marine Supplies Ltd.,
1102 Winfull Commercial Bldg,
174 Wing Lok Street,
Hong Kong;

Toa Paint Co. Ltd,
Head Office,
1-29, 2-chome, Dojima-Hama,
Kita-Ku,
Osaka 530,
Japan;

Healing Industries Ltd,
686 Rosebank Road, Avondale,
Private Bag, Rosebank,
Auckland 7,
New Zealand;

Epiglass (S) Pte. Ltd,
22, Tuas Avenue 8,
Singapore 2263,
Singapore;

Vapocure Taiwan Ltd,
Room 808, 8f-6,
No 147, Chien Kuo Road, Sec. 2,
T'aipei,
Taiwan ;

A.P.C. Industries Co. Ltd,
2469/8-9 Petchburi Road Ext,
Bangkok 10310,
Thailand ;

Copalin Paint Factory,
1st El Madabegh Street,
Wardian,
PO box 348,
Alexandria,
Egypt ;

Pars-Pamchal Chemical Co.,
Mirzaye Shirazi Ave,
15th Street Nr 12,
PO box 13145-1331,
Tehran 13,
Iran ;

Durmus Yasar & Sons,
Sanayi Cadd. No 37,
Bornova PO box 594,
Izmir,
Turkey ;

Colorín SA,
Juramento 5853,
1605-Munro-FGB,
PO box 11,
Buenos Aires,
Argentina ;

Tecno-Química SA,
Rod. Presidente Dutra 2254/km2,

Rio de Janeiro RJ,
Brazil ;

Industria de Pinturas Adolfo Stierling Ltda,
Av. La Divisa 0359 — Lo Espejo,
C. de San Bernardo,
Chile ;

Technoquímica SA,
Pista a la Atarjea 1152,
El Agostino,
PO box 2678,
Lima 100,
Peru ;

Kossan Chemical Industries,
Lot 16632,
51/4 Mile, Jalan Meru,
41050 Kelang,
Malaysia ;

National Paints Factories Co.,
PO box 5822
Sharjah,
United Arab Emirates ;

Neo-Shine Varnishes,
Veera Land Development Corp.,
Off. Veera Desai Road,
Andheri West,
Bombay,
India.

Done at Brussels, 2 December 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission