

JUDGMENT OF THE COURT (Fifth Chamber)
11 July 1985 *

In Case 42/84

Remia BV, a private limited company having its registered office and place of business in the municipality of Den Dolder (Netherlands),

F. A. de Rooij, its director, residing in the municipality of Den Dolder (Netherlands), and

NV Verenigde Bedrijven Nutricia, a public limited company having its registered office and place of business in the municipality of Zoetermeer (Netherlands),

represented by C. A. J. Crul of the Amsterdam Bar and by A. F. de Savornin Lohman and I. G. F. Cath, Brussels, with an address for service in Luxembourg at the Chambers of L. H. Dupong, 14 A rue des Bains,

applicants,

v

Commission of the European Communities, represented by B. van der Esch, acting as Agent, assisted by T. R. Ottervanger of the Brussels Bar, with an address for service in Luxembourg at the offices of M. Beschel, Jean Monnet Building, Kirchberg,

defendant,

supported by

Sluyck BV, in liquidation (previous business name: Luycks Producten BV), having its registered office at Diemen (Netherlands) and its place of business at Ede, Gelderland (Netherlands), represented by G. Loos and C. Hamburger of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of J. Loesch, 2 rue Goethe,

intervener,

APPLICATION for a declaration that the Commission Decision of 12 December 1983, relating to a proceeding under Article 85 of the EEC Treaty (Official Journal 1983, L 376, p. 22), is void,

* Language of the Case: Dutch.

THE COURT (Fifth Chamber),

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: C. O. Lenz

Registrar: J. A. Pompe, Deputy Registrar

after hearing the Opinion of the Advocate General delivered at the sitting on 14 May 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 16 February 1984, the undertaking Remia BV, its director F. A. de Rooij, and the undertaking NV Verenigde Bedrijven Nutricia (hereinafter referred to as 'the applicants') brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission Decision of 12 December 1983, relating to a proceeding under Article 85 of the EEC Treaty (Official Journal 1983, L 376, p. 22), was void.

2 The public limited company NV Verenigde Bedrijven Nutricia (hereinafter referred to as 'Nutricia'), whose registered office is in the Netherlands, is a manufacturer of health and baby foods. In 1974 it acquired two undertakings which became its subsidiaries, Remia BV (hereinafter referred to as 'Remia'), which belonged to Mr de Rooij and was principally a manufacturer of Remia sauces, margarine and materials for the baking industry, and Luycks Producten BV (hereinafter referred to as 'Luycks'), a manufacturer of sauces under the Luycks brand name and of condiments. From 1974 to 1976 both subsidiaries retained their own sales divisions and continued their existing production.

3 In early 1977 Nutricia decided to review the arrangements under which its subsidiaries' products were marketed in order to improve their profitability,

particularly in view of the financial difficulties experienced by Luycks. From 1977 to 1978 Luycks and Remia kept their legal status and production unchanged but the management of the sales divisions of both subsidiaries was modified as part of a rationalization scheme.

- 4 In 1979 Nutricia undertook a restructuring of its production facilities, concentrating sauce production at Remia while leaving the production of pickles and condiments with Luycks. The re-organization was undertaken partly in the hope of making it easier to find buyers for Remia and Luycks.
- 5 By an agreement of 31 August 1979 Nutricia transferred Remia, thus restructured, back to Mr de Rooij, its former proprietor, and the undertaking was later re-named New Remia. That agreement is referred to as 'the sauce agreement'. By a second agreement dated 6 June 1980 Nutricia transferred its Luycks subsidiary, as restructured, to the undertaking Zuid-Hollandse Conservenfabriek (hereinafter referred to as 'Zuid'), and Luycks was re-named Luycks-Zuid and then Sluyck. Zuid is a subsidiary of the American company Campbell. The agreement of 6 June 1980 is referred to as 'the pickles agreement'.
- 6 Both transfer agreements contained non-competition clauses intended to protect the purchasers from competition from the vendor on the same market immediately after the transfers.
- 7 By clause 5 of the sauce agreement Nutricia undertook for a period of 10 years not to engage directly or indirectly in the production or sale of sauces on the Netherlands market and to guarantee Luycks's compliance with that undertaking. As a transitional arrangement, Luycks was given the right to manufacture and sell sauces for export and even, to a very limited extent, on the Netherlands market, but only until 1 July 1980.
- 8 Clause V (1) (f) in the pickles agreement concluded between Nutricia and Zuid extended to Luycks-Zuid the restriction contained in clause 5 of the sauce agreement. Furthermore, under clause IX, Nutricia undertook for a period of five years not to engage 'directly or indirectly . . . in any production or sale of pickles or condiments in European countries.'

9 The Campbell company let it be known to the applicants that it regarded the non-competition clause imposed on Luycks as contrary to Article 85 of the EEC Treaty, and this prompted them to notify the two transfer agreements to the Commission in June and July 1981 and to request, not negative clearance, but an exemption under Article 85 (3) of the EEC Treaty.

10 By a decision dated 12 December 1983, the Commission, taking the view that the duration and scope of the non-competition clauses mentioned above were excessive and that the clauses constituted a restriction on competition, affected trade between Member States and were not eligible for exemption under Article 85 (3), refused the applicants' request for an exemption.

11 Those are the circumstances in which the applicants brought this action, by which they ask the Court to declare the contested decision void, declare 'that the non-competition clause referred to in Article 1 of the decision does not infringe Article 85 (1) of the EEC Treaty and in any case not as from 1 October 1983 and that in any event the Commission wrongly failed to apply Article 85 (3)', and further declare that the decision is wrongly addressed to Mr de Rooij.

The scope of the conclusions set out in the application

12 Because both the contested decision and the conclusions formulated by the applicants were imprecise, the Court invited the applicants to clarify the exact scope of their conclusions and requested the Commission to clarify the meaning of Article 2 of its decision.

13 Having regard to the answers supplied to the Court, it appears that, first, as indeed the applicants accepted during the oral procedure, the Commission's decision is not being challenged in so far as it relates specifically to the pickles agreement, and, secondly, Article 2 of the contested decision must be understood as follows: the non-competition provision laid down in clause 5 of the sauce agreement concluded on 31 August 1979 and that laid down in clause V (1) (f) of the pickles agreement concluded on 6 June 1980 constitute as from 1 October 1983 an infringement of Article 85 (1) of the EEC Treaty.

14 Accordingly, the applicants' conclusions must be read as asking for the following to be declared void:

- (a) The whole of Article 1 of the contested decision, which relates to the non-competition clause contained in the sauce agreement in so far as it covers the period after 1 October 1983;
- (b) Article 2 of the contested decision, only in so far as it relates to the extension of the non-competition clause in the sauce agreement to Zuid and again only as regards the period after 1 October 1983;
- (c) Article 3 of the contested decision in so far as it refuses an exemption under Article 85 (3) for the non-competition clause in the sauce agreement and in so far as it refuses a similar exemption for the extension of that non-competition clause to Zuid;
- (d) Article 4 of the contested decision in the same respects as those mentioned above;
- (e) Article 5 of the decision, only in so far as it names Mr de Rooij as one of its addressees.

The nature of the submissions relied on by the applicants and the objection made against them by the Commission

15 The Commission argues that the applicants have not put forward any submission to the effect that it has infringed Article 85 (1) of the Treaty and that instead they made the mistake of basing their arguments on the contention that it failed to give an adequate statement of the reasons on which the decision was based. The Commission reasons that because of this mistake of law in the grounds relied on the applicants' arguments cannot be entertained or even examined.

16 It should be remembered that in order to be capable of being examined by the Court submissions must be set out in the application with sufficient precision for it to be possible to ascertain whether they come within the grounds of action enumerated in Article 173 of the EEC Treaty. In the circumstances of this case it is sufficiently clear from the application that the applicants wished to contend that both in applying Article 85 (1) of the Treaty and in refusing an exemption under Article 85 (3) the Commission founded its decision on reasons which were both inadequate and based on incorrect findings of fact and wrongly appraised the facts of the case. It follows that the objection raised by the Commission must be dismissed.

The application of Article 85 (1) of the EEC Treaty

- 17 It should be stated at the outset that the Commission has rightly submitted — and the applicants have not contradicted it on that point — that the fact that non-competition clauses are included in an agreement for the sale of an undertaking is not of itself sufficient to remove such clauses from the scope of Article 85 (1) of the Treaty.
- 18 In order to determine whether or not such clauses come within the prohibition in Article 85 (1), it is necessary to examine what would be the state of competition if those clauses did not exist.
- 19 If that were the case, and should the vendor and the purchaser remain competitors after the transfer, it is clear that the agreement for the transfer of the undertaking could not be given effect. The vendor, with his particularly detailed knowledge of the transferred undertaking, would still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business. Against that background non-competition clauses incorporated in an agreement for the transfer of an undertaking in principle have the merit of ensuring that the transfer has the effect intended. By virtue of that very fact they contribute to the promotion of competition because they lead to an increase in the number of undertakings in the market in question.
- 20 Nevertheless, in order to have that beneficial effect on competition, such clauses must be necessary to the transfer of the undertaking concerned and their duration and scope must be strictly limited to that purpose. The Commission was therefore right in holding that where those conditions are satisfied such clauses are free of the prohibition laid down in Article 85 (1).
- 21 However, without denying the basic principle of that reasoning, the applicants challenge the way in which it has been applied to their case on the ground, first, that the non-competition clause contained in the sauce agreement does not affect trade between Member States within the meaning of Article 85 (1) of the Treaty, and, secondly, that in view of the special circumstances surrounding the transfer at issue the Commission did not provide an adequate statement of the grounds for its

decision and wrongly assessed the facts in limiting to four years the permissible duration of the non-competition clause included in the transfer agreement.

- 22 Taking first the condition with regard to the effect on trade between Member States, the Court would point out that, as it has consistently held, in order that an agreement between undertakings may affect trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realization of the aim of a single market in all the Member States. The Court has also held (judgment of 17 October 1972 in Case 8/72, *Cementhandelaren*, [1972] ECR 977) that an agreement or practice restricting competition and extending over the whole territory of a Member State by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is intended to bring about.
- 23 In this case it should be pointed out that the non-competition clause at issue covers the entire territory of the Netherlands. Furthermore, the terms of clause 5 of the sauce agreement under which Nutricia, Luycks and subsequently Zuid are prohibited from engaging directly or indirectly in the production or sale of sauces on the Netherlands market do not merely affect the national production of sauces but also have the effect of prohibiting those undertakings from selling sauces previously imported from other Member States. Finally, it is not denied that Remia has the largest individual share in the Netherlands market in the sauces in question.
- 24 It must therefore be concluded that the Commission correctly assessed the facts of the case in finding that the clause at issue was likely to affect trade between Member States within the meaning of Article 85 (1) of the Treaty.
- 25 On the second point, namely the limitation of the non-competition clause to four years, the applicants contend first that the statement of the reasons for the contested decision is inadequate and secondly that it contains errors of fact and is based on an erroneous assessment of the facts of the case as a whole.
- 26 With regard to the statement of the reasons for the contested decision it must be pointed out that, as the Court has consistently held, and as it made clear, as

regards the field of competition, most recently in its judgment of 17 January 1984 in Joined Cases 43 and 63/82 (*VBVB and VBBB v Commission*, [1984] ECR 19), although under Article 190 of the EEC Treaty the Commission is required to state the factual matters justifying the adoption of a decision, together with the legal considerations which have led to its adopting it, the article does not require the Commission to discuss all the matters of fact and of law which may have been dealt with during the administrative proceedings. The statement of the reasons on which a decision adversely affecting a person is based must allow the Court to exercise its power of review as to the legality of the decision and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded.

27 It is clear from the contested decision alone that the respective financial and commercial positions of the parties concerned were examined by the Commission in paragraphs 4, 5 and 32 of the decision, that the argument based on the brand recognition of the Luycks trademark was sufficiently dealt with in paragraphs 8 and 12, and that the argument based on the issue of the transfer of the Luycks sales force was given adequate consideration in the decision, particularly in paragraphs 11 and 31. That statement of the reasons for the decision provided the applicants with all the information necessary to enable them to decide whether or not the decision was well founded, made it possible for them to present sufficiently detailed arguments on that point to the Court and put the Court itself in a position fully to exercise its power of review as to the legality of the decision. That being the case, the submission based on an inadequate statement of the reasons for the contested decision as regards the application of Article 85 (1) must be rejected.

28 In connection with their submission that the contested decision is based on errors of fact and on a mistaken assessment of the facts of the case as a whole, the applicants complain specifically that the Commission failed sufficiently to take into consideration three factors which were wholly specific to the transfer at issue: first, Remia's adverse financial position at the time when it was taken over and the relative strengths of Remia on the one hand and Nutricia and the Campbell subsidiary Zuid on the other; secondly, the fact that the Luycks trademark was not assigned absolutely at the time of the takeover but only for a period of two years, during which time Luycks continued its activities in the same sector, using the same trademark for other products; lastly, the fact that the Luycks sales force, which had extensive knowledge of the market for sauces, was not taken over by Remia at the time of the transfer but instead remained with Luycks and was then

absorbed by the Campbell group, which thereby became a potentially dangerous competitor for Remia. From that the applicants draw the conclusion that the 10 year period for which the non-competition clause was to run was not excessive in their case because it comprised two years in which the transition was to be completed and recognition under a new trademark gained, followed by eight years in which to win customer loyalty and to avoid a new penetration of the market by the vendor.

- 29 Against that the Commission and Sluyck BV, the intervener, take the view that a period of four years consisting of two years in which to introduce a new trademark and two years to win customer loyalty for it was in any event amply sufficient in the case in point. Moreover, the parties themselves initially agreed on that period.
- 30 The Commission states that it took into consideration all the above-mentioned criteria in its decision and carefully examined all the specific circumstances of the case before coming to the conclusion that the 10 year term of the prohibition on competition finally agreed upon between the parties was clearly excessive and that only a duration of four years was objectively justified.
- 31 It points out in addition that no special legal significance should be attached to the financial situation of the parties to the transfer because an agreement which restricts competition cannot escape the prohibition in Article 85 (1) merely because it enables an undertaking to survive. According to the Commission that fact should be reflected solely by an adjustment to the purchase price and not by an extension of the non-competition clause.
- 32 The Commission goes on to add that in view of the fact that Remia needed only to be given the opportunity to consolidate already existing business relations with customers on a market from which Luycks and Campbell were excluded by a four-year prohibition on sales of Luycks sauces, a non-competition clause limited to four years was amply sufficient to enable Remia to establish itself effectively on the market provided only that it adopted an actively competitive stance, which it did not do.
- 33 Finally, the Commission argues that the sales force, which was moved to Remia at the time of the transfer, had considerable experience in the sauce marketing sector and had four years in which to introduce a new Remia trademark without being

hampered by Nutricia or Luycks. Since the sector concerned did not involve high technology and there were no long-term delivery contracts a four-year period was amply sufficient. Furthermore, if a certain amount of goodwill was to be attributed to the sales staff who were not transferred, that fact should again, in the Commission's view, have been reflected in the purchase price agreed at the time of the transfer and should not have caused the duration of the non-competition clause to be prolonged.

34 Although as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of Article 85 (1) are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking the Commission has to appraise complex economic matters. The Court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.

35 In this instance the applicants have confined themselves to contending that the limitation of the duration of the non-competition clause to four years is based on a number of incorrect findings of fact and, essentially, on the Commission's incorrect appraisal of the specific circumstances of the case.

36 It cannot be inferred either from the documents before the Court or from the oral argument presented to it that by setting at four years the period beyond which the non-competition clause contained in the sauce agreement came within the prohibition laid down in Article 85 (1) of the EEC Treaty, the Commission based its decision on incorrect findings of fact or committed a manifest error in its appraisal of the facts of the case as a whole.

The applicability of Article 85 (3) of the EEC Treaty

37 The applicants argue in substance that the Commission wrongly refused the exemption they had requested under Article 85 (3) of the Treaty. The Commission did not provide an adequate statement of the reasons for its decision and failed to give due weight to the special features of the transfer of Remia and the need to include a non-competition clause in the terms of that transfer.

38 Before examining the arguments of the parties on that point, it should be pointed out that an agreement which proves to be contrary to the provisions of Article 85 (1) may be exempted under Article 85 (3) only if it satisfies the following conditions:

It must contribute to improving the production or distribution of goods or to promoting technical or economic progress;

It must allow consumers a fair share of the resulting benefit;

It must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of its objectives;

It must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

39 The applicants maintained, both in their notification and in the course of the administrative procedure, that the transfer contributed to improving production and promoting technical progress in the sauce sector. They added that the undertaking was more soundly based as a result, that Remia's know-how in the sauce sector had been preserved and that the jobs safeguarded by the transaction was to be regarded as a contribution to the promotion of economic progress. Consumers derived an immediate advantage from this, in particular by virtue of the continuity in the supply to the market of products under a trademark which was familiar to them. Finally, with regard to the condition that the agreement should not eliminate competition in respect of a substantial part of the products in question, the applicants argued in the course of the administrative procedure that the market for sauces at the time of the restructuring of Nutricia was characterized by the presence of a large number of competitors. For that reason they took the view that the two non-competition clauses were not in any way conducive to the elimination of competition in respect of a substantial part of the products in question but were indispensable to the attainment of the objectives of the transfer agreement.

40 As regards the submission to the effect that the contested decision does not contain a sufficient statement of the reasons for the refusal of the request for an exemption under Article 85 (3), it should be pointed out that although at first sight the reasons which the contested decision gives, in paragraph 41, for the refusal of an exemption under Article 85 (3) of the Treaty may appear somewhat brief, they

should be set in the broad context of the contested decision which contains several other paragraphs that deal directly with the arguments put forward by the applicants in support of their request for an exemption under Article 85 (3).

- 41 For example, paragraphs 7 and 31 of the contested decision point out that the products concerned, namely sauces, are not difficult to manufacture, that the technology is well known, and that there is no high technology involved. That reasoning is a sufficient answer to the argument based on the promotion of technical progress said to have been brought about by the transfer of Remia.
- 42 In connection with the argument to the effect that the survival of the undertaking and the preservation of jobs are only possible if the non-competition clause applies for a period of 10 years, it must indeed be admitted that, as the Court held in its judgment of 25 October 1977 in Case 26/76 (*Metro*, [1977] ECR 1875), the provision of employment comes within the framework of the objectives to which reference may be had pursuant to Article 85 (3) because it improves the general conditions of production, especially when market conditions are unfavourable. However, the Commission gave an adequate answer to the applicants' arguments in the contested decision, particularly in paragraph 31 in which it explains the specific reasons for which it considered a period of four years to be sufficient to enable Remia to secure its position in the market against competition from Luycks. Furthermore, and irrespective of this, the Commission stated in paragraph 27 that if, despite having been protected by a non-competition clause for the minimum necessary period, an undertaking proves to be no longer viable, that fact is not sufficient to justify an extension of the duration of that clause.
- 43 Finally, paragraph 6 of the contested decision describes with sufficient precision and, moreover, in terms similar to those used by the applicants during the administrative procedure, the structure of the sauce market in the European Economic Community at the time of the transfer.
- 44 That being the case, and having regard to the scope of the duty to state reasons as set out above, it is clear that the contested decision contains a sufficient answer to the arguments put forward by the applicants in support of their request for an exemption under Article 85 (3) and allows the Court fully to exercise its power of review with regard to the legality of the decision.

- 45 As regards the submission alleging that the contested decision contains a mistaken appraisal of the facts of the case in so far as it refuses a request for an exemption under Article 85 (3), it should be observed that, as the Court held in its judgment of 17 January 1984 in Joined Cases 43 and 63/82 (cited above), where an exemption is being applied for under Article 85 (3) it is in the first place for the undertakings concerned to present to the Commission the evidence intended to establish the economic justification for an exemption.
- 46 In answer to the applicants' arguments set out above, the Commission disputes the existence of any increase in know-how or improvement in the production or distribution of sauces. Moreover, it states that the fact that an agreement prohibited by Article 85 (1) of the Treaty enables an undertaking, which would not be viable in conditions of free competition, to survive is not one of the cases in which Article 85 (3) provides for an exemption. Finally it points out that the continuance of the non-competition clause at issue beyond the permissible period of four years imposes on the undertakings concerned restrictions on competition which are not indispensable to the attainment of the objectives of the transfer agreement.
- 47 It is clear from all the documents before the Court and from the oral argument presented to it that the applicants have not succeeded in establishing that the continuance of the non-competition clause beyond a period of four years was of such a nature as to contribute to an improvement in the production or distribution of the products concerned or to the promotion of technical or economic progress, and it is equally clear that they have not provided evidence enabling it to be established that the continuance of that non-competition clause did not impose on the undertakings concerned restrictions on competition going beyond what was indispensable to the attainment of the objectives of the transfer agreement.
- 48 It has therefore not been established, having regard to the discretion which the Commission enjoys in this matter, that the contested decision is based on an inaccurate statement of reasons or an erroneous appraisal.

The conclusions in the application claiming that Article 5 of the contested decision should be declared void in so far as it names Mr de Rooij as an addressee of the decision

The applicants contend that for the purposes of the application of Article 85 of the Treaty or of Regulation No 17 of 6 February 1962, the only relevant undertaking is Remia and not Mr de Rooij himself, either in his private capacity or in his capacity as a signatory to the agreement in compliance with a purely formal requirement of Netherlands law.

That argument cannot be accepted. As the Commission rightly points out, Mr de Rooij was a contracting party to the sauce agreement, which grants him, particularly in clauses 5 and 7, rights peculiar to him and distinct from those of Remia. Furthermore, in the notification addressed to the Commission on 1 July 1981 with a view to obtaining an exemption under Article 85 (3) of the Treaty, Mr de Rooij is referred to by the applicants themselves as an undertaking which is a party to the agreement on the same footing as Nutricia. It must therefore be inferred that Mr de Rooij played a part in his own right both in the conclusion of the transfer agreement and as a signatory of the non-competition clause and that that justified his being made an addressee of the contested decision. The conclusions mentioned above must therefore be rejected.

It follows from all of the foregoing that the application must be dismissed in its entirety.

Costs

Under Article 69 (2) of the Rules of Procedure the unsuccessful party is required to bear the costs if they have been asked for in the successful party's pleadings. As the applicants have failed in their submissions, they must be ordered to bear the costs, including those of the party intervening on the side of the defendant.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the applicants to pay the costs, including those of the intervener.

Due

Kakouris

Everling

Galmot

Joliet

Delivered in open court in Luxembourg on 11 July 1985.

P. Heim
Registrar

O. Due
President of the Fifth Chamber