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EXCLUSIVE DEALING AGREEMENTS

UNDER EEC COMPETITION LAW

by

Susanne Christina Caillet

submitted for the LL.M degree

University of Glasgow
Department of European Law

January 1989

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January 1989

Susanne Christina Caillet

SUMMARY

The study discusses exclusive dealing agreements relating to vertical distribution.

It examines exclusive dealing agreements in their economic as well as legal contexts.

The importance of exclusive dealing agreements for the proper marketing of the produced goods and the different economic aims of the parties in question is surveyed.

The study concentrates on the legal side, considering first the substantive law.

After covering the different types of exclusive dealing agreements, the study proceeds with relevant Decisions of the Commission and judgments of the European Court of Justice.

The various exemptions applicable to exclusive dealing agreements under Article 85 (3) of the EEC Treaty are pointed out, with reference to block exemptions and individual exemptions.

The study also deals with the procedural dimensions of the law applicable to exclusive dealing agreements. It examines in detail the different types of Decisions by the Commission

referring to exclusive dealing agreements, and the possibilities of challenging them before the European Court of Justice.

Especially considered in this section are the problems involved in procedures and their effects for the parties concerned.

The study finally examines the question whether there are, with regard to exclusive dealing agreements, any identifiable trends in the developing competition system of the EEC.

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ABBREVIATIONS

BGB	German Civil Code (Bürgerliches Gesetzbuch)
cf.	(from Latin confer) compare
CMLR	Common Market Law Report
CMLRev	Common Market Law Review
ECJ	European Court of Justice
ECR	European Court Report
ed.	editor
edn.	edition
EEC	European Economic Community
e.g.	exempli gratia, for instance
EGBGB	Introductory Law on the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch)
ELRev	European Law Review
etc.	et cetera, and the rest, and soon
et sequ.	et sequentes, following pages
EUGHE	Entscheidungssammlung des Europäischen Gerichtshofes (European Court Reports)
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und Internationaler Teil (Periodical)
GWB	Gesetz gegen Wettbewerbsbeschränkungen, German (Federal) Anti-Trust Law
i.e.	id est, that is to say
IBL	International Business Lawyer (Journal of the Section on Business Law of the International Bar Association)
JO	Journal Officiel des Communautés Européennes (French edition)
n.	note
NJW	(German) Neue Juristische Wochenschrift
OJ	Official Journal of the European Communities
op. cit.	opere citato, in the work quoted
p.	page
PatG	Patentgesetz, German (Federal) Patent Act
VwGO	Verwaltungsgerichtsordnung, Code of Procedure for the judicial review of administrative acts (German Federal Republic)

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Regulation 3577/82
Regulation 123/85
Regulation 1983/83
Regulation 1984/83
Regulation 2526/85

NATIONAL LEGISLATION

Federal Republic of Germany

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P A R T I

CHAPTER 1

Introduction, purpose of the study; scope and delimitation; contents, method and sources.

The purpose of the study is to analyse exclusive dealing agreements under the EEC competition system in their economic and particularly legal relevance.

Firstly, the study deals with the economic side of exclusive dealing agreements as to their general function and justification in commercial life. The importance of exclusive dealing agreements for the producers of high quality brand-products as well as their function is pointed out, with reference to the producer's interests in influencing all levels of the vertical distribution. Thereafter the need and function of exclusive dealing agreements in their economic entirety, as well as their justification, is examined.

The economic context of exclusive dealing agreements should not be underestimated; it influences competition and

competition policy thus pointing to the need to define the aims of competition law.

Competition policy and competition law are mutually related, as competition law transposes the aims of competition policy into a legal system of application and compliance. Competition law is thus an instrument to make competition policy effective, and from its effects conclusions may be drawn, influencing in turn competition policy.

Secondly, the study defines and delimits exclusive dealing agreements in relation to other trading contracts.

They are delimited in terms of horizontal distribution agreements, concluded between partners at the same market level. Exclusive dealing agreements are also distinguished from company contracts and from mere purchasing contracts. The study also refers to the delimitation of exclusive dealing agreements against agreements on intellectual property, a point which may also influence the further distribution of the products.

After having defined and delimited the relevant notions, the study proceeds to the various forms and different types of exclusive dealing agreements, in accordance with their function in economic life. With referring to this point,

the problems concerning the adaptation of exclusive dealing agreements to the requirements of the quickly changing commercial life are shown. In this context the possibilities of termination are also considered, together with the important question as to which system of legal rules may be applicable for the validity of the agreements under civil law.

Continuing from the economic and legal basis established in the introductory Chapters 1-3, the study turns in Part II/A to the jurisdiction governing exclusive dealing agreements. Chapter 4 considers the situation in the past (1960s to 1980s) with respect to the different types of exclusive dealing agreements. This concerns the practice of the EEC, more particularly the practice of the Commission as the body in charge of adopting Regulations, monitoring the application and observance of the competition rules and taking Decisions which may be challenged before the European Court of Justice. The question is considered whether certain trends can be detected in the Decisions of the Commission and in the judgments of the European Court of Justice, that is, with reference to the treatment of the different types of exclusive dealing agreements. It should be noted that the study concentrates on the judgments affecting exclusive dealing agreements under EEC Article 85.

Whilst in the first section of Chapter 4 infringements of the EEC Treaty are examined, the second section deals with exemptions of exclusive dealing agreements under EEC Article 85 (3), considering both block exemptions and individual exemptions. The third section takes into account the situation of small and medium-sized businesses, undertakings and enterprises under EEC competition law. These undertakings are usually in a difficult position, as they mostly have powerful international company groups as partners for their exclusive dealing agreements, and these company groups can impose their contracting terms on their weaker business partners. With this point in mind, economic and legal aspects are shown together with efforts, to keep the competitiveness of small and medium-sized undertakings. Fourthly, after having elucidated the situation of exclusive dealing agreements in the past, the study examines the situation under current EEC competition law. Chapter 5 is thus treated as being a reflecting image of Chapter 4.

The study figures out if past trends are being continued, developed or replaced. It also takes into consideration the principles underlying the Commission's current competition policy and the judgments of the European Court of Justice. (The decisions are related to the different types of exclusive dealing agreements).

In section two of Chapter 5 the study proceeds to to the survey of the current system of exemptions and asks if new policies with reference to block exemptions and individual exemptions have been developed.

In section three of Chapter 5 the study details the current situation affecting small and medium-sized businesses, undertakings and enterprises, and examines the position they have in the current competition policy and judicial decisions.

Fifthly, in Part II/B (Chapter 6) the study, after having dealt with the substantive law, proceeds to the procedural law concerning exclusive dealing agreements. It considers the different procedures which are available: application for a negative clearance, notification to obtain an individual exemption and, not to be underestimated, infringement proceedings.

The study examines in section two of Chapter 6 the different forms of available procedures, taking especially into consideration the advantages and disadvantages of applications and notifications by the involved private parties. The third section of Chapter 6 surveys the different decisions relating to exclusive dealing agreements. The study also deals with the topic of informal

settlements, especially the "comfort letters" and their effects for the parties concerned.

Time problems in decision taking are also discussed; time may be an essential factor affecting exclusive dealing agreements and the marketing of the goods in question. Decisions at the right time are most relevant for the parties of the agreement, as only they can provide effective legal protection, for the coordination of the undertaking's distribution policy, and prevent third parties or a contracting partner from claiming damages. Timely decisions are also relevant for cases where infringements of the EEC Treaty have to be terminated. Only quick decisions act as necessary deterrent to lead to fairness for the competitors.

Section four of Chapter 6 explains the possibilities of challenging a Decision of the Commission before the European Court of Justice. Also in this section too time problems relating to the conclusion of proceedings before the European Court of Justice are considered. In section five (of Chapter 6) the study treats the enforcement of decisions with special reference to fines imposed on the parties concerned.

Sixthly, in Part III the study reviews the conclusion obtained in the preceding chapters and examines whether certain trends are detectable and which conclusions may

further follow therefrom. Once more, the importance of time for decision taking will be mentioned, essential for the marketing of a brand product through exclusive dealing agreements.

As to the sources relevant to the present study, the main source relating to substantive law is the EEC Treaty, with particular reference to the competition rules, in the first place EEC Article 85. Other sources are (secondary Community legislation) Regulations, especially governing block exemptions; Notices and Recommendations of the Commission; its Annual Reports on Competition Policy. Further sources include the Decisions of the Commission and the judgments of the European Court of Justice; compendia; text-books and commentaries on European competition policy as well as articles from relevant periodicals.

With regard to procedural law, the main sources are EEC Articles 173, 174 and 175 relating to the judgments of the European Court of Justice.

For the Commission's procedural system main source is Regulation 17/62. As further affecting procedural matters, reference may be made to Forms A/B and the Complementary Note, as well as further Regulations, the Commission's Annual Report on Competition Policy, Decisions of the Commission and judgments of the European Court of Justice, compendia and text-books on procedural law.

CHAPTER 2

**The economic and commercial function of exclusive dealings;
the need and function of exclusive dealing agreements.**

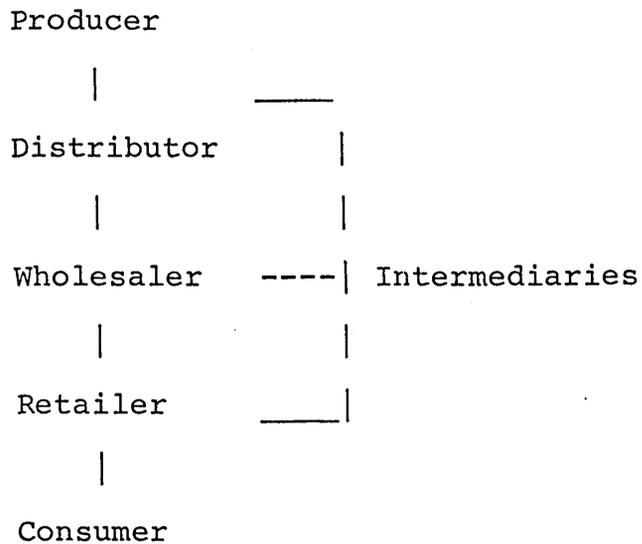
In times of increasing competition it is not sufficient for an undertaking to produce high quality goods, it is also of enormous importance to provide for the best possible outlet.

Distribution is the connecting link between the producer and the ultimate consumer.

According to Fulop, distribution is an "essential corollary of production and makes products available where, when, and in the form in which they are required by consumers".¹

An undertaking - supposing it is not producing the goods for its own consumption - has many different ways of releasing its goods to the market.

Basically the distribution as a rule is carried out at different vertical levels:



In everyday commercial life, this system is to be found in many variations. There may be more than one party involved at one level, or there may be none of the levels at all (which means that the producer consumes the goods for himself or he is into direct-selling (by mail / telephone order or factory to consumer) to the ultimate consumer).²

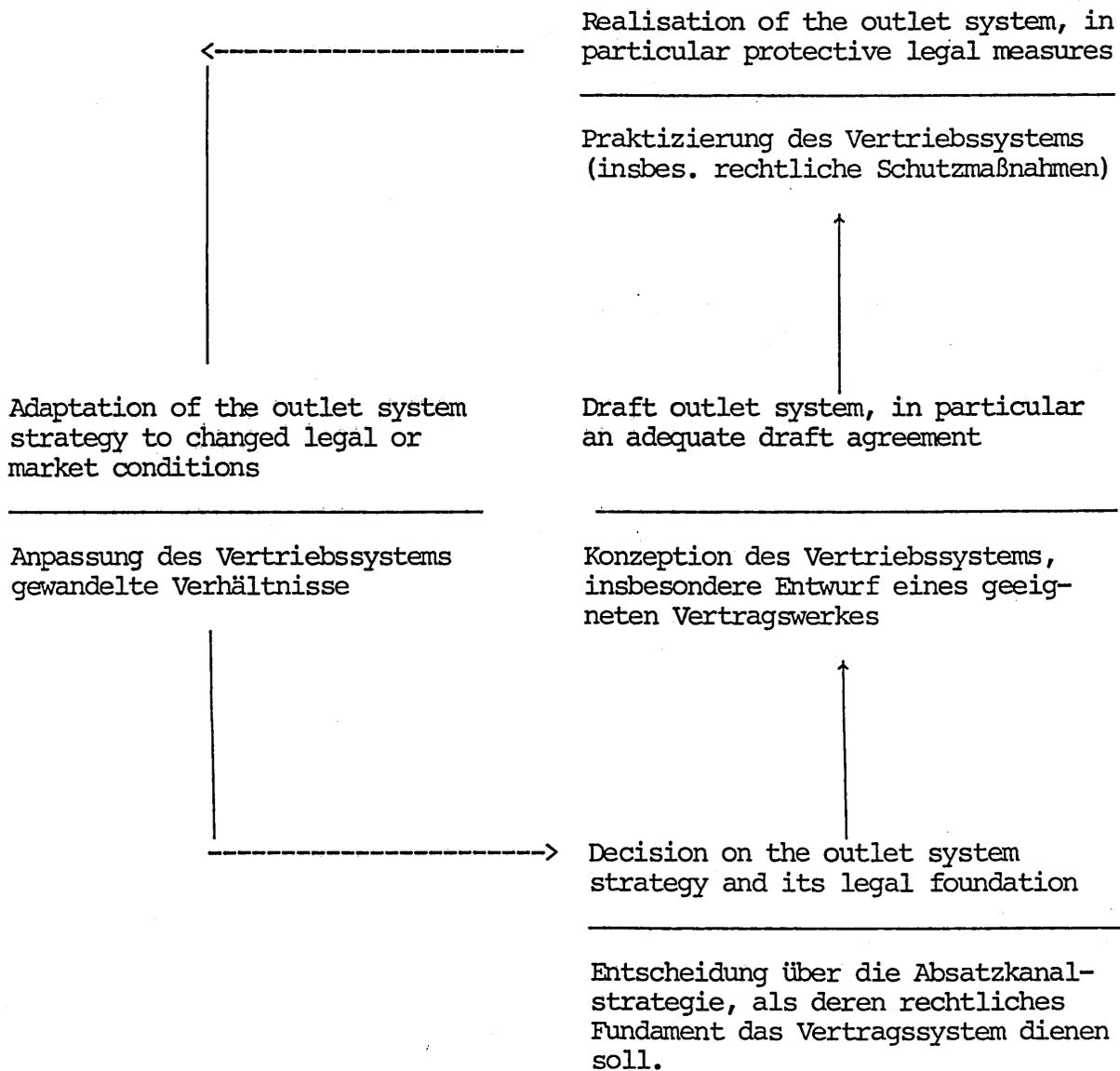
For the present study, the term producer will be used for the undertaking which manufactures the goods in question. According to the definitions of Whish, the term distributor will be used for a firm "whose business is to resell goods but not to the public"; the term retailer will be used to describe firms "whose function is to sell goods to their ultimate consumer".³

As shown above, distribution is an essential corollary to production and also essential for the firm's flourishing.

If the producer is considering the establishment of a contractual marketing distribution system, he has to consider economic as well as legal factors with mutual strong interdependences. Therefore, legal problems have to be solved in all phases of the contractual distribution system's lifetime:

- " - for the decision on the outlet system strategy and its legal foundation (in particular review of the legal preliminary questions)
- for the draft outlet system (in particular for an adequate draft agreement),
- for the realisation of the outlet system (in particular protective legal measures), and
- for the adaptation of the outlet system strategy to changed conditions (again: review of the legal preliminary questions, draft agreement, legal foundation)."⁴

The interdependences between the above mentioned four steps are pointed out in the following figure (with German equivalents of the terms in English):



Beside direct selling, there are basically two ways of distribution the producer can turn to: he can either establish his own distribution system or he can appoint some third parties to do it on his behalf.⁵

Deciding on the outlet system strategy, the producer has to consider carefully, which way of distribution he will choose, because this is to determine the long term posture of the company in its business environment.⁶

Every producer will choose the best possible way considering special requirements of his goods, market requirements, competition with other producers and so on.

He will be interested in efficient and cheap distribution with secure guaranteed outlets and reasonably large quantities of sold goods. He will also want his goods promoted in a suitable way in order to protect the brand image. Finally he will try to maintain the demand for his products at a high level in order to guarantee high prices and profits.⁷

Drafting the outlet system strategy, the producer has to consider also the external environments, in particular the aims of the consumer, the aims of the intermediaries and the legal situation as to national and EEC law.

The consumer expects easy availability and access of the goods with as many retailers as possible, accompanied by a complete range of products and a reliable service. He will also want the goods to be sold at reasonable prices.

The intermediaries desire low risks, as few as possible obligations, especially no price recommendations, to make profit as large as possible. Their specific aims depend entirely on their relation to their contracting partners as employees, agents, subsidiary firms, or complete independent firms.

Surveying the legal situation, the main aim of the EEC authorities (for the consumer's sake) will be a perfect, fair competition in a single European market, and for this purpose EEC competition law will be applied and enforced.

Regarding these aims the producer has to consider the advantages and disadvantages of the establishment of his own distribution system. With his own distribution system he has the advantage to dispose of the firm's entire distribution policy.

He can also dispose of the prices, even if price bindings are not allowed. The producer's own distribution network may be more efficient because with skill, know-how and a

reliable service for the customers. It will guarantee a reliable distribution outlet with no competitors or competing products within the system. Another advantage is, that the whole systems is looked upon as an economic entity and falls outside the competition law provisions, so there is usually no cause for the EEC authorities to start investigations under EEC Article 85.⁸

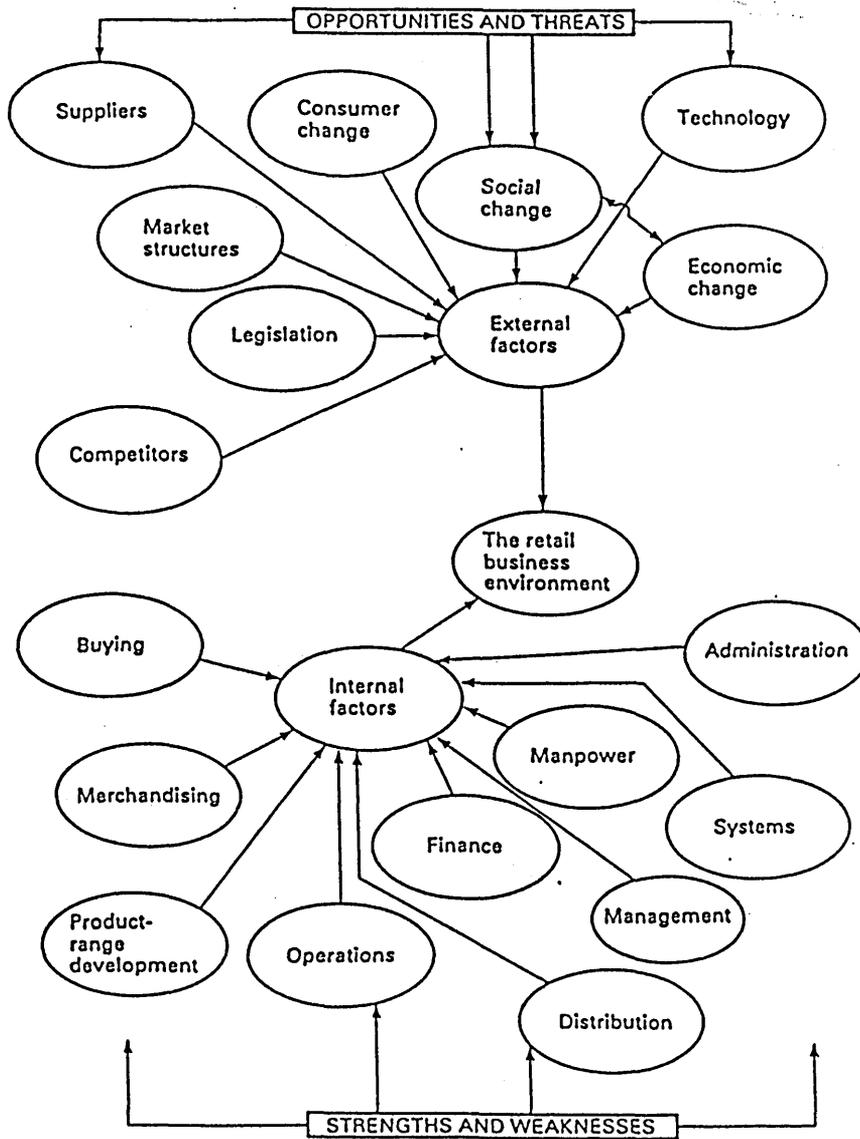
As a disadvantage, a producer firm's own distribution system may require a whole network with employees, subsidiary companies and retail outlets in connection with the necessary know-how and detailed knowledge of the markets. That may require high costs and investment, usually beyond the capacity of small and medium sized firms. Also it is connected with high risks, if the necessary know-how on vertical sectors is not available, especially where foreign markets with different languages, laws, consumer habits, advertising, are in question.⁹

These problems will become very important, especially for small and medium sized firms, when in 1993 a uniform European market will be established and the firms will have to consider the changed competition conditions making it necessary to expand with investment into foreign markets.

On the one hand, a producer's own distribution network may be more flexible to respond to market trends, but it may on the other hand involve difficulties, if the market requirements demand to discard a whole distribution network from "one day to the other." Many employees may have to be made redundant; they may seek the enforcement of their statutory rights before Industrial Tribunals with long-lasting proceedings involving further risks for the undertaking.¹⁰

So, when deciding about a firm's distribution policy, the entire posture of the undertaking, including external factors as well as internal factors, has to be considered.

This very complex system with its varying factors is shown in the following figure:



Source: Derek Knee and David Walters, The Strategy in Retailing Theory and Application (1985) Chapter 4, Figure 4.1, see also n.6 above.

Because of the disadvantages shown above, not every producer will choose to have his own distribution network, and beside the factory-to-consumer sale channel there may be another category of producers who do not actually need a complex distribution network or influence on such a network. These are the producers who manufacture cheap mass products and are only interested in selling as many articles as possible, no matter who is going to buy them. However, if the product in question is a quality product and the selling depends also on its brand image, the producer has to care much about the way the goods are distributed. It depends on the producer's market posture in its entirety, if he decides for or against his own distribution network.

Furthermore, small and medium sized firms will not be able to cover the high costs and risks of a self-owned distribution network. Also firms whose product ranges are dependent on unsteady market requirements and therefore have to change quickly, will - geared to market requirements and resonable planning - not establish their own distribution system.

In commercial life the above mentioned two ways of distribution are often found mixed with many variations.

There are whole networks of partly subsidiary and partly third companies charged with the distribution.

Having decided to charge third parties with the whole or a part of the distribution, the producer will be interested in having sufficient influence over the way of distribution. It is this situation which may cause inquiries by the EC authorities, i.e, the Commission, which decides if the agreement falls within Article 85 of the EEC Treaty or not.¹¹

In opposition to that, there normally will be no cause for the authorities to start inquiries when a producer chooses to establish his own distribution network.¹²

Because the undertaking is selling the goods within the economic unity there is no need for distribution agreements; the undertaking has no interest in influencing the distribution where the whole system is based on the company's policy.

Here another advantage for interlinked companies can be made out: a big company can provide for all the subsidiaries, risks etc. connected with its own distribution system and therefore can fall outside the ambit of enquiries of the Commission and of EEC Article 85, while a

small business may attract enquiries by the Commission and measures according to EEC Article 85.

The justification of a firm's interest in influencing the way of distribution firstly results from the manufacture of the goods in question. The undertaking may have mobilised high investments for product development with material costs, wages, storage, advertising etc. Even the idea (which may be patented) of the manufactured product itself may have been the undertaking's own. With all such investments incurred, in a free economic system the producer is entitled to earn the results of investment by selling the goods and making profits.

The successful sale of goods - as shown above - does not only depend on the quality, but also on various additional circumstances as service, brand image, marketing etc.

These are of enormous importance for the successful marketing of a product. So it is important that the producer be entitled to gain enough influence in the entire selling system in order to pursue the firm's policy and earn the results of productive investment. Not least with an exclusive dealing agreement, the producer can also increase the efficiency of the whole outlet system.¹³ An

other argument for the justification of exclusive dealing agreements is the participation of intermediaries and end-users in the advantages of the outlet system. The intermediaries can benefit from the brand image connected with marketing, detailed product information and assistance in management decisions.¹⁴

Exclusive dealing agreements are also justified by advantages for the consumer. They can provide better quality and a wider distribution of the products, and can promote inter-brand competition¹⁵. They also provide the end-user with a wider range of products and more qualified staff and service.

Tendencies can be observed in some sectors, which "seem to have a natural propensity to vertical integration", as for example beer and petrol.¹⁶ That may be so, because undertakings produce goods on successive delivery, i.e. liquids, whose storage is connected with quite high expenses and risks (especially petrol, where pollution is concerned). Because of the storage problems, such undertakings need a reliable outlet to sell their products.

A recent trend of going into vertical sectors can be noticed in the computer business and connected industries, where complex machines are concerned, requiring efficient

service and supervising, especially for the software. There seems to be a general tendency that the more complex the sold goods are, the more the producers tend to vertical integration. It can be observed that computer producers go into vertical integration, where the big systems are concerned, and tend to charge third parties with the distribution of the small systems (for example personal computers), which do not need much service.

Beside the above mentioned advantages, it is nevertheless necessary to consider the danger of exclusive dealing agreements in forming oligopolies connected with market power and the possibility of imposing prevailing high prices.

The present study considers the limitations of exclusive dealing agreements under the EEC competition policy as to open markets and undisturbed competition¹⁷, points which may sometimes differ from the agreements of the parties concerned.

Having mentioned the economic and commercial function and need of exclusive dealing agreements, we may now look to the legal side.

All distribution contracts, especially the exclusive dealing agreements, are instruments of vertical work-sharing between trade and industry, and thus instruments of the sales strategy of undertakings.¹⁸ Every member of the distribution chain will try to translate his economic aim into the best possible legal form.

The present study looks at the possibilities and limits of pursuing commercial interests at the level of the law.

CHAPTER 3

Notions and types of exclusive dealing agreements.

1. Definition and delimitation in contrast to horizontal agreements, company contracts, licensing and franchising.

Definition

Surveying the literature on exclusive dealing agreements, one finds a wide variety of meanings and definitions. In the present the different meanings will be explained and definitions adopted for the present study.

In some sources the term "exclusive dealing agreement" is used as a kind of general term, covering all kinds of agreements "whereby undertakings agree to deal only with each other, to the exclusion of third parties".¹⁹ In other sources the term defines only a small segment of the above mentioned agreements.²⁰ Exclusive dealing agreements are also found defined as contracts, where " a producer may agree to deal exclusively with a particular customer or the customer to purchase exclusively from the producer other than in the context of the distribution of products."²¹ Deriving from that definition, the "exclusive dealing agreements" are delimited against "distribution agreements".

On the premises that "not all vertical restraints are essentially concerned with distribution policy" the term exclusive dealing agreement is used for agreements which are not part of the producer's distribution system, but concern the supplies which a firm may require for its own needs, e.g. for its own production program(s) or in the form of semi-finished goods for further processing.²²

Different definitions and meanings of the term exclusive dealing agreements are also found in the literature in German on EEC law. As a general term very often the word "Alleinvertriebsvereinbarungen" is used²³, also the term "Absatzverträge" is found.²⁴

Recently there seems to be a tendency to replace the term exclusive dealing agreement with a general meaning by the term "vertical agreements affecting distribution or supply".²⁵

Also the term "exclusive distribution agreement" is to be found.²⁶

This definition, used in Regulation 1983/83, has to be interpreted in connection with Regulation 1984/83.

The Commission makes clear in the Notice on Regulations 1983/83 and 1984/83 that the legal definitions should not be altered. It says: "Regulations (EEC) No. 1983/83 and

(EEC) No. 1984/83 are both concerned with exclusive agreements between two undertakings for the purpose of the resale of goods".²⁷ The conclusion can be drawn that the term "exclusive agreements" is used as a kind of leading term for both Regulations 1983/83 and 1983/84.

For the present study the term exclusive dealing agreements is used with a wide meaning as a leading term, concerning all agreements between undertakings for the purpose of the resale of goods, all the more as every resale agreement excludes some or all competing parties, either intermediaries or producers. Otherwise there would be no need for the establishment of a special outlet system (see above Chapter 1).

The agreement itself is not defined by Article 85 of the EEC Treaty. Agreements are "bilateral or multilateral understandings in which at least one partner is legally bound to a certain act or omission."²⁸

(In the present text, the meaning of bilateral and multilateral agreements will be rendered by the term "trans-frontier" relating to agreements between firms in more than one, that is in two or more member states. Correspondingly, the term "non-transfrontier" will relate to an agreement, concluded between firms in one and the same member state).

The particular agreements and their validity are subject to the specific national legal system, where they take their effect, "national law determines what constitutes an agreement, contents and purpose do not matter".²⁹

An exemption from this principle is made, where the agreement is infringing EEC provisions, especially EEC Article 85. The infringing agreement - however valid according to national law - is automatically void. EEC Article 85 (2) provides that "any agreements or decisions prohibited pursuant to this Article shall be automatically void".

Delimitation in contrast to horizontal agreements, company contracts, licensing and franchising

Having defined the exclusive dealing agreements for the present study, they have to be delimited also against other, similar contracts.

Firstly, it must be considered that in general there are two main types of exclusive dealing agreements: horizontal and vertical agreements. Horizontal agreements are agreements "between undertakings at the same level of supply, usually agreements between competitors, for example an

agreement, not to compete on price or to seek new markets".³⁰ Vertical agreements are agreements "between a supplier and a customer to whom he supplies"³¹, i.e. they are agreements between undertakings at different market levels.³²

The present study concentrates on the vertical agreements, because for the purpose of distribution, as pointed out in Chapter 1, it is most important to gain influence on the following market levels, and such influence can be secured only by vertical agreements.

Vertical agreements between partners at different market levels can also be based on company contracts.³³

Company contracts create independent legal entities as private or private limited companies, public companies or co-operative associations.³⁴

These agreements based on articles of association will be set aside for the present study, as the study concentrates on the exchange trading contracts with exclusive dealing agreements.

The exclusive dealing agreements have also to be delimited against mere purchasing contracts, which can also be agreements between parties at different market levels.

Purchase contracts are basically reciprocal contracts about the exchange of goods and money³⁵. Once the exchange has

been carried out, the consignee is free to do with the goods what he likes. So these purchase contracts can be delimited against exclusive dealing agreements, because they only affect the exchange and do not place the consignee under additional obligations concerning distribution or further buyings, even when the original exchange contracts are already wound up.³⁶ Mere purchase contracts are not useful for a producer, who wants to influence the further business connections as well as the following contracting partners of the distribution chain.

Also the delimitation of exclusive dealing agreements against agreements on intellectual property, i.e. licensing agreements is not always easy to make out. Agreements relating to intellectual property rights, especially licensing agreements can be vertical agreements as well.³⁷ In the decision on the agreements of the Burroughs Corporation the Commission says about licensing agreements³⁸:

"A patent confers on its holder the exclusive right to manufacture the products which are subject of the invention. The holder may cede, by licences for a given territory, the use of the rights derived from its patent".³⁹

Licensing agreements are defined as contracts, which oblige the proprietor of a transferable intellectual property

(industrial property right) to transfer it or allow the use of the right.⁴⁰ Thus they can be distinguished from exclusive dealing agreements, which are agreements relating to distribution of goods⁴¹, whereas licensing agreements relate to the transfer of rights.

Very complex is the delimitation of exclusive dealing agreements against franchising contracts found in many varying forms.

Basically there are at least three distinct types of franchising agreements: service franchise agreements, distribution franchise agreements and production (industrial) franchise agreements.⁴²

The difference with the first and the last can be recognised by the subjects in question: service and production. More difficult is the delimitation to distribution franchise agreements or to the above mentioned types, if they are found mixed, because the same subject, distribution, is concerned. About the difference of franchise agreements and exclusive dealing agreements the European Court of Justice established in the case Pronuptia:

"In a distribution franchise system such as this, an enterprise which has established itself as a distributor in a market and which has thus been able to perfect a range of commercial methods gives independent

businessmen the chance, at a price, of establishing themselves in other markets by using its mark and the commercial methods that created the franchisor's success. More than just a method of distribution, this is a manner of exploiting financially a body of knowledge, without investing the franchisor's own capital. At the same time this system gives businessmen who lack the necessary experience access to methods which they could otherwise only acquire after prolonged effort and research and allows them also to profit from the reputation of the mark. Distribution franchise agreements are thus different from either dealership agreements or those binding approved resellers appointed under a system of selective distribution which involve neither use of a single mark nor application of uniform commercial methods nor payment of royalties in consideration of the advantages thus conferred."⁴³

In the decision of 17 December 1986 (Yves Rocher) the Commission said:

"Commission Regulations No 67/67/EEC (OJ no 57, 25.3.1967. p. 849/67) and (EEC) No 1983/83 (OJ L 173, 20.6.1983, p. 1), as last amended by the Act of Accession of Spain and Portugal, on the block exemption of exclusive dealing and exclusive distribution agreements are not applicable to the standard form franchise at issue, the legal nature of which is different (Case 161/84 (Pronuptia), points 15 and 33). The franchise contracts go beyond mere distribution agreements, for the franchisor undertakes to grant rights to use its identifying marks and its proven trading methods with a view to the application of an original and changing distribution formula. It must therefore be decided

whether the contracts at issue qualify for an individual exemption under Article 85 (3)".⁴⁴

In July 1987 the Commission took another Decision in a case involving Computerland Europe.⁴⁵ The Commission confirmed the principles established in Pronuptia.⁴⁶ The Commission made clear that restrictions for the franchisees, e.g. so-called location clauses, can be accepted for the advantages passed on to the consumers. This is the first decision where a distribution franchise agreement was clearly not found illegal under the EEC competition law.

The Decision confirmed the conclusion that the Commission and the European Court of Justice do not find the Regulation 1983/83 applicable for franchising contracts and therefore regard them as different from exclusive dealing agreements.⁴⁷

Consequently the Commission prepared a new block exemption for franchise agreements.⁴⁸

In it the franchising agreement is defined as an agreement "whereby one undertaking, the franchisor, grants the other, the franchisee, in exchange for financial consideration, the right to exploit a franchise for the purpose of marketing determined goods and / or services."⁴⁹

So the franchise itself means "a package of intangible property rights relating to trade marks, trade names, shop signs, utility models, designs, copyrights, know-how or patents, to be exploited for the resale of goods or the provision of services to end-users and which include at least certain minimum criteria".⁵⁰ The further examination of the recent developments concerning franchising agreements would exceed the extent of the present study which concentrates on exclusive dealing agreements.⁵¹

As a conclusion exclusive dealing agreements can be delimited against franchising agreements by the relation to the resale of goods in general, whilst franchising agreements refer also to licences of intangible property rights, e.g. to the use of the undertaking's name, trade marks and know-how.

2. The different types of exclusive dealing agreements.

Continuing from exclusive dealing agreements as a general term, the different types of exclusive dealing agreements (including selective dealing agreements) and their relevance for the EEC competition system can be pointed out.

As shown above, distribution in commercial life is a very complex matter with many varieties. According to this

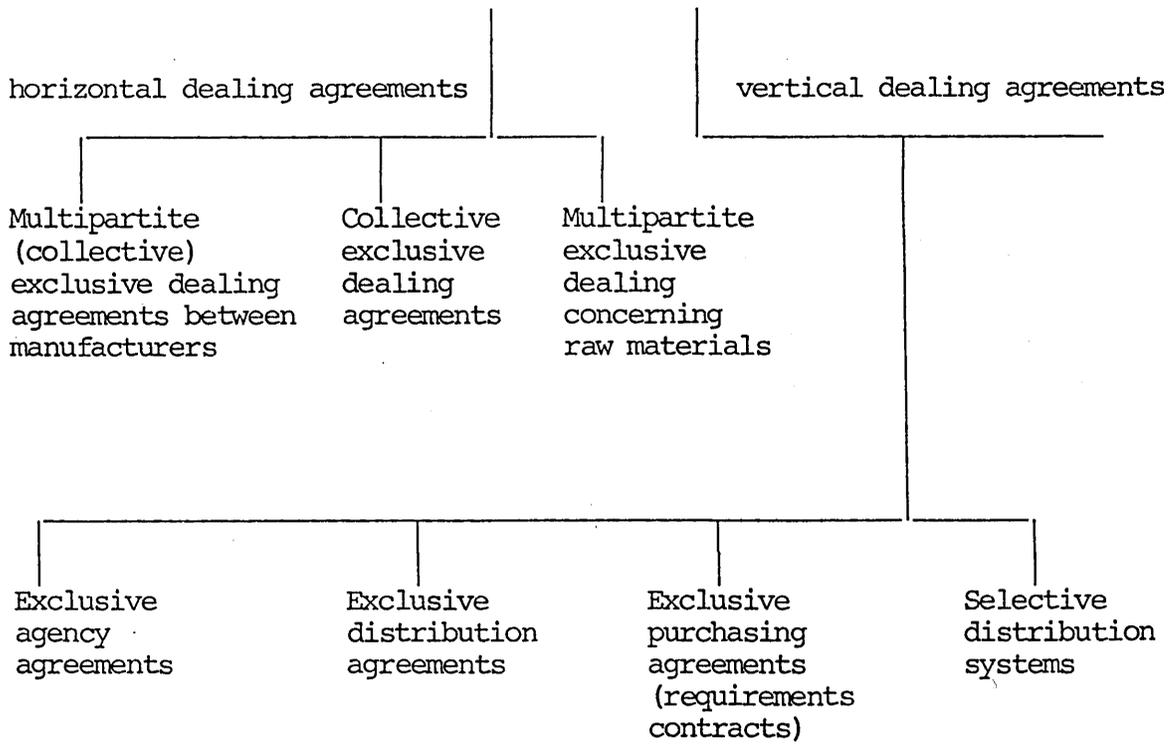
requirement the exclusive dealing agreements are found in many modifications, making them difficult to classify.

In literature - beside the difficulties in definition - mostly enumerations⁵² of the singular cases are to be found, whilst fundamental lines and meanings are difficult to identify.

An attempt of classification can be made when regarding how the agreement binds the contracting partners (type of restriction).⁵³

The different types of exclusive dealing agreements are shown in the following figure:

EXCLUSIVE DEALING AGREEMENTS



Definitions: Bellamy/Child op. cit. (n.25) at paragraphs 4-047, 4-064, 4-078, 6-001 et sequ.

The above mentioned figure is showing the basic structures of the different types of exclusive dealing agreements.

(For a complete picture, the horizontal exclusive dealing agreements are also included in the figure. Although the horizontal dealing agreements might infringe Article 85 of the EEC Treaty, they will be set aside for the present study, which will, as already mentioned, concentrate on vertical exclusive dealing agreements.⁵⁴)

In practical commercial life it may be difficult to find out the different types, because they are found mixed in many variations, adapted to the requirements of the specific economic situation. However, this part of Chapter 3 will deal with the different types of exclusive dealing agreements as a basis for analysing the legal situation in the past (Chapter 4) and at present (Chapter 5).

Vertical agreements include firstly the **exclusive agency agreements**.⁵⁵

According to Bellamy/Child the relationship between the parties is "one of principal and agent strictly so called. The principal is typically restricted as to the other agents through whom he may supply, while the agent is restricted from acting for another principal."⁵⁶

These agreements are to be defined as agreements between the producer and its subsidiaries rather than as agreements between the producer and independent third parties.

As usual these contractual bindings are reciprocal: the principal is restricted from supplying other agents within a specified part of the territory of the Common Market, and the agent assumes the obligation to work exclusively for one principal.⁵⁷ Provided that the agreement is one between principal and commercial agent, the agent is looked upon as performing "an auxiliary function in the commodity market".⁵⁸ On these premises the whole distribution system is looked upon as an economic entity with the consequence that pursuant to the Commission Notice on Exclusive Agency Agreements Article 85 of the EEC Treaty is not applicable, even if the agent is appointed sole agent for a given territory.⁵⁹

The Commission Notice on Exclusive Agency Agreements is only relevant where the agent is acting as a commercial agent, not as an independent trader.

The differentiation in the individual case may be difficult; the Commission regards as decisive criterion the lacking of the commercial agent's responsibility for financial risks other than the giving of delcredere guarantees.⁶⁰

The independent trader on the other hand is assuming financial risks, as he is acting on his own account. He will act for more than one principal or at least, beside working for one principal, acting on his own account as well. In contrast to the commercial agent he is thus not integrated fully into the distribution system of the principal.⁶¹ Because the independent trader is regularly working for other employers too, he cannot be regarded as auxiliary of the employer in question.

Therefore such agreements fall within the provisions of Article 85 of the EEC Treaty.

So exclusive agency agreements have the advantage for the producer that Article 85 of the EEC Treaty is not applicable, they also provide enough influence over details of the distribution. For the agent such arrangements are of advantage because he does not run high financial risks and does not need to make big investments. On the other hand the agent has to consider the strong economic dependence on the producer, who may impose his terms on him.

Secondly, there are the **exclusive distribution agreements** (exclusive supply terms).

Exclusive distribution agreement means "an agreement by which one party (the supplier) agrees to deliver certain

products only to the other (the distributor) for resale within a certain area".⁶²

These agreements contain mutual obligations as well. The supplier is normally prevented from appointing a third party in the territory or selling in the territory himself, while the distributor is assuming the obligation not to sell competing products.⁶³

If the supplier is only restricted from supplying other distributors, the agreement in some sources is defined as "sole distributorship agreement", if the supplier in addition to that is restricted from selling in the territory himself, it is referred to as an "exclusive distributorship" agreement.⁶⁴

In some sources the exclusive dealing agreements are found defined as agreements with the essential that "the distributor should be given an exclusive sales area and the competition issue is the degree of exclusivity he should be afforded; the essence of an exclusive purchasing commitment on the other hand is that the purchaser should only be allowed to purchase from a given supplier, and the competition problem is that this forecloses access to that outlet".⁶⁵

In such exclusive distribution cases the territorial element is a most important one. For the supplier it means expansion into new markets, secure guaranteed outlets, saving of transport expenses and costs connected with the maintaining of several different outlets, which leads to more efficiency and rationalisation. The distributor gains a kind of territorial monopoly, so he will provide for the necessary promotion, advertising etc, i.e. he will develop the "incentive he needs to promote the product".⁶⁶ He will be interested in taking investments, because he can be sure that no other competitor in the area can - provided he is acting on legal grounds - get hold of the goods, so that he has no intra-brand competitor. This kind of agreement has advantages especially for the distributor, because the producer (supplier) is restricted from the supplying of competitors in a certain area. The producer on the other hand has the advantage of secure guaranteed outlets, but in cases of difficulties between the partners or sale difficulties even crises there is the strong dependance of having only one outlet.

Exclusive distribution agreements might infringe Article 85 of the EEC Treaty. In the case of **Consten and Grundig v Commission** the Court made clear that agreements conferring absolute territorial protection upon a distributor fall within Article 85 of the EEC Treaty.⁶⁷ The details and the possibilities of a block exemption (Regulation 1983/83 on

Application of Article 85 (3) of the Treaty to Categories of Exclusive Distribution Agreements⁶⁸) or an individual exemption are pointed out in the following chapters below.

Thirdly, there are the **exclusive purchasing agreements** for resale (exclusive purchasing terms). They mean that the person to be supplied undertakes to obtain all his requirements of certain goods from one particular supplier.⁶⁹ It is not always easy to distinguish an exclusive purchasing agreement from a (mere) contract of purchasing large quantities of certain goods in practice. The distinction is even more difficult where the purchasing contract provides future delivery.

Exclusive purchasing agreements may infringe Article 85 of the EEC Treaty. In the Case **Brasserie de Haecht v Wilkin (No.1)**⁷⁰ the European Court of Justice stated that Article 85 of the EEC Treaty may be applicable to agreements by which the purchaser renounces the freedom to buy his goods from competing producers, and the other producers are excluded from an outlet of their products.

In addition to that, the Commission made clear in the decision of **BP Kemi/DDSF**⁷¹, that when distinguishing mere purchase contracts from exclusive purchasing agreements, the time element is an important one. It said: "However,

when a purchasing obligation of a longer duration is entered into, the relationship of supply is frozen ... it is possible that competition is restricted within the meaning of Article 85 (1)."⁷²

Analysing these decisions, in practice it is most important, when drafting future contracts for the parties, to acquire the complete facts of the case, and pay attention especially to the duration of the contract, before deciding, if the contract is to be regarded as a long term sales agreement or an exclusive purchasing agreement.⁷³

Many exclusive purchasing agreements may now benefit from the block exemption for categories of exclusive purchasing agreements⁷⁴, the details of which are pointed out in Chapter 5.

An exclusive purchasing system is of advantage especially for the producer, who gains guaranteed outlets and, in addition to that, enough influence over the way of distribution, because the contracting partner is obliged to buy all his goods requirements from him. For the distributor this system means that the producer will supply him also with know-how, advertising etc., but it can not be ignored that he may slide into a strong economic dependence, agreeing to buy all his requirements from one producer. And this dependence will increase, even if his

business is doing well, because he has to agree with the terms the producer is imposing on him, in order to satisfy his customers' demands on the branded goods, and there are no competitors he can turn to as long as the agreement is valid.

Regarding the basic structures of the three above mentioned types (exclusive agency agreements, exclusive distribution agreements and exclusive purchasing agreements) , it stands to reason that the different types of exclusive dealing agreements are found mixed in many variations, depending on the requirements of the market. The terms also depend essentially on the aims the contracting partners are pursuing, and on their market powers, which may enable them to impose the most favourable clauses on their contracting partner.

Fourthly, there are the **selective distribution systems**.

All the above mentioned terms, especially the exclusive distribution agreements, are often found in connection with selective distribution systems, in order to choose the following contracting partner, to whom the product will be delivered, before it gets to the end-user.⁷⁵

Basically, the producer is free to choose the ways of distribution and his contracting partners he wants to deliver with the goods, as long as he has no monopoly or dominant position.⁷⁶ As long as there is no monopoly or dominant position - limitation is EEC Article 86 - the producer cannot be forced to deliver the product to everyone who wants to be supplied with it. The producer is free even to deal with similar distributors in a different way.⁷⁷

When reviewing the definitions of selective distribution systems, no uniform tendency can be found. In some sources selective distribution is defined as the producer's systematically accomplished limitation of the distribution mediators in a particular market area (on one or more distribution levels).⁷⁸ In other sources, the term is used for "a system of distribution whereby the supplier limits the resellers he is prepared to supply and the appointed resellers are forbidden from reselling to any one other than end-users or other appointed resellers".⁷⁹

In this study the term is used in the latter sense, with a wide meaning covering every limitation of resellers.

Typically the producer of sophisticated consumer goods wants to limit type and number of retail outlets through

which the products are sold to the end-users, he wants his brand goods sold by "approved dealers only".⁸⁰

The producer may operate such a selective distribution system without infringing Article 85 of the EEC Treaty. However, the system has to fulfill certain criteria, as both the ECJ and the Commission have stated on a number of occasions, otherwise there may be an infringement of Article 85 of the EEC Treaty. The legal situation of selective distribution will be considered in detail later in this study, including the block exemption provided by Regulation 123/85.

Selective distribution systems secure the producer's influence on the following members of the distribution chain. The producer is free - within certain limits - to define the criteria, which have to be fulfilled concerning technical expertise, shop outfit, skill of staff etc. These criteria may vary with the brand image, and the consumer's requests when buying the specific brand products. The reseller on the other hand has to undergo certain procedures to become an "approved dealer"; he may have to make several financial investments (e.g. shop outfit, staff training etc.) in advance - as a kind of venture - not knowing, if the producer will acknowledge his exertions with the desired "approved dealer certificate".

Having explained the basic types of exclusive dealing agreements, we should complete the present review by mentioning that there are many other types of vertical agreements which affect purchase or supply, e.g. franchise agreements, vertical industrial supply or purchase agreements, and subcontracting.

Franchising agreements have been considered above, the other vertical agreements affecting purchase or supply do not relate to the distribution of the final product, but to its stage before entering the distribution chain.⁸¹

As a conclusion it can be said that exclusive dealing agreements are difficult to classify. The different types are mostly found mixed in all kinds of variations depending on their purpose of application in commercial life.

The following Chapters examine whether the decisions of the Commission and the Court of Justice show trends which could lead to certain classifications.

3. Adaptation of exclusive dealing agreements to the requirements of economic and commercial life

The quickly changing commercial life requires contracts, which can easily be adapted to changing market situations; but, at the same time each party wishes to have a reliable partner for long-term planning and therefore wants to have long-term contracts which cannot be easily terminated. Therefore it has to be examined, according to which legal system the exclusive dealing agreements can be adapted to the requirements of everyday commercial life.

Generally, an exclusive dealing agreement requires many detailed provisions to respond to complex market situations. To establish provisions for every development which may occur in the future is, in practice, very difficult and voluminous, if not utopian. The best and most reasonable draft agreement includes as many provisions as necessary and as few provisions as possible. Many detailed provisions require especially those agreements in which the parties wish long-term contracts with as few as possible rights of termination. This is mostly of advantage for the producer, who gains secure guaranteed outlets. Nevertheless, in practice, very often surprising market developments arise, which none of the parties could have considered or envisaged.

Where the parties have agreed about long-term binding obligations, the possibility of terminating a contract in reaction to changed market conditions may gain increasing importance; the survival of the undertaking may be connected with it. So, the corresponding legal provisions also gain enormous importance (see Chapter 2) jointly with the question as to which legal system is applicable to the contract.

The most important European Community provision is Article 85 of the EEC Treaty. To each contract EEC Article 85 is directly applicable public law, the application of which the parties cannot exclude by agreement.⁸²

Article 85 (2) of the EEC Treaty provides that "agreements or decisions pursuant to this Article shall be automatically void"⁸³, but the Treaty gives no further provisions for validity, adaptation and termination of the agreements. Thus, in respect of validity - beside Article 85 of the Treaty -, adaptation and/or termination of an agreement is subject to international private law, referring to the applicable national law in question⁸⁴ or to that national law the parties want to apply. In their agreements the parties are within certain limits free to choose the national law they want to be applicable⁸⁵. Where national law is applicable, there may be differences between the provisions stating validity, adaptation and termination of the agreement. The parties will take such differences into

account when deciding which national law shall apply on their agreement. If they have not made a decision, the agreement is subject to this national law, which comes close or is connected with the agreement.⁸⁶ Where the parties make no agreement about the applicable law, the industrial location becomes very important for implementation, because it decides about the national law which is linked with the agreement. E.g. where German law is applicable, the parties can terminate an agreement according to § 13 GWB. § 13 GWB is public law, which can not be set aside of by the parties. However, the termination pursuant to § 13 GWB requires certain criteria, which have to be observed.⁸⁷

Summarising, it can be stated that beside EEC Article 85 validity, termination and adaptation of exclusive dealing agreements are subject to the relevant national law and have to be judged according to the national law in question.

The completion of the European internal market in 1992 will increase the number of private and/or commercial bi- or multilateral agreements across the boundaries of the member states, and it would be desirable to have uniform or at least harmonised European Community provisions about validity, adaptation and termination of exclusive dealing agreements, and to establish such uniform or harmonised provisions as a matter of Community law.

P A R T II/A

Chapter 4

Exclusive dealing agreements
under EEC competition law in the past

1. 1960s - 1980s: the practice of the Commission and the
European Court of Justice

(a) General remarks

Having discussed the different types of exclusive dealing agreements, the study now turns to the legal side of the exclusive dealing agreements.

As already suggested, there are agreements which infringe Article 85 (1) of the EEC Treaty, others which have been held to fall outside EEC Article 85 (1) entirely, and others which may benefit from block exemptions or qualify for an individual exemption under Article 85 (3). As a result "there is a complex mosaic of what is permitted and what is not permitted under Article 85, in which each kind of agreement must be considered separately".⁸⁸

It should be noted that the study is not attempting a survey of all the cases which have dealt with exclusive dealing agreements. Its purpose is to elaborate the main

structures and tendencies; in this context it refers to the hereto relevant cases.

The analysis of the question whether an exclusive dealing agreement is infringing Article 85 of the EEC Treaty, has to be made in several steps. Firstly it has to be examined whether the agreement falls within EEC Article 85 at all. Secondly, if the agreement is infringing Article 85, possible block exemptions are to be considered. Where block exemptions are not applicable, the question of an individual exemption will have to be thirdly discussed.

In the first section of the two Chapters 4 - 5 the study will concentrate on the first problem: whether the agreement is infringing EEC Article 85. The second section will consider block exemptions and individual exemptions.

(b) Exclusive agency agreements

In view of the situation in the past the study considers the different types of exclusive dealing agreements and firstly turns to the **exclusive agency agreements**.

In December 1962 the Commission issued the Notice on Exclusive Agency Contracts made with Commercial Agents.⁸⁶

The Notice intends to give indications of the considerations the Commission will take into account when interpreting EEC Article 85; the Notice is not prejudicing interpretation by other authorities or the European Court of Justice.⁹⁰

As the Commission stated, for the applicability of the Notice it is essential that the contracting party, the commercial agent, is such by the nature of his functions, and is not engaging in activities proper to an independent trader.⁹¹ In the Notice the Commission considered further that contracts between the principal and a commercial agent, in which the latter agrees in a specific part of the territory and negotiates or concludes transactions in the name (or his own name) and on behalf of the principal, "are not covered by the prohibition laid down in Article 85, paragraph (1) of the Treaty".⁹²

This view was confirmed by the European Court of Justice in the case *Italy v Council and Commission*⁹³, where the Court stated that principal and agent had to be looked upon as one economic unity, the same way as employer and employee, with the consequence that such agreements fall outside EEC Article 85 (1).

Considering that true agency agreements do not fall within Article 85 (1) at all, the distinction between a true agent and an independent trader gains much importance.

Confirming the Commission's view, the European Court of Justice has adopted the distinction between commercial agent and independent trader as pointed out in the case *Consten and Grundig v Commission*⁹⁴.

Consequently in *Pittsburg Corning Europe*⁹⁵ the Commission stated, in agreement with and in addition to the Court's view and the Notice on Exclusive Agency Contracts, that for this distinction the responsibility for financial risks, the essential characteristic of an independent trader, is to be regarded as the decisive criterion.

The agent is not expected to accept financial risks other than delcredere-guarantees and has to be a true auxiliary, integrated fully into the distribution system of his principal.⁹⁶

This view was developed further in the decision the Commission took in *Formica*⁹⁷, where it was made clear that not the label, but only the real relationship between the parties is relevant, and all surrounding circumstances are to be considered.

The opinion that only true agency agreements fall outside Article 85 (1) of the EEC Treaty was reconfirmed in *Sugar*⁹⁸, where the Court held that EEC Article 85 is not applicable to a clause prohibiting the agent from trading in products competing with those of his principal.

In this judgment the ECJ upheld the Commission's opinion that agreements were not agency agreements where the agent, who is himself a powerful broker, carries out business for third parties as well, and is playing two roles: one as an agent and one as an independent trader. Where the agent is not entirely integrated in the principal's firm, e.g. when the agent is acting in the above mentioned two roles, Article 85 (1) is applicable to the agreement.

Similar considerations were applied by the Commission in SCPA/Kali und Salz⁹⁹, where it was stated that EEC Article 85 (1) may apply where competing firms agree in appointing the same agent, and the "agent" is doing business transactions for more than one firm.

With the intention to harmonise the national laws on the relationship of principal and agents, the Commission has published the Directive "Proposal re Self-Employed Commercial Agents".¹⁰⁰ Its application and future cases before the Commission and the ECJ, as well as practice in the single European Market after 1992, will show, if this Directive is leading to more clarification, and is apt to guarantee an uniform legal system for agency contracts.

Reviewing the Court's and Commission's decisions it can be said that they continue in not applying EEC Article 85 (1) on agreements with (true) commercial agents. However, the

uncertainty appears, when an agency contract has to be delimited against a contract with an independent trader. Considering the Case Sugar, the delimitation seems even more problematic in cases where the agent himself has a strong economic position; it is not clear, how wide or narrow this decision should be interpreted.

There might be a tendency to apply the benefits of the Notice on Agency Contracts only to such agents who have a weaker economic position, are entirely integrated in the principal's undertaking, and completely dependant upon the principal.

Although the Commission Notice on exclusive Agency Contracts suggests to remove the incentive for firms to obtain a Negative Clearance or a decision about an individual exemption, the cases show that in practice there may be considerable difficulties in distinguishing an agent from an independent trader. In such cases it seems advisable to be on the safe side and apply for a negative clearance under Article 2 of Regulation 17/62. A negative clearance may always be submitted without grounds for application, and the Commission is obliged to adopt a decision.¹⁰¹

(c) Exclusive distribution agreements

(i) General remarks

Having discussed the exclusive agency agreements, we will secondly turn to **exclusive distribution agreements**.

It has to be introductory considered, as already mentioned, that exclusive distribution and exclusive purchasing in practice are very often found in combination with other clauses, especially selective distribution clauses or systems. Therefore quite a few decisions may refer both to exclusive distribution/purchasing and to selective dealing systems.

There also may be a number of decisions referring to a few other legal problems. These decisions will be analysed in the respective context.

Further the present study will, before dealing with the particulars of exclusive distribution agreements, consider the preliminary question of the relevant facts for a given case on exclusive distribution agreements.

In the very early Case of **Société Technique Minière v Maschinenbau Ulm**¹⁰² the ECJ established that for the judgment of a case not only the provisions of the agreement but also the surrounding legal and economic circumstances and the question what would have happened in the absence of

the agreement are to be considered. The ECJ held that the nature and quantity of the goods, market position of grantor and concessionaire, isolated or series of agreements, and the severity of the clauses have to be taken into account. The ECJ confirmed this principle in many subsequent cases¹⁰³, and therefore not the isolated agreement itself, but the whole network and the economic circumstances surrounding it may have to be considered.¹⁰⁴

This assessment makes clear that in practice the legal nature of the respective agreement depends first of all on the particular clauses and on the whole surrounding circumstances and facts of the given case. Even when applying general principles, each case has to be examined carefully. ECJ and Commission have passed many decisions on the particular agreements and clauses.

As already suggested, the study also concentrates in this section these clauses, agreements and cases, which show trends and general principles of what is contravening EEC Article 85 and not fit for an exemption.

(ii) Export bans and similar agreements

The first important case in which the Commission and the European Court of Justice gave a judgement on permitted and prohibited exclusive distribution agreements, was **Consten**

and *Grundig v Commission*¹⁰⁵. There the ECJ passed a decision which for the present study is relevant with regard to various legal aspects.

The facts of the case.

Grundig, a German producer of electric equipment agreed with Consten, its French distributor, that Consten will not deliver any Grundig products directly or indirectly outside France, and in France Grundig will not deliver its products to any other distributor but Consten.

Similar agreements were made with other distributors in the Member States. With the German wholesalers there were agreements made which prevented them to import the Grundig products to France or to the other Member States.

In addition to that a special collateral arrangement was made between Grundig and Consten, which authorised Consten to register in France the Grundig mark "GINT", which is used on the products together with the "GRUNDIG" mark.¹⁰⁶

Nevertheless, a parallel importer of Consten managed to obtain the Grundig products, and Consten sued him under the French law of unfair competition and for infringement of the trademark "GINT".

The case was brought before a French court which suspended proceedings (stayed proceedings pending) and submitted the case to the Commission.

The Commission found itself competent and passed a Decision that was challenged before the European Court of Justice for a final decision.

The legal grounds/the Commission's Decision.

The Commission stated¹⁰⁷ that the exclusive distribution agreement conferring absolute territorial protection upon the distributor was caught by Article 85 (1).

The Commission argued that the agreement reserved the trade between France and Germany in Grundig products exclusively to Consten. As no competitors could obtain the products without great difficulties, the agreement had the effect that the French market was isolated by Consten, and competitors could not obtain the products, with the result that parallel imports were practically obstructed.

The obligation that Consten was not allowed to export the products in other Member States took, together with corresponding agreements, the same effect in the other Member States, i.e. parallel imports were made nearly practically impossible. Together with the use of the trademark "GINT" by Consten the isolation of the French market was completed.

With these effects in mind the Commission drew the conclusion that the agreements between Consten and Grundig were affecting and restricting trade between the Member States, and thus infringing Article 85 (1) of the EEC Treaty. In addition to that the Commission refused an individual exemption under EEC Article 85 (3).¹⁰⁸

The legal grounds/the judgment of the European Court of Justice.

The ECJ¹⁰⁹ confirmed the Commission's decision in most parts. It made unmistakably clear that both horizontal and vertical agreements fall within Article 85 of the EEC Treaty. It refused the then discussed opinion of EEC Article 85 being only applicable to horizontal agreements.¹¹⁰

The ECJ stated that the vertical Grundig/Consten agreements fell within EEC Article 85 (1).

Having distinguished the agent from an independent trader (see section (b) above, the ECJ confirmed the Commission's Decision that the given agreement was infringing the competition between the member states, as it had the object or effect of restricting distribution between distributors of the same branded products, and therefore violated Article 85 (1) of the EEC Treaty.¹¹¹ The ECJ confirmed also the Commission's refusal to grant an individual exemption under EEC Article 85 (3).¹¹²

In conclusion it can be said that the ECJ thus established two fundamental principles. Firstly, the Court stated that both horizontal and vertical agreements fall within Article 85 of the EEC Treaty. Secondly, it made clear that such agreements artificially separate the national markets by conferring absolute territorial protection to the distributor and imposing an export ban on him. The ECJ held that

these agreements granting absolute territorial protection, and thus "export bans", infringe EEC Article 85 (1).

Subsequent to the ECJ judgment in *Consten and Grundig v Commission*, many efforts have been made to gain the same effect as from the - now prohibited - export bans and absolute territorial protection, indirectly by similar agreements. Very apt to achieve the effects of an export ban has seemed the method of fixing different prices (price discrimination) according to the territory the products are to be delivered in, in order to favour "home deliveries" or supplies to certain member states with convenient prices. However, the Commission and the ECJ have firmly disapproved of such indirect export bans, too, and have made clear, that such agreements infringe Article 85 of the EEC Treaty as well¹¹³.

In 1978 the Commission passed an important decision on indirect export bans in *The Distillers Company Limited*¹¹⁴. In this case the producer made rebates and allowances where the products' destination was the "home trade" and not the export. The Commission made clear that there were no adequate reasons for such practices and that EEC Article 85 (1) was infringed.

On appeal, the ECJ confirmed in *Distillers v Commission*¹¹⁵ the view that such price policies contravene EEC Article 85 (1). The question of an exemption under EEC Article 85 (3),

which the ECJ discussed in the judgment as well, is pointed out below.

Beside pricing to restrict exports, producers have tried, with an abundance of other measures, to impede parallel imports and establish export bans. In the past such measures included especially the exercise of trademark rights¹¹⁶ and the use of national law¹¹⁷, if the latter involved less strict provisions than Community law. Attempts were also made to prevent parallel imports by refusing to honour guarantees from products not acquired in a certain territory.¹¹⁸ Reviewing the practice in the past, it can be said that the ECJ and the Commission have not been (and are not) sympathetic towards such attempts to avoid direct export bans and absolute territorial restrictions.¹¹⁹ They have analysed carefully in every given case, if EEC Article 85 (1) was being infringed.

(iii) Agreements obliging the supplier to sell exclusively to the distributor

Such agreements, obliging the supplier (producer) to sell only to the distributor, can be regarded as the inversion of exclusive purchasing agreements, for the exclusive obligation is not on the buyer's but on the seller's side. Thus common to both agreements is that the exclusivity imposes a severe tie on the supplier/purchaser and a restriction of competition on the other competing suppliers

or purchasers. In this context too the decision in **Consten and Grundig**¹²⁰ has important aspects. In its Decision the Commission held that an agreement obliging the supplier to sell only to the distributor within a given area, without containing any restrictions on parallel imports, may infringe EEC Article 85 (1). This part of the decision was reversed on appeal by the European Court of Justice, but only on grounds of lack of reasoning.¹²¹

In another early decision, **Société Technique Minière**¹²² the ECJ stated that an agreement granting merely exclusive distribution rights, without absolute territorial restrictions and export bans, did not necessarily fall within EEC Article 85 (1). However, in the past in many subsequent Decisions the Commission stated that an inter-state exclusive supply clause may by itself fall within EEC Article 85 (1).¹²³

(iv) Restrictions on resale (other than selective distribution systems).

As already stated in Chapter 2, in economic life a producer of brand goods may have for many reasons an interest in influencing not only his contracting partner, but also further members in the distribution chain. He may achieve this by establishing a selective distribution system and limit the number of distribution intermediaries in each particular market area, or by imposing on his contracting

partner other restrictions on resale. This contracting partner for his part is then bound to act in accordance with the restrictions.

The selective distribution systems will be dealt with separately below. As other restrictions on resale are often found in connection with exclusive distribution agreements, they will be considered here in this present section.

An important part of restrictions on resale are resale price maintenance clauses, where, similar to pricing to restrict parallel imports, prices are used as a market instrument.

In the past, resale price maintenance conditions have on several occasions been scrutinised by the ECJ and the Commission. In its First Report on Competition Policy the Commission expressed that in general only national systems of resale price maintenances do not fall within the scope of EEC Article 85 (1).¹²⁴ It is therewith clear, however, that the Commission regarded EEC Article 85 (1) to be infringed, whenever bilateral, i.e. transfrontier, resale price maintenances are in question; in these cases obviously an exemption would not be granted.¹²⁵

As illegal and contravening EEC Article 85 were also found to be agreements on transfrontier resale price maintenance for imported or reimported goods. In uniform Decisions the

Commission has stated that such practices do infringe EEC Article 85.¹²⁶

This strict approach was maintained and further developed in the Decision the Commission adopted in *Re GERO-fabriek*, when it held that even a national resale price maintenance system was apt to infringe EEC Article 85 (1), if it restricted competition and affected trade between the Member States.¹²⁷ Reviewing these Decisions, it can be said that a transfrontier resale price maintenance agreement is most likely to infringe EEC Article 85 (1), while the assessment of a non-transfrontier agreement will depend on its effects on trade between the member states.

As beside resale price maintenances, also the other restrictions on resale may be desirable for the producer, the judicial practice at EEC level has scrutinised them with not too much sympathy.

The Commission stated in *Omega*¹²⁸ that a clause prohibiting a retailer from supplying certain kinds of customers may infringe EEC Article 85 (1). This view was confirmed in *Re Deutsche Philips*¹²⁹, when the Commission found an agreement prohibiting the reseller from supplying resellers in other member states contravening EEC Article 85 (1), on grounds

that these restrictions on horizontal supply may have the same effect as export bans.

A particular approach was formulated by the European Court of Justice in **Metro v Commission No.1**¹³⁰. The ECJ held that an agreement prohibiting the wholesaler from directly supplying private consumers did not contravene EEC Article 85 (1). In addition to the Commission's Decision which the ECJ upheld, a distinction was made by the Court between agreements prohibiting supply to other traders at the same level, and agreements corresponding to the separation of functions in the distribution chain, where a wholesaler per se is not supposed to go into direct selling.

However, also the other restrictions on resale have to be closely examined. Thus a producer is not allowed to impose restrictions on the distributor with reference to the ultimate purpose the products are sold, or with reference to the number of products to be sold together.¹³¹

A restriction on resale in the form of information by the distributor does not necessarily infringe EEC Article 85 (1), provided the producer will not use the information for an improper purpose, e.g. for influencing the distributor.¹³² In **BP Kemi/DDSF**¹³³ the Commission's Decision made clear that also the supply of competitive information from one of the dealers to other dealers may constitute such an improper use. In addition to infringing EEC competition law

such an act may also contravene national law and may generate claims for damages for breach of contract under national law.

(d) Exclusive purchasing agreements

At first, exclusive purchasing agreements were sparingly considered by the Commission, and, if at all, then in the light of Article 86 of the EEC Treaty.

Only gradually did the Commission recognise the importance of exclusive purchasing agreements in respect to EEC Article 85 (1) before adopting one of its first important Decisions in 1978.

In *EEC v Brooke Bond Liebig Ltd (Spices)*¹³⁴, an agreement obliging the supermarkets to buy spices only from Liebig was found to infringe EEC Article 85 (1). Earlier the Commission had stated that a non-competition clause providing for exclusive purchasing was caught by EEC Article 85.¹³⁵ The Decisions in question are significant, because the Commission did not base its conclusions solely on the contents of concrete agreements, but considered also the serious effects which the anti-competitive conduct would have on the market.

A year later in 1979 the Commission generated another important decision on exclusive purchasing agreements in BP Kemi/DDSF¹²⁹. It made an attempt to distinguish between an exclusive purchasing obligation and the apparent "anti-competitive" effect of any purchase contract of large quantities of goods. The Commission established:

"However, when a purchasing obligation of a longer duration is entered into, the relationship of supply is frozen and the role of offer and demand is eliminated to the disadvantage of inter alia new competitors who are thereby prevented from supplying this customer and old competitors who in the meantime may have become more competitive than the actual supplier."¹³⁷

It can in conclusion be noted that the Commission has grown cautious against exclusive purchasing agreements and has been scrutinising them carefully, taking into account especially the market strength of the parties.

(e) Selective distribution systems

As mentioned earlier, all selective distribution systems impose restrictions on the resellers and the "approved dealers", and in addition to such restrictions they include

the obligation not to sell the goods in question to any non-approved dealers. Otherwise the whole system would be, however minimally, breached and its purpose foiled.

The Commission took its first Decisions on selective distribution systems in 1970, in *Kodak* and *Omega*. In *Kodak*¹³⁸ the Commission made clear that selective distribution systems do not necessarily infringe Article 85 of the EEC Treaty, and that there may be systems which may completely fall outside the scope of EEC Article 85 (1).

As a preliminary question it has to be scrutinised whether a selective distribution system is appropriate for the goods which are sold. In *Kodak* the Commission stated that a system which limited supply only to (all) resellers who provided suitable premises, trained staff and sufficient servicing arrangements (i.e. qualitative criteria), is for the purpose of the law adequate for cameras.

So, such a system may completely fall outside the scope of EEC Article 85 (1).¹³⁹

In *Omega*¹⁴⁰ the Commission found - as in *Kodak* - a selective distribution system reasonably necessary for the proper sale of expensive Swiss watches, so that the selective distribution system would not per se infringe EEC Article 85 (1).¹⁴¹ However, for the Commission the case gave reason to adopt a Decision particularly about the

given restrictions. The Swiss watch company had agreed with the "Omega general agents", the main distributors, to restrict the number of the "Omega concessionnaires" as retail outlets, by using qualitative criteria with reference to technical qualification, and also by using quantitative criteria with reference to the size of the local population and its presumed purchasing power. Even though the Commission considered the qualitative part of the distribution system to be appropriate for expensive Swiss watches, it found that the quantitative part of the system infringed EEC Article 85 (1).¹⁴² It stated that a selective distribution system would - even if appropriate to the goods in question - fall only outside the ambit of EEC Article 85 (1), if it was an "open system", imposing only "simple", objective and qualitative conditions on the reseller with respect to professional qualifications. As the Omega system was not allowing each retailer, who fulfilled the qualitative criteria, to become an "approved dealer", that is an "Omega concessionnaire", the Commission found that the system infringed EEC Article 85 (1), especially because the number of retail outlets was restricted by additional quantitative requirements based on the presumed market power of the region. Thus, the Commission found that competition was infringed, because the quantitative requirements effected "a maximum retailer quota per town and per region".¹⁴³ In such decisions the Commission and the European Court of Justice have

consistently considered the relevance of specific economic circumstances and have thus adopted an economic decision as well. ¹⁴⁴

A differing Decision, relating to objective criteria, that is the "minimum standards", took the Commission in *BMW*¹⁴⁵, when it stated that even if the objective criteria were uniformly and equally applied, the system infringed EEC Article 85 (1). In later Decisions the principles in *BMW* referring to the applicability of EEC Article 85 (1) were abandoned and the line of approach pointed out in *Omega* was developed further, as made clear in the important case of *Metro v Commission No.1*.¹⁴⁶

The facts of the case.

SABA a German producer of television, radio and tape-recorder equipment, operated a selective distribution system in Germany and other member states. The purpose of the distribution system was to secure that SABA products were distributed only through a network of approved dealers and wholesalers.

All SABA dealers had to assume the following obligations:

- (1) no delivery to any dealer who does not fulfil objective qualitative criteria for resale;
- (2) accomplishment of certain qualitative criteria as technical qualification, employment of specialist staff, suitable trading premises, provision of adequate service;

(3) accomplishment of additional criteria as six-month-supply contracts, achievement of what SABA considered to be an adequate turnover for each dealer, maintenance of a stock level and general participation in the creation of the SABA sales network.

SABA/the Commission's Decision.

Confirming the principles laid down in Kodak and Omega, the Commission held that for the SABA products the selective distribution system with the (above mentioned) obligations (nos. 1 and 2), requiring certain objective and qualitative criteria, were adequate and therefore fell completely outside the scope of EEC Article 85 (1)¹⁴⁷

In respect of the additional obligations under no. 3 (above) the Commission stated that they went beyond the qualitative criteria in a "simple", open system and that they thus restricted competition, falling therewith within EEC Article 85 (1). The Commission was inclined, however, to grant an exemption under EEC Article 85 (3). The Commission's Decision was challenged by Metro, a self-service cash and carry warehouse, which had been refused supplies by SABA on the grounds as it did not fulfill the requirements for admission to the distribution system.

SABA/the Court's judgment.

The ECJ wholly confirmed the Commission's Decision. It acknowledged the difference between qualitative and other,

especially quantitative, criteria and confirmed that selective distribution systems based on objective and qualitative criteria such as the given obligations under nos. 1 and 2 (above) are in agreement with EEC Article 85 (1). The objective requirements were defined as "objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his premises and (...) such conditions (...) laid down uniformly for all potential resellers and (...) not applied in a discriminatory fashion".¹⁴⁸

The ECJ held that the wholesaler's obligation to supply only to retailers which fulfill the objective criteria also falls outside EEC Article 85 (1).¹⁴⁹

In respect of the obligations under no. 3 (above) the Court accepted and completed the Commission's view that the additional promotional requirements partially fell within the scope of EEC Article 85 (1), because they went beyond qualitative criteria.¹⁵⁰

The Court also confirmed the Commission's Decision that the additional obligations such as six-month-contracts, maintaining stocks and the achievement of an adequate turnover, restricted competition and fell within EEC Article 85 (1), because they exceeded the qualitative criteria.¹⁵¹

These principles have been consequently applied in the later decisions.¹⁵² The EEC authorities first examined whether a selective distribution system is adequate at all

for the sold products. When they found it to be adequate, they distinguished between mere qualitative (technical) criteria, not infringing EEC Article 85 (1), and (exceeding) quantitative criteria falling within the ambit of EEC Article 85 (1), which, as such, are to be examined in the light of EEC Article 85 (3). Therefore, in relation to selective distribution systems containing quantitative restrictions, the question of an exemption becomes one of vital importance.

2. The system of exemptions

(a) Block exemptions (Regulation 67/67)

(i) Purpose

Having dealt with the problems of exclusive dealing agreements infringing EEC Article 85 (1), the study will now turn to block exemptions. It should in general be reminded that when an exclusive dealing agreement is caught by EEC Article 85 (1), the next step to consider is the review under EEC Article 85 (3) and the question of a block exemption.

The most important provision on block exemptions in the past has been Regulation 67/67 on the Application of Article 85 (3) of the Treaty to Certain Categories of Exclusive Dealing Agreements.¹⁵³ Regulation 67/67 was enacted by the Commission under powers given by virtue of EEC Article 87 (2) (b) and 155, Article 24 of Regulation 17, and Regulation 19/65. Pursuant to Article 9, Regulation 67/67 entered into force on 1 May 1967 and expired on 30 June 1983, after having been extended twice by Regulation 2591/72 and 3577/82.

Under Regulation 67/67 many exclusive dealing agreements, normally falling under EEC Article 85 (1), benefited from the block exemption, i.e. the general exemption from applicability of EEC Article 85 (1). With the block exemptions the Commission intended to achieve an improvement in distribution, help the consumers to get a "proper share of the resulting benefits", while some but no absolute territorial protection would be allowed, and parallel imports would still be possible.¹⁵⁴

(ii) Application of Regulation 67/67 in general

The Commission established, that only agreements infringing EEC Article 85 (1) would have to be dealt with. The Commission said, that it is not expressly necessary to

exclude from the category of exemptions those agreements which are not caught by the conditions of EEC Article 85.¹⁵⁵ Regulation 67/67 was applicable to agreements between undertakings in one member state (unilateral agreements) or undertakings in different member states (bilateral agreements).¹⁵⁶ In spite of the provision in Article 1 (2) of Regulation 67/67, the European Court of Justice stated that the Regulation is applicable to parties within one member state as well.¹⁵⁷

The Regulation was applicable to both horizontal and vertical agreements, i.e. to agreements at any level in the market.¹⁵⁸ Pursuant to Articles 1 and 8 of Regulation 67/67, the exemption was applicable only to agreements or concerted practices between two undertakings. Multipartite agreements could not benefit from the exemption. Regulation 67/67 would also apply to a whole network of distribution agreements possibly treated as a series of bilateral contracts between supplier and the contracting partner.¹⁵⁹

Article 1 (1) (a)-(c) provided that only agreements on goods for resale were covered by the exemption, as the Commission intended to improve distribution and not production.

(iii) Substantive provisions

Article 1 of the Regulation referred to the types of agreements, while Article 2 specified the obligations, and Article 3 defined the clauses not fit for a block exemption.

Article 1 (1) (a) - (c) of Regulation 67/67 provided an exemption for three types of agreements whereby

"(a) one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common market; or

(b) one party agrees with the other to purchase only from that other certain goods for resale; or

(c) the two undertakings have entered into obligations, as in (a) and (b) above, with each other in respect of exclusive supply and purchase for resale."

Exempted were both exclusive supply agreements with reference to a defined area, i.e. the exclusive distribution agreements, and exclusive purchase agreements.

Article 2 established, which clauses in these agreements were allowed ("white list"):

"2. (a) to purchase complete ranges of goods or minimum quantities;

(b) to sell the goods to which the contract relates under trade marks

or packed and presented as specified by the manufacturer;

(c) to take measures for promotion of sales, in particular:

- to advertise,
- to maintain a sales network or stock of goods,
- to provide after-sale and guarantee services,
- to employ staff having specialised or technical training."¹⁶⁰

The Regulation, in addition to the above quoted Article 2 par. 2, provided also, in Article 2 par. 1 for

"no restriction on competition (...) imposed on the exclusive dealer other than:

- (a) the obligation not to manufacture or distribute, during the duration of the contract or until one year after its expiration goods which compete with the goods to which the contract relates;
- (b) the obligation to refrain, outside the territory covered by the contract, from seeking customers for the goods to which the contract relates, from establishing any branch, or maintaining any distribution depot."

The latter amounted to a qualified territorial restriction, as the producer could not prevent parallel imports in the area,¹⁶¹ and thus export prohibitions could not be imposed either.¹⁶²

The fact that only qualified territorial restrictions were permitted within Regulation 67/67 had important consequences for the selective distribution systems. In a selective distribution system it is essential that the person to be supplied is not allowed to sell to dealers other than to "approved dealers". This requirement could take whole selective distribution systems outside Regulation 67/67, as the Commission had made clear that only an obligation to supply solely technically qualified dealers would be conform to the Regulation.¹⁶³ From this the conclusion can be drawn that the Commission intended to privilege only the restrictions based on objective, qualitative criteria; other restrictions with reference to the persons to whom the goods are resold, or the user of the goods, would not be permitted.¹⁶⁴

Reviewing these - permitted - obligations with reference to the decisions passed on selective distribution systems, it is to be noted that Article 2 (2) (a)-(c) was not limited to qualitative objective restrictions, but exempted also other additional restrictions, clearly found to be going beyond objective criteria, such and as especially measures for promotion.¹⁶⁵ It seems that the Commission had at this point considered particularly the interests of the producer in promoting his (brand) goods at every level of distribution in order to intensify their marketing.¹⁶⁶

Article 3 made clear which kinds of agreements did not qualify for an exemption under Regulation 67/67 ("black list"). Article 3 (a) referred to horizontal agreements, where competing manufacturers appoint each other as exclusive dealer. The term "each other" in this context means that only reciprocal agreements contravened Regulation 67/67.¹⁶⁷ Article 3 (b) confirmed the principle that the agreements must not effect an absolute territorial protection for the distributor. Article 3 (b) (i) and (ii) referred to examples for such undesirable clauses. It should be noted that Article 3(b) did not allow absolute territorial protection; for the prohibition it was already sufficient that the clause effected difficulties for intermediaries or customers in obtaining the goods.

This approach was subsequently followed in decisions of the Commission and the European Court of Justice.¹⁶⁸

However, significant criticism was directed at Regulation 67/67 by the European Court of Justice, in *De Norre and de Clercq v NV Brouwerij concordia*¹⁶⁹, when the ECJ stated that the Regulation was treating exclusive purchasing agreements too leniently. This agreed with the above made observation (Chapter 4 (1) (d)), that for quite a time the Commission did not see any reason to intervene in exclusive purchasing agreements.

In consequence of the Court's judgment in *De Norre v NV Brouwerij Concordia* in 1978 the Commission drafted a new Regulation. In accordance with Article 5 of Regulation 2821/71, the draft text of the envisaged Regulation was published to enable the parties concerned to express their comments. The new draft Regulation "attracted widespread criticism and in due course it was dropped".¹⁷⁰

(iv) Procedural provisions

Regulation 67/67 also contained several procedural provisions. Articles 4 and 5 made transitional provisions for agreements, already in existence when the Regulation entered into force. Article 7 (1) referred to Article 4 (2) (a) of (repealed) Regulation 27. Article 7 (2) complemented the transitional provisions referring to not amended agreements. Article 6 required the Commission to examine each individual case under Article 7 of Regulation 19/65, i.e. it empowered the Commission to withdraw the benefits of the block exemption, if it were of the opinion that competition was restricted especially pursuant to Article 6 (a)-(c) of Regulation 67/67. Article 9 laid down provisions on the validity of the Regulation. As already shown, Regulation 67/67 was extended twice after the draft Regulation of 1978 was not approved, and expired on 30 June 1983. It was thus relevant for the whole time between the

1967 and 1983 and was, as said in Article 9 part 2, "binding in its entirety and directly applicable in all Member States."¹⁷¹

(c) Individual exemptions

(i) General remarks

An agreement not qualifying for a block exemption may nevertheless be permitted to operate by virtue of an individual exemption under EEC Article 85 (3). Unlike the block exemptions, whereunder an agreement, on the premise that the relevant requirements are satisfied, is automatically exempted and not void according to Article 85 (2) of the EEC Treaty, individual exemptions are not granted automatically.

The application for an individual exemption under EEC Article 85 (3) in connection with Article 9 of Regulation 17 has to be distinguished from a negative clearance under Article 2 of Regulation 17. A negative clearance means no exemption, but the certification by the Commission that on the basis of the given facts, there are no grounds for action under EEC Article 85 (1) (for details see Chapter 6 below).

EEC Article 85 (3) establishes that "the provisions of paragraph 1 may, however, be declared inapplicable." Thus the undertaking in question is required to initiate the necessary steps itself and apply for an individual exemption, otherwise the agreement may be infringing Article 85 (1) of the EEC Treaty.¹⁷²

The application has to be made to the Commission as Article 9 (1) of Regulation 17 provides that "subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty."

An agreement is qualifying for an individual exemption if the following four conditions are met:

- (1) improvement of production or distribution of goods, or promotion of technical or economic process; and
- (2) a fair share of the resulting benefits to the consumers; and
- (3) not indispensable restrictions; and
- (4) no substantial elimination of competition.¹⁷³

In respect of EEC Article 85 (3) (1) the exclusive dealing agreements obviously the first of the four above mentioned conditions "improvement of distribution of goods" is applicable.¹⁷⁴

Concluding it should be noted that individual exemptions are granted only for a specified period of time.¹⁷⁵

Although the exempting decision may be renewed, the Commission is also empowered to revoke or amend its decision on the basis that the requirements established in Article 8 (3) of Regulation 17 are fulfilled.¹⁷⁶

(ii) Exclusive Agency Agreements

After dealing with the general aspects of EEC Article 85 (3), we now turn to details, and, in conformity with the order of points treated in Chapters 3 and 4 (1), firstly consider exclusive agency agreements.

Regarding exclusive agency agreements under Article 85 (3) of the EEC Treaty, the preliminary question of the relevance of EEC Article 85 (3) to exclusive agency agreements has to be dealt with.

Referring to the Commission Notice on Exclusive Agency Contracts¹⁷⁷ as well as the Commission's and the Court's decisions¹⁷⁸, the vital question is that of making the distinction between a (true) commercial agent and an independent trader. If the agreement is one between an agent and his principal, it falls outside the applicability of EEC Article 85 (1) altogether. Thus, the question of EEC Article 85 (3) is of no importance for exclusive agency agreements.

This results as well from the application of Regulation 67/67 where the Commission stated that it was not necessary to exclude expressly "those agreements which do not fulfil the conditions of Article 85 (1) the Treaty."

Consequently, Article 85 (3) of the EEC Treaty has no relevance exclusive agency agreements, where the agent is a "true" agent in the sense as we have seen before.

Only where the agent is not an agent, but an independent trader and the agreement is thus infringing EEC Article 85 (1), the question of an exemption under EEC Article 85 (3) becomes of importance.

(iii) Exclusive distribution agreements

Of much importance is EEC Article 85 (3) for exclusive distribution agreements. Whenever EEC Article 85 (1) is infringed and the provisions of a block exemption are not applicable, the granting of an individual exemption may be of vital significance for a distribution network.

Regarding territorial restrictions even under EEC Article 85 (3) both the Commission and the European Court of Justice have not been sympathetic towards absolute territorial restrictions, and a good example for it is **Consten and Grundig**. Therein Commission argued that the absolute

territorial protection for Consten was not indispensable for the improvement of production and refused an exemption under EEC Article 85 (3).¹⁷⁹

On review the European Court of Justice indicated that it would not intervene with this part of the Commission's Decision.¹⁸⁰ The Court held that the Commission in its decision has to consider economic issues as well, and it therefore has administrative discretion which may not be replaced by the Court.

However, the Court annulled parts of the Commission's Decision on grounds of lack of reasoning: the Commission had struck down the whole agreement, not only the particular clauses granting absolute territorial protection, without stating, however, the reasons pursuant to Article 190 of the EEC Treaty.

So the partial annulment has to be interpreted not with reference to substantive law, but only with reference to procedural law. It can thus in conclusion be said that the Court mostly confirmed the Commission's view.

This approach was developed further in *Distillers v Commission*¹⁸⁰, where pricing was used to restrict exports. The Commission found that the agreements infringed Article 85 (1) of the EEC Treaty and refused an individual exemption under EEC Article 85 (3). The argument of *Distillers* that a territorial protection is only the equivalent for promotion and advertising investments not

provided by the parallel importers,¹⁸¹ was rejected by the Commission. Although this argument was discussed on appeal, the appeal itself was decided on procedural grounds, mostly with reference to non-notification of the pricing agreements in question.¹⁸³

However, in cases where clauses concerned dealt with matters other than export bans, the Commission has been prepared to grant individual exemptions under Article 85 (3) of the EEC Treaty.

In the past the Commission has given an individual exemption to agreements prohibiting active sales policy outside the distributor's area, e.g. in *Campari*.¹⁸⁴ For various other agreements as well the Commission has granted individual exemptions, e.g. *Duro-Dyne/Europair*¹⁸⁵ and *Junghans*.¹⁸⁶ From the Commission's and the Court's approach in the past, the tendency can be elicited that an individual exemption under EEC Article 85 (3) was treated benevolently as long as there were no attempts to effect absolute territorial protection and obstruction of parallel imports.

(iv) Exclusive purchasing agreements

Earlier in the present study the question of an individual exemption was mentioned as it arose, when an agreement did fall within EEC Article 85 (1) but at the same time did not qualify for a block exemption under Regulation 67/67.

As the Commission only gradually recognised the importance of exclusive purchasing (see above Chapter 4 (1) (d)) the question of an individual exemption was also sparingly discussed.

In *EEC v Brooke Bond Liebig Ltd. (Spices)*¹⁸⁷ the possibility of an individual exemption was taken into consideration. However, the Commission indicated that an individual exemption would not be granted as the agreement in question was imposing restrictions on the resale prices and competition was adversely affected. Therefore, the requirements of EEC Article 85 (3), especially the improvement of distribution and no substantial elimination of competition, were not met.¹⁸⁸

(v) Selective distribution systems

Much more important has been and is the question of an individual exemption for selective dealing agreements. Mention has already been made of the requirement that only "approved dealers" are to be supplied with the products and that such a requirement may take entire selective

distribution networks out of the relevant Regulations on block exemptions, e.g. under Regulation 67/67. This made the whole system dependent vitally on the question whether an individual exemption could be granted. However, this only applies to agreements that do not impose solely objective requirements on the undertaking to be supplied, thus making consideration under EEC Article 85 (3) or Article 85 (1) irrelevant at all.¹⁸⁹

The first important case on a selective distribution system under EEC Article 85 (3) was *Omega*.¹⁹⁰ Although there was a quantitative selection imposed ("a maximum dealer quota per town and per region"¹⁹¹) the Commission was prepared to grant an individual exemption under EEC Article 85 (3). The Commission found the requirements of EEC Article 85 (3) fulfilled, i.e. an improvement of competition, a fair share of the benefits for the consumers were given, and it ascertained that no substantial elimination of competition was effected; there were still many other competing watch-makers.¹⁹²

Also relevant for EEC Article 85 (3) is the Commission Decision in *BMW*.¹⁹³ An individual exemption was granted under EEC Article 85 (3). The main considerations of the Commission concerned the aspects of improvement of distribution and the resulting benefits for the consumers. As to cars, involving also safety aspects with reference to

expert and regular maintenance, better service as well as the distributor's large investments in maintenance and service, had been taken into account.¹⁹⁴

Another important involved the Commission's and the Court's decision in *Metro v Commission*.¹⁹⁵

As shown above, the Commission found that the SABA system was going beyond a "simple" selective system and was thus (partially) caught by EEC Article 85 (1). Investigating further, the Commission granted, however, an exemption under EEC Article 85 (3). It found the requirements of EEC Article 85 (3) fulfilled, especially with regard to the improvement of distribution and the resulting benefits for the consumers in form of a regular supply. This view was confirmed on appeal by the European Court of Justice.¹⁹⁶

In summary, it can be observed that the Commission and the European Court of Justice have not been unsympathetic against exclusive distribution systems, while scrutinising each agreement carefully. Even some but no absolute territorial restrictions may be accepted within certain limits, and if necessary for the distribution, as the cases *Omega* and *BMW* show.

3. The situation of small and medium-sized businesses, undertakings and enterprises.

The above cited cases and decisions concern mostly large undertakings and company groups with enough capital and marketpower behind them in a competitive market. It is useful to turn also to the specific situation of small businesses, undertakings and enterprises (SMEs).

Realising that SMEs face more difficulties than large enterprises do in establishing trade relations across the boundaries of the member states, the Commission tried from the beginning to encourage cooperation between SMEs, to give them, on the one hand, the opportunity to strengthen their market position, to grow and make themselves independent from unsteady customers' demands in only one member state, and to encourage on the other hand the competition between large and small undertakings as an issue which could intensify workable competition and could lead to more benefits for consumers.

In the first case, *Transocean Marine Paint I*¹⁹⁷, the Commission pursued these issues. A group of marine paint manufacturers, scattered all over the world, with five of them situated in EEC countries, had tried to establish a common brand of "Transocean" paint. In such a sector of fierce competition, the Commission granted a five-year

individual exemption to ensure that the small firms were able to distribute their "Transocean" paint around the world and make it available for the consumers. For similar reasons, the Commission renewed the exemption for another period of six years.¹⁹⁸ With respect to some points with concerning conditions and obligations imposed under an agreement, with reference to which the Commission had not given the right to be heard, the Decision was challenged, and annulled by the European Court of Justice.¹⁹⁹ Pursuant to the Court's judgment the Commission passed another individual exemption with revised conditions.²⁰⁰

Another attempt to encourage SMEs was made by the Commission in 1967, when Regulation 67/67 came into force. In the introduction to Regulation 67/67 the Commission established: "whereas, moreover, the appointment of an exclusive distributor or an exclusive purchaser who will take over, in the place of the manufacturer, sales promotion, after-sales service and carrying of stocks, is often the sole means whereby small and medium-size undertakings can compete in the market."²⁰¹

In May 1970 the Commission published the "Notice on Agreements of Minor Importance",²⁰² to bring also advantages to small and medium-size undertakings. One of the desires of the Commission was "in particular, to facilitate co-operation between small- and medium-sized undertakings."²⁰³ The Commission established that such agreements of minor

importance would not be caught by EEC Article 85 (1), and therefore no exemptions would be required.

However commendable these initiatives of the Commission were, it has in practice remained doubtful whether they were able to achieve their purpose. Difficulties arise already when trying to identify the segment of the market where the agreements would have their effects, and more difficulties arise when assessing the total annual turnover of the undertakings in question.²⁰⁴

The Commission Notice on Agreements of Minor Importance is part of the " De-minimis-doctrine", first applied by the ECJ in *Völk v Verwaecke*²⁰⁵. Although the agreement in question provided absolute territorial protection against parallel imports, the Court held that Article 85 (1) of the EEC Treaty was not infringed, because the agreement "has only insignificant effects on the markets" .²⁰⁶

With reference to it and the Notice on Minor agreements, it should not be ignored, however, that there are serious uncertainties in respect of the market sectors, oligopolies etc.²⁰⁷ It may thus remain doubtful whether all these commendable initiatives have led to relief and success for SMEs, this may seriously be queried, because nearly all the decisions deal with large undertakings.

CHAPTER 5

Exclusive dealing agreements under EEC competition law in the present time

1. The current situation: the policy of the Commission, its purpose, principles, contents and rules; judgments of the European Court of Justice.

(a) General remarks

Having surveyed the situation in the past, we may now proceed to the current situation and examine whether trends and opinions from the past are carried further whether new trend are emerging, and if so, which relevance and feedback they yield for competition policy with particular regard to the Single European Market after 1992. Whereas Chapter 4 illuminated the first steps and opinions of the Commission and the ECJ after the EEC was established, the present Chapter examines further developments and recent trends, as a basis for conclusions.

It is for practical purpose, also most important to scrutinise current trends in the way an agreement is drafted for a party, in order to adapt its provisions to the current practice of the Commission and the European

Court of Justice. For this purpose reference will be made to current decisions only.

(b) Exclusive agency agreements

Dealing firstly with exclusive agency agreements, we shall examine whether trends and judgments of Commission and Court on exclusive agency contracts show a continuity and were further developed from the past to current practice. In the past both the ECJ and the Commission have emphasised that only true agency agreements should benefit from the exclusion of a true agency contract from the prohibition scope of EEC Article 85 (1).

This approach has been confirmed and elaborated in a recent Decision for **Aluminium Imports from Eastern Europe**.²⁰⁸ The Commission held that the aluminium producers from Eastern and Western Europe infringed EEC Article 85 (1) during the period 1963-1976 when distributing aluminium from Eastern Europe exclusively through western producers.

The Commission developed further the distinction between a (true) agent and an independent trader when it stated that it is contrary to EEC Article 85 (1) when an independent trader participates freely in a cartel and is acting on behalf of the cartel as agent. For the Commission such an

agreement is not a (true) agency agreement and contravenes EEC Article 85 (1).²⁰⁹

When assessing this decision, it can be seen that the Commission has confirmed its past practice and has specified the characteristics of a true agency contract. Thus, the recent decision on Aluminium Imports from Eastern Europe harmonises with the earlier decisions of both the ECJ and the Commission.²¹⁰

Even the trend shown in **Sugar**²¹¹ namely, that the Commission seems to be more ready to apply the benefits of its Notice on Agreements made with Commercial Agents to agents with a weaker economic position, can be found confirmed. The agent in Aluminium was an independent trader with considerable influence.

Thus, the attitude of the Commission towards exclusive agency agreements has been stable, making spectacular changes in the near future not likely to happen.

(c) Exclusive distribution agreements

(i) General remarks

The study examines secondly the recent developments with regard to exclusive distribution agreements. It concentrates on developments referring to agreements found to be contrary to Article 85 of the EEC Treaty and as such unfit for an exemption. With reference to the facts to be considered when judging a case, the ECJ has stated that all the circumstances surrounding the case are to be taken into account, already in early decisions. In recent decisions this line has been continued and completed. The Court has again confirmed that all circumstances have to be considered.²¹² The ECJ has also ascertained the view that the case must be approached in the light of as to what the situation would have been in the absence of the agreement.²¹³

When considering these recent decisions the conclusion applied to past practice can be but repeated: when evaluating an expert opinion on an agreement, it is of the utmost importance to take into account all the facts and circumstances of the matter.

(ii) Export bans and similar agreements.

After the preceding general remarks, we may now turn to the examination of particular clauses in agreements and begin with exclusive distribution agreements involving export bans and similar restrictive clauses.

In the past both the ECJ and the Commission have been of the opinion that agreements effecting export bans restricted competition and thus infringed EEC Article 85 (1). This view has continued to be applied up to the present time, the Court and the Commission finding agreements containing export bans as being contrary to EEC Article 85 (1), and not refraining from imposing heavy fines.

In an early decision in *Pioneer's*²¹⁴ distribution system, the Commission found elements of horizontal and vertical market-division by various price levels as effecting export bans and did not hesitate to impose fines from 300,000 to 4,350,000 ECU, amounting to a total of nearly 7,000,000 ECU. Fines were imposed not only on the producer but also on the distributor. On appeal, the ECJ upheld most of the Commission's conclusions, but halved the imposed fines.²¹⁵ Nevertheless, the ECJ indicated in its judgment that in future cases as a general principle the Commission might impose even severer penalties for evident infringements of the EEC Treaty.

Subsequently, large fines were inflicted on export bans in **Johnson & Johnson**²¹⁶ and **Moet et Chandon**.²¹⁷

An important judgment by the European Court of Justice concerns the case **Hasselblad v Commission**.²¹⁸ Beside the legal dimension with distribution clauses in question, on the factual side the cameras had serial numbers on them to enable Hasselblad finding out possible parallel importers. The Court confirmed the Commission's view that a clause prohibiting inter-state cross-supplies amounts to an export ban.²¹⁹ The Court established further that the same effects can be generated by refusing to honour the producer's guarantees in their application to parallel imports.²²⁰ Consistently, fines were imposed not only on the Swedish manufacturer but also on the distributors.²²¹ This scheme was confirmed in subsequent decisions of the Commission and the European Court of Justice.²²²

However, in spite of the clear disapproval by the Commission and the ECJ, undertakings have not refrained from agreements including export bans. In 1984 the Commission in **Polistil/Arbois**²²³ imposed a fine on an agreement granting absolute territorial protection to Italian Polistil SpA's French contracting partner Arbois.

Nevertheless, undertakings still continued to agree on and apply export bans.²²⁴ The most recent examples are **Sandoz**²²⁵

and Tipp-Ex²²⁶, involving export bans infringing EEC Article 85 (1) and the firms were fined with ECU 800,000, ECU 400.000, respectively.²²⁷

In Tipp-Ex²²⁸ not only the West German producer Tipp-Ex, but also its French distributor Belersdorf were fined; for Belersdorf the fines were ECU 10,000. The other three exclusive distributors, Belgian Burotex, Dutch Esveha-Rijam and British Tipp-Ex (Leslie Mac Lean) were found acting contrary to EEC Article 85 (1), but were not fined. The Commission stated that they did not voluntarily take part in the system, because Tipp-Ex "also exerted pressure on its exclusive distributors in order to obtain their agreement and support".²²⁹

A likewise determined attitude has been maintained by the EEC authorities towards indirect export bans and similar agreements. The Commission confirmed the opinion that price discrimination with reference to the different member states is able to obstruct parallel imports and thus may effect an export ban.²³⁰ The view towards price discrimination too has not changed. The recent decisions are based on the principles applied in the above cited earlier leading cases.

A critical view by the Commission and the ECJ has been taken also with respect to measures obstructing parallel

imports and thus effecting export bans. In *ETA v DK Investment ("Swatch")*²³¹ the European Court of Justice held, in agreement with the earlier practice of the Commission²³², that there was violation of EEC Article 85 (1) if a manufacturer refused to honour a guarantee referring to a parallel imported product. Subsequent decisions confirm this principle.²³³

These above quoted decisions have considerable implications for the undertakings' distribution and also for the consumer. As shown earlier, vertical integration in whatever form is worthwhile and apt only for brand goods, i.e. sophisticated consumer goods. However, especially for such branded goods the consumer sets a high value on the producer honouring the guarantee. When refusing guarantees or services affecting parallel imported products, the firm practically makes it impossible, at least economically uninteresting, to buy the parallel imported products. So the decisions in question of the ECJ and the Commission should enable the consumer to benefit from cheaper prices in other member states.

The same critical examination by the Commission and the ECJ found other attempts to obstruct parallel imports, e.g. information on the products to recognise their destination²³⁴, not to provide cross-supplies and so on.²³⁵

Summarising, it can be stated that in respect of export bans, there has also been a uniform development of the practice from the past to the present.

The Commission and the European Court of Justice have both left no doubt that they treat all types of export bans as contravening EEC Article 85 (1) and that they do not refrain from imposing large fines on the parties concerned.

With reference to the economic side these decisions indicate that the firms consider export bans as indispensable for efficient vertical integration and distribution of their products. Despite the clear-cut attitude of the EEC authorities, the firms seem to consider export bans as being so important to achieve their economic aims that they even take large fines into account.

With relevance to the aims and reasons of the various parties, mentioned in Chapter 2, the decisions provide a vivid example of obviously conflicting opposite targets. On the one hand the authorities aim at ensuring a workable competition while on the other hand the undertakings pursue their economic interests.

It remains to be seen in which direction both sides will develop their further efforts.

(iii) Agreements obliging the supplier to sell exclusively to the distributor.

In the past both the ECJ and the Commission have considered exclusive supply agreements as falling within EEC Article 85 (1). This was restated in decisions passed in the early 1980s.²³⁶ However, in *Polistil-Arbois*²³⁷ the Commission decided that the exclusive distribution agreement between the Italian supplier and the French producer per se did not fall within Article 85 (1) of the EEC Treaty. This practice was not pursued further, as in its most recent Decisions the Commission restated the original view that exclusive supply clauses fell within EEC Article 85 (1).²³⁸ Therefore, it may be reckoned that the Commission will pursue this recent approach in future decisions. It seems probable that future exclusive supply clauses too will be looked upon as falling within EEC Article 85 (1). This is important for the undertakings in question, as they have then to rely on (possible) block exemptions or an individual exemption granted by the Commission.

(iv) Restrictions on resale (other than selective distribution systems)

An important part in the present section concerns resale price maintenance clauses. From decisions in the past it can be taken for granted that the EEC authorities will regard transfrontier resale price maintenance systems as contrary to EEC Article 85 (1). However, the question of unilateral agreements under EEC Article 85 (1) is not yet completely clarified. Of particular interest in this context is the judgment of the European Court of Justice in *VBBB and VBVB v Commission*.²³⁹ In this case, referring to a Dutch-Flanders agreement on the distribution of books, the Commission had held - confirmed by the Court - that the resale price maintenance was infringing EEC Article 85 (1).²⁴⁰

The Commission has consistently found resale price maintenance clauses, used in the Italian market sector for spectacles, as being contrary to EEC Article 85 (1). The Commission held that such agreements including the whole sector and being valid in the whole of the member state, contravene EEC Article 85 (1).²⁴¹ In due course the undertakings changed their clauses to resale price recommendations.

The Commission desisted from imposing fines with regard to the new matter but indicated that future cases may lead to stricter sanctions.²⁴² Thus, the Commission is expected not to change its view on resale price maintenances, and to

scrutinise even non-transfrontier agreements with suspicion.

However, the other restrictions on resale also require close examination. The EEC authorities' view on guarantees has already been detailed above.

In *Hasselblad v Commission*²⁴³ the European Court of Justice found - in accordance with the Commission's Decision - a clause giving the producer the right to stop each of the distributor's planned or proceeded marketing measure as incompatible with EEC competition law. The Commission seems to confirm also a strict view on clauses restricting the persons to whom the goods may be resold.

While holding that restrictions on resale by specialised wholesalers may not be falling within EEC Article 85 (1)²⁴⁴, the Commission has not hesitated to strike out other measures²⁴⁵, e.g. binding the retailer not to supply certain kinds of customers, if this did not correspond to the separation of functions between the different levels of the market.²⁴⁶

In 1986 the Commission ordered the "Instituto Brasileiro do Café (IBC) "to cancel the clauses restricting its coffee roasters from reselling raw coffee."²⁴⁷ This practice show that the Commission is closely scrutinising the agreements and is expected to do so in the future as well.

(d) Exclusive purchasing agreements

Although the Commission made in the past clear that exclusive purchasing agreements should be viewed with more attention, it is interesting to observe that currently the Commission has taken only one decision with reference to exclusive purchasing agreements, in **Carlsberg**.²⁴⁸ It remains to be seen whether this development may depend on a new block exemption system which has been issued.

In **Carlsberg** the Commission established that a purchasing agreement obliging a brewer to buy about half of the annual requirement of lager from his contracting partner over a period of 11 years, was infringing Article 85 (1) of the EEC Treaty and stated: "The trade in lager to and from the United Kingdom is thereby significantly altered from what it would otherwise be. The agreement therefore falls within the scope of Article 85 (1)." ²⁴⁹ The Commission took especially into consideration the substantial market shares of the parties in question restricting competition by preventing the brewer to produce himself or to buy from other sources, and preventing the seller from supplying other competitors.²⁵⁰

This decision indicates that the Commission is prepared to scrutinise exclusive purchasing agreements also with reference to their economic effects.

(e) Selective distribution systems

Unlike exclusive purchasing agreements, selective distribution systems have been subject of quite a few decisions passed by the ECJ and the Commission. It should be reminded that all vertical distribution systems are of enormous economic importance for the producer desiring to market his brand-products in the best possible way.

With the modern communication technologies there seem to be tendencies to intensify the specific brand images even in multi-market selling, including the thereto related circumstances as advertising etc. as well. Therefore the producers seem to be increasingly interested in protecting the image of their brand-products and tend to vertical selective integration.

This may be one of the reasons generating an abundance of recent decisions on selective agreements.

Another reason may be the Commission's more critical view on selective dealing agreements. The particular cases will show whether certain trends can be identified.

When dealing with and deciding a case, the Commission confirms its view already expressed in the past, that every selective distribution system, even one based solely on objective technical requirements, has to be appropriate for the sold goods. Only on such premises could the

agreement system be regarded as falling outside EEC Article 85 (1).

Continuing from their decisions in the past, both the ECJ and the Commission have confirmed that a selective distribution system may be appropriate for the selling of television-sets, hi-fi and similar products.²⁵¹ This has been recently confirmed by the Commission in a decision on the Grundig distribution system.²⁵²

Selective distribution systems were found also appropriate for computers,²⁵³ jewellery,²⁵⁴ perfumes,²⁵⁵ ceramic tableware²⁵⁶ and newspapers.²⁵⁷

Referring to watches, the European Court of Justice confirmed the view that selective distribution systems are necessary for the proper marketing and sale of high quality watches.²⁵⁸ The Court, however, refused to accept the existence of such a necessity for the mass produced "Swatch" watches.²⁵⁹ This judgment shows once more that the EEC authorities take also into consideration the technical and economic details of the products. The Court distinguished the high-quality products from the Swiss mass product "Swatch" which can not be repaired apart from replacing the batteries and the wrist straps, although it is sold with a producer's guarantee.²⁶⁰

In other cases the Commission found a selective distribution system to be likewise unnecessary for tobacco products.²⁶¹ Also not indispensable are selective distribution systems for plumbing equipment.²⁶²

As pointed out in Chapter 4, with reference to selective distribution systems, the jurisdictional practice distinguished between clauses with objective, qualitative criteria, on the one hand, and quantitative criteria on the other. This has been maintained in recent decisions.

An important case judged recently was **AEG v Commission**.²⁶³ In 1973 AEG, a German producer of electrical equipment had notified to the Commission a selective distribution system allegedly based on qualitative criteria. In the following time the Commission found this system implemented in a discriminatory fashion with the effect that 18 dealers, who met the required objective and technical criteria, had been refused admission. The Commission²⁶⁴ found this system, as it was run, contrary to EEC Article 85 (1), as the refusals to admit all retailers fulfilling the required objective criteria were intended to maintain high prices. Because this practised system was different from the one that was notified, the Commission held that the protection of the notification was lost, and a large fine was imposed on the undertaking.²⁶⁵

On appeal the European Court of Justice confirmed the Commission's Decision and dismissed the appeal.²⁶⁶

The Court held that all surrounding circumstances, i.e. the whole distribution network, have to be taken into account and refused AEG's view that the system was being limited to one member state only. The Court established further, in agreement with its decision in *Metro (No.1)*,²⁶⁷ that only systems based on qualitative criteria and admitting all qualified resellers fall outside EEC Article 85 (1). If these conditions are not met, the Court stated, the system with its negative effects on price competition contravenes Article 85 (1) of the EEC Treaty.

Thus the appeal was dismissed, the Court upheld the Commission's fine of one million ECU.²⁶⁸

Another important decision took the European Court of Justice in *Ford v Commission (No.2)*.²⁶⁹

The case dealt with the selective distribution system Ford operated in Germany and other member states, inter alia the United Kingdom.

Up to 1 May 1982 German Ford-Werke had sold to its German dealers both left-hand-drive and right-hand-drive (RHD) cars. With changes in exchange rates the British demand on RHD cars began to increase in Germany. Ford-Werke sent a circular to its German dealers stating that from 1 May 1982 no more RHD cars would be sold to German dealers, in order

to avoid effects which may be damaging for Ford Britain and the British dealers.

In November 1983 the Commission took a final Decision²⁷⁰ that the refusal of supply of RHD cars was not itself infringing EEC Article 85 (1), but that other clauses, e.g. territorial allotments, prevention of cross-supplies etc. fell within EEC Article 85 (1) and have to be examined under EEC Article 85 (3) (see below Chapter 5 (2) (b) (v)). On appeal the argumentation of the Court was different from that of the Commission, but the ECJ reached the same conclusion in respect of EEC Article 85 (3).²⁷¹

The Court found the refusal to supply RHD cars to German dealers by itself contravened EEC Article 85 (1), because therewith British dealers were more protected against parallel imports and could maintain their high price levels. Thus the cessation of supply had to be considered within Ford's whole distribution system and not only as a matter limited to one member state only. Because of its effects of obstructing parallel imports, the agreement was found to be contrary to EEC Article 85 (1).²⁷²

The view that a refusal to supply RHD cars to dealers on the continent is contrary to Article 85 (1) has been subsequently confirmed in recent decisions.²⁷³

A third important decision which the ECJ and the Commission took concerns **Metro v Commission (No.2)**.²⁷⁴ This case has to be seen in connection with the earlier decisions of the Commission and the ECJ in Metro (No.1).²⁷⁵

In 1976 the selective distribution system of SABA was granted an exemption under EEC Article 85 (3); the exemption was renewed in 1983.²⁷⁶ On appeal²⁷⁷ the ECJ confirmed the Commission's Decision and dismissed the appeal. In the context of this case the Court also dealt with some general principles on selective distribution systems. It confirmed previous judgments referring to "simple" (qualitative) selective distribution systems and defined in more detail its practice.

It held that selective distribution systems based solely on objective criteria may on the one hand fall completely outside EEC Article 85 (1), but that they may, on the other hand infringe the same EEC Article 85 (1), if they restrict competition. The Court established that "simple" (open) systems may restrict competition "where the existence of a certain number of such systems does not leave any room for other forms of distribution based on a different type of competition policy or results in a rigidity in price structure which is not counterbalanced by other aspects of competition between products of the same brand and by the existence of effective competition between different brands."²⁷⁸

The Court made clear that EEC Article 85 (1) may apply in exceptional circumstances also to "simple" selective distribution systems based on objective criteria.

The decision shows once more that the Court, too, is reviewing each particular case with attention to the economic background.

The Commission found its policy of long standing on selective distribution systems confirmed, especially where the sector of entertainment-electronics is concerned, and indicated that it will pursue its policy further.²⁷⁹

So this is in accordance with the other decisions passed on selective distribution systems.²⁸⁰

Reviewing these recent decisions, it can be observed that a uniform approach can be made out in the judgments. Both the ECJ and the Commission based their decisions and attitudes on past practice and developed it further. The recent decisions are thus in agreement with the past judicial practice in pursuing the principles further. As the Commission indicated, this policy will be confirmed and continued in the future; rapid changes in the practice of the Commission and the ECJ may not be expected.

2. The system of exemptions

(a) Block exemptions

The purpose of the exemptions is to exclude certain abstractly defined agreements from the prohibition under EEC Article 85 (1).²⁸¹

(i) Regulation 67/67

As already mentioned, Regulation 67/67 expired on 30 June 1983 and two successors Regulations 1983/83 and 1983/84 are now in force, but two recent decisions, *Hydrotherm v Compact*²⁸² and *Hasselblad v Commission*²⁸³, have relevance for the application of Regulation 67/67.

In the *Hydrotherm v Compact* the European Court of Justice passed an important judgment on the question as to how Article 1 (1) of Regulation 67/67 referring to "two undertakings" should be interpreted.

The Court ruled:

"Commission regulation 67/67 of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements must be applied even if several legally independent undertakings participate in the agreements as one contracting party provided that those undertakings constitute an economic unit for the purposes of the agreement."²⁸⁴

This judgment is of particular relevance, as it can be applied to a great number of other agreements.

It is interesting to observe that the Court once more tended, in order to meet the economic requirements of a competition case, to apply more an economic rather than a limited grammatical interpretation. This approach had been applied in earlier decisions, e.g. when distinguishing an agent from an independent trader (Chapter 4 (1) (a) and 5 (1) (b)).

Thus, the Court's practice is marked by a uniform continuity.

In *Hasselblad v Commission* the Court was able to decide with reference to the interpretation of Article (2) (b) of Regulation 67/67. As the problems with guarantee services in connection with obstruction of parallel imports have currently lost nothing of their acuteness, it is important to consider this aspect of the *Hasselblad* decision for current EEC policy and as well as for the application of the Regulations.

The Court established that one of the prohibited obligations (cf. Article 2 (2) (b) of Regulation 67/67) is the exclusive dealer's refusal to honour the producer's guarantee, if a product has been obtained by parallel import.²⁸⁵

This shows how the ECJ in its practice applies a uniform approach to general principles as relevant for various legal aspects. In addition, the judgment confirms once more how the Court is upholding the principle that export bans obstructing parallel imports have to be scotched.

With the above citation of recent decisions, the interpretation and application of Regulation 67/67²⁸⁶, no longer in force since 1983, after having been involved with respect to approximately 25,000,²⁸⁷ may be treated as concluded.

We now turn to the interpretation and application of the current successors of Regulation 67/67, namely Regulations 1983/83 and 1983/84.²⁸⁸

(ii) Regulation 1983/83

(α) General remarks

After the expiring of Regulation No. 67/67/EEC on 30 June 1983, "with Regulations (EEC) No. 1983/83²⁸⁹ and (EEC) No. 1984/83²⁹⁰ the Commission has adapted the block exemption of exclusive distribution agreements and exclusive purchasing agreements to the intervening developments in the Common market and the Community law. "²⁹¹

As a guide to the interpretation of the new Regulations, the Commission published its Notice on Regulations 1983/83 and 1983/84.²⁹²

While Regulation 67/67 dealt with several types of agreements, there are now different block exemptions for different types: Regulation 1983/83 for exclusive distribution agreements, with their main significance that "the supplier allots to the other, the reseller, a defined territory (the contract territory)", while "in exclusive purchasing agreements, the reseller agrees to purchase the contract goods only from the other party and not from any other supplier".²⁹³

Nevertheless several provisions are identical and the Commission states that "in so far as their wording permits, these parallel provisions are to be interpreted in the same way".²⁹⁴

After the above general remarks, we now turn to the provisions of Regulation 1983/83 in detail. However, not as a commentary on block exemptions: the present study concentrates on the question whether tendencies can be made out in current developments.

(β) The provisions of Regulation 1983/83 in detail

Differences and trends, similarities and peculiarities found in Regulations 67/67, 1983/83 and 1983/84, are pointed out in the following detailed figure:

Differences between Regulations 67/67 and its successors, Regulations 1983/83 and 1983/84

Subject	67/67	1983/83	1983/84
scope of the Regulations	<p>recital</p> <p>Article 1: definitions Article 2: permitted obligations ("white list") Article 3: prohibited obligations ("black list") with specification in Articles 4,5,6.</p> <p>Procedural provisions: Articles 7-9</p>	<p>recital</p> <p>Article 1: definitions Article 2: permitted obligations ("white list"); Article 3,4,5 prohibited obligations ("black list").</p> <p>Article 6: withdrawal</p> <p>Article 8: exemption not applicable for resale of beer and petroleum products.</p>	<p>recital, then categories of agreements although the Regulation is also based on the "white and black list" principle: <u>Definitions:</u> Articles 1,6,9 <u>White list:</u> Articles 2,7,11 <u>Black List:</u> Articles 4,5; 8,9; 12,13.</p> <p>Article 4: withdrawal</p> <p>Articles 16,17: provisions where the Regulation not applies</p>
exclusive distribution/ exclusive purchasing	both	only exclusive distribution agreements	only exclusive purchasing agreements
applicability to uni-/bilateral agreements	only bilateral agreements (but see Case Fonderies Roubaix/Fonderies Roux n. 157 Brouwerij Concordia n.159	uni-/bilateral agreements recital (3)	uni-/bilateral agreements recital (3)

continued

"agreements and concerted practices which satisfy the conditions set out in this Regulation need not be notified; whereas an undertaking may nonetheless in a particular case where real doubt exists, request the Commission to declare whether its agreements comply with this Regulations." Thus, an undertaking in question can always apply for a decision; a procedure which in practice can be quite important (see Chapter 6 below).

Another guiding principle is stated in recital (11) (of Regulation 1983/83): parallel import have to remain possible.

This point, established as a principle in early cases, is once again expressed in the currently valid Regulations. In accordance with the recital, the Commission has worded Article 3 more stringently than Article 3 of Regulation 67/67.

Another significant detail can be found in Articles 4 and 5 of Regulation 1983/83. The Commission has detailed with precision the provisions on the "black list" in Article 3. This implies that the Commission has taken into account the economic effects of the agreements and accordingly set up the "black list". This approach is completed in Article 8 of the Regulation, which provides that the block exemption is not applicable" to agreements entered into for resale of drinks in premises used for the sale and consumption of

beer or for the resale of petroleum products in service stations."

However, many agreements still benefit from Regulation 1983/83 and the clauses permitted in Article 2 of the Regulation.²⁹⁵ E.g. allowed are obligations not to sell competing products, the distributor's exclusive purchasing obligations and qualified territorial protections. The latter may - as in Regulation 67/67 - take whole selective distribution systems out of the block exemption. Pursuant to Article 2 (3), obligations may be attached to stock holding, selling under trademarks etc. and certain promotional measures.²⁹⁶

In four recent Decisions in 1985 the Commission gave further indications on the interpretation of Regulation 1983/83. Two decisions referred to Article 3 of Regulation 1983/83, the other ones to the question as to which clauses are to be allowed under Regulation 1983/83.

In the Decision in **Sole distribution agreements for whisky and gin (Distillers)**, the Commission examined the distribution system of the Distillers Company, U.K. which had appointed other firms of the spirits sector for the distribution in the different member states.²⁹⁷ The Commission confirmed that with reference to Article 3 (b) of Regulation 1983/83 the producers of certain categories of

alcoholic beverages, e.g. whisky and gin, are not to be looked upon as competing manufacturers.

Therefore, 17 of the 21 noticed agreements fell within the block exemption, only four had to be decided upon under EEC Article 85 (3) in connection with an individual exemption (this aspect is dealt with below).

The other Decision the Commission took in respect of Article 3 (b) of Regulation 1983/83 concerns **Siemens-Fanuc**.²⁹⁸

Although the Decision was based on Regulation 67/67, the Commission regarded this decision relevant also for the interpretation of Article 3 (a) of Regulation 1983/83.²⁹⁹

In this agreement Siemens and Fanuc had appointed each other as exclusive distributors in their respective selling areas. The Commission looked upon this agreement as reciprocal and therefore pursuant to Article 3 (a) of Regulation 1983/83 not fit for a block exemption.³⁰⁰

The other two recent cases are **Sperry New Holland**³⁰¹ and **Ivoclar**³⁰². The Decisions in them confirm the constant practice of the Commission to regard obligations exceeding those mentioned in Article 2 of Regulation 1983/83 ("white list") as being opposed to block exemption.³⁰³

In **Sperry New Holland** the Commission found the distribution agreement infringing EEC Article 85 (1) and not apt for a

block exemption under Regulation 1983/83 as the clauses were obstructing parallel imports.³⁰⁴

In **Ivoclar** the Commission found the selective distribution system infringing EEC Article 85 (1) and Regulation 1983/83 not being applicable, as the restrictions imposed on the resellers were exceeding provisions of Article 2 of Regulation 1983/83.³⁰⁵ The Commission stated that Article 2 contains definitive provisions which may not be altered.³⁰⁶

These Decisions indicate that the Commission is developing a reserved attitude when interpreting Regulation 1983/83, especially when undertakings with large market power are concerned. This seems correct as a starting-point as it secures the detailed examination of each case in question; if the Commission finds no objections, the possibility of an individual exemption may be envisaged, an application for the exemption may be made, and the exemption may be granted.

Another trend can be observed relating to export bans. The Commission is still pursuing its determined policy of preventing export bans and does not hesitate to implement it when examining an agreement under Regulation 1983/83.

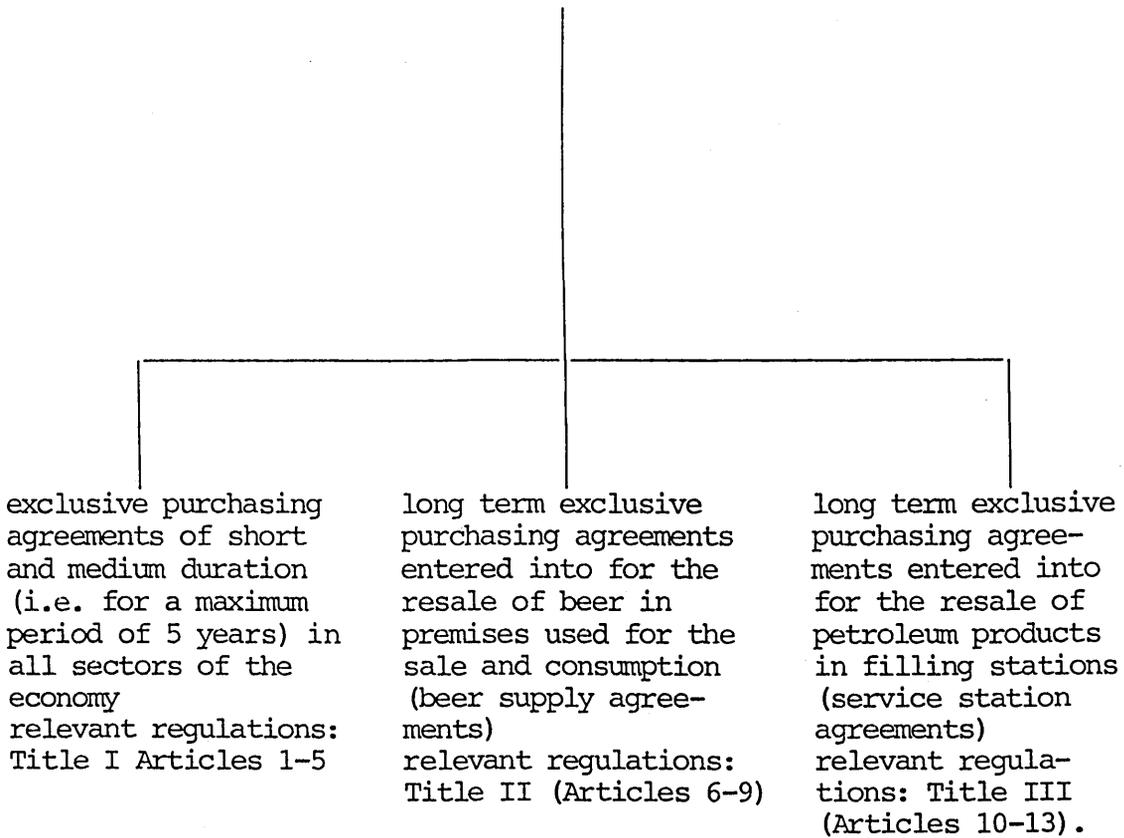
(iii) Regulation 1984/83

(α) General

In difference to Regulation 1983/83, Regulation 1984/83 contains more modifications in comparison with Regulation 67/67.

The Commission has defined block exemption for certain categories of exclusive purchasing agreements as follows in the figure below:

Regulation 1984/83 on categories of
exclusive purchasing agreements³⁰⁷



Thus, the Regulation provides for block exemptions applicable to all kinds of exclusive purchasing agreements of short duration, beer supply agreements and filling station agreements.

This categorisation makes clear, that the Commission could - from the experience gained during the period of application of Regulation 67/67 - make out certain types of exclusive purchasing agreements and attune special provisions to the requirements of economic life as well as to competition policy.

The special provisions for beer supply and filling station agreements indicate that the Commission regarded exclusive purchasing agreements as particularly necessary for the relevant sectors of the economy and for one of its main application fields.

However, the Commission has shaped the structure of the provisions in a form similar to that of Regulation 1983/83 (see the figure showing the differences, p. 118-119 above). Regulation 1984/83 contains, besides definitions of the respective agreements, "white lists" of the permitted obligations (Articles 2,7,11) and "black lists" of the prohibited clauses (Articles 3-5 ,8,9,12,13).

With this survey we will conclude and turn to the provisions in detail.

(β) The provisions of Regulation 1984/83 in detail

As already pointed out, Title I of Regulation 1984/83 contains general provisions, while Title II and III contain special provisions for beer and petrol, and Title IV contains various miscellaneous provisions.

Before Regulation 1984/83 came into force the Commission took the various aspects - the negative aspects as well - into consideration and "therefore sought to achieve a balance between what it considers to be desirable and undesirable exclusive purchasing commitments."³⁰⁸

(As a detailed discussion the individual provisions would exceed the scope of the present study,³⁰⁹ we will concentrate on recent developments as reflected in decisions.)

In 1985 the Commission examined a standard exclusive purchasing agreement notified by the German ice-cream producer Schöller.³¹⁰ As the exclusive purchasing agreement was intended for indefinite duration, the Commission found that a block exemption was not applicable: the agreements were not in accordance with Article 3 (d) of Regulation 1984/83. However, the Commission took into consideration that the agreements could be terminated yearly, after a period of two years, with six months' notice. Thus the Commission found the agreements' average duration to be three years. Furthermore, the Commission assessed that Schöller's (and the main competitor's) networks of

exclusive purchasing agreements added up to not more than a total of 30 % of the given economic sector of the market. As a result, the Commission found Schöller's agreement not falling within EEC Article 85 (1) and quashed proceedings with a "comfort letter".³¹¹

The Commission took another recent decision on purchasing agreements in **VEB/Shell**.³¹² The Commission had to examine Shell's exclusive purchasing agreements; some of the leaseholders complained about the rebate system as involving alleged indirect resale price maintenance and price discrimination. The Commission found these complaints to be untenable as Shell ran the rebate system in order to support the local leaseholders dependent on the local competition conditions.³¹³ The Commission came to the conclusion that the agreements were containing no indirect resale price maintenance and that the system was within Regulation 1984/83. The complaint was quashed.³¹⁴

The few decisions passed on exclusive purchasing agreements indicate that many agreements, particularly in the special sectors, now benefit from the block exemptions.

The system of block exemption seems to make - as intended by the Commission - many individual decisions redundant. It is significant that, compared with other agreements, e.g. the exclusive distribution agreements under Regulation 1983/83, there have thus far been only a few decisions with

reference to exclusive purchasing agreements and Regulation 1984/83. One of the reasons for it may be that most of the exclusive purchasing agreements are concluded in the sectors of beer and petrol, and thus fall within the system of block exemption.

Future decisions will show, if this trend will continue.

(iv) Regulation 123/85

In 1984 the Commission adopted a block exemption for the sector of motor vehicle distribution. With Regulation 123/85 on the application of Article 85 (3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements³¹⁵, the Commission exempted certain distribution agreements in this sector of the economy. The Commission stated that "in the light of experience since Commission Decision 75/73/EEC and of the many motor vehicle distribution and servicing agreements which have been notified to the Commission pursuant to Articles 4 and 5 of Council Regulation No.17, as last amended by Regulation (EEC) No.2821/71, a category of agreements can be defined as satisfying the conditions laid down in Regulation No. 19/65 EEC."³¹⁶

This approach was a response by the Commission to meet the requirements in the motor vehicle sector and laid down the permitted obligations.

On the interpretation of the block exemption the Commission issued its Notice on Regulation 123/85.³¹⁷ The block exemption is applicable to certain exclusive and selective distribution clauses in the motor vehicle sector.²⁹⁵ Thus the Commission has for the first time exempted agreements with selective distribution clauses by block exemption.³¹⁸ Moreover, Regulation 123/85 exempts agreement systems with supply to a "specified number of resellers within the distribution system".³¹⁹ "This is thought to cover the "closed" system of selective distribution used by motor vehicle suppliers who appoint a limited number of dealers and sub-dealers within a given territory".³²¹ The Commission considered that selective and exclusive distribution systems are generally indispensable measures in this sector of the economy. Furthermore, the Commission took into account that motor vehicles are long-lived goods needing regular repairing and servicing.³²² As competition in the motor vehicle sector is one concentrating between brands, the Commission put up with certain restrictions in competition between producer and resellers.³²³

The Commission has, however, also proceeded in several cases against infringements of the general principles laid down in the Regulation and confirmed by the ECJ.³²⁴

One of the decisions referred to **British Leyland** ³²⁵, refusing, respectively aggravating, the issue of certificates of conformity for parallel imported motor vehicles. The Commission found that the practices in question contravened EEC Article 86, and imposed the obligation to discontinue such practices and imposed a fine of ECU 350,000 on the undertaking. ³²⁶

This Decision was confirmed on appeal by the European Court of Justice in **British Leyland v Commission**. ³²⁷

The Court established that the obstruction of parallel imports may also contravene Article 86 of the EEC Treaty. It rejected British Leyland's argument that the measures were taken in order to protect the - permitted - selective distribution system. The Commission's view was entirely confirmed and the appeal dismissed.

Several other decisions have also dealt with obstructions of parallel imports, but the Commission examined the cases under Article 85 of the EEC Treaty, e.g. **Distribution System of Ford Werke AG (No.2)** ³²⁸, on appeal **Ford v Commission (No.2)** ³²⁹, **Alfa Romeo** ³³⁰ and **Fiat** ³³¹, where the latter also referred to the problems of guarantee systems. ³³²

These decisions make clear that both the ECJ and the Commission are pursuing their determined view to intervene in order to secure parallel imports in this sector of the economy as well.

In its Sixteenth Report on Competition policy the Commission explained that until then a revocation of the block exemption under Regulation 123/85 had not been necessary in a particular case, because in most cases the causes for complaints could be removed.³³³ However, the Commission stated again the three basic principles to be observed when examining a complaint.³³⁴ The Commission once again confirmed its objection to any hindrances to parallel imports obstructing the achievement of a uniform European Market.

These recent decisions and statements are in accordance with the past practice. Emphasis has been on the significance attached to unrestricted parallel imports and on intent to continue the adopted policy and practice.

(b) Individual exemptions

(i) General remarks

Individual exemptions are important for agreements to which a block exemption does not apply, or where no block exemption is provided.

The following sections examine whether certain trends can be made out in the current practice of the Commission and the ECJ.

(ii) Exclusive agency agreements

Concerning exclusive agency agreements, the Commission took a recent Decision in **Aluminium Imports from Eastern Europe**.³³⁵ Because the Commission found the agreement system infringed Article 85 (1) of the EEC Treaty, it detailed, in connection with the possibility of fines to be imposed, that the deficient notification of an agreement is no valid notification able to protect against fines or to be the basis for an exemption under Article 85 (3) of the EEC Treaty.³³⁶

This indicates that the Commission is generally prepared to examine exclusive agency cases which infringe EEC Article 85 (1), i.e. where the "agent" is not a true agent in the light of EEC Article 85 (3). The Commission did not find the above mentioned case qualifying for an exemption, but refrained from imposing fines.

It can be observed that, as stated in Chapter 4 (2) (b) (ii), the question of an exemption under EEC Article 85 (3) is only relevant for such agreements, which are not "true" agency agreements, as they in no way fall within EEC Article 85 (1). As the Commission did not regard the agreements in **Aluminium Imports from Eastern Europe** as "true" agency agreements, but as agreements made with independent traders, it had to take EEC Article 85 (3) into consideration.

It can in general be said that exclusive agency agreements are not in the centre of gravity of the Community decision. One reason for it may be the guidelines the Commission has set up in its Notice on Exclusive Agency agreements explaining which agreements do not fall within EEC Article 85 (1). Another reason may be that the exclusive agency agreements are of minor economic importance in contrast to the other types of exclusive dealing agreements, and thus generate less controversial points.

(iii) Exclusive distribution agreements

More relevance to individual exemptions have exclusive distribution agreements.

In 1980 the Commission refused an individual exemption in **Hennessy-Henkell**³³⁷ as it found (unacceptable) clauses granting absolute territorial protection and agreements on price terms.

An exemption from the brazen principle not tolerating any direct or indirect export bans made the Commission in the Decision in **Distillers Company PLC (Red Label)**.³³⁸

In order to enable Distillers to penetrate a new market, respectively re-establish the brand in the U.K., the Commission was prepared to grant an individual exemption

with respect to differential price terms for a limited period.³³⁹ The exemption was indeed given only for a limited period, in circumstances different from other decided cases: the clauses were not operated to fix a maximum profit for Distillers and to cement the market positions, but to stimulate and improve competition, and make more products available for the customers.

The decision should not be misunderstood, as it means no alteration of the previous adjudications, in which the EEC authorities continually disapproved of export bans, which reduced competition, lead to compartmentalisation of the market and placed the customers at a disadvantage.

This can be seen in the Decision in **Hasselblad v Commission**³⁴⁰ where export bans were effected by economic pressure and concerted practices and an exemption under EEC Article 85 (3) was not granted and fines were imposed.

An individual exemption was also refused in the Decision for **VBBB and VBVB**, where the agreement was found to infringe EEC Article 85 (1) by pricing and mutual exclusivity.³⁴¹ The ECJ confirmed the Decision and upheld the Commission's view to the effect of not granting an individual exemption.³⁴²

To exclusive distribution agreements between producers of competing products refers also the Decision in **Sole distribution agreements for whisky and gin (Distillers)**.³⁴³

The Commission found some of the exclusive distribution clauses with competing producers contravening EEC Article 85 (1) and not fit for a block exemption.³⁴⁴ However, the Commission considered the rough competition in this sector and the relatively weak market position of the undertakings in question, and thus was able to grant an individual exemption under EEC Article 85 (3).³⁴⁵

Although many agreements now benefit from block exemptions, the EEC authorities' decisions explain that there are nevertheless some agreements which have to be examined under EEC Article 85 (3).

It has to be taken into account that each case is considered separately and there are still some agreements - mostly on export bans - where the Commission and the ECJ do not hesitate to refuse an individual exemption and impose large fines on infringing undertakings.

(iv) Exclusive purchasing agreements

A detailed Decision referring to exclusive purchasing agreements took the Commission in **Carlsberg**.³⁴⁶ As it found the agreements contrary to EEC Article 85 (1) and Regulation 1984/83 as not applicable, the question of an individual exemption had to be reviewed.

The Commission exposed:

"The Lager Agreement and the restrictions of competition contained in it must be seen in the light of the peculiar structure of the British beer market and the economic and commercial position of Carlsberg on that market. The Cooperation Agreement has enabled Carlsberg to establish itself more quickly and over a wider area thanks to GM's large network of tied outlets. Without this co-operation Carlsberg would as yet be unable to keep its Northampton brewery fully occupied. In view of the economic advantages of the arrangements, which will be shown below, the restrictions of competition resulting from the Agreement can be tolerated until 30 September 1991, since this period should be sufficient for Carlsberg to build up its own sales network and progressively become independent of any other large brewery for distributing its output."³⁴⁷

This argumentation makes clear that the Commission took, as in the above mentioned Decision in **Distillers Company PLC (Red Label)**³⁴⁸, into consideration the economic situation of the parties and, above all, the fact that new products were being introduced onto the market. Once again the Commission took a benign view on efforts to introduce products to new markets, as means to an improvement in

distribution, competition and, last but not least, a fair share of the benefits in form of more variety and quality of the products for the consumers.

(v) Selective distribution systems

Of vital importance in the past have been and currently are individual exemptions for selective distribution systems. As selective clauses may take whole systems out of the applicability of a block exemption, quite a few agreements depend entirely on the granting of an individual exemption.

When reviewing the decisions recently passed on selective distribution systems, it can be observed that - as in the past - introductorily the adequacy of the system for the products has been examined.

In a recent judgment, where the ECJ did not find a selective distribution system adequate for the goods in questions, that is in **SA ETA Fabriques d'Ebauches v SA DK Investment and others "Swatch"** ³⁴⁹, it was stated that such systems would infringe Article 85 (1) of the EEC Treaty. It is remarkable that although the system contravened EEC Article 85 (1), an individual exemption for such infringements seemed to be beyond question. ³⁵⁰

In another Decision, referring to the sale of plumbing equipment, the Commission did find a selective distribution system not adequate and thus contrary to EEC Article 85 (1).³⁵¹ Even though in this Decision the question of EEC Article 85 (3) was broached, it was refused as a restriction in reselling plumbing equipment by plumbers only was not considered necessary.³⁵²

Thus, the Commission seems not to grant individual exemptions for agreements, which, in general, are not adequate for the distributed products. It remains to be seen if this approach will be pursued in the future, or if exemptions will be granted.

From systems, where selective criteria were not considered necessary, we will now proceed to decisions on selective distribution systems which are considered adequate for the products in question.

In respect of cars, the selective system was found necessary for the distribution in *Ford v Commission (No. 2)*.³⁵³ Although the Commission examined the agreement under EEC Article 85 (3), an individual exemption was refused because parallel imports were obstructed by Ford ceasing to supply RHD cars to Germany.³⁵⁴ The Commission held that "the effects of a restrictive agreements must be considered in its economic and legal context" and it stated further that

"it is normally a prerequisite for an Article 85 (3) exemption that intra brand competition at the distribution level across notional frontiers should be possible, at least unobstructed and hence that distribution systems within the Community should not cause a substantiated part of the Community to be deliberately isolated from the rest" .³⁵⁵ The Decision was confirmed by the European Court of Justice, ³⁵⁶ making it again clear that the Court's and Commission's attitude towards export bans of all types has not altered. Thus the refusal of an individual exemption is in accordance with previous decisions.

Likewise not fit for an individual exemption are agreements containing resale price maintenances.³⁵⁷ In the Decision in *Ivoclar*³⁵⁸ the Commission found the restrictions on the resellers apt for an individual exemption as it effected a concentration of the efforts in the distribution sector and was of advantage for the consumer. This decision was regarded as an example set for the Commission's policy on selective distribution systems.³⁵⁹

This policy is reflected as well in the Decision in *Grundig distribution system*³⁶⁰, where the Commission was prepared to grant an individual exemption too, on grounds, that every reseller meeting the requirements was admitted to the system. The Commission explained that the agreements are fulfilling even the stricter criteria which the ECJ

established in 1983.³⁶¹ The Commission took also into consideration the economic situation and the fierce competition in this sector.³⁶² As this Decision is in agreement with the policy of the ECJ and the Commission, it seems probable that it will be later upheld on appeal.

In another recent judgment referring to individual exemptions of selective distribution systems passed by the ECJ the **Metro v Commission (No.2)**³⁶³, the Court corroborated the Commission's view that the economic situation of each case has to be taken into account.³⁶⁴ The ECJ held that self-service wholesalers were in fact not - as alleged by Metro - discriminated as distributors in the electronics market and that the requirements of EEC Article 85 (3) were still fulfilled.³⁶⁵

Another aspect of the Court's judgment is also of general significance. With respect to the renewal of the individual exemption the Court held that when a distribution system corresponds to a former system already exempted in all important points, the Commission can take for granted that the new system is fullfilling, until disproved, the conditions of EEC Article 85 (3) as well.³⁶⁶ This decision will make the future renewal of exemptions easier, and many other firms will benefit it.

All in all, the ECJ upheld the Decision of the Commission with respect to EEC Article 85 (3), the appeal was dismissed.³⁶⁷

So, this decision with regard to EEC Article 85 (3) has confirmed the previous decisions and is a further development of past judicial practice. Again, changes in evaluation by the Commission and the ECJ are not to be expected in the near future.

This is confirmed by the Decision in **Peugeot-Talbot**.³⁶⁸ Details of the Commission's reasoning explained in **Ford v Commission**³⁶⁹, were re-affirmed and the Commission again made clear that the refusal to supply RHD cars to the member states on the continent was obstructing parallel imports and was thus restricting competition. Hence, the Commission refused to grant an individual exemption under EEC Article 85 (3).

Peugeot-Talbot was in addition fined with ECU 4,000 as it had supplied false information; however, the Commission refrained from imposing fines for the agreement, as it was notified and, additionally, the obligations with reference to the supply of RHD cars were (in **Ford v Commission (No.2)**) only recently made absolutely clear.³⁷⁰

The reviewing of these recent cases shows that no grave changes in the judicial practice have taken place. The EEC

authorities have rather adopted the starting-points already established in the past and have developed them further. Especial emphasis was laid on the necessity to take all economic circumstances into account. The view on parallel imports has also been confirmed and especially explained when RHD supplies to the continental member states were in question. It may be expected that this policy will be maintained in the future.

3. The situation of small and medium-sized businesses, undertakings and enterprises.

In the recent period (1980s) the Commission has intensified its endeavours to improve the situation of small and medium-sized enterprises (SMEs). Among other efforts there can be observed three main directions in the Commission's attempts: firstly, the information to the undertakings in question; secondly, legislation with reference to SMEs; and thirdly, case-by-case decisions, involving SMEs.³⁷¹

Concerning the information sector, the Commission had before 1983 found that with reference to European competition policy one of the SMEs' main problems was their shortage of information about their rights and obligations. In order to remedy it, in 1983 - on the occasion of the

year of the SMEs - the Commission published a guideline on the European competition rules for small and medium-sized firms.³⁷² With the help of national ministries, industrial associations and chambers of commerce nearly 100,000 copies of the guideline were distributed free to the SMEs.³⁷³ The Commission received a feed-back which was positive throughout.

In 1985 the Commission published further information as guidance on the Commission's powers of investigation under European competition law; the guideline is especially meant for those firms which do not have a legal advisor at their disposal.³⁷⁴ With this publication the Commission made another important contribution in order to reduce the information deficit of the SMEs, all the more so, as practice shows that many of the disadvantages such firms sustain in everyday economic life are due to the fact that they do not dispose of the necessary legal informations, unlike large firms with legal departments or their permanent legal advisers.

Concerning legislation affecting the SMEs, an important improvement was made with the new block exemption Regulations 1983/83 and 1984/83. In the recitals the Commission again emphasised its concern about the SMEs. It explained with reference to exclusive distribution agreements: "... whereas the appointment of an exclusive distributor who will take over sales promotion, customer service

and carrying of stocks is often the most effective way, and sometimes indeed the only way, for the manufacturer to enter a market and compete with other manufacturers already present; whereas this is particularly so in the case of small and medium-sized undertakings".³⁷⁵

The Commission explained further with reference to exclusive purchasing agreements:

" ... whereas the appointment of several resellers, who are bound to purchase exclusively from the manufacturer and who take over sales promotion, customer services and carrying of stock, is often the most effective way, and sometimes the only way, for the manufacturer to penetrate a market and compete with other manufacturers already present; whereas this is particularly so in the case of small and medium-sized undertakings;"³⁷⁶

To pursue this issue further, the Commission provided additional provisions especially relevant to the SMEs. The Commission issued Article 3 (b) and Article 5 of Regulation 1983/83 in order to give small and medium-sized undertakings the possibility to enter into non-reciprocal exclusive distribution agreements not normally allowed under the Regulation.

Further provisions are anchored in Article 5.³⁷⁷ Article 3 (b) of Regulation 1983/83 permits non-reciprocal agreements between competing manufacturers up to a total turnover of 100 million ECU.

Similar provisions are found in Articles 3 (b) and 5 of Regulation 1984/83. These provisions are applicable mutatis mutandis to exclusive purchasing agreements for beer and petrol (Articles 9 and 13 of Regulation 1984/83).³⁷⁸

These provisions show that, with SMEs in mind, the Commission was prepared to stand off principles prohibiting distribution/purchasing agreements between competing manufacturers. The relaxations are meant to facilitate the access of SMEs into new markets. The Commission did not disregard, however, the facts that exclusive purchasing agreements may often concern the SMEs, e.g. landlords or leaseholders of filling stations, and secured with Regulation 1984/83 that these resellers do not get into too strong temporal and assortment dependence in relation to the supplier.³⁷⁹

Further important provisions for SMEs were also issued with Regulation 123/85. The Commission regards this Regulation as particularly important for the SMEs. It realised that the Regulation on the one hand grants the advantages of a network of selected dealers, but on the other hand provides more protection for the dealers, which are often SMEs, and opens up the spare part market for them.³⁸⁰

The Commission thought the aspect of the Regulation protecting the SMEs to be important. It took into consideration that the SME-motor-vehicle-dealers should not

get into too strong a dependence on the supplier, and that they should have enough a margin in the spare part sector and for supplies to other approved dealers.³⁸¹

Concern for the SMEs was pursued further when in 1986, with view to the de-minimis-rule, the Commission published a new Notice concerning agreements of minor importance.³⁸²

This Notice replaced the former Commission Notice concerning agreements of minor importance.³⁸³ With the new Notice the Commission intended both the establishment of provisions and the improvement of information for the undertakings.

Thus, the above mentioned improvements with reference to access to information have been continued. The Notice explains which agreements are to be considered as not falling within the scope of EEC Article 85 (1), because of their minor importance and non-effect of competition to a significant degree.³⁸⁴

The Commission proceeded from the principle that competition is not affected when the market share of the parties in question does not exceed 5 % and their joint turnover does not exceed 200 million ECU.³⁸⁵

The Commission details that the new Notice is different from the preceding Notice in three main points: firstly, the market shares are found out with reference to the region where the agreement takes effect; secondly, the turn-over limits are raised from 50 million to 200 million

ECU; and thirdly, the Notice is now also applicable to the services sector.³⁸⁶

Especially important for the SMEs are the second and third innovations. With the increase of the turn-over limits more undertakings will benefit from the Notice.

In practice even more importance will have the third point: many of the service-rendering-businesses are SMEs which will now benefit from the Commission's view. With such references in the Notice, the Commission acknowledged the increasing economic significance of this sector.³⁸⁸

Thus, the Commission intended, as already said, not only to publish a new Notice, but also to supply more information for the SMEs, to provide more legal security in their everyday economic activities.³⁸⁹ In order to collect itself more information about the SMEs, as a relevant point for its future competition policy, the Commission has established a common study group in order to examine the EEC and national programs for the promotion of establishment and expansion of SMEs, the simplification of Regulations and removal of encumbrances when founding a SME, and improving the effects of the instruments of financial policy for the SMEs.³⁹⁰

All these recent developments show that the Commission is prepared to intensify its exertions for the SMEs, and, in

reaction to the requirements of the SMEs, is providing the necessary factual materials.

With regard to case-by-case decisions with reference to SMEs, it can in general be observed that both the ECJ and the Commission are intent on considering the economic sides of a case.³⁹¹

This is of importance also for SMEs. As an example, a detailed analysis of the economic circumstances and the relevant market is found in the judgment in *Hasselblad v Commission*.³⁹²

In respect of the amount of fines to be imposed on a firm, the EEC authorities have taken into consideration the question whether the undertaking is an SME, a circumstance which would extenuate the negative effects of the infringement and therefore be the reason for a reduction of fines.³⁹³

An example on SMEs has been provided in the Commission's Decision in *Ivoclar*.³⁹⁴ The Commission based its Decision granting an individual exemption, amongst other grounds, on the fact that Ivoclar was a medium-sized enterprise and had to face substantial competition by larger undertakings throughout the EEC.³⁹⁵

Reverting to the fact that in the past there were only few decisions concerning SMEs, it can be seen that the situation has not fundamentally changed. There are still only few decisions referring to SMEs.

One reason may be the provisions in the system of block exemptions (Regulations 1983/83 and 1984/83), which have been developed further, as well as the publication of the new block exemption Regulation 123/85 and the Notice on minor agreements. However, the question of the costs of a case should be additionally considered, as an aspect, which is not to be underestimated in practice.

Each court proceeding have involves a considerable risk for bearing costs.

"So an unsuccessful applicant challenging a decision of the Commission under Article 173 should expect to pay not only his own costs, but also those of the Commission."³⁹⁶

This aspect should not be neglected in practice. For an SME the question of costs is much more important than for a large undertaking. For the latter, costs are no risk, but eventually just another operating expense to be shown in the balance sheet. For SMEs costs are a substantial risk, and quite often this is just the reason for refraining from proceedings, all the more as firms are not entitled to apply for legal aid, only in exceptional circumstances, even under national law.³⁹⁷

Thus, with regard on the financial risks of bearing lawsuit costs, improvements for SMEs are still to be made. It should be considered how the dreaded risk could be removed from SMEs, e.g. by the establishment of new provisions granting legal aid to them.

Another reason explaining the few cases found in judicial proceedings may be the fact that SMEs still do not primarily seek their sales markets in the whole EEC, but are traditionally tending more to their "hereditary" national markets. With reference to the common market, the integration into new markets will become interesting and necessary also for the SMEs in order to keep their competitiveness.

Hence it is to be expected that the Commission will proceed further in its efforts to support the SMEs, as it regards the SMEs as making an important contribution to the economic development of Europe.³⁹⁸

P A R T II/B

CHAPTER 6

Procedure and enforcement

1. Introductory remarks

Having examined the exclusive dealing agreements under substantive law, we now turn to the aspects of the procedural law. As we have already seen this side of the law is not to be underestimated and is important for many aspects, such as when applying for negative clearance, notifying in order to obtain an individual exemption, and as well when imposing fines, or appealing from Decisions of the Commission.

It has already been pointed out above, how vital the exact observance of procedural provisions may be for the undertakings concerned and their distribution networks.³⁹⁹

However, while procedural law may be important, the decisions of the Commission and the European Court of Justice made clear, especially those referring to export bans, how for the benefit of both consumers and competitors, the observance of all the competition rules is indispensable. The decisions on export bans and similar agreements and

other cases in general, where fines were imposed, also show that it is important to provide the EEC authorities with suitable means in order to enforce, wherever necessary, the rules of competition policy. Only where this is ensured will the EEC be able to pursue and implement economic objectives and promote the common market.

Thus, it is important to consider that the provisions of both substantive and procedural law are serving the purpose of realising the Community's competition policy. Hence, not only the substantive, but also the procedural aspects of EEC competition law have to satisfy two following fundamental requirements, one of which is economic, the other legal in nature.

The economic aspect requires the procedural law to assist the undertakings in question to get a maximum economic benefit from their competitive products (possibly connected with high development and production costs) within a commercially reasonable time.

As already mentioned at the beginning of the study, the time element should not be neglected.

An undertaking notifying its exclusive dealing agreements or seeking adequate protection under the competition law (e.g. a dealer who is not allowed to operate a selective

distribution system) wants to safeguard the benefits derived from its products or investments.

In order to effect that, the time element, together with enhanced competition assumes more and more importance.

Certain products may become economically worthless once the competitors achieve the same technical standards; the technical advance may be lost, production and development costs wasted.

Practice shows that competitiveness of high-quality brand products, which usually are the object of exclusive dealing agreements, is normally eroded within 4-6 years. Thus, exclusive dealing agreements are usually concluded for an average period of five years. This is of great importance when considering the length or duration of procedures.

However, the time element is as well relevant for the Commission and the European Court of Justice, to ensure the proper functioning of competition with regard to economic aspects.

In respect of competitiveness it can be understood that the termination of infringements and the imposition of fines can be effective only when the infringing party is not permitted to profit from procedural delays, as otherwise the products can be marketed and profits be made by the prohibited conduct.

Equally important is the second, the legal requirement of the procedural law referring to exclusive dealing agreements. The parties entering into vertical distribution agreements are, in order to market their products, dependent on maximum legal security and predictability of decisions within the framework of competition law. In this respect, especially the Commission's Notices and the interpretation of the block exemptions should be kept in mind. The undertakings have to rely, when concluding their agreements, on previous comments and decisions. Thus, timely information about the intentions of the EEC authorities is not only important for the SMEs, as already seen above, but also for other undertakings if they are to bring their exclusive dealing agreements in line with the current legislation and judicial practice.

Beyond these general observations we will proceed to the details of procedural questions relevant to exclusive dealing agreements.

When reviewing the procedural dimension of competition law, four steps are to be observed as a line of action:

- (1) institution of proceedings; fact-finding;
- (2) Decision(s) by the Commission;
- (3) judicial review by the European Court of Justice;
- (4) enforcement of the decision(s) of the Commission and/or the European Court of Justice.

In what follows below we will consider this classification and begin with the institution of proceedings and fact-finding.

2. The institution of proceedings; fact-finding

(a) General remarks

While the Community rules on competition with reference to substantive law are directly applicable provisions in the member states, concerning EEC procedural law "the Commission is the principal enforcement agency."⁴⁰⁰

The legal basis for the Commission's procedures is provided by Regulation 17.⁴⁰¹ Under Regulation 17 the Commission is empowered to grant negative clearances or individual exemptions to an exclusive dealing agreement, or to take Decisions requiring the termination of infringements.⁴⁰² The procedure of the Commission is essentially administrative; its decisions are quasi-judicial and may be subject to appeals to the European Court of Justice.⁴⁰³

The relevant provisions show that the Commission is not only acting as an administrative organ, but also as adjudicating and enforcing organ. This status does not seem

to be unproblematic in the light of the principle of separation of powers, because the Commission is acting as a quasi-judicial authority.⁴⁰⁴

When reviewing the administrative procedure in competition cases referring to exclusive dealing agreements, there are basically three possibilities to commence proceedings: firstly, one (or both) parties initiate proceedings in order to obtain a negative clearance, respectively an individual exemption; secondly, the Commission by itself may initiate proceedings in order to terminate infringements of the competition rules; thirdly, in connection with infringement, proceedings may be started by complaints of third parties.

(b) Application for negative clearance

An important procedure for the parties of an exclusive dealing agreement is the above mentioned application for a negative clearance.

"Application for negative clearance is the procedure under which a declaration may be obtained from the Commission that in the light of the information available to it an agreement falls outside Articles 85 and 86 altogether."⁴⁰⁵

Article 2 of Regulation 17 provides:

"Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice."

Based on that legal definition, the application for negative clearance with its respective functions has to be defined against the procedure for a notification to obtain exemption. While a negative clearance serves to certify that the whole agreement is not falling within EEC Article 85 (1) at all, as e.g. a (true) agency agreement, notification is required for those agreements which possibly fall within EEC Article 85 (1), e.g. certain selective distribution systems with quantitative criteria, and need an exemption under EEC Article 85 (3), in order not to contravene EEC Article 85 (1) and not to be void (EEC Article 85 (2)).⁴⁰⁶

A negative clearance may be applied for under EEC Article 85 (1) and/or EEC Article 86.⁴⁰⁷ However, for vertical exclusive dealing systems mostly a decision in respect of EEC Article 85 (1) will have to be considered.⁴⁰⁸

Article 2 of Regulation 17 establishes that the party seeking a negative clearance has to apply for it, i.e. the

Commission will not initiate proceedings by itself: an undertaking has to act on its own initiative.

Details of the formal requirements which an undertaking has to consider, when making an application, are laid down in Regulation 27.⁴⁰⁹ It provides that the application has to be made on Form A/B and include all the information requested by the Form and the Complementary Note.⁴¹⁰

When applying for a negative clearance, it is important to provide the Commission with a complete set of information on the agreement.

"Although the Commission has the right to seek further information from applicants or third parties, and is obliged to publish a summary of the application before granting negative clearance or an exemption under Article 85 (3), it will usually base its decision on the information provided by the applicant. Any decision taken on the basis of incomplete information could be without effect in the case of a negative clearance or voidable in that of an exemption. For the same reasons, it is also important to inform the Commission of any material changes to your arrangements made after your application or notification"

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These requirements governing complete information and information about changing circumstances are not to be

neglected in practice. Especially, when the applicant parties do not seek legal advice and make the application themselves, they must see to it that they do not omit mention of (legally) important circumstances which they may erroneously think to be unimportant. Besides, it should be remembered that the Commission is empowered to impose fines on parties supplying intentionally or negligently incorrect or misleading information.⁴¹²

It should be furthermore realised that an application for a negative clearance provides no protection against fines (Articles 15 and 16 of Regulation 17), if the Commission thinks the agreement contrary to EEC Article 85 (1). Article 15 (5) of Regulation 17 is applicable only to applications for negative clearance.⁴¹³ Thus, in case of doubt, it is in practice highly recommendable to scrutinise closely the exclusive dealing agreement and the circumstances related thereto before making an application for negative clearance.

Once the application is made the Commission is entitled, pursuant to Articles 11 and 14 of Regulation 17, to request all the necessary information. Moreover, the Commission, under Article 19 (3) of Regulation 17 "shall publish a summary of the relevant application or notification and invite all interested third parties to submit their

observations within a time limit which it shall fix being not less than one month."

(c) Notification to obtain an individual exemption

As already suggested, the procedure to obtain an individual exemption is another important aspect of exclusive dealing agreements.

"The purpose of the procedure for exemption under Article 85 (3) is to allow undertakings to enter into arrangements which, in fact, offer economic advantages but which, without an exemption, would be prohibited under Article 85 (1)."⁴¹⁴

If an agreement falls within EEC Article 85 (1), the situation may in practice have serious (and expensive) consequences for the parties concerned:

Firstly, the Commission is empowered under Articles 15 and 16 of Regulation 17, to impose fines or periodic penalty payments on the undertakings.

Secondly, pursuant to EEC Article 85 (2), any agreement infringing EEC Article 85 is declared automatically void. Lastly, third parties may be in a position to claim damages and injunction.⁴¹⁵

"A principal object of notification, therefore, is to secure the legal validity of the agreement by obtaining an exemption under Article 85 (3)."⁴¹⁶

As seen in Chapters 4 and 5, an individual exemption is necessary only for agreements which do not benefit from the provisions of a block exemption. Agreements meeting the stated requirements for a block exemption, are automatically exempted. The Commission has explained:

"Whereas agreements and concerted practices which satisfy the conditions set out in this Regulation need not be notified; whereas an undertaking may nonetheless in a particular case where real doubt exists request the Commission to declare whether its agreements comply with this Regulation".⁴¹⁷

For the notification, too, it is most important to consider that the procedure is initiated by the parties in question; the Commission is not authorised to make a decision on individual exemption without a notification.⁴¹⁸ Even in cases where notification is not required, e.g. under Article 4 (2) of Regulation 17, notification is in practice nonetheless highly recommended, because of its positive effects upon the parties.⁴¹⁹

The notification must be made on Form A/B; "ommission to do so is fatal to the grant of an exemption".⁴²⁰ An exception

from this principle was made by the European Court of Justice in the recent judgment in *Metro v Commission*⁴²¹, where it held that formal notification is not required, when a renewal of an already granted exemption is sought. Besides the form, the principles shown in respect of negative clearances do apply here as well.

A notification with insufficient information is not able to effect the benefits of a valid notification.⁴²²

As already suggested, the notification has positive effects for exclusive dealing agreements.

The most important effect is provided by Article 15 (5) of Regulation 17: on an undertaking having notified its agreement, no fines can be imposed, even if the agreement is contrary to EEC Article 85 (1). This may have, for exclusive dealing agreements, far-reaching consequences. Taking into consideration that pursuant to Article 15 and 16 of Regulation 17, large fines up to one million ECU or more can be imposed, non-notification may have grave economic effects for the undertakings in question, all the more so as the vertical exclusive dealing agreements, not seldom, are made between large corporate entities and SMEs. Heavy fines may lead an SME straight into bankruptcy or total economic dependence, where a large undertaking may just add to the balance sheet another item for operating costs may even get a tax refund by doing so. Thus, a

substantial risk lies on the side of the SMEs, which may be quite often dependent on concluding the agreement in order to keep their competitiveness and meet the customers' demands.

Although the Commission in recent cases⁴²³ has sometimes refrained from imposing fines on a contracting partner who did not willfully agree to infringing clauses the residual risk can only be removed by notifying the agreement.

However, the protection under Article 15 (5) of Regulation 17 is removed where "the Commission has informed the undertakings concerned that after preliminary examination it is of opinion that Article 85 (1) of the Treaty applies and that application of Article 85 (3) is not justified"

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Another effect of notification that of the retroactivity, which can be granted by the Commission under Article 6 (1) of Regulation 17. "A retroactive exemption will render the agreement fully valid and enforceable for the period fixed by the Commission."⁴²⁵ On the other hand, it should not be disregarded that if the retroactivity is derived, the agreement is void ab initio pursuant to EEC Article 85 (2).⁴²⁶ Regarding these effects, notification is in practice most recommendable for clarifying the legal validity of exclusive dealing agreements.

These advantages are prevail by far over such disadvantages as, for example, requests for information by the Commission and publication in the Official Journal.⁴²⁷

(d) Infringement proceedings

There have been quite a few exclusive dealing agreements infringing EEC Article 85 (1), and as such not eligible for a block exemption or an individual exemption under EEC Article 85 (3). Good example therefore are exclusive dealing agreements with clauses which impede parallel imports. As the cases demonstrate, for such agreements frequently neither an application is made for negative clearance nor a notification submitted for an individual exemption.

In order to deal with them, the Commission is therefore dependent on information from third sources before initiate proceedings, beginning with fact- finding.

Fact-finding is of fundamental importance as far as the Commission's work is concerned, for enforcing procedure on firms, whose agreements are not in accordance with the competition rules and thus distort competition on the market.

Facts are obtained on various occasions as beside applications and notifications, there exists an abundance of other channels to obtain information, e.g. through announcements in newspapers, financial press, trade journals and, very importantly, the complaints made to the Commission by third parties.

For exclusive dealing agreements complaints are generally information sources which should not be underrated, when third parties express their grievances about refusal to supply certain goods.⁴²⁸

On the basis of - sometimes fragmentary - information the Commission may pursue the matter further by its own fact-finding powers. "In practice it is not unknown for their (the Commission's) officials to appear at 09.00 at the reception desk of your office and request to be given access to your filing cabinets and drawers. Of course, this only happens in a small minority of cases. But it is important to keep in mind what can happen."⁴²⁹ Although in such dramatic situations there is no entitlement to the presence of a lawyer, the Commission may nevertheless be prepared to wait while one is summoned.⁴³⁰

The Commission is generally entitled to obtain information under Articles 11 and 14 of Regulation 17. The officials of the Commission are especially authorised

- " - to examine books and other business records;
- to take copies of extracts from the books and business records;
- to ask for oral explanation on the spot;
- to enter any premises; land and means of transport of undertakings".⁴³¹

However, within the Commission's right of information certain documents are privileged (doctrine of privilege) such as correspondence between a client and an independent (not staff) lawyer, although it has to be remembered that this principle applies only to correspondence relating to the defence of the client after initiation of proceedings by the Commission.⁴³²

The investigation of the Commission can be carried out by agreement (Article 14 (1) and (2) of Regulation 17), or can be carried out formally (Article 14 (3) of Regulation 17).

If an undertaking does not supply the requested information requested, the Commission may take a decision under Article 11 (5) of Regulation 17. Failing to comply with such a decision entails fines for the undertaking concerned pursuant to Articles 15 and 16 of Regulation 17.⁴³³ A

decision imposing fines may be challenged under Article 17 of Regulation 17 (see below).

3. The Decisions of the Commission

(a) "Positive" decisions

(i) Negative clearance

It should introductorily be said that all Decisions of the Commission have to be taken subject to the general principles of law and fundamental rights as well as in accordance with the procedural rules of the Commission.⁴³⁴

As Article 2 of Regulation 17 provides that "the Commission may certify", the Commission has administrative discretion when delivering the decision. A decision granting negative clearance is a final decision.⁴³⁵

However, in this context some elements of legal uncertainty should not be overlooked.

To begin with, there are the facts to be considered.

Article 2 of Regulation 17 lies down that the Commission shall decide "on the basis of the facts in its possession".

Even if a decision is based on complete information about the case, changing circumstances may soon make it worthless. Connected thereto is a substantial uncertainty which should not be underestimated by the parties, about the question as to which changes of circumstances do have and do not have effects on the decision. This is all the more important as the decision may at any time be reconsidered by the Commission. The principle of *res judicata* does not apply to decisions on negative clearance.⁴³⁶ Any complaining person or incidental investigations may convince the Commission to re-examine an agreement.

Moreover, the case can be taken up before national courts in order to review the agreements under EEC Article 85 (1).⁴³⁷ A national court may take the Commission's view into consideration, but there is no legally binding rule that the national court should be bound by the Commission's decision.⁴³⁸

Another aspect to consider is that the decision granting a negative clearance under EEC competition law is not likely to be of great value when stricter provisions of national law apply.⁴³⁹

As held by the European Court of Justice in the *Perfumes* cases, the negative clearance will not prevent from applying (stricter) national competition law.⁴⁴⁰

There is, in addition, the problem of uniformity to be considered in the decisions of the Commission:

"A decision may at the same time give negative clearance to one agreement and exemption for another, or, for example, give negative clearance to one part of a distribution system, whilst granting exemption to the remainder."⁴⁴¹

This quoted critical view seems to neglect the fact that the Commission stresses the importance of the detailed economic circumstances in a case-by-case examination, whereby comparisons of alleged unequal treatment become difficult. As for the rest, the Commission - as all authorities - stands committed to the principle of legal certainty.⁴⁴²

(ii) Individual exemptions

A second matter to consider relates to decisions granting individual exemption under EEC Article 85 (3). A decision granting an individual exemption declares the prohibition of EEC Article 85 (1) not applicable.

As to all its decisions, the Commission has abide by certain procedural requirements.⁴⁴³

If an individual exemption is granted, the nullity of EEC Article 85 (2) does not apply; under Article 6 of Regulation 17 the Commission has "to specify the date from which the decision shall take effect". Article 8 (1) of Regulation 17 provides that the decision "shall be issued for a specified period".⁴⁴⁴ Under Article 8 (2) the Commission is empowered to revoke or amend its decision on the basis that the requirements of Article 8 (3) (a)-(d) are met.⁴⁴⁵

A decision granting an individual exemption provides the parties concerned with more protection than a negative clearance.

Firstly, the decision "can be relied on as against a third party."⁴⁴⁶ Also the Commission is not entitled to re-examine the agreement; only a revocation or amendment is permitted, if the requirements of Article 8 (3) of Regulation 17 are fulfilled.

Secondly, the question arises, if an exemption under EEC Article 85 (3) provides protection against stricter provisions of national law or whether the agreement has to meet both the requirements of Community and national law (the so-called double-barrier theory).⁴⁴⁷ In this respect, the status of the individual exemption is still unclear and contested.⁴⁴⁸ Judging at least from discussion and opinions on the matter, it seems that with difference to negative

clearances, it is not absolutely clear whether stricter provisions of national law apply off-hand and shall override EEC competition law.

The Commission has explained that national authorities of the member states are bound to respect Community decisions and to refrain from applying the stricter standards of national law.⁴⁴⁹ With respect to block exemptions which place certain types of agreements outside the scope of application of EEC Article 85 (1), there remain still many questions which could be raised. For example how do national competition rules which are stricter than EEC competition rules relate to the legal dimensions of block exemption when national rules would happen to be stricter than the comparable EEC rules.

In recital (19) of Regulation 1984/83 the Commission indicates that "the application and enforcement of such national laws or measures must therefore be regarded as compatible with this Regulation."

It remains, however, unclear why a block exemption, which most of all is meant to reduce the administrative expenses for a multitude of agreements, but would otherwise require individual decisions, should be treated as different from an individual exemption.

With these considerations we will conclude the point "individual exemptions" and will turn to the informal settlements.

(iii) Informal settlements

The two preceding sections of the present study were on the formal ways in which the Commission may deal with an agreement.

Beside that, "for many years the Commission has also attempted to settle informally cases where parties have applied to it for negative clearance or notified to it for individual exemption".⁴⁵⁰

For exclusive dealing agreements the most relevant form of informal settlements are the "comfort letters".⁴⁵¹ As many hundreds of agreements are notified to the Commission each year⁴⁵², it seems sensible that the Commission attempts to settle quite a few of them without taking a formal decision. Instead of taking a formal decision the Commission often writes a simple letter (a so-called "comfort-letter") to the parties, informing them that on the facts in its possession it sees no need to take action under EEC competition law.⁴⁵³

Recently, the Commission, in addition to "comfort letters", has developed a more formal type to enhance the declaratory value, hereinafter referred to as a "formal comfort letter".

The comfort letters, however practical they may be for the Commission to close a file, involve several problems for the parties in question.

Firstly, it should be considered that a comfort letter may have thoroughly positive effects for the parties. The agreement remains notified, and the protection from fines continues under Article 15 (5) of Regulation 17.

However, the legal situation remains unclear including the application of (stricter) provisions of national law by national authorities.⁴⁵⁴

Secondly, it can be said that with reference to a re-examination by the Commission itself, the general legal principles of legal certainty and non venire contra factum proprium⁴⁵⁵ have to be observed, and reconsideration is to be admitted only when there is a material change in circumstances or incomplete or wrong information was supplied.⁴⁵⁶

Thirdly, it must be taken into account that the interests of third parties are only insufficiently considered.

Under Article 19 (3) of Regulation 17 the Commission is bound to publish a summary in the Official Journal of the

European Communities and give third parties the opportunity to be heard. This is not provided when the Commission sends a "simple" comfort letter to the parties.

In order to improve the legal quality of the comfort letters, the Commission recently developed the "formal comfort letter". This is issued after the publication of a summary of the agreement in the Official Journal, so that third parties have an opportunity to be heard.⁴⁵⁷

However, the problems of stricter provisions of national law and the value of a formal comfort letter in a national Court proceedings still remain unsolved.

Therefore, the question of the parties being entitled to enforce a decision continues to be of substantial importance (see section 4 below).

(b) "Negative" decisions relating to the termination of infringements; fines.

Article 3 of Regulation 17 empowers the Commission that where it finds undertakings acting contrary to EEC Article 85 or 86 "it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end".

As we have seen, the Commission has in quite a few cases on exclusive dealing agreements required the parties to end an infringement, especially where export bans were in question.⁴⁵⁸

Under Article 3 of Regulation the Commission is also entitled to order positive measures to terminate the infringement.⁴⁵⁹ In addition to that the Commission "may by decision impose on undertakings or associations of undertakings fines"⁴⁶⁰ or periodic penalty payments.⁴⁶¹ In several cases referring to exclusive dealing agreements the Commission has up to now imposed substantial fines on undertakings (see Chapter 5 above); especially export bans have been severely punished with a tendency to increase amounts of the imposed fines.⁴⁶²

With these decisions the infringement proceedings themselves have acquired growing importance for exclusive dealing agreements.

In the light of this situation, it is, in practice, imperative to submit, especially in cases of doubt, a notification under Article 15 (5) of Regulation 17 with the benefit that as a result no fines can be imposed.

It can in conclusion be noted that these "negative" decisions equally require certain rules of procedure to be observed by the Commission.⁴⁶³

(c) Interim decisions

As already pointed out, the question of time may be very important for an undertaking which is party to an exclusive dealing agreement, as the effective marketing of products is involved in the implementation of the agreement. Above all, sectors with fast innovation, e.g. the clothing industry, electronics industry, are dependent on decisions within reasonable time. If the proceedings pend for too long, even a positive decision may be without value; but the time element is also relevant when the Commission initiates infringement proceedings. The sooner an infringement is ended, the more effective is the decision, as the undertaking is not able to gain considerable economic benefits from the infringement.

Hence, the question of the Commission being empowered to take interim decisions has been the subject of long-standing debates. In the judgment in **Camera Care v Commission**⁴⁶⁴ the ECJ put an end to the debate when it held that the Commission has powers to take interim measures with relevance to the termination of infringements under Article 3 of Regulation 17.

The Commission has since then passed three Decisions on interim measures: **Ford Werke AG No.1 (Interim measures)**⁴⁶⁵, **ECS/AKZO**⁴⁶⁶ and **BBI/Boosey and Hawkes**.⁴⁶⁷

Although this approach is commendable, there are nevertheless many more exclusive dealing agreements awaiting a "positive" decision for granting negative clearance or an individual exemption.⁴⁶⁸ In respect of these, the Commission is entitled to pass only a provisional Decision under Article 15 (6) of Regulation 17. An interim measure seeking a favourable decision cannot be taken. Therefore exclusive dealing agreements depend entirely on the Commission providing a Decision within a(n) (economically) reasonable time.⁴⁶⁹

4. Judicial review by the European Court of Justice:
the judgments of the European Court of Justice.

(a) General remarks

All decisions giving cause for complaint may be challenged before the European Court of Justice. Under Article 172 of the EEC Treaty and Article 17 of Regulation 17, the Court has unlimited jurisdiction to review a decision, even where administrative discretion is concerned, the administrative discretion can be replaced by the Court's own discretion.⁴⁷⁰

It should be remarked that for all types of actions there are certain procedural requirements to be fulfilled, as e.g. time limits under EEC Article 173 (3), locus standi under EEC Article 173 (2). The present study will refrain from explaining these provisions in detail⁴⁷¹; it will concentrate on the effects relate to exclusive dealing agreements.

(b) Action for annulment: EEC Articles 173, 174

This action applies, as provided by EEC Article 173, to all "acts of the Council and the Commission other than recommendations of opinions". As a result with respect to exclusive dealing agreements, annulment is regularly sought for decisions terminating infringements and/or imposing fines on the parties in question; but annulment may as well be sought for a decision granting an individual exemption,⁴⁷² or refusing an individual exemption or a negative clearance.⁴⁷³

An important aspect in this context is the question, whether a comfort letter may be challenged, and the Commission may thus be forced to take a (formal) decision.

Where a notification is concerned, the Commission would deal with it anyhow only on a comfort letter basis, on the

premises that the parties agree to that, otherwise a decision will be passed.⁴⁷⁴ In cases referring to negative clearance, the Commission regularly writes its comfort letters, with or without consent of the parties.

On the grounds detailed above, it may for the parties of an exclusive dealing agreement be very important, to obtain a formal decision and not a comfort letter. The comfort letters are, as shown by the Court's decision in the "Perfumes" Cases⁴⁷⁵, usually not looked upon as "acts" of the Commission.⁴⁷⁶

This does not seem to be unproblematic in the light of the judgment of the European Court of Justice in **IBM v Commission**, where the ECJ held on the definition of acts:

"Any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be object of an action under Article 713 for a declaration that it is void".⁴⁷⁷

It has already been mentioned that even the comfort letters are in a way binding (e.g. under the principle of legal certainty), and effect even considerable changes in the legal position of the parties concerned, or third parties who are, where simple comfort letters are in question, deprived of a right to be heard. It is thus it is not perfectly understandable why comfort letters should not be

considered as legally relevant acts, all the more when they may implicitly or otherwise inspire certain legally relevant conclusions with possible effects on the rights and obligations of known or unknown parties, while depriving an applicant or third parties from a right to challenge them and to be heard on them.⁴⁷⁸

It remains to be seen how in this respect the European Court of Justice will develop its practice.

(c) Action for failure to act (EEC Article 175)

Whereas EEC Articles 172 and 173 enable actions against acts of the Commission, EEC Article 175 provides for an action against the Commission's failure to act. With reference to exclusive dealing agreements it is important to examine whether the Commission can be obligated to continue proceedings up to the stage of a final decision. As shown above, this point is especially relevant where comfort letters are concerned. In **GEMA v Commission**⁴⁷⁹ the ECJ made a general statement that under Article 3 of Regulation 17 neither the parties of the agreement nor third party are authorised to obtain a final decision from the Commission; but under Article 2 of the Regulation 17 a different legal reasoning may apply.

In *Hoffmann-La Roche v Commission*⁴⁸⁰ the ECJ has indicated that, if Hoffmann-La Roche had wanted to know its position under EEC Articles 85 and 86, it should have applied for a negative clearance under Article 2 of Regulation 17. This decision is important for exclusive dealing agreements, when a negative clearance is sought. Important is also the question whether the Commission can be obligated to pass a formal decision instead of sending a comfort letter.

There is thusfar no definite decision on this point. The obligation of the Commission to issue a final decision instead of sending a comfort letter is not altogether clear, in spite of the stipulation in EEC Article 175 that the Commission by not acting, may commit an "infringement of (the) Treaty". Nor is it yet clear how far the Court will develop its practice as found in *Hoffmann-La Roche*. Although it would be of much advantage for the parties of agreements and third parties (e.g. those who are not supplied with the goods they request), the obligation of the Commission to pass on to a final decision is currently "still in doubt, but highly unlikely".⁴⁸¹

(d) Interim relief

When considering actions brought before the Court of Justice, it is important to emphasise that under EEC Article 185 they are not to have suspensory effects. This is relevant especially where fines are imposed as extraordinary expenses for the undertakings.

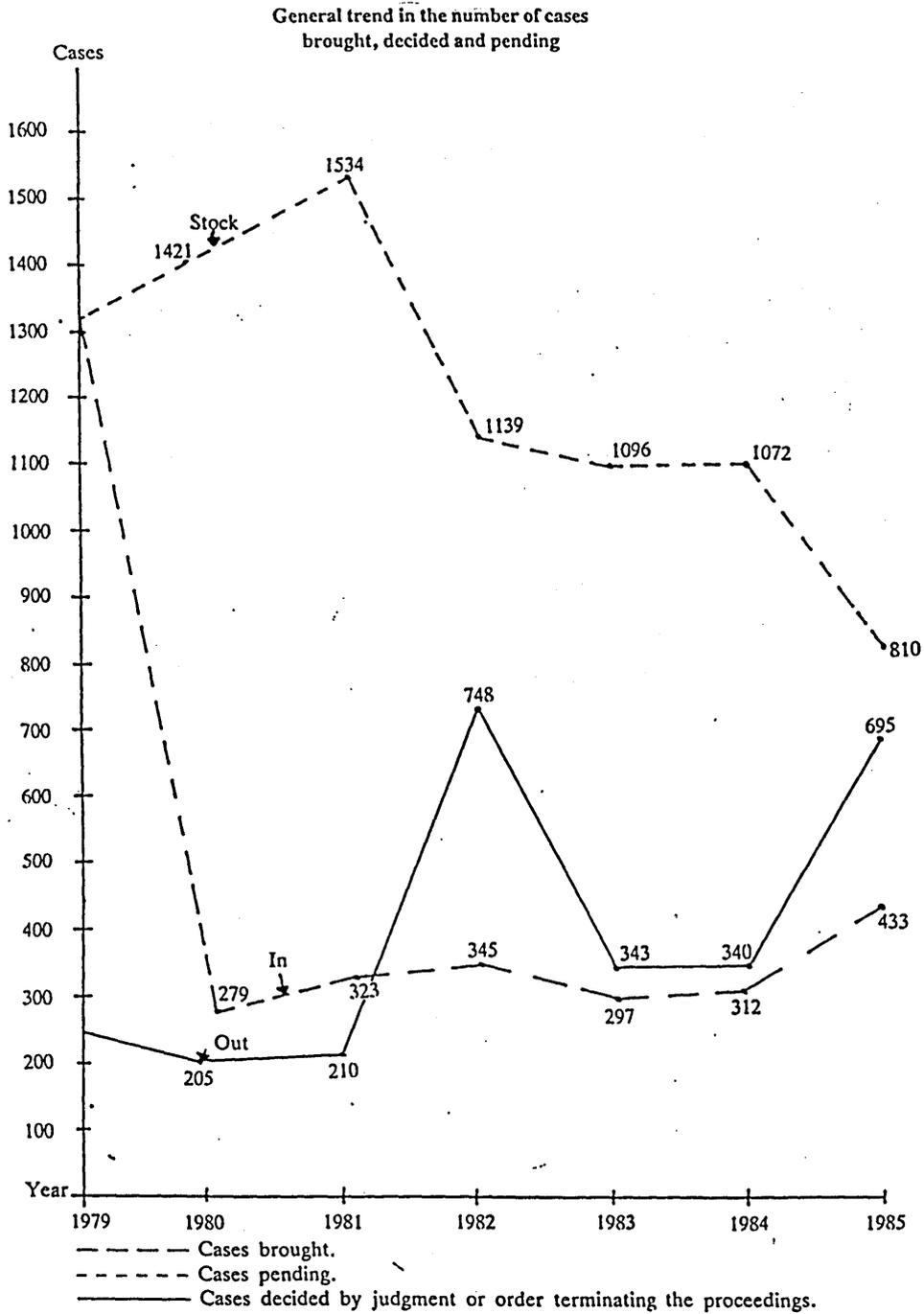
Under EEC Article 185, 2 "the Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended". And EEC Article 186 provides that "the Court of Justice may in any cases before it prescribe any necessary interim measures". These provisions empower the Court to provide interim measures, but there is a substantial limitation. The Court can only provide these measures in a case that is already pending.

In respect of exclusive dealing agreements it has the effect that the parties cannot go directly to the ECJ for a decision, e.g. on a comfort letter, as these interim measures can only be sought when a case is already pending.⁴⁸² Thus, interim measures do not grant relief also in cases where the Commission's Decision is requiring too much time. However, they may prove to be useful in cases, where the court proceedings require considerable time.

Before the establishment of a Court of First Instance, cases were pending for a longer time and the duration of proceedings was increasing. This is explained, among other reasons, also by the increasing number of cases brought before the Court.

In 1953 were four in 1973 already 192 cases were instituted. 483

The following graphs show recent developments:



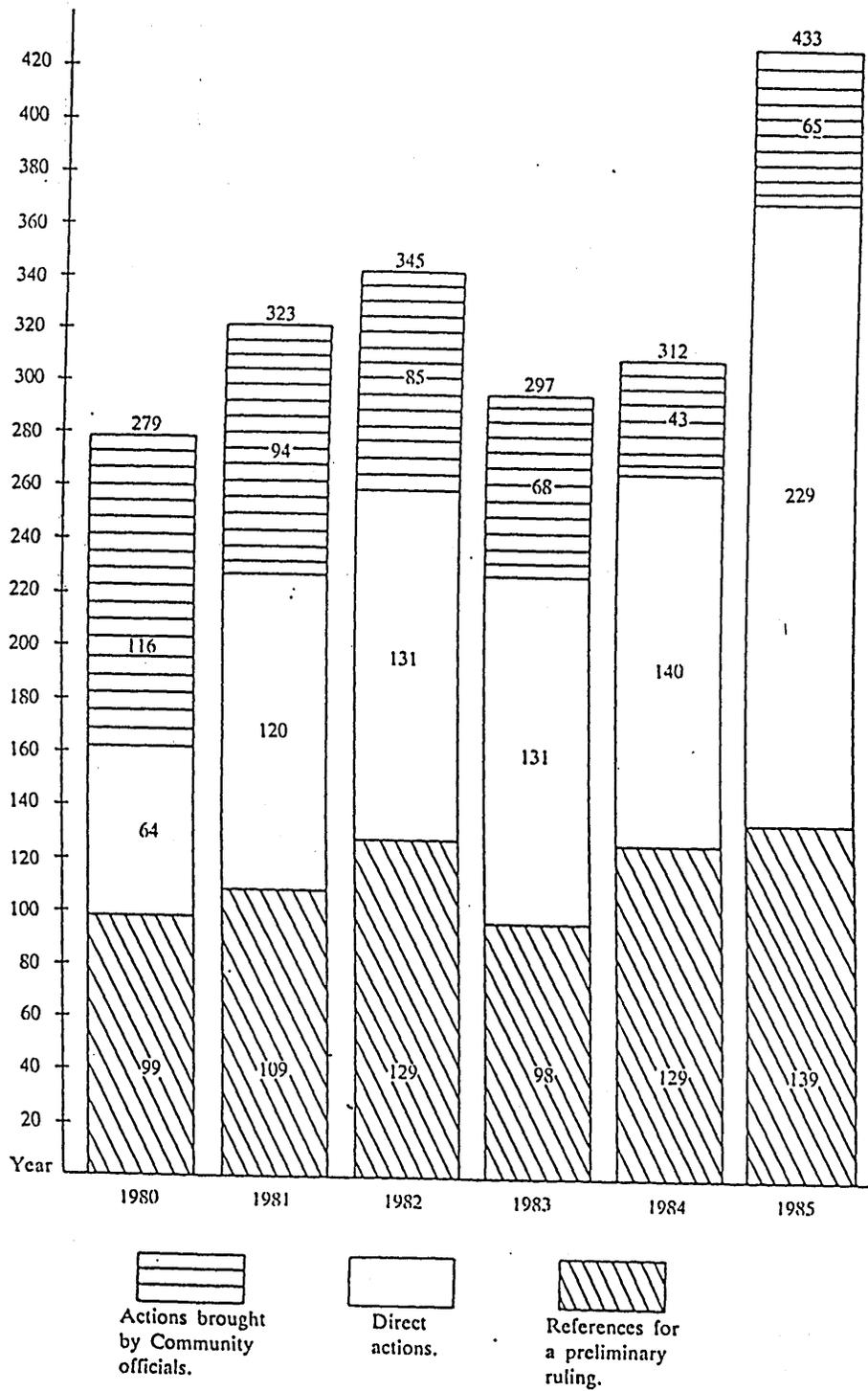
In 1980/81, 112 cases pending belonged to 10 groups of related cases.

In 1982, 691 cases pending belonged to 8 groups of related cases.

In 1983/84, 617 cases pending belonged to 3 groups of related cases.

In 1985, 237 cases pending belonged to 2 groups of related cases.

Trend in the number of cases brought



Source: Synopsis of the work of the Court of Justice of the European Communities in 1984 und 1985 and record of formal sittings in 1984 and 1985, Luxembourg 1987, p. 16 and 17.

In order to improve the situation, the Single European Act⁴⁸⁴ provides for the establishment of a Court of First Instance (already in action since October 1989):

"The second court must ease the workload of the EC's current Court of Justice, which has a backlog of cases, many of which wait up to 22 month for a final ruling."⁴⁸⁵ However, the European Community agreed to keep dumping cases out of the second Court's jurisdiction, thus "the new 12-judge court will handle other unfair competition cases, disputes over state subsidies to ailing industries, steel output and EC staff cases."⁴⁸⁶

It is to be expected that the exclusive dealing agreements too will benefit from the new Court and from expedited proceedings.⁴⁸⁷

5. Enforcement of the decisions of the Commission and the European Court of Justice

In order to complete the procedural review the present study includes also the enforcement of the decisions.

Concerning the enforceability of the decisions of the Commission, Article 192 of the EEC Treaty provides:

"Decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than states shall be enforceable. Enforcement shall be governed by the rules of civil procedure in force of the state in the territory of which it is carried out ..."

From this provision the conclusion can be drawn that only decisions imposing a pecuniary obligation are enforceable. It can furthermore be concluded that other decisions, e.g. under Article 3 of Regulation 17, are not enforceable. The enforceability of decisions enhances the importance of the Commission power to impose fines on the undertakings concerned.

As to the enforceability of judgments of the European Court of Justice, the same principles prevail, as EEC Article 187 provides that the judgments of the Court are enforceable pursuant to EEC Article 192.

Therefore, the power to impose fines is an important measure in order to enforce European competition law. This aspect has been considered by the European Court of Justice too. It has emphasised the function of fines as deterrents and ruled:

"Article 15 of Regulation 17 does not limit the imposition of fines exclusively to cases of recurrence of infringements already found to have taken place and forbidden by the Commission under Article 3. Such limitation of Article 15 would considerably reduce the deterrent effect of fines".⁴⁸⁸

This view was developed further in *Pioneer*⁴⁸⁹, where it was held that the Commission must ensure the necessary deterrent effect of the measures, especially where infringements, particularly harmful to the competition principles of the Community, are concerned. Taking these points into consideration, the Commission has continued to raise the amounts of imposed fines.

With respect to exclusive dealing agreements, substantial fines were imposed in *John Deere*⁴⁹⁰, (two million ECU), *Tipp-Ex*⁴⁹¹ (400,000 and 10,000 ECU), and *Sandoz*⁴⁹² (800,000 ECU).

It is noteworthy that these decisions all deal with export bans and the prevention of parallel imports, showing once more the great importance which both the ECJ and the Commission attach to the unobstructed movement of goods between the member states.

P A R T III

CHAPTER 7

Conclusions

Trends in EEC competition law with reference to exclusive dealing agreements; adaptation to economic circumstances; time required for decision taking by the Commission and the European Court of Justice; is the current system satisfactory?

An objective the European Community is to ensure the economic and social progress of the member states by removing national barriers and by instituting an integrated Common Market.⁴⁹² In this framework the Commission emphasises the important function and responsibility of competition policy, to ensure the complete opening of the markets (free movement of goods) and generating the expected economic effects.⁴⁹³

Thus, with respect to competition policy, the principle purpose of competition law, especially "of Articles 85 and 86, is to serve as instruments of market integration."⁴⁹⁴

The decisions mentioned earlier in the present study show that, in exclusive dealing agreements, the Commission found especially clauses obstructing parallel imports and imposing export bans as being contrary to EEC Article 85, and contrary to the purpose of an integrated Common market. The Commission has from the beginning pursued the principle that export bans are not to be tolerated, as recently in *Sandoz*⁴⁹⁵, as a good example to illustrate vividly this point.

The decisions refer not only to substantive law, but are also to be considered in respect of procedural law.

Where the latter is concerned, the decisions show that the Commission is determined to pursue their purposes not only by Decisions under Article 3 of Regulation 17, but also under Articles 15 and 16 of Regulation 17 to make them, wherever necessary, enforceable; the Commission explains its practice (especially with respect to the integrated Common Market in 1992) with emphasis.

The position of the Commission towards export bans has throughout found the approval of the European Court of Justice. The ECJ has adopted an equally determined attitude. Moreover, in the judgments of the European Court of Justice, a distinct line of continuity can be made out.

As to export bans and territorial restrictions we may assume that as the Common Market is not yet fully integrated, firms may be tempted to indulge in such bans and restrictions; but we may ask whether they will continue to do so after 1992, when the internal market is expected to be completed. The view of the EEC authorities is sufficiently clear, and the infringing undertakings are in general no SMEs lacking adequate legal and other information. The prevailing situation can only be interpreted in terms that the infringing undertakings derive not unimportant economic benefits by agreed restrictions, to the point of inducing them to risk even more and more substantial fines.

With this and the establishment of the single integrated European market in 1992 in mind, we may consider as appropriate the determination of the EEC authorities to increase the amounts of fines in order to enhance the deterrent effects (and thus remove the economic profits).

Similarly harmful to competition have been, in the eyes of the Commission and the ECJ, exclusive distribution systems containing resale maintenance clauses.

These also have been uniformly found to be infringing EEC Article 85 (1), as the decision in *Hennessy/Henkell*⁴⁹⁶ in recent times shows. However, in respect of other restrictions on resale, the EEC authorities take a

comparatively liberal view, as e.g. the new block exemptions indicate.

The same may in general also be said for the selective distribution systems, although the Commission is closely scrutinising to see whether the selective distribution system is necessary for the marketing of the goods in question.

This approach has been evolved in the past and developed further in recent decisions, as e.g. in **Grohe and Ideal-Standard**⁴⁹⁷, but also in such decisions dealing with restrictions on resale, it can be observed that the Commission's attitude became quickly negative, when the selective distribution systems were abused and the restrictions effected export bans or similar infringements of competition law.

When reviewing these trends, and decisions delivered by the Commission and the European Court of Justice, it should not be disregarded that both authorities in a case-by-case examination closely take the economic circumstances and their effects into consideration. This manner of proceeding has led on the one hand to large fines for large corporate entities, e.g. **Sandoz** (above), but, on the other hand, to alleviations for SMEs struggling to keep their competitiveness.

With regard to policy towards SMEs the trend has been to the effect that because of their important role within the competition system of the EEC, the Commission has intensified its efforts to improve the competitive position of the SMEs.

Having ascertained that one of the SMEs' main problems has been the lack of adequate information, the Commission has tried to improve the situation and continues to do so.

A further problem concerning all undertakings, the time problem, has been recognised as such by the EEC authorities.

It is essential to recall that the effectiveness of competition law, and connected thereto competition policy, depends above all upon the time requested for decision taking. This applies to decisions of both the Commission and the European Court of Justice.

The time factor is relevant for the parties of the agreement as well, for the termination of infringements.

Pending a decision, the parties of the agreement do not have the necessary legal certainty which they need for the marketing of their products, while the infringing parties

continue to benefit from their unlawful behaviour. The developments show that the EEC authorities are aware of these problems. As a measure indirectly related thereto, the Commission has issued several new block exemptions in order to reduce the need for individual notifications and applications.

At the level of judicial matters, the establishment of the new Court of First Instance is expected to reduce the workload of the ECJ. However, with 1992 approaching even more cases may come up with aspects relating to EEC competition law, as more undertakings will expend into transfrontier bi- or multi-lateral marketing.

It thus remains to be seen whether the adopted measures will really lead to shorter time periods required for the decision taking.

It may otherwise become inevitable to enlarge the relevant EEC authorities in order to endow the Community citizens after 1992 with a functioning competition law capable to ensure fair competition in an integrated common market.

A P P E N D I X 1

N O T E S

The last figures in the notes refer to pages.

1. Christina Fulop, Competition for Consumers (1966), 3; see also Thomas Pawlikowski, Selektive Vertriebssysteme- Grenzen und Möglichkeiten einer Freistellung nach Artikel 85 Abs. 3 EWGV (1983), 12 et sequ.
2. The latter way will be set aside for the present study, because there is no necessity for agreements between the parties and therefore no relevance to exclusive dealing agreements.
3. Richard Whish, Competition Law (1985), 415.
4. Dieter Ahlert (ed.), Vertragliche Vertriebssysteme zwischen Industrie und Handel (1985), 34; translation by the author.
5. Richard Whish op. cit. (n. 3), 413.
6. Derek Knee and David Walters, Strategy of Retailing Theory and Application (1985), 15; see also Christian J. Meier, Der selektive Vertrieb im EWG-Kartellrecht, 1979, 1st volume, 32 et sequ.
7. Richard Whish op. cit. (n. 3) 417, 418.

8. For further details see Richard Whish, *ibidem*, 413, 414, on the problems of infringing EEC Article 86 see Wahé H. Balekjian, *Legal Aspects of Foreign Investment in the European Economic Community* (1967), 242 et sequ.; Dieter Ahlert *op. cit.* (n. 4), 450 et sequ.
9. *Ibidem*.
10. For details see Norman M. Selwyn, *Law of Employment* (3rd edn 1980) chapters 9, 10 for UK law; for German Law see Schaub, *Handbuch des Arbeitsrechts* 6th edn. 1987, paragraph 136.
11. See n. 8 ante.
12. An example of efficient vertical integration is provided by United Brands Co and United Brands Continentaal BV v Commission Case 27/76 (1978) ECR 207, (1978) 1 CMLR 429; details see also Richard Whish, *op. cit.* (n. 3), 414 referring to problems which began, where thirds became involved, and to the danger of monopolies (n. 6, p. 414). On the same problem see also Case 30/78 Distillers Co Ltd v Commission (1980) ECR 2229, (1980) 3 CMLR 121.
13. Dieter Ahlert, *op. cit.* (n. 4), 59 et sequ.
14. Dieter Ahlert, *ibidem*, 61 - 63.
15. For details see Richard Whish, *op. cit.* (n. 3), 412.
16. Richard Whish, *ibidem*, 415.

17. Ulrich Immenga/Kurt Markert/Herrmann Schaper/Walter Wichmann, *Selektiver Vertrieb und SB- Warenhäuser* (1982): Ulrich Immenga - *Selektive Vertriebssysteme im europäischen Gemeinschaftsrecht*, 57.
18. Studienvereinigung Kartellrecht e.V., *Neue Entwicklungen im EWG-Kartellrecht*, VI. Kartellrechtsforum Brüssel (1975), *Vertriebssysteme in EWG Raum* von Dr. Klaus Stöver, 99 et sequ.
19. This definition was used by C.W. Bellamy/Graham D. Child, *Common Market Law of Competition*, up to their 2nd edn (1979), paragraph 3-27. At paragraphs 8-01 et sequ. the term was defined with a wide meaning as an agreement between producer/supplier and intermediaries "under which restrictions upon trading activities are accepted by one or both parties" and also in Regulation 67/67 relating to "categories of exclusive dealing agreements".
20. See n. 23 post.
21. Richard Whish, *op. cit.* (n. 3), 458.
22. Richard Whish, *ibidem*, 457 with the "sulphuric acid example": a firm which produces sulphuric acid needs access to sulphates for the production and enters into agreements with a mining company which guarantees supplies for a certain time. In return the firm may agree not to buy raw materials from anyone else. This definition seems to be problematic against the background of the definitions used in Regulation 67/67, and its successors, Regulations 1983/83 and 1983/84.

23. See Ernst-Joachim Mestmäcker, *Europäisches Wettbewerbsrecht*, (1974) paragraph 24: "also Regulation 1983/83 referring to "Alleinvertriebsvereinbarungen"; about the different definitions see also Adolf Baumbach/ Wolfgang Hefermehl, *Wettbewerbsrecht*, 15th edn. 1988, § 1 Gesetz gegen den unlauteren Wettbewerb (UWG) paragraphs 735 et sequ. A complete different definition is found in Thomas Pawlikowski, *op. cit.* (n. 1), 29: Leading term is - deriving from a so-called anglo-american term - selective distribution. (citing between others Bellamy/Child at para 8-39 <n. 97>). He defines the limitation to one dealer in a certain area as the "extremest form of selective dealing which is called exclusive distribution <p. 29>; cf. Thomas Pawlikowski, *Zur Rechtsnatur des Selektivvertriebsvertrags, Wettbewerb in Recht und Praxis (WRP) 1983, 658 et sequ.*
24. Alfred Gleiss/Martin Hirsch, *Kommentar zum EWG-Kartellrecht*, 3rd edn. 1978, Article 85 (1) paragraph 233; see also Alfred Gleiss/Martin Hirsch (ed.) *Common Market Cartel Law* 3rd edn. 1981, Article 85 (1) paragraph 233.
25. C.W. Bellamy/Graham D. Child, *Common Market Law of Competition* 3rd edn 1987, paragraphs 6-001 et sequ. The described agreements are defined as "vertical agreements between a supplier and his intermediaries in the distribution sector under which restrictions upon their trading activities are accepted by one or both parties". This is similar to the definition given in the 2nd edn. *op. cit.* (n. 19), paragraph 8-01 for exclusive dealing agreements.

26. This term is used in Regulation 1983/83 which replaced Regulation 67/67, where the term "exclusive dealing agreements" was used.
27. Commission Notice on Regulations 1983/83 and 1984/83, OJ 1984 C 101/2.
28. Gleiss/Hirsch Common Market Cartel Law op. cit. (n. 24) Article 85 paragraph 16.
29. Gleiss/Hirsch, *ibidem*, Article 85 paragraph 16 and Introduction paragraph 38; see also Dieter Ahlert op. cit. (n. 4), 137.
30. Bellamy/Child op. cit. (n. 25) paragraphs 2-049 and 2-050; the various types will be pointed out in chapter 3 part 2.
31. *Ibidem*.
32. In the individual case the difference is not always easy to make out, especially where "competing manufacturers appoint each other as exclusive distributors or enter into cross-licensing agreements" Richard Whish, op. cit. (n. 3), 412. Both horizontal and vertical agreements may fall within Article 85 (1), details see Bellamy/Child op. cit. (n. 25) paragraph 2-018.
33. Dieter Ahlert, op. cit. (n. 4), 18 with examples; see also Gleiss/Hirsch, op. cit. (n. 24) Article 85 paragraph 16.
34. See n. 32 ante.

35. See § 433 Bürgerliches Gesetzbuch (BGB) (German) Civil Code for German law, Einheitliches Gesetz über den Abschluß von Internationalen Kaufverträgen über bewegliche Sachen vom 17.7.1973 (Uniform law on international sale contracts relating to movable property).
36. Dieter Ahlert, *op. cit.* (n. 4), 66, 67.
37. Res Burroughs AG and Deplanque & Fils Agreement, Burroughs AG and Geha-Werke GmbH contract JO 1972 L13/50, respectively JO 1972 L13/53, 1972 CMLR D67, D73; see also B. I. Cawthra, *Patent Licensing in Europe* 2nd edn. (1986), 68.
38. *Ibidem.*
39. For details see also Richard Whish, *op. cit.* (n. 3), 348 and 358.
40. Soergel/Siebert (ed.) BGB-Kommentar 11th edn. 1986, Vor § 433 BGB paragraph 57; Translation by the author, German original: "Lizenzverträge sind Verträge, durch die sich der Inhaber eines übertragbaren Immaterialgüterrechts zur Übertragung eines Rechts verpflichtet oder sich der Patentinhaber verpflichtet, dem Erwerber die Benützung oder Verwertung des Patents zu gestatten". Those contracts are defined as purchase contracts, or contracts similar to purchase contracts. Details see Hans-Rudolf Ebel, *Lizenzverträge nach EWG-Recht, Wettbewerb in Recht und Praxis (WRP)* 1985, 387; and Richard Whish, *ibidem*, chapter 13 (Intellectual property); see also § 15 (German) Patentgesetz and Bellamy/Child, *op. cit.* (n. 25), at paragraphs 7-001 et sequ.

41. The delimitation in the individual case may be difficult, because exclusive dealing agreements are sometimes found in combination with obligations re brand-image, marketing etc.
42. Case 161/84, 29 January 1986, Pronuptia de Paris Schillgalis GRUR Int. 1986, 193, NJW 1986, 1415 n. 15 (1986) 1 CMLR 414, 442. The same decision took Oberlandesgericht Koblenz 26 Oktober 1984, WuW/E OLG 345/-Eismann; see also Pronuptia Decision of the Commission 17 December 1986, OJ 1987 L 13/39.
43. Ibidem, Pronuptia Case (161/84) paragraph 15; about the differences between franchise arrangements and "more traditional distribution "Martin Mendelsohn, Distribution and Franchising Contracts, Essay/ Lecture on the occasion of the meeting of the British-German Jurists' Association, St. John's College Oxford 1987.
44. Decision of the Commission 17 December 1986 Re Yves Rocher OJ 1987 L8/49, 57 GRUR Int. 1987, 236, 244, n. 42 ante; see also Belmont European Law Office, The European Community: 1986 Review and 1987 Prospects, February 1987, 47.
45. Re Computerland Europe Financial Times 16.7.1987, OJ 1987 C 114/2; exemption granted OJ 1987 L222/12, GRUR Int. 1988, 577.
46. The Commission makes clear that restrictions for the franchisees, e.g. so-called location clauses, can be accepted for the advantages passed on to the consumers. This is the first decision where a distribution-franchising agreement was clearly not found illegal under the EEC competition law.

47. As shown above (n. 30) delimitation in the individual case may be difficult; it is even doubtful, if the definition of the European Court of Justice is lightening the distinguishment because of the similarity of the two distribution systems, especially were exclusive dealing agreements are connected with further obligations, e. g. use of a uniform business name. For details and criticism of the Court's definition see Kevekordes, Zur EWG-kartellrechtlichen Beurteilung von Franchise-Verträgen (Bemerkungen zum Pronuptia - Urteil des Europäischen Gerichtshofs) Der Betriebsberater (BB) 1987, 74, 75 n. 24.
48. Draft Commission Regulation on the application of Article 85 (3) of the Treaty of franchising agreements (1986) 4 CMLR 557 (Antitrust Supplement) and Sixteenth Report on Competition Policy (1987), point 31, see also Belmont European Law Office, The European Community: 1986 Review and 1987 Prospects, a competition/anti-trust overview, 19 August 1987, 3.
49. See n. 48 ante: Draft Regulation on franchising agreements Artikel 1 (2) (Rec.5); for definitions see also Jutta Kurtenbach, Die Beurteilung von Bezugs- und Alleinvertriebsbindungen nach § 18 GWB und Artikel 85 EWGV (1986), 2; Martin Mendelsohn, Distribution and franchising contracts op. cit. (n. 43); and Wolfgang Bauder, Die Selbständigkeit des Franchise-Nehmers NJW 1989, 78 et sequ.
50. See n. 48 ante: Draft Regulation on franchising agreements Artikel 1 (2) (Recs.2 & 4).
51. For further details about recent developments concerning franchising agreements see Kevekordes, op.

- cit. (n. 47) BB 1987,74; Herrmann-Josef Bunte, Franchising und EG-Kartellrecht, NJW 1986, 1406; and Bellamy/Child op. cit. (n. 25) paragraph 6-117 et sequ.
52. See Langen/Niederleithinger/Ritter/Schmid, *GWB Kommentar zum Kartellgesetz* 6th edn. (1982) § 18 paragraph EG 201 et sequ.; see also Richard Whish, op. cit. (n. 3) 417 et sequ.; and Baumbach/Hefermehl op. cit. (n. 23) § 1 UWG at paragraph 735 et sequ.
53. See Richard Whish, *ibidem*, 417.
54. Details about multipartite exclusive dealing agreements between manufacturers see Bellamy/Child, op. cit. (n. 25), paragraph 4-047 et sequ., especially 4-049, details about collective exclusive dealing paragraph 4-064 et sequ., details about multipartite exclusive dealing concerning raw materials paragraph 4-078 et sequ. and n. 30 ante; generally about horizontal agreements see also Richard Whish, *ibidem*, 280 et sequ.
55. Richard Whish, *ibidem*, 435 et sequ.; Bellamy/Child, *ibidem*, paragraph 6-002, 6-004 et sequ.
56. Bellamy/Child, *ibidem*, paragraph 6-002.
57. In practice such contracts are as usual found as contracts with mutual obligations. Agreements, which only restrict the principal are seldom found, especially where large concerns with enough market power are acting as principal (Bellamy/Child op. cit. (n. 18) in their 2nd edn at paragraph 8-03 described the exclusive agency agreements with only restric-

tions for the principal - this opinion has changed in the 3rd edn, *ibidem*, paragraph 6-002).

58. Commission Notice of 24th December on Exclusive Agency Contracts made with Commercial Agents JO (1962) 139/2921; Langen/Niederleithinger/Ritter/Schmid, *op. cit.* (n. 52) § 18 EG paragraph 227.
59. Commission Notice of 24th December on Exclusive Agency Agreements, see n. 58 ante; the ECJ confirmed this view in the Cases 40/73 etc. *Coöperative vereniging "Suiker Unie" UA v Commission* (1975) ECR 1663, 2005-2010, (1976) 1 CMLR 295.
60. See n. 58 ante; and also Gleiss/Hirsch. *op. cit.* (n. 24) Article 85 (1) paragraphs 235 et sequ.
61. Bellamy/Child *op. cit.* (n. 25) paragraph 6-004 et sequ.; Richard Whish *op. cit.* (n. 3), 435 et sequ. and the Commission's Decision in *Re Pittsburg Corning Europe JO* (1972) L 272/35, (1973) CMLR D2, where it was stated that the commercial agent has to be a true auxiliary, and one has to look at the true relationship between the parties, not at the label given to an agent by the parties.
62. Bellamy/Child, *ibidem*, paragraph 6-008. For those agreements also the term "exclusive supply terms" is used; see Whish *op. cit.* (n. 3), 419. The term "distributor" in this context is used in contrast to p. 10 above, with a wide meaning, standing generally for the contracting partner as the following link in the distribution chain.
63. See Bellamy/Child, *ibidem*, paragraph 6-009; Richard Whish, *ibidem*, 419.

64. Richard Whish, *ibidem*, 420.
65. Richard Whish, *ibidem* 451.
66. Richard Whish, *ibidem*, 419.
67. Cases 56 & 58/64 *Consten and Grundig v Commission* (1966) ECR 299, (1966) CMLR 418, GRUR Int. 1966, 580, EUGHE 1966, 322; for the Commission Decision see JO 1964, 2545, (1964) CMLR 489; Article 85 see Appendix 2; please note that all Articles refer to the Treaty establishing the European Economic Community, if not stated otherwise.
68. OJ 1983, L 173/1, as amended by corrigendum in OJ 1983, L 281/24.
69. Richard Whish, *ibidem*, 418; Bellamy/Child, *op. cit.* (n. 25) at paragraph 6-070; the term distributor in this context is also used with a wide meaning (see n. 62, *ante*).
70. Case 23/67 *Brasserie de Hæcht v Wilkin* (No.1) (1967) ECR 407, EUGHE. 1967, 543. In some circumstances even Article 86 of the EEC Treaty may be infringed; details see Bellamy/Child, *ibidem*, paragraph 6-071 and Richard Whish, *op. cit.* (n. 3), 442.
71. Re BP Kemi/DDSF OJ 1979 L286/32, (1979) 3 CMLR 684.
72. *Ibidem*.
73. In such cases it may be advisable to be on the safe side and apply for a negative clearance, a proceeding which will be pointed out further down in Chapter 6.

74. Regulation 1984/83 on Application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements OJ 1983 L 1735, as amended by corrigendum OJ 1983 L 281/24.
75. On the economic importance of selective distribution systems in general see Dieter Ahlert, Die Bedeutung des vertraglichen Selektivvertriebs für den freien Wettbewerb und die Funktionsfähigkeit von Märkten, Wettbewerb in Recht und Praxis (WRP) 1987, 215 et sequ.
76. Generally on dominant positions see Bellamy/Child ibidem, paragraph 8-001 et sequ.
77. Langen/Niederleithinger/Ritter/Schmid, op. cit. (n. 52) § 18 EG paragraph 233: difference to French Law, where the producer can be forced to handle similar distributors in a similar way.
78. Christian J. Meier, op. cit. (n. 6), 69, translation by the author.
79. Bellamy/Child op. cit. (n. 25) paragraph 24; a similar definition is found: Richard Whish op. cit. (n. 3), 183, 420; see also Mestmäcker op. cit. (n. 23) paragraph 24 VI 2; Baumbach/Hefermehl op. cit. (n. 23) § 1 UWG paragraph 741; Gleiss/Hirsch op. cit. (n. 24) Article 85 paragraph 295; Immenga op. cit. (n. 17), 57; but cf. the different definition of Pawlikowski n. 23 ante.
80. Bellamy/Child, ibidem, paragraph 6-132.

81. Details about industrial supply/purchase agreements see Bellamy/Child, *ibidem*, paragraphs 6-165 et sequ. and about sub-contracts paragraphs 6-170 et sequ.
82. Gleiss/Hirsch op. cit. (n. 24) Introduction paragraph 36.
83. EEC Article 85 (2) see Appendix 2.
84. Gleiss/Hirsch op. cit. (n. 24), Article 85 paragraph 16.
85. For German Law see Articles 27, 28 Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB).
86. See Article 28 EGBGB.
87. Ulrich Immenga/Ernst-Joachim Mestmäcker, *Kommentar zum GWB (1981) § 13*, paragraphs 8 et sequ.; see also Wernhard Möschel, *Das Recht der Wettbewerbsbeschränkungen (1983)*, § 6 paragraph 345 et sequ.
88. Bellamy/Child op. cit. (n. 25), paragraph 6-003.
89. See n. 58 ante.
90. Commission Notice on Exclusive Agency contracts paragraph II see n. 58 ante.
91. See n. 89 ante; for further details about the difference between a commercial agent and an independent trader see paragraph (b) ante.
92. Commission Notice n. 58 ante, paragraph I.

93. Case 32/65 Italy v Council and Commission (1966) ECR 389, 407 - 408, EuGHE 1966, 458, 467, 484.
94. Cases 56 & 58/64 Consten and Grundig v Commission, n. 67 ante.
95. Re Pittsburg Corning Europe, n. 61 ante.
96. Bellamy/Child op. cit. (n.25) paragraph 6-006.
97. Re Formica OJ 1973 L272/35,38, (1973) CMLR D2; see also n. 61 ante.
98. Cases 40/73 etc. Coöperative Vereniging Suiker Unie UA v Commission see n. 59 ante; for the Commission's decision OJ 1973 L140/17, (1973) CMLR D65; also Ernst-Joachim Mestmäcker op. cit. (n. 23), paragraph 24 VII.
99. Re SCPA/Kali und Salz, OJ 1973 L217/3, (1973) CMLR D219, see also Article 3 of Regulation 1983/83.
100. OJ (1977) C 13/2, amended OJ (1977) C 56/5; see also Richard Whish op. cit. (n. 3), 435.
101. Gleiss/Hirsch (op. cit. n. 23) Article 85 paragraph 234; see also paragraph 241 for a synopsis of the cases referring to exclusive agency agreements; on problems where the Commission writes a "comfort letter" instead of taking a formal decision see chapter 6 (2) (a) (iii) below.
102. Case 56/65 Société Technique Minière v Maschinenbau Ulm (1966) ECR 235, 250, (1966) CMLR 257.

103. Case 23/67, Brasserie de Haecht v Wilkin (No.1), n. 70 ante, (1967) ECR 407, 415-416; Case 22/71, Beguëlin Import Co. v GL Import Export (1971) ECR 949; Case 8/74 Procureur du Roi v Dassonville (1974) ECR 837, 853, § 13, that the prices of the product in the different Member States are of significant importance when judging the agreement.
104. Case 23/67, Brasserie de Haecht v Wilkin (No.1), ibidem.
105. Cases 56 & 58/64 Consten and Grundig v Commission n. 67 ante.
106. For this special aspect of the case, which relates to trade marks and will therefore not be detailed in this study see Richard Whish (op. cit. n. 3, 259, 369 and Bellamy/Child (op. cit. n. 25) paragraphs 6-014 et sequ.
107. Commission's Decision JO (1964), 2545, (1964) CMLR 489.
108. This aspect of the Commission's and the Court's decision will be considered below, when detailing the exemptions (section 2 of Chapter 4 and 5).
109. See n. 105 and 67 ante.
110. Richard Whish op. cit. (n. 3), 439 and n. 30 ante.
111. Cases 56 & 58/64 Consten and Grundig v Commission, n. 105 and 67 ante, (1966) ECR 299, 342.
112. Details will be pointed out in section 2 of chapters 4 and 5.

113. This was firstly stated by the Commission in the Decision in Kodak JO 1970 L147/24, (1970) CMLR D19; see also Re Pittsburgh Corning Europe JO 1972 L272/35, (1973) CMLR D2, n. 61 ante. Also export bans imposed on the distributor were found contrary to EEC Article 85 (1) and void: e.g. see Case 19/77 Miller International v Commission (1978) ECR 131; for a synopsis of these cases see Bellamy/Child op. cit. (n. 25), n. 37 to paragraph 2-099. For infringements of EEC Article 86 see Richard Whish op. cit. (n. 3), 441, 493 et sequ.
114. Re the Distillers Company Ltd. OJ 1977 L50/16, (1978) 1 CMLR 400.
115. Case 30/78 Distillers Company Ltd. v Commission (1980) ECR 2229, (1980) 3 CMLR 121 n. 12 ante; cf. also Valentine Korah, Goodbye Red Label: Condemnation of Dual Pricing by Distillers (1978) 3 ELRev 62.
116. Case 56 & 58/64 Consten and Grundig v Commission, see n. 67 and 105 ante; cf. Case 28/77 TEPEA (Theal Watts) BV v Commission (1978) ECR 1391.
117. Consten and Grundig ibidem; for a synopsis of the decisions Case 22/71 Béguelin Import v G. L. Import Export (n. 103 ante); Case 8/74 Procureur du Roi v Dassonville (n. 103 ante); and Case 2/78 Commission v Belgium (1979) ECR 1761.
118. Re Zanussi SpA Guarantee, OJ 1978 L322/36, (1979) 1 CMLR 81.

119. On the question of restrictions on export outside the common market see Bellamy/Child op.cit. (n. 25) paragraph 6-027.
120. See n. 67 ante.
121. Ibidem, 344.
122. See n. 102 ante.
123. See especially Re Omega JO 1970 L242/22, (1970) CMLR D49, D 55; SABA (No.1) OJ 1976 L28/19, (1976) 1 CMLR D61, D74, the decision was confirmed on appeal by the European Court of Justice in Case 26/76 Metro SB Großmärkte GmbH & Co KG v Commission (No.1) (1977) ECR 1875, (1978) 2 CMLR 1; Re Goodyear Italiana SpA's application OJ 1975 L38/10, (1975) 1 CMLR D31 on unilateral agreements; and the early decisions on DRU-Blondel, JO 1965, 2194, (1965) CMLR 180; Hummel/Isbecque, JO 1965, 2581, (1965) CMLR 242; and Jalatte-Voss and Jalatte-Vandeputte, JO 1966, 37, (1966) CMLR D1.
124. First Report on Competition Policy (1972), point 55; cf. Case 13/61 Bosch GmbH v de Geus (1962) ECR 45, (1962) CMLR 1, EUGHE 1962, 67.
125. See also Richard Whish op. cit. (n. 3), 441; Alan Campbell EC Competition Law, A Practitioner's Textbook (1980), 213.
126. E.g. EEC v Brooke Bond Liebig Ltd. (Spices) OJ 1978 L53/20, (1978) 2 CMLR 116.

127. Re GERO-fabriek NV OJ 1977 L16/8, (1977) 1 CMLR D35; e.g. also Re Hennessy & Co and Henkell & Co Agreement OJ 1980 L383/11, (1981) 1 CMLR 601.
128. Re Omega, n. 123 ante.
129. Re Deutsche Philips, OJ 1973 L293/40, (1973) CMLR D241, cf. also n. 124 ante.
130. Case 26/76, Metro SB Großmärkte GmbH & Co KG v Commission (No.1) (1977) ECR 1875 at pp. 1908-1909, n. 123 ante.
131. Details on the various forms see Bellamy/Child op. cit. (n. 24) paragraphs 6-030 et sequ.
132. E.g. Re BMW OJ 1975 L29/1, (1975) 1 CMLR D44; SABA (No.1) n. 123 ante.
133. Re BP Kemi/DDSF see n. 71 ante.
134. "Spices" see n. 126 ante.
135. Re Goodyear Italiana SpA's Application OJ 1975 L38/10, (1975) 1 CMLR D31, n. 123 ante.
136. BP Kemi/DDSF see n. 71 ante.
137. Ibidem.
138. Re Kodak n. 113 ante.
139. However, each agreement has to be considered separately. In Re Kodak, *ibidem*, EEC Article 85 (1) was held to be infringed because of direct and indirect export restrictions, the bans on cross

supplies to other appointed dealers, i.e. restrictions on export and pricing to obstruct interstate exports.

140. Re Omega JO 1970 L242/22, (1970) CMLR D49, n. 123 ante.
141. Subsequently the Commission decided that selective distribution systems are appropriate for television, hi-fi and similar products (Re SABA No.1 OJ 1976 L28/19, (1976) 1 CMLR D61 n. 123 ante; high-quality watches and clocks (Re Junghans OJ 1977 L30/10, (1977) 1 CMLR D82).
142. Re Omega, ibidem (1970) CMLR at D55.
143. Ibidem.
144. For details on this aspect see Alan Campbell op. cit. (n. 125), 24 et sequ.
145. Re BMW m. 132 ante.
146. Case 26/76 Metro SB Großmärkte GmbH & Co KG v Commission (No. 1) (1977) ECR 1875, (1978) 2 CMLR 1, n. 123 ante.
147. For the Commission's preliminary Decision see SABA (No.1) n. 123 ante.
148. Case 26/76 Metro v Commission (No.1), n. 123 ante, (1977) ECR 1875,1904 paragraph 20.
149. Ibidem, at paragraphs 27 and 37.
150. Ibidem at paragraph 40.

151. Ibidem at paragraphs 36 et sequ.
152. Re Junghans OJ 1977 130/10, (1977) 1 CMLR D82, n. 141 ante; see also Case 27/76 United Brands Co. v Commission n. 12 ante, (1978) 1 CMLR 429, 431.
153. OJ 1967, 10.
154. Ibidem, introductory remarks.
155. Ibidem.
156. Not fit for the block exemption were agreements, where the distributor was appointed for the whole EEC, as the Commission stated in Re Duro-Dyne/ Europair OJ 1975 L29/11, (1975) 1 CMLR D62.
157. Case 53/75 Fonderies Roubaix Wattrelos SA v Societé Fonderies A Roux (1975) ECR 111, (1976) 1 CMLR 538.
158. Richard Whish op. cit. (n.3), 450.
159. Case 47/76 De Norre and de Clercq v NV Brouwerij Concordia (1977) ECR 65, (1977) 1 CMLR 378; and Case 1/70 Rochas v Bitsch (1970) ECR 515.
160. Article 2 (1) (a), (b) of Regulation 67/67, n. 153 ante.
161. Bellamy/Child 2nd edn. op cit. (n. 19) paragraph 8-46.
162. Case 22/71 Beguëlin Import Co. v GL Import-Export n. 103 ante, 960.
163. Cf. Re Junghans n. 141 ante.

164. See Re Omega n. 123 ante, (1970) CMLR D49, D57.
165. Cf. Case 26/76 Metro v Commission (No.1) n. 123 ante.
166. Introduction of Regulation 67/67, see n. 153 ante.
167. Richard Whish op. cit. (n. 3) 450 and n. 16.
168. E.g. Case 25/75 Van Vliet Kwasten-en Ladderfabriek v Dalle Crode (1975) ECR 1103; and the Commission Decision in Theal/Watts OJ 1977 L39/19, (1977) 1 CMLR D44 which was confirmed on appeal by the European Court of Justice in Case 28/77 TEPEA (Theal Watts) BV v Commission (1978) ECR 1391, see n. 116 ante.
169. Case 47/76 De Norre and de Clercq v NV Brouwerij Concordia (1977) ECR 65, (1977) 1 CMLR 378, n. 159 ante.
170. Richard Whish op. cit. (n. 3), 450.
171. However, problems may arise where agreements are exempted which infringe national law: details see Immenga/Markert/Schaper/Wichmann op. cit. (n. 17), Ulrich Immenga, *Selektive Vertriebssysteme im Europäischen Gemeinschaftsrecht*, 71, 79 et sequ.
172. Details will be pointed out in Chapter 6.
173. EEC Article 85 (3); for details see Richard Whish op. cit. (n. 3), 196 et sequ.
174. Ibidem, 196.

175. Article 8 (1) of Regulation 17, details see Chapter 6 below.
176. Article 8 (2) and (3) of Regulation 17.
177. See n. 59 ante.
178. See Chapter 4 (1) (b) ante.
179. The Commission's Decision see n. 107 ante.
180. See n. 67 ante.
181. Case 30/78 Distillers Company Ltd. v. Commission, see n. 12 ante; for the Commission's Decision Re the Distillers Company Ltd. see n. 114 ante.
182. Ibidem.
183. Ibidem.
184. Re Campari OJ 1978 L70/69, (1978) 2 CMLR 397.
185. Re Duro-Dyne/Europair n. 156 ante.
186. Re Junghans n. 152 ante.
187. Re EEC v Brooke Bond Liebig Ltd. (Spices) n. 126 ante.
188. Ibidem.
189. E.g. Re Kodak n. 113 ante.
190. Re Omega n. 123 ante.

191. Ibidem.
192. Ibidem.
193. Re BMW n. 132 ante.
194. Ibidem.
195. Case 26/76 Metro v Commission (No.1) n. 123 ante.
196. Ibidem; see also the review by Faull CMLRev 1985, 287 et sequ.
197. Re Transocean Marine Paint I OJ 1967 L163/10.
198. Re Transocean Marine Paint II OJ 1974 L19/18, (1974) 1 CMLR D11.
199. Case 17/74 Transocean Marine Paint Association v Commission (1974) ECR 1063, (1974) 2 CMLR 459.
200. Re Transocean Marine Paint III OJ 1975 L286/24, (1975) 2 CMLR D75; see also Transocean Marine Paint IV OJ 1980 L39/73.
201. Regulation 67/67 n. 153 ante.
202. JO 1970 C84/1 and OJ 1977 C313/3, (1976) 3 CMLR 648.
203. For details see ibidem.
204. Bellamy/Child 2nd edn. op. cit. (n. 19), paragraphs 2-61 et sequ.; see also Re Putz v Kawasaki Motors (UK) Ltd. OJ 1979 L16/9, (1979) 1 CMLR 448.

205. Case 5/69 Völk v Verwaecke (1969) ECR 295, (1969) CMLR 273.
206. Ibidem.
207. Details see Richard Whish op. cit. (n. 3), 190.
208. Re Aluminium Imports from Eastern Europe OJ 1985 L92/1; Fourteenth Report on Competition Policy, point 57, 64.
209. Ibidem.
210. E.g. Commission Notice on Exclusive Agency Contracts made with Commercial Agents, n. 58 ante; and Cases 56 & 58/64 Consten and Grundig v Commission n. 67 ante; see also Commission Decision in Re Formica, n. 97 ante.
211. Case 40/73 etc. "Sugar" n. 59 ante.
212. Case 31/80 L'Oréal v De Nieuwe AMCK (1980) ECR 3775, 3792, (1981) 2 CMLR 235.
213. Case 31/80 L'Oréal v De Nieuwe AMCK, ibidem; Case 99/79 Lancôme SA and Cosparfrance Nederland BV v Etos BV and Albert Heijn Supermart BV (1980) ECR 2511, 2536, (1981) 2 CMLR 164; see also Case 31/85 ETA Fabriques d' Ebauches SA v DK Investment SA and others ("Swatch") OJ 1985 C347/22, Sixteenth Report on Competition Policy, points 120, 126.
214. Re Pioneer Hi-Fi Equipment OJ (1980) L60/21, (1980) 1 CMLR 457.

215. Cases 100-103/80 etc. Pioneer High-Fidelity (GB) Ltd v Commission (1983) ECR 3045, see also Musique Diffusion Française (1983) ECR 1825, (1983) 3 CMLR 221.
216. Re Johnson & Johnson OJ 1980 L377/16, (1981) 2 CMLR 287.
217. Re Moët et Chandon OJ 1982 L94/7, (1982) 2 CMLR 166.
218. Case 86/82 Hasselblad v Commission (1984) ECR 883, Fourteenth Report on Competition Policy points 131 et sequ.; for the Commission's Decision see Camera Care Ltd. v Victor Hasselblad AB OJ 1982 L161/18, (1982) 2 CMLR 233.
219. See Case 86/82 Hasselblad v Commission, ibidem, Fourteenth Report on Competition Policy points 131, 152 et sequ. Once again the Court established that the imposed fines not only depend on the undertaking's turnover, but also on the severity of the infringements.
220. Ibidem, Fourteenth Report on Competition Policy, point 143.
221. Case 86/82 Hasselblad v Commission, n. 218 ante.
222. E.g. Res NAVEWA/ANSEAU OJ 1982 L167/39 & L325/20, (1982) 2 CMLR 193, also Re National Panasonic (UK) Ltd OJ 1982 L354/28, (1983) 1 CMLR 497; where the appeal was dismissed: Cases 96/82 etc. National Panasonic (UK) Ltd. and others v Commission (1983) ECR 3369, (1984) 2 CMLR 279, see also Pioneer v Commission n. 215 ante.

223. Re Polistil SpA and Arbois-Modelud Agreement OJ 1984 L139/9, (1984) 2 CMLR 594, Fourteenth Report on Competition Policy, point 66.
224. E.g. Re John Deere OJ 1985 L35/58, (1985) 2 CMLR 554, Fourteenth Report on Competition Policy, point 67, where fines of 2 million ECU were imposed on the producer, the American parent company, but no fines were imposed on the distributors as the Commission ascertained that they had not required the clauses; cf. Re Sperry New Holland OJ 1985 L376/21, Fifteenth Report on Competition Policy, 56 where the producer was fined with 750.000 ECU and the distributors were spared with similar reasons as in "John Deere". See also Seventeenth Report on Competition Policy, points 62 et sequ.
225. Re Sandoz OJ 1987 L222/28.
226. Re Tipp-Ex OJ 1987 L222/1, Financial Times 16th July 1987.
227. For a synopsis of the imposed fines see Bellamy/Child op. cit. (n. 25) paragraph 12-014.
228. N. 226 ante.
229. Ibidem.
230. See Res Polistil/Arbois n. 223 ante and Moët et Chandon (London) Ltd. n. 217 ante; cf. also Re Distillers Company PLC (Red Label) OJ 1983 C245/3 (1983) 3 CMLR 173, where price differences were permitted for a short period to bring the branded

goods out on the market (see individual exemptions, below).

231. Case 31/85 SA ETA Fabriques d'Ebauches v SA DK Investment and others ("Swatch") OJ 1985 C347/22, n. 213 ante, Fifteenth Report on Competition Policy, point 126 referring to the projected Europe-Guarantee.
232. See n. 118 ante.
233. E.g. Ideal-Standard's distribution system OJ 1985 L20/38, (on appeal Case 55/85); Ford Garantie Deutschland Thirteenth Report on Competition Policy (1984), points 104-106. Generally see Sixteenth Report on Competition Policy, point 56 with a synopsis of the previous judgments.
234. E.g. Case 86/82 Hasselblad v Commission n. 218 ante.
235. For a synopsis of the present fashionable measures see Bellamy/Child op. cit. (n. 25) paragraph 6-018.
236. E.g. Case 86/82 Hasselblad v Commission n. 218 ante; Re Windsurfing OJ 1983 L229/11, (1984) 1 CMLR 1, and the Court's confirming decision Case 193/83 Windsurfing international v Commission OJ 1986 C79/8, Fifteenth Report on Competition Policy, points 112-116.
237. Re Polistil SpA and Arbois-Modelud Agreement n. 223 ante.
238. Res Ivoclar OJ 1985 L369/1, Fifteenth Report on Competition Policy, point 59; Sole distribution

- agreements for whisky and gin (Distillers) OJ 1985 L369/19, Fifteenth Report on Competition Policy, point 58; La Maison des Bibliothèques, Fourteenth Report on Competition Policy, point 68, (1984) 1 CMLR 261.
239. Cases 43 & 62/82 VBBB and VBVB v Commission OJ 1984 C61/4, (1985) 1 CMLR 27, Fourteenth Report on Competition Policy, point 116.
240. See also Studienvereinigung Kartellrecht e.V. XI. Internationales EG-Kartellrechtsforum Brüssel (1986), Dr. Otto Schlecht - Aspekte deutscher und europäischer Wettbewerbspolitik, 5.
241. Fifteenth Report on Competition Policy, point 66.
242. Ibidem; see also Sixteenth Report on Competition Policy point 55 (VEB/Shell) with reference to indirect resale price maintenances and rebates.
243. Case 86/82 Hasselblad v Commission n. 218 ante.
244. Details see Bellamy/Child op. cit. (n. 25) paragraph 6-030.
245. Bellamy/Child, ibidem, paragraphs 6-028 and 6-031.
246. On this special problem see Grundig's EEC distribution system OJ 1985 L233/1 (on appeal); and Villeroy and Boch OJ 1985 L376/15. On restrictions on resale not found infringing EEC Article 85 (1), because of the minor importance of the market segments see Re Mitsui/Bridgestone Agreement OJ 1985 L369/1, Fifteenth Report on Competition Policy, point 60;

- see also Re German Spectacle Frames (1985) 1 CMLR 574, Fifteenth Report on Competition Policy, point 64.
247. Instituto Brasileiro do Café (IBC), Sixteenth Report on Competition Policy, point 54.
248. Re Carlsberg OJ 1984 L207/26, (1985) 1 CMLR 735.
249. Ibidem, 749.
250. Ibidem.
251. OJ 1986 C318/4, Sixteenth Report on Competition Policy, points 97-106.
252. Re Grundig's EEC distribution system OJ 1985 L233/1, which continued the European Court of Justice's and the Commission's attitude towards this industrial branch, n. 246 ante.
253. Re IBM Personal Computer OJ 1984 L118/24, (1984) 2 CMLR 342, Fourteenth Report on Competition Policy; the recent Decision in Computerland Europe (n. 45 ante) is not directly comparable in this context as it is referring to franchise agreements.
254. Re Murat OJ 1983 L348/20, (1984) 1 CMLR 219.
255. Cf. Case 31/80 L'Oréal v De Nieuwe AMCK n. 212 ante.
256. Re Villeroy & Boch OJ 1985 L 376/15, n. 246 ante, with reference to the other decisions on jewellery, computers, audio-video-equipment and newspapers in Fifteenth Report on Competition Policy, point 63.

257. Case 243/83 Binon SA & Cie v SA Agence et Messageries de la Presse (AMP), OJ 1985 C185/6, Fifteenth Report on Competition Policy, points 121-124: the Court held that in view of the peculiarities of the distribution of press products selective distribution systems are to be considered as appropriate and could be established without infringing EEC Article 85 (1).
258. See Re Junghans n. 141 ante.
259. Case 31/85 "Swatch" n. 213 ante.
260. On the question of a "market orientated" approach to selective distribution systems see generally Bellamy/ Child op. cit. (n. 25) paragraph 6-134 n.16 referring to Dr. Caspari "The Community's Competition Policy in relation to distribution agreements", speech delivered in Brussels 25 April 1985, noted by Faull (1985) ELRev.257; on SMH's "Swatch" production and marketing see also "Der Spiegel", 1989 (No.1), 70 et sequ.
261. Cases 209/78 etc. Van Landewyk v Commission (1980) ECR 3125, 3265.
262. See Res Grohe OJ 1985 L19/17 (on appeal Case 49/85) and Ideal-Standard OJ 1985 L20/38 (on appeal Case 55/85), n. 233 ante.
263. Case 107/82 AEG v Commission (1983) ECR 3151.
264. The Commission's Decision OJ 1982 L117/15, (1982) 2 CMLR 386.

265. Ibidem, the amount of the imposed fine was one million ECU.
266. Case 107/82 AEG v Commission n. 263 ante.
267. Case 26/76 Metro v Commission (No.1) n. 123 ante.
268. Case 107/82 AEG v Commission, n. 263 ante.
269. Cases 25 & 26/84 Ford v Commission (No.2) judgment of 17 September 1985, OJ 1985 C 281/4, Fifteenth Report on Competition Policy, point 125.
270. Re Distribution system of Ford-Werke AG (No.2) OJ 1983 L327/31, (1984) 1 CMLR 596. Prior to this Decision the Commission had adopted interim measures (Distribution system of Ford Werke AG (No.1) OJ 1982 L256/20, (1982) 2 CMLR 267). This interim Decision was quashed on appeal by the European Court of Justice on procedural grounds (Cases 228 & 229/82 Ford of Europe Inc. and Ford Werke AG v Commission (No.1) (1984) ECR 1129, (1984) 1 CMLR 649, see also Forteenth Report on Competition Policy points 122-124).
271. See n. 269 ante.
272. Ibidem, on EEC Article 85 (3) see below.
273. E.g. Re Peugeot-Talbot OJ 1986 L295/19, Sixteenth Report on Competition Policy, point 62; on the same problem see Fourteenth Report on Competition Policy points 70-71 (Fiat) and 72 (Alfa-Romeo).

274. Case 75/84 Metro v Commission (No.2) judgment of 22 October 1986, OJ 1986 C318/4, Sixteenth Report on Competition Policy, points 97-106.
275. See n.123 ante.
276. The Commission's Decision in SABA (No.2) OJ 1983 L376/41, (1984) 1 CMLR 676.
277. See n. 274 ante.
278. Ibidem, and Sixteenth Report on Competition Policy, point 98.
279. Ibidem, point 106.
280. See e.g. Re IBM Personal Computer OJ 1984 L118/24, (1984) 2 CMLR 342, n.253 ante, Fourteenth Report on Competition Policy point 63: where the Commission gave a negative clearance for IBM's selective distribution system based solely on objective criteria and admitted all dealers which met the requirements. Also the clause that no cross-supplies should be made to non-approved dealers was held not to fall within EEC Article 85 (1), it is to be distinguished from bans on cross-supplies.
281. Sixteenth Report on Competition Policy, point 25. On the important problem of agreements, which are exempted under EEC law (Article 85 (3)), but contravene national law, see Hermann-Josef Bunte/Herbert Sauter, EG-Gruppenfreistellungsverordnungen (1988), Einleitung (introduction) paragraphs 67 and 68.

282. Case 170/83 Hydrotherm Gerätebau GmbH v Compact de Dott. Ing. Mario Andreoli & C.S.A.S. (1985) 3 CMLR 224, Fourteenth Report on Competition Policy, points 137 et sequ.; see also Commission Notice on Regulations 1983/83 and 1984/83 (n. 291 post), II (2) (c).
283. Case 86/82 Hasselblad v Commission n. 218 ante.
284. Case 170/83 Hydrotherm v Andreoli n. 282 ante, 244, 245; ibidem, 245 for the interpretation of territorial scopes.
285. Case 86/82 Hasselblad v Commission n. 218 ante, also Fourteenth Report on Competition Policy, point 143.
286. Although it should not be left that the new Regulations contain many similar or identical provisions to which the cases referring to Regulation 67/67 may apply as well.
287. C.S. Kerse, EEC antitrust procedure 2nd edn. (1988), 43.
288. On Regulation 67/67 see Bellamy/Child 2nd edn. op. cit. (n. 19) at paragraphs 8-44 et sequ. It should be noted that pursuant to Article 7 of Regulation 1983/83 "in the period 1 July 1983 to 31 December 1986, the prohibition in Article 85 (1) of the Treaty shall not apply to agreements which were in force on 1 July 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions of Regulation No. 67/67/EEC."
289. OJ 1983 L173/1, as amended by corrigendum OJ 1983 L281/24.

290. OJ 1983 L172/5, as amended by corrigendum OJ 1983 L281/24.
291. Commission Notice on Regulations 1983/83 and 1984/83, OJ 1984 C101/2, I (1).
292. Ibidem.
293. Ibidem, II (1) (4).
294. Ibidem, II (1) (5).
295. For details see Bunte/Sauter op. cit. (n. 281).
296. For details and commentary on Regulation 1983/83 see Bunte/Sauter, ibidem; Bellamy/Child op. cit. (n. 25) paragraphs 6-044 et sequ.; Valentine Korah, Group Exemptions for exclusive Distribution and Purchasing in the EEC (1984) CMLRev, 53 et sequ.; Valentine Korah, Exclusive dealing agreements in the EEC - Regulation 67/67 replaced (1984), 6 et sequ.; see also Friedrich W. Klinkert, Selektiver Vertrieb -mit Artikel 85 Abs.1 EWGV vereinbar- und Alleinvertrieb nach der VO 1983/83, Wettbewerb in Recht und Praxis (WRP) 1986, 249.
297. Re Sole distribution agreements for whisky and gin (Distillers) n. 238 ante.
298. Re Siemens-Fanuc OJ 1985 L376/29
299. Fifteenth Report on Competition Policy, points 18 and 54.
300. Ibidem, see also n. 298 ante.

301. Re Sperry New Holland n. 224 ante.
302. Re Ivoclar n. 238 ante.
303. Fifteenth Report on Competition Policy, point 18.
304. N. 301 ante; see also the Commission Notice on Regulations 1983/83 and 1984/83 III (3).
305. Re Ivoclar n. 238 ante.
306. Ibidem.
307. Details see Recital (2), (12), of Regulation 1984/83 in connexion with Articles 3 (d), 9 and 13; see also Commission Notice on Regulations 1983/83 and 1984/83 OJ 1984/C101/2 Title IV 1 et sequ.
308. Richard Whish, op. cit. (n. 3), 455.
309. For details of the provisions see Bellamy/Child op. cit. (n. 25) paragraphs 6-072 et sequ.; for a commentary see Bunte/Sauter op. cit. (n. 281) and Valentine Korah, Exclusive dealing agreements in the EEC-Regulation 67/67 replaced op. cit. (n. 296), 63 et sequ.; see also Valentine Korah, Group exemptions for exclusive distribution and purchasing in the EEC, n. 296 ante.
310. Fifteenth Report on Competition Policy, point 19.
311. Ibidem.

312. Re Vereniging Exploitanten Benzinstation (VEB) v Shell, Sixteenth Report on Competition Policy, points 55 and 26, n. 242 ante.
313. Ibidem, point 55.
314. However, according to the Commission's advice, Shell modified some of its clauses: ibidem, point 26.
315. OJ 1985 L15; for a commentary on the particular clauses see Bunte/Sauter op. cit. (n. 281).
316. Ibidem, Recital (1).
317. OJ 198 C17/4.
318. Article 4 of Regulation 123/85.
319. In general on this block exemption and the detailed provisions see Bellamy/Child op. cit. (n. 25) paragraphs 6-153 et sequ.; generally on the permitted clauses see Fourteenth Report on Competition Policy, point 38.
320. Article 1 of Regulation 123/85.
321. Bellamy/Child op. cit. (n. 25) paragraph 6-155.
322. Fourteenth Report on Competition Policy, point 37.
323. Ibidem.
324. Fifteenth Report on Competition Policy, point 20.

325. Re British Leyland OJ 1984 L207/11, (1984) 3 CMLR 92, Fourteenth Report on Competition Policy, point 96; the Commission examined the case under EEC Article 86.
326. Ibidem.
327. Case 226/84 British Leyland (BL) v Commission and Merson OJ 1986 C318/4, Sixteenth Report on Competition Policy, points 119-122.
328. Re Distribution System of Ford Werke AG (No.2) OJ 1983 L327/31, (1984) 1 CMLR 596, n. 270 ante.
329. Cases 25 & 26/84 Ford v Commission (No.2) OJ 1985 C281/4, n. 269 ante.
330. Re Alfa Romeo, Fourteenth Report on Competition Policy, point 72, n. 273 ante.
331. Re Fiat, Fourteenth Report on Competition Policy, point 70, n. 273 ante.
332. On guarantees see p. 61 ante.
333. Sixteenth Report on Competition Policy, point 30.
334. Ibidem.
335. Re Aluminium Imports from Eastern Europe n. 208 ante.
336. Ibidem, Fourteenth Report on Competition Policy, point 58, where the Commission referred to its Decision in Re AEG agreement OJ 1982 L117/15, (1982)

- 2 CMLR 386, n. 265 ante; on notifications generally see Chapter 6 below.
337. Re Hennessy & Co and Henkell & Co agreement OJ 1980 L383/11, (1981) 1 CMLR 601, n. 127 ante.
338. Re Distillers Company PLC (Red Label) OJ 1983 C245/3 (1983) 3 CMLR 173, n. 230 ante.
339. Ibidem.
340. Case 86/82 Hasselblad v Commission n. 218 ante; cf. also Case 170/83 Hydrotherm v Compact n. 282 ante.
341. Cases 43 & 62/82 VBBB and VBVB v Commission, n. 239 ante, Fourteenth Report on Competition Policy, point 116.
342. Ibidem.
343. Re Sole distribution agreements for whisky and gin (Distillers) n. 238 ante.
344. Ibidem.
345. Ibidem.
346. Re Carlsberg, n. 248 ante.
347. Re Carlsberg, ibidem, 750 (62).
348. Distillers Company PLC (Red Label) n. 230 ante.
349. Case 31/85 SA ETA Fabriques d'Ebauches v SA DK Investment and others ("Swatch"), n. 213 ante.

350. Cf. *ibidem*.
351. *Res Grohe and Ideal Standard*, n. 233 and 262 ante.
352. *Ibidem*.
353. Cases 25 & 26/84 *Ford v Commission* (No. 2) n. 269 ante; for the Commission's Decisions see n. 270 ante.
354. Re distribution system of *Ford Werke AG* (No. 2), (1984) 1 CMLR 596, 597.
355. *Ibidem*.
356. Cases 25 & 26/84 *Ford v Commission* (No.2) n. 269 ante.
357. E.g. Case 243/83 *Binon v AMP* n. 257 ante; cf. also Case 126/80 *Salonia v Poidomani* (1981) ECR 1563, (1982) 2 CMLR 235.
358. Re *Ivoclar*, n. 238 ante.
359. *Ibidem*, Fifteenth Report on Competition policy, point 59.
360. Re *Grundig* distribution system n. 246 ante (on appeal).
361. *Ibidem*, Fifteenth Report on Competition policy point 62.
362. *Ibidem*.

- 363. Case 75/84 Metro v Commission (No.2) n. 274 ante.
- 364. Ibidem.
- 365. Ibidem.
- 366. Ibidem, and Sixteenth Report on Competition policy, point 103.
- 367. Ibidem.
- 368. Re Peugeot-Talbot n. 273 ante.
- 369. Cases 25 & 26/84 Ford v Commission (No.2) n. 269 ante.
- 370. Re Peugeot-Talbot n. 273 ante.
- 371. Cf. Fifteenth Report on Competition Policy, point 16.
- 372. See Fourteenth Report on Competition Policy, point 23; particularly, European Documentation on: EEC Competition Rules, Guide for small and medium-sized enterprises, Periodical 1983/84, Office for official publications of the European Communities, Luxemburg.
- 373. Ibidem.
- 374. Ibidem.
- 375. Recital (6) of Regulation 1983/83.
- 376. Recital (6) of Regulation 1984/83.

377. See also Bellamy/Child op. cit. (n. 25) paragraph 6-060, referring also to the problem that "competing manufacturers must be aware of each other's annual turnover throughout the life of the agreement". A critical view took also Valentine Korah in "Exclusive dealing agreements in the EEC - Regulation 67/67 replaced" op. cit. (n. 296), 20 et sequ.; see also Bunte/Sauter op. cit. (n. 281), paragraph 7 and Commission Notice on Regulations 1983/83 and 1984/83 Title II 5.
378. Valentine Korah, *ibidem*, 35 et sequ.; and Commission Notice on Regulations 1983/83 and 1984/83, *ibidem*.
379. Fifteenth Report on Competition Policy, point 16.
380. Fourteenth Report on Competition Policy, points 16, 24; see *ibidem* point 24 et sequ. and Fifteenth Report on Competition Policy on other provisions for SME not referring to exclusive dealing agreements.
381. Fifteenth Report on Competition Policy, point 16.
382. OJ 1986 C231.
383. As amended in OJ 1977 C313.
384. Sixteenth Report on Competition Policy, point 24; see also EEC Article 85 (1) providing "agreements ... which may affect trade ..." (Appendix 2).
385. Sixteenth Report on Competition policy, point 24.
386. *Ibidem*.

387. Ibidem.
388. Ibidem.
389. Ibidem.
390. Sixteenth Report on Competition Policy, point 22.
391. E.g. Cases 25 & 26/84 Ford v Commission (no.2) n. 269 and 353 ante.
392. Case 86/82 Hasselblad v Commission n. 218 ante.
393. Ibidem.
394. Re Ivoclar n. 238 ante.
395. Ibidem; cf. also Fifteenth Report on Competition Policy, point 59; see also the Mitsui/Bridgestone Agreement, ibidem, point 60 and n. 246 ante.
396. C.S. Kerse op. cit. (n. 287), 302; ibidem for an example where the costs were divided: Cases 32 & 36-82/78 BMW v Commission (1979) ECR 2435, (1980) 1 CMLR 370.
397. E.g. § 116 (German) Zivilprozeßordnung.
398. Sixteenth Report on Competition Policy, point 22.
399. Cf. Re Peugeot-Talbot, OJ 1986 L295/19, n. 273 ante, Sixteenth Report on Competition Policy, point 62.
400. C.S. Kerse op. cit. (n. 287), 33 with further references.

401. JO 1962, 204; OJ 1959-1962, 57; it came into force 13 March 1962.
402. Articles 2 et sequ. of Regulation 17; see also C. S. Kerse, *op. cit.* (n. 287), 33.
403. C.S. Kerse, *ibidem*.
404. On the problem of the Commission lacking division of power see Case 100-102/80 *Musique Diffusion Française SA v Commission ("Pioneer")* (1983) ECR 1825, (1983) 3 CMLR, 221, 227, see also n. 215 ante; cf. also Article 6 (1) of the European Convention on Human rights.
405. Bellamy/Child *op. cit.* (n. 25), paragraph 11-00; see also Form A/B (Appendix 4) and the Complementary Note OJ 1985 L 240/1 and C.S. Kerse *op. cit.* (n. 287), 39.
406. Cf. Article 4 of Regulation 17; details will be discussed below.
407. C.S. Kerse, *op. cit.* (n. 287), 40.
408. For a recent example see e.g. *Re Villeroy & Boch*, n. 246 ante.
409. JO 1962, 1118; OJ 1959-1962, 132; see also C.S. Kerse, *op. cit.* (n. 287) 41 et sequ.
410. Introduced by Regulation 2526/85 (OJ 1985 L240/1) amending Regulation 27; with difference to the situation before 1986, there are no longer separate forms for applications for negative clearances and notifications under EEC Article 85 (3); see also Fifteenth Report on Competition Policy, point 48.

411. Complementary Note on Form A/B n. 410 ante, (VI).
412. C.S. Kerse, op. cit. (n. 287), 41 and Article 15 (1) (a) of Regulation 17.
413. Cf. Re John Deere n. 224 ante, where the undertaking had applied (only) for negative clearance and was not protected against large fines of 2 million ECU.
414. Forms A/B and Complementary Note n. 405 and 410 ante, (III).
415. Bellamy/Child op. cit. (n. 25) paragraphs 11-002 and 10-025 et sequ.
416. Ibidem.
417. Recital (14) of Regulation 1983/83; e.g. Re Sole distribution agreements for whisky and gin (Distillers) ,n. 238 ante; on the special "opposition procedure" for block exemption on patent licences, research and development and specialisation see C.S. Kerse op. cit. (n. 287), 68 et sequ.
418. Article 4 (1) of Regulation 17; this principle has been confirmed in the decisions of the European Court of Justice; details and further references see C.S. Kerse op. cit. (n. 287), 43.
419. Details will be shown below; for the effects it is recommendable even in cases where a negative clearance is sought, precautionary to apply for an individual exemption as well; a vivid example, where this was omitted is provided in Re John Deere, n. 224 ante.

420. Bellamy/Child op. cit. (n. 25) paragraph 11-060; ibidem 11-057 et sequ. for further details of the procedure; C.S. Kerse op. cit. (n. 287), 49 et sequ.
421. Case 75/84 Metro v Commission (No.2) n. 274 ante.
422. For recent examples see Re Aluminium Imports from Eastern Europe n. 208 ante and Case 107/82 AEG v Commission (1983) ECR 3151 n. 263 ante, and the Commission decision n. 264 ante.
423. E.g. Re John Deere n. 224 ante, where the resellers were relieved from fines; similar Re Sperry New Holland, n. 224 ante.
424. Article 15 (6) of Regulation 17.
425. Bellamy/Child op. cit. (n. 25), paragraph 11-018.
426. Ibidem; for further details paragraphs 11-019 et sequ. and 11-023 for the merits and demerits of notification.
427. Cf. ibidem; generally on the notification procedure see ibidem, paragraphs 11-057 et sequ.
428. Cf. Cases 26/76 and 75/84 Metro v Commission (No.1) and (No.2), n. 123 respectively n. 274 ante, where the third party, Metro was refused supplies by SABA and tried to claim its alleged interests; on complaints generally see Richard Whish op. cit. (n. 3), 245 and C.S. Kerse op. cit. (n. 287), 60 et sequ; likewise John Temple Lang, The position of third parties in EEC competition cases (1978) 3 ELRev 177 et sequ.; on complaints see also Seventeenth Report on Competition

Policy, point 59: "The increase in the number of complaints is particularly noteworthy (93 as against 75 in 1986), and reveals the confidence shown in the Commission by firms adversely affected by infringement of the competition rules."

429. Graham D Child, *Banking and the Treaty of Rome*, Article 85, (1988) 16 IBL, 487; this principle also applies to all the other cases, where the Commission is pursuing its requests for information.
430. ... and you can only hope that your permanent consulting lawyer is not on the way to a remote court hearing. For references to the summoning of a lawyer see Richard Whish *op. cit.* (n. 3), 249. An example of an unannounced investigation is provided in the Case *National Panasonic Ltd. (UK) v Commission* Case 136/79 (1980) ECR 2033, (1980) 3 CMLR 169, where the Commission's decision that the undertaking is entitled to summon a lawyer, but that the Commission is not obliged to postpone the investigation until the lawyer is present, if this would unduly delay proceedings, was contained and upheld tacitly.
431. Article 14 (1) (a)-(d) of Regulation 17.
432. Case 155/79 *AM & S Europe Ltd. v Commission* (1982) ECR 1575, (1982) 2 CMLR 264, NJW 1983, 503.
433. Generally on fact-finding and fines see C.S. Kerse, *op. cit.* (n. 287), 78 *et sequ.* respectively 200 *et sequ.*
434. On general principles of law and fundamental rights see C.S. Kerse *op. cit.* (n. 287), 236 *et sequ.*

435. Cf. C.S. Kerse, *ibidem*, 155 et 170.
436. In C.S. Kerse, *ibidem*, 171, where the formulation is found "the principle of *res judicata* does not apply to decisions of the Commission. However, this definition seems to be too extensive, otherwise the provision of Article 8 (3) would be redundant".
437. C.S. Kerse, *ibidem*, 305.
438. *Ibidem*, 171.
439. *Ibidem*, 329; see also Richard Whish *op. cit.* (n.3), 21.
440. The perfumes cases: *Anne Marty SA v Estée Lauder SA* Case 37/79 (1980) ECR 2481, (1981) 2 CMLR 143. *Lancôme SA and Cosparfrance Netherland BV v Etos BV and Albert Heijn Supermart BV* Case 99/79 (1980) ECR 2511, (1981) 2 CMLR 164, n. 213 ante; *Procureur de la République v Guerlain SA, Procureur de la République v Parfums Rochas SA, Procureur de la République v Lanvin Parfums SA, Procureur de la République v Nina Ricci Sàrl*, Case 253/78, 1-3/79, (1980) ECR 2327, (1981) 2 CMLR 99.
441. C.S. Kerse *op. cit.* (n. 287), 171.
442. *Ibidem*, 257.
443. Cf. *Ibidem*, 171.
444. E.g. *Re Carlsberg* n. 248 ante, Cases 26/76 and 75/84 *Metro v Commission (No.1) and (No.2)* n. 123, 274 ante.
445. Details see C.S. Kerse *op. cit.* (n. 287), 180 et sequ.

446. Richard Whish op. cit. (n. 3), 255, and Case 31/80 L'Oréal NV and L'Oréal SA v De Nieuwe AMCK n. 212 ante.
447. C.S. Kerse op. cit. (n. 287), 329 et sequ.
448. Ibidem.
449. Richard Whish op. cit. (n. 3), 21, 22.
450. Ibidem, 258.
451. On the other informal possibilities see C.S. Kerse op. cit. (n. 287), 192 et sequ.
452. Ibidem, 192.
453. In 1986 74 such letters were written see Sixteenth Report on Competition Policy, point 44.
454. Cf. Bellamy/Child op. cit. (n. 25), paragraph 11-005 and Richard Whish op. cit. (n. 3), 258.
455. C.S. Kerse op. cit. (n. 287), 257 and 262.
456. Bellamy/Child op. cit. (n. 25) paragraph 11-005.
457. Ibidem, paragraph 11-022.
458. Details see C.S. Kerse op. cit. (n. 287), 165 et sequ.
459. Ibidem, 167.
460. Article 15 (2) of Regulation 17.

461. Article 16 of Regulation 17.
462. For tables of fines see C.S. Kerse op. cit. (n. 287), 218 et sequ.; Bellamy/Child op. cit. (n. 25) paragraph 12-014.
463. See C.S. Kerse, *ibidem*, 165 respectively 236 et sequ.
464. Case 792/79R Camera Care Ltd. v Commission (1980) ECR 119, (1980) 1 CMLR 334; see also Studienvereinigung Kartellrecht e.V, XI. Internationales Kartellrechtsforum Brüssel (n. 240 ante), John Temple Lang, Procedure in Community competition cases - some recent developments, 94 et sequ.
465. Re Distribution system of Ford Werke AG No.1 (Interim Measures) and appeal, see n. 270 ante. In its decision the Court made clear that interim measures can only be taken under Article 3 of Regulation 17.
466. Re ECS/AKZO Interim measures OJ 1983 L252/13, (1983) 3 CMLR 694.
467. Re BBI/Boosey and Hawkes OJ 1987 L286/36; and see also the interim measures "Hilti" and "Ford", which could be suspended in Fifteenth Report on Competition Policy, point 49.
468. See C.S. Kerse op. cit. (n. 287), 39 referring to "vast numbers of agreements sitting in the files of DG IV without hope of an individual decision".
469. As the statement in the Fifteenth Report on Competition Policy, points 47 and 48 shows, the

Commission is aware of the problem and tries to take remedial measures.

470. This is different to German law, where the Court can not replace the discretion, the decision has to be annulled and the case remanded to the administrative authority cf. § 114 Verwaltungsgerichtsordnung.
471. Details see C.S. Kerse op. cit. (n. 287), 265 et sequ.; on the Court's procedure, ibidem, 287 et sequ.
472. E.g. Cases 26/76 and 75/84 Metro v Commission (No.1) and (No.2), n. 123, 274 ante, where the "positive" decision for SABA was challenged by a third party (Metro).
473. Richard Whish op. cit. (n. 3), 254, 255.
474. Richard Whish ibidem, 259.
475. Perfumes Cases n. 440 ante.
476. Bellamy/Child op. cit. (n. 25) paragraph 12-103, also on the "formal comfort letters".
477. Case 60/81 IBM v Commission (1981) ECR 2639, (1981) 2 CMLR 635, point 9.
478. This position seems even more doubtful when comparing it to German law, where the "act" is not to be judged by its form, but by its legal contents and effects for the parties cf. Ferdinand O. Kopp, *Verwaltungsverfahrensgesetz mit Erläuterungen*, 3. Auflage 1983, § 35 paragraph 5 et sequ.

479. Case 125/78 GEMA v Commission (1979) ECR 3173, (1980) 2 CMLR 177.
480. Case 85/76 Hoffmann-La Roche v Commission , (1979) ECR 361, (1979) 3 CMLR 211, points 129-134.
481. Richard Whish op. cit. (n. 3), 260.
482. But cf. § 123 Verwaltungsgerichtsordnung.
483. See Synopsis of the Work of the Court of Justice of the European Communities in 1973, Luxembourg (1974), 21.
484. Single European Act (1987) 2 CMLR 741.
485. Financial Times 26 July 1988.
486. Ibidem.
487. Cf. also Sixteenth Report on Competition Policy, point 1 (i).
488. Case 49/69 BASF v Commission (1972) ECR 619, (1972) CMLR 557, point 38.
489. Cases 100-102/80 etc. Pioneer High Fidelity (GB) Ltd. v Commission, n. 215 ante; also Re Polypropylene OJ 1986 L230/1, Sixteenth Report on Competition Policy, point 46, where 15 firms of the chemical industry producing polypropylene were fined with a total amount of 57,850,000 ECU.
490. Re John Deere n. 224 ante.

491. Re Tipp-Ex n. 226 ante.

492. Re Sandoz n. 225 ante.

493. Sixteenth Report on Competition Policy, introduction.

494. Studienvereinigung Kartellrecht e.V, XI. Internationales Kartellrechtsforum Brüssel (n. 240 ante), Prof. Dr. M. Waelbroeck, Distribution agreements, 21.

495. Re Sandoz, see n. 225 ante.

496. Re Hennessy/Henkell n. 127 ante.

497. Res Grohe and Ideal-Standard see n. 262 respectively n. 233 ante.

A P P E N D I X 2

EEC ARTICLE 85

1. The following shall be prohibited 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, and in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of,
 - any agreement or category of agreements between undertakings;
 - any decision or category of decisions by associations of undertakings;
 - any concerted practice or category of concerted practices;which contributes to improving the 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;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

A P P E N D I X 3

REGULATIONS

(Excerpts)

REGULATION 17/62

Article 1.

Basic provision.

Without prejudice to Articles 6, 7 and 23 of this Regulation, agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty and the abuse of a dominant position in the market, within the meaning of Article 86 of the Treaty, shall be prohibited, no prior decision to that effect being required.

Article 2.

Negative clearance.

Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice.

Article 3.

Termination of infringements.

1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. Those entitled to make application are:

- (a) Member States;
- (b) natural or legal persons who claim a legitimate interest.

3. Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under paragraph (1) address the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

Article 4.

Notification of new agreements, decisions and practices.

1. Agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty which come into existence after the entry into force of this Regulation and in respect of which the parties seek application of Article 85(3) must be notified to the Commission. Until they have been notified, no decision in application of Article 85(3) may be taken.

2. Paragraph 1 shall not apply to agreements, decisions or concerted practices where:

- (1) the only parties thereto are undertakings from one Member State and the agreements, decisions or practices do not relate either to imports or to exports between Member States;
- (2) not more than two undertakings are party thereto, and the agreements only:
 - (a) restrict the freedom of one party to the contract in determining the prices or conditions of business upon which the goods which he has obtained from the other party to the contract may be resold; or
 - (b) impose restrictions on the exercise of the rights of the assignee or user of industrial property rights - in particular patents, utility models, designs or trade marks - or of the person entitled under a contract to the assignment, or grant, of the right to use a method of manufacture or knowledge relating to the use and to the application of industrial processes;
- (3) they have as their sole object:
 - (a) the development or uniform application of standards or types; or
 - (b) joint research and development;
- (c) specialisation in the manufacture of products, including agreements necessary for achieving this,
 - where the products which are the subject of specialisation do not, in a substantial part of the common market, represent more than 15 per cent of the volume of business done in identical products or those considered by consumers to be similar by reason of their characteristics, price and use, and
 - where the total annual turnover of the participating undertakings does not exceed 200 million units of account.

These agreements, decisions and practices may be notified to the Commission.

Article 5.

Notification of existing agreements, decisions and practices.

1. Agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty which are in existence at the date of entry into force of this Regulation and in respect of which the parties seek application of Article 85(3) shall be notified to the Commission before 1 November 1962. However, notwithstanding the foregoing provisions, any agreements, decisions and concerted practices to which not more than two undertakings are party shall be notified before 1 February 1963.

2. Paragraph 1 shall not apply to agreements, decisions or concerted practices falling within Article 4(2); these may be notified to the Commission.

REGULATION 1983/83

On Application of Article 85 (3) of the Treaty to Categories of Exclusive Distribution Agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation 19/65 of March 2, 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, as last amended by the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

- (1) Whereas Regulation No. 19/65/EEC empowers the Commission to apply Article (5 (3) of the Treaty by regulation to certain categories of bilateral exclusive distribution agreements and analogous concerted practices falling within Article 85(1);
- (2) Whereas experience to date makes it possible to define a category of agreements and concerted practices which can be regarded as normally satisfying the conditions laid down in Article 85(3);
- (3) Whereas exclusive distribution agreements of the category defined in Article 1 of this Regulation may fall within the prohibition contained in Article 85(1) of the Treaty; whereas this will apply only in exceptional cases to exclusive agreements of this kind to which only undertakings from one Member State are party and which concern the resale of goods within that Member

State; whereas, however, to the extent that such agreements may affect trade between Member States and also satisfy all the requirements set out in this Regulation there is no reason to withhold from them the benefit of the exemption by category;

- (4) Whereas it is not necessary expressly to exclude from the defined category those agreements which do not fulfil the conditions of Article 85(1) of the Treaty;
- (5) Whereas exclusive distribution agreements lead in general to an improvement in distribution because the undertaking is able to concentrate its sales activities, does not need to maintain numerous business relations with a larger number of dealers and is able, by dealing with only one dealer, to overcome more easily distribution difficulties in international trade resulting from linguistic, legal and other differences;
- (6) Whereas exclusive distribution agreements facilitate the promotion of sales of a product and lead to intensive marketing and to continuity of sales of a product and lead to intensive marketing and to continuity of supplies while at the same time rationalising distribution: whereas they stimulate competition between the products of different manufacturers; whereas the appointment of an exclusive distributor who will take over sales promotion, customer services and carrying of stocks is often the most effective way, and sometimes indeed the only way, for the manufacturer to enter a market and compete with other manufacturers already present; whereas this is particularly so in the case of small and medium-sized undertakings; whereas it must be left to the contracting parties to decide whether and to what extent they consider it desirable to incorporate in the agreements terms providing for the promotion of sales;
- (7) Whereas, as a rule, such exclusive distribution agreements also allow consumers a fair share of the resulting benefit as they gain directly from the improvement in distribution, and their economic and supply position is improved as they can obtain products manufactured in particular in other countries more quickly and more easily;
- (8) Whereas this Regulation must define the obligations restricting competition which may be included in exclusive distribution agreements; whereas the other restrictions on competition allowed under this Regulation in addition to the exclusive supply obligation produce a clear

division of functions between the parties and compel the exclusive distributor to concentrate his sales efforts on the contract goods and the contract territory; whereas they are, where they are agreed only for the duration of the agreement, generally necessary in order to attain the improvement in the distribution of goods sought through exclusive distribution; whereas it may be left to the contracting parties to decide which of these obligations they include in their agreements; whereas further restrictive obligations and in particular those which limit the exclusive distributor's choice of customers or his freedom to determine his prices and conditions of sale cannot be exempted under this Regulation;

- (9) Whereas the exemption by category should be reserved for agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 85(3) of the Treaty;
- (10) Whereas it is not possible, in the absence of a case-by-case examination, to consider that adequate improvements in distribution occur where a manufacturer entrusts the distribution of his goods to another manufacturer with whom he is in competition; whereas such agreements should, therefore, be excluded from the exemption by category; whereas certain derogations from this rule in favour of small and medium-sized undertakings can be allowed;
- (11) Whereas consumers will be assured of a fair share of the benefits possible; whereas agreements relating to goods which the user can obtain only from the exclusive distributor should therefore be excluded from the exemption by category; whereas the parties cannot be allowed to abuse industrial property rights or other rights in order to create absolute territorial protection; whereas this does not prejudice the relationship between competition law and industrial property rights, since the sole object here is to determine the conditions for exemption by category;
- (12) Whereas, since competition at the distribution stage is ensured by the possibility of parallel imports, the exclusive distribution agreements covered by this Regulation will not normally afford any possibility of eliminating competition in respect of a substantial part of the products in question; whereas this is also true of agreements that allot to the exclusive distributor a

contract territory covering the whole of the common market;

- (13) Whereas, in particular cases in which agreements or concerted practices satisfying the requirements of this Regulation nevertheless have effects incompatible with Article 85(3) of the Treaty, the Commission may withdraw the benefit of the exemption by category from the undertakings party to them;
- (14) Whereas agreements and concerted practices which satisfy the conditions set out in this Regulation need not be notified; whereas an undertaking may nonetheless in a particular case where real doubt exists, request the Commission to declare whether its agreements comply with this Regulation;
- (15) Whereas this Regulation does not affect the applicability of Commission Regulation (EEC) No. 360/82 of 23 December 1982 on the application of Article 85(3) of the Treaty to categories of specialisation agreements, whereas it does not exclude the application of Article 86 of the Treaty.

Has adopted this regulation:

Article 1.

Pursuant to Article 85(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party agrees with the other to supply certain goods for resale within the whole or a defined area of the common market only to that other.

Article 2.

1. Apart from the obligation referred to in Article 1 no restriction on competition shall be imposed on the supplier other than the obligation not to supply the contract goods to users in the contract territory.

2. No restriction on competition shall be imposed on the exclusive distributor other than:

- (a) the obligation not to manufacture or distribute goods which compete with the contract goods;
- (b) the obligation to obtain the contract goods for resale only from the other party;
- (c) the obligation to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch, and from maintaining any distribution depot.

3. Article 1 shall apply notwithstanding that the exclusive distributor undertakes all or any of the following obligations:

- (a) to purchase complete ranges of goods or minimum quantities;
- (b) to sell the contract goods under trademarks, or packed and present as specified by the other party;
- (c) to make measures for promotion of sales, in particular:
 - to advertise,
 - to maintain a sales network or stock of goods,
 - to provide customer and guarantee services,
 - to employ staff having specialised or technical training.

Article 3.

Article 1 shall not apply where:

- (a) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into reciprocal exclusive distribution agreements between themselves in respect of such goods;
- (b) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into a non-reciprocal exclusive distribution agreement between themselves in respect of such goods unless at least one of them has a total annual turnover of no more than 100 million ECU;
- (c) users can obtain the contract goods in the contract territory only from the exclusive distributor and have no alternative source of supply outside the contract territory;
- (d) one or both of the parties makes it difficult for intermediaries or users to obtain the contract goods from other dealers inside the common market or, in so far as no alternative source of supply is available there, from outside the common market, in particular where one or both of them:
 - 1. exercises industrial property rights so as to prevent dealers or users from obtaining outside, or from selling in, the contract territory properly marked or otherwise properly marketed contract goods;
 - 2. exercises other rights or take other measures so as to prevent dealers or users from obtaining outside, or from selling in, the contract territory contract goods.

Article 4.

1. Article 3(a) and (b) shall also apply where the goods there referred to are manufactured by an undertaking connected with a party to the agreement.

2. Connected undertakings are:

- (a) undertakings in which a party to the agreement, directly or indirectly:
- owns more than half the capital or business assets, or
 - has the power to exercise more than half the voting rights, or
 - has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or
 - has the right to manage the affairs;
- (b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a).

3. Undertakings in which the parties to the agreement or undertakings connected with them jointly have the rights or powers set out in paragraph 2(a) shall be considered to be connected with each of the parties to the agreement.

Article 5.

1. For the purpose of Article 3(b), the ECU is the unit of account used for drawing up the budget of the Community pursuant to Articles 207 and 209 of the Treaty.

2. Article 1 shall remain applicable where during any period of two consecutive financial years the total turnover referred to in Article 3(b) is exceeded by no more than 10 per cent.

3. For the purpose of calculating total turnover within the meaning of Article 3(b), the turnovers achieved during the last financial year by the party to the agreement and connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the parties to the agreement or between these undertakings and undertakings connected with them or between the connected undertakings.

Article 6.

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No. 19/65/EEC, when it finds in a particular case that an agreement which is exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions set out in Article 85(3) of the Treaty, and in particular where;

- (a) the contract goods are not subject, in the contract territory, to effective competition from identical goods considered by users as equivalent in view of their characteristics, price and intended use;

- (b) access by other suppliers to the different stages of distribution within the contract territory is made difficult to a significant extent;
- (c) for reasons other than those referred to in Article 3(c) and (d) it is not possible for intermediaries or users to obtain supplies of the contract goods from dealers outside the contract territory on the terms there customary;
- (d) the exclusive distributor:
 - 1. without any objectively justified reason refuses to supply in the contract territory categories of purchasers who cannot obtain contract goods elsewhere on suitable terms or applies to them differing prices or conditions of sale;
 - 2. sells the contract goods at excessively high prices.

Article 7.

In the period 1 July 1983 to 31 December 1986, the prohibition in Article 85(1) of the Treaty shall not apply to agreements which were in force on 1 July 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions of Regulation No. 67/67/EEC.

(The provisions of the preceding paragraph shall apply in the same way to agreements which were in force on the date of accession of the Kingdom of Spain and of the Portuguese Republic and which, as a result of accession fall within the scope of Article 85(1) of the Treaty.)

Amendment.

The second para. was added by the Act of Accession of the Kingdom of Spain and the Republic of Portugal, Annex I (iv) (10).

Article 8.

This Regulation shall not apply to agreements entered into for the resale of drinks in premises used for the sale and consumption of beer or for the resale of petroleum products in service stations.

Article 9.

This Regulation shall apply mutatis mutandis to concerted practices of the type defined in Article 1.

Article 10.

This Regulation shall enter into force on 1 July 1983. It shall expire on 31 December 1997.

Done at Brussels, 22 June 1983.

REGULATION 1984/83

On Application of Article 85(3) of the Treaty to categories of
exclusive purchasing agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European
Economic Community,

Having regard to Council Regulation 19/65 of March 2,
1965 on the application of Article 85(3) of the Treaty to
certain categories of agreements and concerted practices,
as last amended by the Act of Accession of Greece, and in
particular Article 1 thereof,

Having published a draft of this Regulation,

Having consulted the Advisory Committee on Restrictive
Practices and Dominant Positions.

- (1) Whereas Regulation No. 19/65/EEC empowers the
Commission to apply Article 85(3) of the Treaty by
regulation to certain categories of bilateral ex-
clusive purchasing agreements entered into for the
purpose of the resale of goods and corresponding
concerted practices falling within Article 85;
- (2) Whereas experience to date makes it possible to define
three categories of agreements and concerted practices
which can be regarded as normally satisfying the
conditions laid down in Article 85(3); whereas the
first category comprises exclusive purchasing agree-
ments of short and medium duration in all sectors of
the economy; whereas the other two categories comprise
long-term exclusive purchasing agreements entered into
for the resale of beer in premises used for the sale
and consumption (beer supply agreements) and of
petroleum products in filling stations (service-
station agreements);
- (3) Whereas exclusive purchasing agreements of the cate-
gories defined in this Regulation may fall within the
prohibition contained in Article 85(1) of the Treaty;
whereas this will often be the case with agreements
concluded between undertakings from different Member
States; whereas an exclusive purchasing agreement to
which undertakings from only one Member State are
party and which concerns the resale of goods within
that Member State may also be caught by the pro-
hibition; whereas this is in particular the case where
it is one of a number of similar agreements which
together may affect trade between Member States;
- (4) Whereas it is not necessary expressly to exclude from
the defined categories those agreements which do not
fulfil the conditions of Article 85(1) of the Treaty;
- (5) Whereas the exclusive purchasing agreements defined in
this Regulation lead in general to an improvement in

- distribution; whereas they enable the supplier to plan the sales of his goods with greater precision and for a longer period and ensure that the reseller's requirements will be met on a regular basis for the duration of the agreement; whereas this allows the parties to limit the risk to them of variations in market conditions and to lower distribution costs;
- (6) Whereas such agreements also facilitate the promotion of the sales of a product and lead to intensive marketing because the supplier, in consideration of the exclusive purchasing obligation, is as a rule under an obligation to contribute to the improvement of the structure of the distribution network, the quality of the promotional effort or the sales success; whereas, at the same time, they stimulate competition between the products of different manufacturers;
- whereas the appointment of several resellers, who are bound to purchase exclusively from the manufacturer and who take over sales promotion, customer services and carrying of stock, is often the most effective way, and sometimes the only way, for the manufacturer to penetrate a market and compete with other manufacturers already present; whereas this is particularly so in the case of small and medium-sized undertakings;
- whereas it must be left to the contracting parties to decide whether and to what extent they consider it desirable to incorporate in their agreements terms concerning the promotion of sales;
- (7) Whereas, as a rule, exclusive purchasing agreements between suppliers and resellers also allow consumers a fair share of the resulting benefit as they gain the advantages of regular supply and are able to obtain the contract goods more quickly and more easily;
- (8) Whereas this Regulation must define the obligations restricting competition which may be included in an exclusive purchasing agreement; whereas the other restrictions of competition allowed under this Regulation in addition to the exclusive purchasing obligation lead to a clear division of functions between the parties and compel the reseller to concentrate his sales efforts on the contract goods; whereas they are, where they are agreed only for the duration of the agreement, generally necessary in order to attain the improvement in the distribution of goods sought through exclusive purchasing; whereas further restrictive obligations and in particular those which limit the reseller's choice of customers or his freedom to determine his prices and conditions of sale cannot be exempted under this Regulation;

- (9) Whereas the exemption by categories should be reserved for agreements of which it can be assumed with sufficient certainty that they satisfy the conditions of Article 85(3) of the Treaty;
- (10) Whereas it is not possible, in the absence of a case-by-case examination, to consider that adequate improvements in distribution occur where a manufacturer imposes an exclusive purchasing obligation with respect to his goods on a manufacturer with whom he is in competition; whereas such agreements should, therefore, be excluded from the exemption by categories; whereas certain derogations from this rule in favour of small and medium-sized undertakings can be allowed;
- (11) Whereas certain conditions must be attached to the exemption by categories so that access by other undertakings to the different stages of distribution can be ensured; whereas, to this end, limits must be set to the scope and to the duration of the exclusive purchasing obligation; whereas it appears appropriate as a general rule to grant the benefit of a general exemption from the prohibition on restrictive agreements only to exclusive purchasing agreements which are concluded for a specified product or range of products and for not more than five years;
- (12) Whereas, in the case of beer supply agreements and service-station agreements, different rules should be laid down which take account of the particularities of the markets in question;
- (13) Whereas these agreements are generally distinguished by the fact that, on the one hand, the supplier confers on the reseller special commercial or financial advantages by contributing to his financing, granting him or obtaining for him a loan on favourable terms, equipping him with a site or premises for conducting his business, providing him with equipment or fittings, or undertaking other investments for his benefit and that, on the other hand, the reseller enters into a long-term exclusive purchasing obligation which in most cases is accompanied by a ban on dealing in competing products;
- (14) Whereas beer supply and service-station agreements, like the other exclusive purchasing agreements dealt with in this Regulation, normally produce an appreciable improvement in distribution in which consumers are allowed a fair share of the resulting benefit;
- (15) Whereas the commercial and financial advantages conferred by the supplier on the reseller make it significantly easier to establish, modernize, maintain and operate premises used for the sale and consumption of drinks and service stations; whereas the exclusive

purchasing obligation and the ban on dealing in competing products imposed on the reseller incite the reseller to devote all the resources at his disposal to the sale of the contract goods; whereas such agreements lead to durable cooperation between the parties allowing them to improve or maintain the quality of the contract goods and of the services to the customer and sales efforts of the reseller; whereas they allow long-term planning of sales and consequently a cost effective organisation of production and distribution; whereas the pressure of competition between products of different makes obliges the undertakings involved to determine the number and character of premises used for the sale and consumption of drinks and service stations, in accordance with the wishes of customers;

- (16) Whereas consumers benefit from the improvements described, in particular because they are ensured supplies of goods of satisfactory quality at fair prices and conditions while being able to choose between the products of different manufacturers;
- (17) Whereas the advantages produced by beer supply agreements and service-station agreements cannot otherwise be secured to the same extent and with the same degree of certainty; whereas the exclusive purchasing obligation on the reseller and the non-competition clause imposed on him are essential components of such agreements and thus usually indispensable for the attainment of these advantages; whereas, however, this is true only as long as the reseller's obligation to purchase from the supplier is confined in the case of premises used for the sale and consumption of drinks to beers and other drinks of the types offered by the supplier, and in the case of service stations to petroleum-base fuel for motor vehicles and other petroleum-base fuels; whereas the exclusive purchasing obligation for lubricants and related petroleum-based products can be accepted only on condition that the supplier provides for the reseller or finances the procurement of specific equipment for the carrying out of lubrication work; whereas this obligation should only relate to products intended for use within the service-station;
- (18) Whereas, in order to maintain the reseller's commercial freedom and to ensure access to the retail level of distribution on the part of other suppliers, not only the scope but also the duration of the exclusive purchasing obligation must be limited; whereas it appears appropriate to allow drinks suppliers a choice between a medium-term exclusive purchasing agreement covering a range of drinks and a long-term exclusive purchasing agreement for beer;

whereas it is necessary to provide special rules for those premises used for the sale and consumption of drinks which the supplier lets to the reseller; whereas, in this case, the reseller must have the right to obtain, under the conditions specified in this Regulation, other drinks, except beer, supplied under the agreement or of the same type but bearing a different trademark; whereas a uniform maximum duration should be provided for service-station agreements, with the exception of tenancy agreements between the supplier and the reseller, which takes account of the long-term character of the relationship between the parties;

- (19) Whereas to the extent that Member States provide, by law or administrative measures, for the same upper limit of duration for the exclusive purchasing obligation upon the reseller as in service-station agreements laid down in this Regulation but provide for a permissible duration which varies in proportion to the consideration provided by the supplier or generally provide for a shorter duration than that permitted by this Regulation, such laws or measures are not contrary to the objectives of this Regulation which, in this respect, merely sets an upper limit to the duration of service-station agreements; whereas the application and enforcement of such national laws or measures must therefore be regarded as compatible with the provisions of this Regulation;
- (20) Whereas the limitations and conditions provided for in this Regulation are such as to guarantee effective competition on the markets in question; whereas, therefore, the agreements to which the exemption by category applies do not normally enable the participating undertakings to eliminate competition for a substantial part of the products in question;
- (21) Whereas, in particular cases in which agreements or concerted practices satisfying the conditions of this Regulation nevertheless have effects incompatible with Article 85(3) of the Treaty, in Commission may withdraw the benefit of the exemption by category from the undertakings party thereto;
- (22) Whereas agreements and concerted practices which satisfy the conditions set out in this Regulation need not be notified; whereas an undertaking may nonetheless, in a particular case where real doubt exists, request the Commission to declare whether its agreements comply with this Regulation;
- (23) Whereas this Regulation does not affect the applicability of Commission Regulation (EEC) No. 3604/82 of 23 December 1982 on the application of Article 85(3) of the Treaty to categories of specialisation

agreements; whereas it does not exclude the application of Article 86 of the Treaty;

Has adopted this regulation:

Article 1.

Pursuant to Article 85(3) of the Treaty, and subject to the conditions set out in Articles 2 to 5 of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, to purchase certain goods specified in the agreement of resale only from the supplier or from a connected undertaking or from another undertaking which the supplier has entrusted with the sale of his goods.

Article 2.

1. No other restriction of competition shall be imposed on the supplier than the obligation not to distribute the contract goods or goods which compete with the contract goods in the reseller's principal sales area and at the reseller's level of distribution.

2. Apart from the obligation described in Article 1, no other restriction of competition shall be imposed on the reseller than the obligation not to manufacture or distribute goods which compete with the contract goods.

3. Article 1 shall apply notwithstanding that the reseller undertakes any or all of the following obligations:

- (a) to purchase complete ranges of goods;
- (b) to purchase minimum quantities of goods which are subject to the exclusive purchasing obligation;
- (c) to sell the contract goods under trademarks, or packed and presented as specified by the supplier;
- (d) to take measures for the promotion of sales, in particular:
 - to advertise,
 - to maintain a sales network or stock of goods,
 - to provide customer and guarantee services,
 - to employ staff having specialised or technical training.

Article 3.

Article 1 shall not apply where:

- (a) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into reciprocal exclusive purchasing agreements between themselves in respect of such goods;
- (b) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their

characteristics, price and intended use enter into a non-reciprocal exclusive purchasing agreement between themselves in respect of such goods, unless at least one of them has a total annual turnover of no more than 100 million ECU;

- (c) the exclusive purchasing obligation is agreed for more than one type of goods where these are neither by their nature nor according to commercial usage connected to each other;
- (d) the agreement is concluded for an indefinite duration or for a period of more than five years.

Article 4.

1. Article 3(a) and (b) shall also apply where the goods there referred to are manufactured by an undertaking connected with a party to the agreement.

2. Connected undertakings are:

- (a) undertakings in which a party to the agreement, directly or indirectly:
 - owns more than half the capital or business assets, or
 - has the power to exercise more than half the voting rights, or
 - has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertakings, or
 - has the right to manage the affairs;
- (b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a);
- (c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).

3. Undertakings in which the parties to the agreement or undertakings connected with them jointly have the rights or powers set out in paragraph 2(a) shall be considered to be connected with each of the parties to the agreement.

Article 5.

1. For the purpose of Article 3(b), the ECU is the unit of account used for drawing up the budget of the Community pursuant to Articles 207 and 209 of the Treaty.

2. Article 1 shall remain applicable where during any period of two consecutive financial years the total turnover referred to in Article 3(b) is exceeded by no more than 10 per cent.

3. For the purpose of calculating total turnover within the meaning of Article 3(b), the turnovers achieved during the last financial year by the party to the agreement and connected undertakings in respect of all goods and

services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the parties to the agreement or between these undertakings and undertakings connected with them or between the connected undertakings.

Article 6.

1. Pursuant to Article 85(3) to the Treaty, and subject to Articles 7 to 9 of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for according special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain beers, or certain beers and certain other drinks, specified in the agreement for resale in premises used for the sale and consumption of drinks and designated in the agreement.

2. The declaration in paragraph 1 shall also apply where exclusive purchasing obligations of the kind described in paragraph 1 are imposed on the reseller in favour of the supplier by another undertaking which is itself not a supplier.

Article 7.

1. Apart from the obligation referred to in Article 6, no restriction on competition shall be imposed on the reseller other than:

- (a) the obligation not to sell beers and other drinks which are supplied by other undertakings and which are of the same type as the beers or other drinks supplied under the agreement in the premises designated in the agreement;
- (b) the obligation, in the event that the reseller sells in the premises designated in the agreement beers which are supplied by other undertakings and which are of a different type from the beers supplied under the agreement, to sell such beers only in bottles, cans or other small packages, unless the sale of such beers in draught form is customary or is necessary to satisfy a sufficient demand from consumers;
- (c) the obligation to advertise goods supplied by other undertakings within or outside the premises designated in the agreement only in proportion to the share of these goods in the total turnover realised in the premises.

2. Beers or other drinks of the same type are those which are not clearly distinguishable in view of their composition, appearance and taste.

Article 8.

1. Article 6 shall not apply where:

- (a) the supplier or a connected undertaking imposes on the reseller exclusive purchasing obligations for goods other than drinks or for services;
- (b) the supplier restricts the freedom of the reseller to obtain from an undertaking of his choice either services or goods for which neither an exclusive purchasing obligation nor a ban on dealing in competing products may be imposed;
- (c) the agreement is concluded for an indefinite duration or for a period of more than 10 years and the exclusive purchasing obligation relates only to specified beers;
- (e) the supplier obliges the reseller to impose the exclusive purchasing obligation on his successor for a longer period than the reseller would himself remain tied to the supplier.

2. Where the agreement relates to premises which the supplier lets to the reseller or allows the reseller to occupy on some other basis in law or in fact, the following provisions shall also apply:

- (a) notwithstanding paragraphs (1)(c) and (d), the exclusive purchasing obligations and bans on dealing in competing products specified in this Title may be imposed on the reseller for the whole period for which the reseller in fact operates the premises;
- (b) the agreement must provide for the reseller to have the right to obtain:
 - drinks, except beer, supplied under the agreement from other undertakings where these undertakings offer them on more favourable conditions which the supplier does not meet,
 - drinks, except beer, which are of the same type as those supplied under the agreement but which bear different trade marks, from other undertakings where the supplier does not offer them.

Article 9.

Articles 2(1) and (3), 3(a) and (b), 4 and 5 shall apply mutatis mutandis.

Article 10.

Pursuant to Article 85(3) of the Treaty and subject to Articles 11 to 13 of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the

distribution of his goods, certain petroleum-based motor-vehicle fuels or certain petroleum-based motor-vehicle and other fuels specified in the agreement for resale in a service station designated in the agreement.

Article 11.

Apart from the obligation referred to in Article 10, no restriction on competition shall be imposed on the reseller other than:

- (a) the obligation not to sell motor-vehicle fuel and other fuels which are supplied by other undertakings in the service station designated in the agreement;
- (b) the obligation not to use lubricants or related petroleum-based products which are supplied by other undertakings within the service station designated in the agreement where the supplier or a connected undertaking has made a available to the reseller, or financed, a lubrication by or other motor-vehicle lubrication equipment;
- (c) the obligation to advertise goods supplied by other undertakings within or outside the service station designated in the agreement only in proportion to the share of these goods in the total turnover realised in the service station;
- (d) the obligation to have equipment owned by the supplier or a connected undertaking or financed by the supplier or a connected undertaking serviced by the supplier or an undertaking designated by him.

Article 12.

1. Article 10 shall not apply where:

- (a) the supplier or a connected undertaking imposes on the reseller exclusive purchasing obligations for goods other than motor-vehicle and other fuels or for services, except in the case of the obligations referred to in Article 11(b) and (d);
- (b) the supplier restricts the freedom of the reseller to obtain, from an undertaking of his choice, goods or services, for which under the provisions of this Title neither an exclusive purchasing obligation nor a ban on dealing in competing products may be imposed;
- (c) the agreement is concluded for an indefinite duration or for a period of more than 10 years;
- (d) the supplier obliges the reseller to impose the exclusive purchasing obligation on his successor for a longer period than the reseller would himself remain tied to the supplier.

2. Where the agreement relates to a service station which the supplier lets to the reseller, or allows the reseller to occupy on some other basis, in law or in facts, exclusive purchasing obligations or prohibitions of

competition indicated in this Title may, notwithstanding paragraph 1(c), be imposed on the reseller for the whole period for which the reseller in fact operates the premises.

Article 13.

Article 2(1) und (3), and 3(a) and (b), 4 and 5 of this regulation shall apply mutatis mutandis.

Article 14.

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No. 19/65/EEC, when it finds in a particular case that an agreement which is exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions set out in Article 85(3) of the Treaty, and in particular where;

- (a) the contract goods are not subject, in a substantial part of the common market, to effective competition from identical goods or goods considered by users as equivalent in view of their characteristics, price an intended use;
- (b) access by of other suppliers to the different stages of distribution in a substantial part of the common market is made difficult to a significant extent;
- (c) the supplier without any objectively justified reason:
 1. refuses to supply categories of resellers who cannot obtain the contract goods elsewhere on suitable terms or applies to them differing prices or conditions of sale;
 2. applies less favourable prices or conditions of sale to resellers bound by an exclusive purchasing obligation as compared with other resellers at the same level of distribution.

Article 15.

1. In the period 1 July 1983 to 31 December 1986, the prohibition in Article 85(1) of the Treaty shall not apply to agreements of the kind described in Article 1 which either were in force on 1 Juli 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions under Regulation No. 67/67/EEC.

2. In the period 1 July 1983 to 31 December 1988, the prohibition in Article 85(1) of the Treaty shall not apply to agreements of the kinds described in Article 6 and 10 which either were in force on 1 Juli 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions of Regulation No. 67/67/EEC.

3. In the case of agreements of the kinds described in Articles 6 and 10, which were in force on 1 July 1983 and which expire after 31 December 1988, the prohibition in Article 86(1) of the Treaty shall not apply in the period

from 1 January 1989 to the expiry of the agreement but at the latest to the expiry of this Regulation to the extent that the supplier releases the reseller, before 1 January 1989, from all obligations which would prevent the application of the exemption under Titles II und III.

(4. The provisions of the preceding paragraphs shall apply in the same way to the agreements referred to respectively in those paragraphs, which were in force on the date of accession of the Kingdom of Spain and of the Portuguese Republic and which, as a result of accession, fall within the scope of Article 85(1) of the Treaty.)

Amendment.

Para. 4 was added by the Act of Accession of the Kingdom of Spain and the Portuguese Republic, Annex I(iv)(ii).

Article 16.

This Regulation shall not apply to agreements by which the supplier undertakes with the reseller to supply only to the reseller certain goods for resale, in the whole or in a defined part of the Community, and the reseller undertakes with the supplier to purchase these goods only from the supplier.

Article 17.

This Regulation shall not apply where the parties or connected undertakings, for the purpose of resale in one and the same premises used for the sale and consumption of drinks or service station, enter into agreements both of the kind referred to in Title I and of a kind referred to in Title II or III.

Article 18.

This Regulation shall apply mutatis mutandis to the categories of concerted practices defined in Articles 1, 6 and 10.

Article 19.

This Regulation shall enter into force on 1 July 1983. It shall expire on 31 Decemer 1997.

Done at Brussels, 22 June 1983.

A P P E N D I X 4

Note. This form must be accompanied by an Annex containing the information specified in the attached Complementary Note

The form and Annex must be supplied in 13 copies (one for the Commission and one for each Member State). Supply three copies of any relevant agreement and one copy of other supporting documents.

Please do not forget to complete the Acknowledgement of Receipt annexed.

If space is insufficient, please use extra pages, specifying to which item on the form they relate.

FORM A/B

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

Directorate-General for Competition,
Rue de la Loi, 200,
B-1049 Brussels.

- A. Application for negative clearance pursuant to Article 2 of Council Regulation No 17 of 6 February 1962 relating to implementation of Article 85 (1) or of Article 86 of the Treaty establishing the European Economic Community.
- B. Notification of an agreement, decision or concerted practice under Article 4 (or 5) of Council Regulation No 17 of 6 February 1962 with a view to obtaining exemption under Article 85 (3) of the Treaty establishing the European Economic Community, including notifications claiming benefit of an opposition procedure.

Identity of the parties

1. *Identity of applicant/notifier*

Full name and address, telephone, telex and facsimile numbers, and brief description (!) of the undertaking(s) or association(s) of undertakings submitting the application or notification.

For partnerships, sole traders or any other unincorporated body trading under a business name, give, also, the name, forename(s) and address of the proprietor(s) or partner(s).

Where an application or notification is submitted on behalf of some other person (or is submitted by more than one person) the name, address and position of the representative (or joint representative) must be given, together with proof of his authority to act. Where an application or notification is submitted by or on behalf of more than one person they should appoint a joint representative (Article 1 (2) and (3) of Commission Regulation No 27).

(!) E.g. 'Motor vehicle manufacturer', 'Computer service bureau', 'Conglomerate'.

2. Identity of any other parties

Full name and address and brief description of any other parties to the agreement, decision or concerted practice (hereinafter referred to as 'the arrangements').

State what steps have been taken to inform these other parties of this application or notification.

(This information is not necessary in respect of standard contracts which an undertaking submitting the application or notification has concluded or intends to conclude with a number of parties (e.g. a contract appointing dealers).)

Purpose of this application/notification
(see Complementary Note)

(Please answer yes or no to the questions)

Are you asking for negative clearance alone? (See Complementary Note — Section IV, end of first paragraph — for the consequence of such a request.)

Are you applying for negative clearance, and also notifying the arrangements to obtain an exemption in case the Commission does not grant negative clearance?

Are you only notifying the arrangements in order to obtain an exemption?

Do you claim that this application may benefit from an opposition procedure? (See Complementary Note — Sections III, IV, VI and VII and Annex 2). If you answer 'yes', please specify the Regulation and Article number on which you are relying.

Would you be satisfied with a comfort letter? (See the end of Section VII of the Complementary Note).

The undersigned declare that the information given above and in the ... pages annexed hereto is correct to the best of their knowledge and belief, that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere.

They are aware of the provisions of Article 15 (1) (a) of Regulation No 17 (see attached Complementary Note).

Place and date :

Signatures :
.....
.....

COMMISSION
OF THE
EUROPEAN COMMUNITIES

Brussels

Directorate-General for Competition

To

ACKNOWLEDGEMENT OF RECEIPT

(This form will be returned to the address inserted above if the top half is completed in a single copy by the person lodging it)

Your application for negative clearance dated:

Your notification dated:

concerning:

Your reference:

Parties:

1.

2. and others

(There is no need to name the other undertakings party to the arrangement)

(To be completed by the Commission.)

was received on:

and registered under No IV/:

Please quote the above number in all correspondence

Provisional address:
Rue de la Loi 200
B-1049 Brussels

Telephone:
Direct line: 235....
Telephone exchange: 235 11 11

Telex:
COMEU B 21877

Telegraphic address:
COMEUR Brussels

A P P E N D I X 5

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