COMMISSION OF THE EUROPEAN COMMUNITIES

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98/0288 (CNS)

Proposal for a
COUNCIL REGULATION (EC)

amending Regulation No 19/65/EEC on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices

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Proposal for a
COUNCIL REGULATION (EC)

amending Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty

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(presented by the Commission)

EXPLANATORY MEMORANDUM

1. VERTICAL RESTRICTIONS AND THE RULES IN FORCE

Ever since Council Regulation No 17 entered into force[1] a major concern of Community competition policy has been the handling of agreements and concerted practices entered into by firms operating each at a different stage of the economic process, in respect of the supply or purchase, or both, of goods for resale or processing, or in respect of the marketing of services ("vertical agreements"). This concept of vertical agreements includes exclusive distribution agreements, exclusive purchasing agreements, franchising agreements and selective distribution agreements, and combinations of these, whether they are concerned with finished goods, intermediate products or services.

Article 4(1) of Regulation No 17 provides that agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty 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. In order to limit the number of agreements subject to notification and to take account of the fact that some agreements have special characteristics which may make them less harmful to the development of the common market, Article 4(2) of Regulation No 17 provides that the abovementioned provisions are not applicable to agreements, decisions and concerted practices satisfying certain specific criteria[2]. It is a fact, however, that most vertical agreements caught by Article 85(1) are not exempt from notification under Article 4(2).

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1 First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, p. 204; amended by Regulation No 59, OJ 58, 10.7.1962, p. 1655; by Regulation No 118/63/EEC, OJ 162, 7.11.1963, p. 2696; and by Regulation (EEC) No 2822/71, OJ L 285, 29.12.1971, p. 49.

2 Article 4(2) stipulates that the notification obligation does not apply to "agreements, decisions and 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% 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."

In order further to facilitate the Commission's task in handling the notifications submitted, the Council adopted Regulation No 19/65/EEC[3], on the basis of Article 87 of the Treaty, which empowers it to adopt any appropriate regulations or directives "to lay down detailed rules for the application of Article 85(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other". By means of the Regulation, the Council enabled the Commission to declare by way of regulation that Article 85(1) does not apply to categories of agreements to which only two undertakings are party and whereby 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 whereby one party agrees with the other to purchase only from that other certain goods for resale, or whereby the two undertakings have entered into obligations with each other in respect of exclusive supply and purchase for resale[4]. It must be pointed out that the scope of the powers were defined in such a way as to cover the most frequently used types of vertical agreement which, at the time of the adoption of Regulation No 19/65/EEC, were on the whole represented by bilateral exclusive territorial sales concession contracts for goods for resale.

Thus, acting under the powers granted to it by Regulation No 19/65/EEC, the Commission adopted block exemption regulations to cover certain specific distribution systems. The regulations currently cover:

- exclusive distribution agreements (Regulation (EEC) No 1983/83[5]);

- exclusive purchasing agreements (Regulation (EEC) No 1984/83[6]);

- franchise agreements (Regulation (EEC) No 4087/88[7]).

In addition to the systems described above, the Commission examined another form of distribution, i.e. selective distribution. As the powers granted under Regulation No 19/65/EEC do not cover this field, the Commission was unable to adopt any block exemption regulation for selective distribution. Its policy was therefore based solely on individual decisions and/or positions.

In a complex modern economy, distribution systems and vertical relationships are very varied, not only because of the emergence of new distribution methods but also owing to the need of a growing number of economic operators for a combination of different types of vertical agreement in their search for greater flexibility in contractual relationships. It goes without saying that the difference between the types of distribution referred to above does not cover all forms or types of vertical agreement which, to the extent that they are covered by Article 85, must be notified and examined case by case.

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3 OJ 36, 6.3.1965, p. 533, as last amended by the Act of Accession of Austria, Finland and Sweden.

4 Article 1(1)(a) of Regulation No 19/65/EEC.

5 OJ L 173, 30.6.1983, p. 1, as last amended by Regulation (EC) No 1582/97, OJ L 214, 6.8.1997, p. 27.

6 OJ L 173, 30.6.1983, p. 5, as last amended by Regulation (EC) No 1582/97, OJ L 214, 6.8.1997, p. 27.

7 OJ L 359, 28.12.1988, p. 46. Although franchise agreements are used especially for the distribution of goods, they were covered as a category only by virtue of the powers conferred on the Commission by Article 1(1)(a) and (b) of Regulation No 19/65/EEC.

2. REVIEW OF COMMUNITY COMPETITION POLICY ON VERTICAL RESTRAINTS

On 22 January 1997, the Commission published a Green Paper on *Vertical Restraints in EC Competition Policy* with the aim of stimulating a wide-ranging debate on the application of Article 85(1) and (3) of the Treaty to vertical agreements.

The paper was prompted first by the prospect of the expiry of the abovementioned block exemption Regulations, recently extended to 31 December 1999. It also felt that it would be a timely opportunity to assess the extent to which Community policy in this area needed changing in order to take account both of progress towards completion of the internal market and of the radical transformation in distribution structures and techniques in recent years, chiefly due to the introduction of information technologies.

The publication of the Green Paper gave rise to numerous responses from the business and legal communities, as well as from the Member States, the European Parliament, the Economic and Social Committee and the Committee of the Regions. The Commission was thus afforded the opportunity to take complete stock of the main criticisms levelled at its policy in this area, relating both to the substance of the rules and some aspects of their implementing procedures.

2.1 Review of the substantive rules

As regards the substantive rules, there are three main reasons which have been put forward for dissatisfaction in this area.

2.1.1 The scope of the Regulations is too limited

Regulations (EEC) Nos 1983/83, 1984/83 and 4087/88 cover only categories of bilateral exclusive agreements concluded with a view to resale which relate either to the distribution and/or exclusive purchase of goods or comprise restrictions on the acquisition or use of intellectual property rights. They do not therefore cover agreements between more than two firms operating at different stages of the economic process, selective distribution agreements, agreements on the marketing of services or agreements concerning the supply of goods for utilisation, transformation and processing of products supplied by a supplier. The exclusion of such agreements means that they are subject to a more cumbersome vetting procedure, as they qualify for exemption under Article 85(3) of the Treaty only when the Commission has examined each one individually. In order to cope with the mass of notifications, systematic recourse to comfort letters became inevitable; this does not give firms the same guarantee of legal certainty as a block exemption regulation. The criticisms emphasise the lack of valid reasons, based on economic analysis, which could justify such different treatment of the agreements. On the other hand, it was generally accepted that vertical agreements between competing firms should not be covered by any block exemption regulations, although small or medium-sized firms could be given more favourable treatment.

2.1.2 The rules are too inflexible

The block exemption regulations in force cover only certain specific forms of distribution and are applicable only on condition that the agreements contain certain typical clauses. In addition, they do not simply specify the restraints or clauses that cannot be included in agreements ("black clauses"), they also include an exhaustive list of exempted clauses ("white clauses"). By this means, firms in the process of defining their contractual relationships have a much more limited choice, since all agreements with restrictive clauses not corresponding to the form of distribution specifically concerned and/or the "white" clauses listed in the abovementioned Regulations do not qualify for the block exemption and thus lose the advantages and legal certainty offered by the latter. Thus, in a context where economic structures and the size of markets are evolving rapidly, the lack of flexibility in the present rules can adversely affect the development of innovative and/or more competitive forms or methods of distribution. The criticisms fall short of attacking the value of block exemption as a tool, but stress the need to replace existing rules with simpler and more flexible exemption rules which would simply identify vertical restraints, or combinations of such restraints, whose incorporation in an agreement would entail the non-application of Article 85(3) to such agreements. In other words, it would be appropriate to replace the present system, involving exemption regulations comprising an exhaustive list of exempted clauses, with a new approach based mainly on the identification of "black" clauses.

2.1.3 An overly formalistic approach

The present regulations are often criticised for taking an approach based solely on an analysis of the clauses contained in the agreements they exempt, without taking account of the economic effects such agreements are likely to have on the markets on which they operate. Aimed at both the block exemption regulations in force and the broad interpretation traditionally given by the Commission to Article 85(1), the criticism is twofold. First, the Commission's current approach does not give sufficient weight to the gains in efficiency secured by vertical agreements, and gives excessive weight to restrictions which affect competition only between products of the same brand. Secondly, it is pointed out that, in applying Article 85(3) by regulation, the Commission is exaggeratedly extending the scope of its block exemption regulations, which continue to apply even where competition between brands is weak and contract goods account for a large proportion of the market in question. This results in a lack of differentiation in the assessment of restrictions of competition between brands and restrictions of competition between same-brand products, and in inadequate supervision of vertical agreements between firms with market power.

2.2 Review of procedures

The discussions that followed the publication of the Green Paper also highlighted the cumbersome nature of the existing system, which calls for the notification of a large number of vertical agreements not covered by the block exemption regulations in force. The system involves administrative costs which firms regard as excessive and, by compelling the Commission to deal with all the cases notified to it, prevents it from concentrating more of its efforts on monitoring agreements that are more harmful to competition.

The main criticism concerns Article 4(2) of Regulation No 17 which, as currently worded, is not regarded as capable of carrying out its original function, i.e. to filter out cases that appear *a priori* to be less harmful to competition by exempting them from prior notification.

First, vertical agreements should benefit from a more flexible procedure than that applicable to horizontal agreements, as they generally entail fewer dangers to competition. Whilst horizontal agreements concern substitutable services or products, vertical agreements relate only to supplementary products or services.

Secondly, the provisions of Article 4(2)(1) which exempt from prior notification only agreements concluded between undertakings from one Member State and not relating either to imports or exports between Member States are no longer of any practical value since, with ongoing Community integration, there is an increasing number of vertical agreements capable of affecting imports or exports between Member States.

Thirdly, there is an imbalance, which Article 4(2) does not rectify, between agreements in respect of the supply or purchase, or both, of goods for resale or processing, or in respect of the marketing of services, which are generally subject to the prior notification requirement, and licensing agreements, which to a large extent are covered by the exemption in Article 4(2)(b).

2.3 The need for reform

The views expressed by the business and legal communities and the institutions following the publication of the Green Paper are thus generally all in favour of a reform of Community competition policy on vertical agreements.

Any such reform must satisfy two objectives: first, it must ensure more effective protection of competition, while providing adequate legal certainty for firms; secondly, it should take account of the need to simplify administration and the regulatory framework to the greatest possible extent.

The various aspects of the reform are described in detail in the policy document which the Commission has adopted in parallel with this Communication. It should be noted that the proposed reform comprises both an amendment to the block exemption regulations in force and some relaxation of procedures. However, as the powers conferred on the Commission by Council Regulation No 19/65/EEC do not allow it to carry out such a reform, it is necessary to extend the scope of the powers provided for in the Regulation. It is also necessary, in order to achieve the abovementioned objectives, to update the notification system provided for in Article 4(2) of Council Regulation No 17.

3. EXTENSION OF THE POWERS PROVIDED FOR IN REGULATION No 19/65/EEC

As far as the substantive rules are concerned, it would be desirable to replace the existing block exemption regulations by rules that are simpler, more flexible and better targeted.

First, in response to the criticisms referred to in point 2.1.1 above, the scope of the new exemption regulation should be broader and should cover all vertical agreements relating to the supply and/or purchase of goods for resale or processing, and the marketing of services, concluded between two or more firms each operating at a different stage of the economic process. Vertical agreements between competitors would not be covered, though more favourable treatment would be accorded to small and medium-sized enterprises.

As already pointed out, however, Article 1(1)(a) of the Regulation gives the Commission the power to declare by regulation that Article 85(1) does not apply to categories of agreements to which only two undertakings are party and whereby 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 whereby one party agrees with the other to purchase only from that other certain goods for resale, or whereby the two firms have entered into such exclusive supply and purchasing obligations.

The attached proposal for a Council Regulation extends the scope of such powers in order to enable the Commission to cover, by block exemption regulation and provided they are caught by Article 85(1), all types of vertical agreements concluded between two or more firms, each operating at a different stage of the economic process, in respect of the supply and/or purchase of goods for resale or processing or in respect of the marketing of services, including exclusive distribution agreements, exclusive purchasing agreements, franchising agreements and selective distribution agreements, and combinations thereof. The block exemption would not cover vertical agreements between actual or potential competitors, except where the agreement is a non-reciprocal one and none of the parties have an annual turnover exceeding ECU 100 million, or where the agreement is between an association of retailers and its members, or between such an association and its suppliers, and the members of the association are small and medium-sized enterprises as defined in the Annex to Commission Recommendation 96/280/EC. A further justification for extending the scope of block exemption is that a large number of notifications concern vertical agreements not covered by the block exemption regulations in force; the experience acquired by the Commission in adopting decisions or individual positions now allows it to define the limits within which vertical agreements are likely to satisfy the conditions of Article 85(3) of the Treaty.

Secondly, in order to meet the criticisms in point 2.1.2 above, it is planned to adopt an exemption regulation for all types of vertical agreement which, based on a broader concept, would be aimed at identifying vertical restrictions, or combinations thereof, which, if implemented, would entail loss of the benefit of block exemption ("black" clauses). Such a change requires amendment of Article 1(2)(b) of Regulation No 19/65/EEC, which provides that all block exemption regulations must specify "the clauses which must be contained in the agreements". The attached proposal for a Council Regulation accordingly proposes to abolish this provision, which is at the root of the lack of flexibility and the "straitjacket" effect which the rules in force are said to have.

Thirdly, in response to the criticisms in point 2.1.3 above, the rules should be more specifically targeted. The Commission considers that a wider block exemption, achieved in particular by abandoning the approach based on identifying each individual form of exempted distribution, should be counterbalanced by introducing

economic criteria limiting the applicability of the exemption regulation on the ground of the possible anticompetitive effects of the agreements concerned. This would allow more effective supervision of the vertical agreements concluded between firms with market power.

The Commission considers that the means of achieving that objective must necessarily take account of the share of the relevant market accounted for by the contract goods. Thus, if the market shares of the parties to the agreement exceed a given threshold, the block exemption regulation would no longer be applicable.

The attached proposal indicates that all exemption regulations concerning vertical agreements which are adopted under the powers granted to the Commission by the Council must specify the criteria, such as the level of the market share thresholds, for identifying the circumstances in which, having regard to the economic effects of the agreements concerned, the block exemption regulation is no longer applicable.

Finally, when an agreement covered by the block exemption nonetheless produces effects which are incompatible with the conditions set out by Article 85(3), the Commission can withdraw the benefit of the block exemption. With the view to ensuring the effective monitoring of markets and an increased decentralisation in the implementation of EC competition rules, it is justified to provide that, when such an agreement produces its anti-competitive effects in a Member State territory and this territory has all the characteristics of a distinct antitrust market, the competent national competition authority may withdraw the benefit of the block exemption in respect of its territory by adopting a decision aimed at removing the aforesaid effects. Accordingly, the attached proposed Council Regulation contains a provision which supplements Article 7 of Regulation No 19/65/EEC, by stipulating the circumstances under which national authorities may withdraw the benefit of the block exemption.

The withdrawal procedure will be applicable both in respect of individual agreements and parallel networks of similar agreements. Nevertheless, it must be emphasised that the problems arising from the presence of these parallel networks are frequent, particularly in the context of selective distribution. Taking into account the widened scope of the proposed block exemption, it seems appropriate, in addition to the general remedy of the withdrawal procedure, to provide for a specific mechanism intended to guarantee the effective control of these distribution networks. In this regard, it is proposed to provide that the block exemption will contain a condition based on the coverage rate of the relevant market by such networks and having as its object the exclusion of such agreements from the benefit of the block exemption. Given that the companies concerned may not have access to precise sector-wide data, this condition should not be automatically applicable. It is therefore proposed that the future block exemption regulation will empower the Commission to establish *ex officio* that, with regard to a given market, such a condition is fulfilled and to fix a period of not less than six months, at the expiration of which the block exemption will cease to apply to the agreements concerned. The relevant Commission decision will be published in the *Official Journal of the European Communities*. In order to grant the Commission the powers necessary to implement this mechanism, the attached proposed Council Regulations contains a provision which supplements Article 7 of Regulation No 19/65/EEC.

4. RELAXATION OF THE NOTIFICATION PROCEDURE PROVIDED FOR IN REGULATION No 17

The main drawbacks of the present notification system have already been described above in point 2.2.

There is another good reason for relaxing the system. The proposed reform endeavours to achieve a better balance between, on the one hand, the need to protect competition more effectively and, on the other, the need to provide adequate legal certainty for firms. In order to attain that balance, the Commission considers that the new type of block exemption, which introduces economic criteria in the form of market share thresholds, necessitates a broadening of the provision in Article 4(2) of Regulation No 17 granting dispensation from the prior notification requirement.

The Commission proposes that the Council extend the scope of Article 4(2)(2)(a) by replacing the existing text by a new provision stipulating that all agreements concluded between two or more firms each operating at a different stage of the economic process in respect of the supply and/or purchase of goods for resale or processing or in respect of the marketing of services are exempt from notification under paragraph 1 of that Article.

The practical advantage of the proposed amendment from the point of view of firms is the fact that the Commission could in future, even in cases of late notification, consider whether the agreements in question satisfied the conditions of Article 85(3) and, if so, it could then adopt an exemption decision taking effect on the date on which the agreement was entered into. In this way the legal certainty afforded to firms would be strengthened, as the proposed amendment removes the automatic nullity which applies under the present system to vertical agreements caught by Article 85(1) if they are not notified. In addition, the amendment does not entail a relaxation in the task of supervision entrusted to the Commission, as Article 4(2) does not prevent the Commission from prohibiting vertical agreements caught by Article 85(1) which do not satisfy the tests of Article 85(3), and, in the absence of notification, from imposing fines.

The attached proposal for a Council Regulation contains the necessary amendment to Regulation No 17 in order to achieve the proposed reform.

5. PROPOSAL

In view of the foregoing, the Commission proposes that the Council adopt:

- the Regulation amending Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, and

- the Regulation amending Council Regulation No 17 of 6 February 1962, the first Regulation implementing Articles 85 and 86 of the Treaty.

Proposal for a
COUNCIL REGULATION (EC)

amending Regulation No 19/65/EEC on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 87 thereof,

Having regard to the proposal from the Commission[8],

Having regard to the opinion of the European Parliament[9],

Having regard to the opinion of the Economic and Social Committee[10],

1. Whereas by Regulation No 19/65/EEC[11], as last amended by the Act of Accession of Austria, Finland and Sweden, the Council empowered the Commission, without prejudice to the application of Council Regulation No 17[12]: First Regulation implementing Articles 85 and 86 of the Treaty, as last amended by the Act of Accession of Austria, Finland and Sweden, and in accordance with Article 85(3) of the Treaty, to adopt regulations declaring that Article 85(1) does not apply to certain categories of agreements, and in particular to categories of agreements to which only two undertakings are party and whereby 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 whereby one party agrees with the other to purchase only from that other certain goods for resale, or whereby the two undertakings enter into such obligations with each other in respect of exclusive supply and purchase for resale;

2. Whereas, pursuant to Regulation No 19/65/EEC, the Commission has in particular adopted Regulations (EEC) No 1983/83[13] and (EEC) No 1984/83[14] regarding the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements and to categories of exclusive purchasing agreements, respectively, both of which were last amended by Regulation (EC) No 1582/97[15], and also Regulation (EEC) No 4087/88[16], as amended by the Act of Accession of Austria,

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8 OJ C
9 OJ C
10 OJ C
11 OJ 36, 6.3.1965, p. 533/65.
12 OJ 13, 21.2.1962, p. 204/62.
13 OJ L 173, 30.6.1983, p. 1.
14 OJ L 173, 30.6.1983, p. 5.
15 OJ L 214, 6.8.1997, p. 27.
16 OJ L 359, 28.12.1988, p. 46.

Finland and Sweden, regarding the application of Article 85(3) of the Treaty to categories of franchise agreements;

3. Whereas on 22 January 1997 the Commission published a Green Paper on *Vertical Restraints in EC Competition Policy*[17], which was intended to generate a wide-ranging public debate on the application of Article 85(1) and (3) of the Treaty to agreements or concerted practices entered into by undertakings each operating at a different stage of the economic process in respect of the supply or purchase, or both, of goods for resale or processing, or in respect of the marketing of services ("vertical agreements"), including exclusive distribution agreements, exclusive purchasing agreements, franchising agreements and selective distribution agreements; whereas this class of agreement does not include vertical agreements between actual or potential competitors, unless the agreement is a non-reciprocal one and none of the parties have an annual turnover exceeding ECU 100 million, or is between an association of retailers and its members, or between such an association and its suppliers, and the members of the association are small or medium-sized enterprises as defined in the Annex to Commission Recommendation 96/280/EC[18];

4. Whereas the response to the Green Paper from the Member States, the European Parliament, the Economic and Social Committee, the Committee of the Regions and interested parties in business and the legal professions has been generally in favour of reform of Community competition policy on vertical agreements; whereas the block exemption regulations already referred to should accordingly be revised;

5. Whereas any such reform must meet the two requirements of ensuring effective protection of competition and providing adequate legal certainty for firms; whereas the pursuit of those objectives should take account of the need as far as possible to simplify administrative supervision and the legislative framework;

6. Whereas the exempting regulations already referred to do not confine themselves to defining the categories of agreement to which they apply and to specifying the restrictions or clauses which are not to be contained in the agreements, but also list the restrictive clauses exempted; whereas this legislative approach to contractual relations is generally perceived to be over-rigid in an economic context where distribution structures and techniques are rapidly changing;

7. Whereas the regulations refer only to those categories of bilateral exclusive agreements entered into with a view to resale which are concerned with the exclusive distribution or purchase of goods, or both, or which include restrictions imposed in relation to the assignment or use of industrial property rights; whereas they exclude from their scope agreements between more than two undertakings operating at different stages of the economic process, selective distribution agreements, agreements for the marketing of services, and agreements concerning the supply or purchase, or both, of goods intended for processing; whereas a substantial number of vertical agreements consequently cannot qualify

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17 COM(96) 721 final.

18 OJ L 107, 30.4.1996, p. 4.

for exemption under Article 85(3) of the Treaty until they have been examined individually by the Commission, which may reduce the legal certainty available to the undertakings concerned and make administrative supervision unnecessarily burdensome;

8. Whereas the debate which followed the publication of the Green Paper also drew attention to the fact that in determining the manner in which Article 85(1) and (3) are to apply proper account needed to be taken of the economic effects of vertical agreements; whereas any economic criteria limiting the scope of the block exemption by reason of the anticompetitive effects which an agreement may produce must necessarily take into consideration the share of the relevant market accounted for by the goods covered by the agreement;

9. Whereas, therefore, it would be advisable to replace the existing legislation with legislation which is simpler, more flexible and better targeted, and which covers all kinds of vertical agreement; whereas if the scope of the exempting regulation covering such agreements is to be broadened in this way, there should be criteria such as market-share thresholds to specify the circumstances where, in view of the economic effects of the agreement, that regulation ceases to be applicable;

10. Whereas the powers conferred on the Commission by Regulation No 19/65/EEC do not allow it to conduct such a reform of the rules currently in force; whereas the scope of Article 1(1)(a) and (2)(b) thereof should consequently be broadened to cover all kinds of vertical agreement caught by Article 85(1) of the Treaty which are entered into by two or more undertakings, each operating at a different stage of the economic process, and which concern the supply or purchase, or both, of goods for resale or processing, or the marketing of services, including exclusive distribution agreements, exclusive purchasing agreements, franchising agreements and selective distribution agreements, or any combination of these;

11. Whereas the exempting regulations already referred to empower the Commission, in accordance with Article 7 of Regulation No 19/65/EEC, to withdraw the benefit of application of those regulations wherever, in a particular case, an agreement has certain effects which are incompatible with the conditions laid down in Article 85(3); whereas in order to ensure effective supervision of markets and greater decentralisation in the application of the Community competition rules, it is appropriate to provide that where the effects of such an agreement are felt in a Member State which possesses all the characteristics of a distinct market the competent authority in that Member State may withdraw the benefit of the block exemption in its territory and adopt a decision aimed at eliminating those effects; whereas Article 7 thereof should accordingly be supplemented so as to specify the circumstances in which the competent authorities in the Member States may withdraw the benefit of application of the block-exemption regulation;

12. Whereas, in order to guarantee an effective control of the effects arising in a given market from the existence of parallel networks of similar agreements, a block-exemption regulation may establish the conditions under which those networks of agreements are excluded from its application; whereas such conditions may be based on structural criteria, such as the market coverage rate of these agreements; whereas such conditions will not be applicable automatically because the companies concerned may not have access to precise sector-wide data; whereas the Commission will accordingly be empowered to establish that in a given market

the relevant agreements fulfil the conditions; whereas in such a case, the Commission will have to fix a transitional period of not less than six months, at the expiry of which the block exemption will cease to be applicable to the relevant agreements,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation No 19/65/EEC is hereby amended as follows:

1. Article 1 is amended as follows:

(a) Paragraph 1 is replaced by the following:

"1. Without prejudice to the application of Regulation No 17 and in accordance with Article 85(3) of the Treaty the Commission may by regulation declare that Article 85(1) shall not apply to:

(a) categories of agreements between two or more undertakings, each operating at a different stage of the economic process, in respect of the supply or purchase, or both, of goods for resale or processing, or in respect of the marketing of services, except where:

- the agreement is between actual or potential competitors, unless it is a non-reciprocal agreement none of the parties to which have an annual turnover exceeding ECU 100 million, or

- the agreement is between an association of retailers and its members, or between such an association and its suppliers, unless the members of the association are small or medium-sized enterprises as defined in Commission Recommendation 96/280/EC.*

(b) categories of agreements to which only two undertakings are party and which include restrictions imposed in relation to the acquisition or use of industrial property rights - in particular of patents, utility models, designs or trade marks - or to the rights airisng out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or to the application of industrial processes.

* OJ L 107, 30.4.1996, p. 4."

(b) In paragraph 2(b), the words "the clauses which must be contained in the agreements, or" are deleted.

(c) Paragraph 3 is replaced by the following:

"3. Paragraphs 1 and 2 shall apply by analogy to categories of concerted practices."

(d) The following paragraph 4 is added:

"4. For purposes of paragraph 1, an agreement between competitors means an agreement which is entered into by manufacturers or distributors of identical products or products considered by consumers to be similar by reason of their characteristics, price and use, and which relates to such products."

2. In Article 7 the following two paragraphs are added:

"A regulation pursuant to Article 1 may stipulate the conditions which exclude from its application certain parallel networks of similar agreements or concerted practices operating on a particular market; when these circumstances are fulfilled the Commission may establish this by means of decision and fix a period at the expiry of which the regulation would no longer be applicable in respect of the relevant agreements or concerted practices; such period must not be shorter than six months.

Where in any particular case agreements or concerted practices to which a regulation adopted pursuant to Article 1 applies have certain effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct market, the competent authority in that Member State may on its own initiative or at the request of the Commission or of natural or legal persons claiming a legitimate interest withdraw the benefit of application of that regulation."

Article 2

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council
The President

Proposal for a
COUNCIL REGULATION (EC)

amending Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 87 thereof,

Having regard to the proposal from the Commission[19],

Having regard to the opinion of the European Parliament[20],

Having regard to the opinion of the Economic and Social Committee[21],

1. Whereas Article 4(2) of Regulation No 17[22], as last amended by the Act of Accession of Austria, Finland and Sweden, exempts a number of agreements, decisions and concerted practices from the requirement of notification under Article 4(1);

2. Whereas this exemption relates in particular to agreements, decisions and concerted practices where the only parties thereto are undertakings from one Member State and the agreements, decisions or practices do not relate either to imports or exports between Member States, or where not more than two undertakings are party thereto, and the agreements only restrict the freedom of one party to the contract in determining the prices or conditions of business upon which the goods he has obtained from the other party to the contract may be resold; whereas this exemption is not therefore such as to cover most agreements or concerted practices between undertakings each at a different stage of the economic process in respect of the supply or purchase, or both, of goods for resale or processing, or in respect of the marketing of services ("vertical agreements"), that are likely to fall within the scope of Article 85;

3. Whereas on 22 January 1997 the Commission published a Green Paper on *Vertical Restraints in EC Competition Policy*[23] which was intended to generate a wide-ranging public debate on the application of Article 85(1) and (3) of the Treaty to vertical agreements; whereas the response from Member States, the European Parliament, the Economic and Social Committee, the Committee of

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19 OJ C
20 OJ C
21 OJ C
22 OJ 13, 21.2.1962, p. 204/62.
23 COM(96) 721 final.

the Regions and interested parties in business and the legal professions has been generally in favour of reform of Community competition policy in this area;

4. Whereas any such reform must meet the two requirements of ensuring effective protection of competition and providing adequate legal certainty for firms; whereas, in order to achieve these objectives, the Commission has been empowered by the Council to declare, by regulation and in accordance with Article 85(3) of the Treaty, that Article 85(1) is not applicable to categories of agreements entered into by two or more undertakings, each operating at a different stage of the economic process, in respect of the supply or purchase, or both, of goods for resale or processing, or in respect of the marketing of services, including exclusive distribution agreements, exclusive purchasing agreements, franchising agreements and selective distribution agreements; whereas this class of agreement does not include vertical agreements between actual or potential competitors, unless the agreement is a non-reciprocal one and none of the parties have an annual turnover exceeding ECU 100 million, or is between an association of retailers and its members, or between such an association and its suppliers, and the members of the association are small or medium-sized enterprises as defined in the Annex to Commission Recommendation 96/280/EC[24];

5. Whereas the Commission was also called upon to stipulate the circumstances in which, having regard to the economic effects of the relevant agreements, a block exemption Regulation ceases to be applicable; whereas such reform of the regulatory framework applicable to vertical agreements must in addition take account of the need to simplify administrative supervision and as far as possible to reduce the number of notifications of vertical agreements, which are generally considered less dangerous to competition than horizontal restrictive practices; whereas it should no longer be necessary to notify vertical agreements before they can be exempted, so that where a vertical agreement is caught by Article 85(1) and satisfies the tests of Article 85(3) the Commission can exempt it with effect from the date on which it was entered into;

6. Whereas the current arrangements impose on firms which are party to vertical agreements an administrative burden which, given their effect on competition, has proved in most cases to be excessive;

7. Whereas the agreements referred to in Article 4(2) of Regulation No 17 are dispensed from the requirement of notification prior to exemption; whereas the purpose of this dispensation is to reduce the number of notifications, which enables the Commission to concentrate its efforts on supervising those restrictive agreements which are the most damaging to competition; whereas, therefore, this amendment does not entail any relaxation in the supervision which the Commission has a duty to exercise under Article 89(1);

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[24] OJ L 107, 30.4.1996, p. 4.

8. Whereas the scope of Article 4(2) of Regulation No 17 should therefore be extended, and all agreements entered into by two or more undertakings, each operating at a different stage of the economic process, in respect of the supply or purchase, or both, of goods for resale or processing, or in respect of the marketing of services, should be exempted from the requirement of prior notification,

HAS ADOPTED THIS REGULATION:

Article 1

Point 2 of Article 4(2) of Regulation No 17 is replaced by the following:

"(2) the agreements or concerted practices relate to the supply or purchase, or both, of goods for resale or processing, or to the marketing of services, and the agreements or concerted practices are between two or more undertakings each operating at a different stage of the economic process;

(2a) not more than two undertakings are party thereto, and the agreements only 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;"

Article 2

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Communities.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council
The President

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