

**ARTICLES 85 AND 86 OF THE EEC TREATY
AND THE RELEVANT REGULATIONS: A MANUAL FOR FIRMS**



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ARTICLES 85 AND 86 OF THE EEC TREATY
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FOREWORD

This manual is addressed to firms and associations of firms as a guide to the formalities required in order to conform to, or claim benefit of, the "rules of competition" laid down in Articles 85 and 86 of the EEC Treaty and in the regulations implementing these articles.

It attempts to answer the queries most commonly raised so far. However, it is particularly important to note that the views expressed are without prejudice to any interpretations placed on the Treaty or regulations under decisions handed down by the Commission or the courts in individual cases; no responsibility is taken for the matter contained in this manual.

The provisions now in force are :

- a) Articles 85 and 86 of the Treaty of Rome of 25 March 1957 establishing the European Economic Community (EEC), (see Annex I).
- b) Council Regulation No. 17 of 6 February 1962 (First Implementing Regulation pursuant to Articles 85 and 86 of the Treaty), published in the official gazette of the European Communities No. 13 of 21 February 1962, pp. 204 et seq., and put into force 13 March 1962, as amended by Council Regulation No. 59 of 3 July 1962, published in the official gazette of the European Communities No. 58 of 10 July 1962, pp. 1655 et seq., and put into force on 11 July 1962 (see Annex IV).
- c) Council Regulation No. 26 dated 4 April 1962 (Regulation applying certain rules of competition to the production of and trade in agricultural produce), published in the official gazette of the European Communities No. 30 of 20 April 1962, pp. 993 et seq., as amended by Council Regulation No. 49 of 29 July 1962, published in the official gazette of the European Communities No. 53, page 1571.
- d) Commission Regulation No. 27 of 3 May 1962 (First Implementing Regulation pursuant to Regulation No. 17), published in the official gazette of the European Communities No. 35 of 10 May 1962, pp. 1118 et seq., put into force 11 May 1962 (see Annex IV).

Addresses of the sales offices from which the official gazette is obtainable are given in Annex II.

Article 85 requires firms to consider whether the agreements, decisions and concerted practices to which they are party are liable to affect trade between the Member States and whether their purpose or effect is to prevent, restrict or distort competition within the Common Market. Article 86 requires firms to consider whether they hold a dominant position in the Common Market or in a substantial part of it, whether they are improperly exploiting this position and whether trade between Member States is liable to be affected.

Many agreements or practices will probably have to be altered or terminated in order to avoid sanctions (fines or daily penalties) or possibly civil proceedings (notably actions for avoidance of contract or for damages); in other cases firms will

have to apply for a declaration that Article 85(1) is not applicable.

Firms may apply for negative clearance in order to ascertain that they will not be liable to action by the Commission under Articles 85 and 86.

Firms wishing to invoke Article 85(3) may, and in some cases must, submit a notification to the Commission.

The notification procedure is not intended to substitute administrative and judicial control for the firms' own responsibility in these matters. On the contrary, it is primarily for the firms, under their own responsibility, to see that the rules laid down are complied with.

Any person who shows that he has a legitimate interest is entitled to file a complaint against agreements, concerted practices and the improper exploitation of dominant positions under Article 3 of Regulation 17. The procedures that will be followed by the Commission and its staff, in seeing that the Treaty is observed, are also explained in the manual.

PART I
GENERAL

I. WHAT DOES ARTICLE 85 OF THE TREATY SAY?

1. Article 85(1) prohibits certain agreements between firms, decisions by association of firms and concerted practices having as their object or result the prevention, restriction or distortion of competition (1).

The article lists some examples :

- the direct or indirect fixing of purchase or selling prices or of other trading conditions (e.g. rebates, discount, deferred payment) ;
- the limitation or control of production, markets, technical development or investment (e.g. by sharing out a production quota or fixing production capacity ceilings) ;
- market-sharing or the sharing of sources of supply (e.g. agreement to sell only in a given area or not to operate on the partner's home market) ;
- the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage (e.g. by granting unfair advantages to certain customers, thereby making it harder for other customers to compete) ;
- the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract (e.g. any obligation imposed on customers or on suppliers to buy or to sell another product or to accept or supply another service having no connection with the original product or service).

2. The agreement must prevent, restrict, or distort competition within the Common Market (see Article 227 of the Treaty). If it does so outside the Common Market, and has no other effect, the prohibition in Article 85(1) does not apply.

3. The agreement must be liable to affect trade between the Member States of the European Economic Community.

Generally speaking, this will be the case if the agreement regulates trade (in goods or in services) with abroad or affects such trade (e.g. an agreement controlling the conduct of parties to commercial transactions between two Member States).

4. Provided all these conditions are fulfilled, the agreements are prohibited, without prior decision by any authority, save where a decision is taken pursuant to Article 85(3) declaring the ban inoperative in the particular case. However, for agreements which already existed before Regulation 17 came into force, the prohibition only applies from 13 March 1962 on. This is established by a ruling of the Court of Justice of the European Communities on 6 April 1962 in the Bosch case (case No.

(1) For convenience, agreements, decisions and concerted practices having as their object or result the prevention, restriction or distortion of competition are hereinafter referred to as "agreements", unless the context requires otherwise.

13/61, official gazette of the European Communities, 1962, No. 33, p. 1081).

5. Under Article 85(3) the ban in Article 85(1) may be declared inapplicable to agreements which satisfy at one and the same time two positive and two negative criteria.

The two positive criteria are :

- A. the agreement must help to improve the production or distribution of goods or to promote technical or economic progress (e.g. rationalization or standardization agreements) ;
- B. the agreement must at the same time afford users a fair share of the benefit derived from such improvement or progress (this could be the case, for example, if it brought about lower prices or improved quality or servicing).

The two negative criteria are :

- a) the restrictions imposed should go no further than is strictly necessary for achieving these aims ;
 - b) the agreement must not enable firms to eliminate competition in respect of a substantial proportion of the goods concerned.
6. To sum up, a firm may reach the conclusion :

- a) that the agreement is caught by Article 85(1) and that the benefit of Article 85 (3) cannot be claimed.

In this case the firm has the choice between terminating or altering the agreement, either of its own accord, or, if the agreement already existed before 13 March 1962, under the procedure set out in Article 7 of Regulation 17 (see Part II, Section III) ;

- b) that the agreement is caught by Article 85(1) but that the benefit of Article 85 (3) can be claimed, on the grounds that the four criteria given above are satisfied.

In this case, the firm must ascertain whether certain formalities set forth in Part II (Section III) should be complied with, and in particular whether the agreement should be registered with the Commission of the European Economic Community (voluntary notification is always possible) ;

- c) that the firm is not clear whether the agreement is caught by Article 85(1) or not, but would still like to know whether in the Commission's view there are any grounds for action in respect of it.

In that case, the firm may apply to the Commission for "negative clearance" (see Part II, Section II). This is, however, not compulsory, since notification can be made "solely as a precautionary measure" by filling out parts IV and V of Form B as prescribed by Regulation 27.

II. WHAT DOES ARTICLE 86 OF THE TREATY SAY?

For the application of Article 86, the following four conditions must be fulfilled :

1. The firms in question must, alone or with others, hold a dominant position on the market for a given product or service.
2. They must hold a dominant position on the Common Market or within a substantial part of it. Note that a "substantial part" of the Common Market may lie within the confines of a single Member State.
3. The dominant position as such is not prohibited; only the improper exploitation of it. What the Article is designed to prohibit is the abuse of a dominant position.

According to Article 86 improper practices include :

- a) the direct or indirect imposition of any unfair purchase or selling prices or any other unfair trading conditions ;
 - b) the limitation of production, markets or technical development to the prejudice of consumers ;
 - c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage ;
 - d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.
4. Lastly, the agreement must be liable to affect trade between the Member States.

Where these four conditions are fulfilled, improper exploitation is prohibited, without prior decision by any authority.

III. WHO ENSURES COMPLIANCE WITH THE RULES LAID DOWN IN ARTICLES 85 AND 86?

Compliance with the rules of Articles 85 and 86 is ensured :

1. by the Commission of the European Economic Community :
 - a) either ex officio, on the basis of information in its possession or transmitted to it ;
 - b) or upon the request (complaint) of a Member State or "of any natural or legal person or association of persons, showing a justified interest".
2. by the domestic courts of Member States pronouncing within their jurisdiction on Article 85(1) and (2) and on Article 86.
3. by the competent administrative authorities of Member States, with which in particular a complaint may be laid.

IV. WHO HAS POWER TO DECLARE THE BAN IN ARTICLE 85(1) INOPERATIVE BY VIRTUE OF ARTICLE 85(3) ?

The Commission of the European Economic Community has sole competence to do this (Article 9(1) of Regulation 17). Its decisions are subject to review by the Court of Justice of the European Communities (see Part III, Section VI).

V. APPLICATION OF ARTICLES 85 AND 86 OF THE TREATY TO PUBLIC UNDERTAKINGS

Articles 85 and 86 of the Treaty apply to public undertakings as well as to

private firms.

Under Article 90(2) of the Treaty, any undertaking, whether private or public, responsible for the management of services of general economic interest or having the character of a fiscal monopoly, is subject to the rules of Articles 85 and 86 in so far as the application of such rules does not obstruct the de jure or de facto fulfilment of the specific tasks entrusted to such undertakings. The development of trade shall not be affected to such an extent as would be contrary to the interests of the Community.

VI. MATERIAL SCOPE OF ARTICLES 85 AND 86

Under the law as it stands, Articles 85 and 86 apply in principle to all branches of the economy, including in particular banking, insurance and transport. There are, however, the following exceptions :

1. Articles 85 and 86 do not affect the provisions of the Treaty establishing the European Coal and Steel Community, notably Articles 65, 66, 79 and 80 (see Article 232(1) of the EEC Treaty).
2. Articles 85 and 86 do not derogate from the provisions of the Treaty establishing the European Atomic Energy Community (Article 232(2) of the EEC Treaty).
3. Articles 85 and 86 of the Treaty and regulations made under them (i.e. presently Council Regulation 17 and Commission Regulation 27) have only applied to agreements, decisions and practices relating to the production of and trade in the products listed in Annex II of the Treaty (agricultural produce) since 30 July 1962.

This is the effect of Articles 1 and 5 of Council Regulation 26, as amended by Article 1 of Regulation 49.

However, Article 2 of Regulation 26 provides that Article 85(1) of the Treaty shall not apply to agreements, decisions or practices dealing with the production of or trade in the above-mentioned agricultural products, which form an integral part of a national market organization or which are necessary for the attainment of the objectives set out in Article 39 of the Treaty.

In particular Article 85(1) does not apply to any agreements, decisions or practices of farmers, farmers' associations or associations of these associations belonging to a single Member State in so far as these agreements, decisions or practices concern the production or sale of agricultural produce or the use of joint storage, treatment or processing facilities for agricultural produce and impose no obligation to charge a specific price, unless the Commission finds that the effect is to eliminate competition or to jeopardize the objectives of Article 39 of the Treaty.

PART II
RIGHT AND OBLIGATIONS OF FIRMS

The relevant provisions impose obligations on firms, but also confer upon them certain rights.

I. COMPLAINTS

Article 3(2) of Regulation 17 provides that any natural and legal person or association of persons who show a justified interest are intitled to request the Commission to find that Article 85 or Article 86 is being infringed, in order to put an end to such infringement.

The complaint must be lodged in writing (7 copies) with The Commission of the European Economic Community, Directorate-General for Competition, Directorate for Restrictive Agreements and Monopolies, 12, avenue de Broqueville, Brussels 15, Belgium. The formalities to be observed are set out in Part III (Section I).

Firms are recommended to use the prescribed Form C, copies of which can be obtained from the Commission, from trade associations and from Chambers of Commerce in the Member States, etc.

The plaintiff must show clear proof that he has a legitimate interest in the termination of an infringement, e.g. on grounds of damage suffered on account of it.

If such interest is not established, the complaint merely has the force of an information enabling the Commission to take proceedings ex officio.

In the applicant's own interest, his complaint should be supported from the outset by adequate proof or reliable indications that the Treaty is being infringed.

II. APPLICATION FOR NEGATIVE CLEARANCE

1. The procedure is to make an application.

The application requests the Commission to find that, according to the information available to it, there are no grounds for it to proceed against an agreement, decision or practice under Article 85(1) or Article 86 (Article 2 of Regulation 17).

This application should be addressed only to the Commission of the European Economic Community, Directorate-General for Competition, Directorate for Restrictive Agreements and Monopolies, 12, avenue de Broqueville, Brussels 15, Belgium.

Any firm party to agreements, decisions or practices coming under Article 85 or Article 86 is entitled to submit such an application. If such application is only submitted by some of the firms participating, these must inform the others (Article 1(1) of Regulation 27).

If negative clearance is applied for in respect of Article 85(1), seven copies of Form A duly completed and signed should be sent to the Commission (Article 4(1) of Regulation 27).

If negative clearance is desired in respect of Article 86, all that is needed is a written application to the above address giving a full statement of the facts, in seven copies (Articles 2 and 4(5) of Regulation 27).

2. After examination, the Commission may grant the applicants "negative clearance" when, according to the information it has obtained, it considers that it has no ground for intervening, under Article 85(1) or Article 86, with regard to the agreements, decisions or practices at issue.

The value of negative clearance depends on the information available to the Commission at the time clearance is given. If some new factor comes in or additional facts are disclosed of which the Commission was unaware at the time of its decision, the validity of the clearance may be challenged. It is therefore in the interests of the firms concerned to supply the fullest possible information.

III. APPLICATION FOR EXEMPTION UNDER ARTICLE 85(3)

1. General

As stated above, agreements between firms, decisions of associations of firms and concerted practices liable to affect trade between Member States and whose object or effect is to prevent, restrict or distort competition within the Common Market are forbidden without prior decision by any authority.

This ban may be declared inapplicable when the conditions laid down in Article 85(3) of the Treaty (see Part I, Section I - 5) are fulfilled.

The Commission of the European Economic Community has sole competence to declare Article 85(1) inapplicable (Article 9(1) of Regulation 17); firms wishing to obtain such a decision must therefore apply to it.

When the Commission declares the ban to be inapplicable, it states the date from which its decision takes effect (Article 6 of Regulation 17).

The procedure to be followed to obtain a decision to issue a declaration under Article 85(3) and the effects of the Commission's decision vary according to whether it concerns :

- a) agreements caught by Article 85(1) and
 - concluded after 12 March 1962: these will be hereinafter referred to as "new agreements", (1) or
 - already existing on 13 March 1962: these will be referred to as "old agreements" ;
- b) agreements caught by Article 85(1) and :
 - not belonging to the categories listed in Article 4(2) of Regulation 17, i.e. agreements for which notification is required (hereinafter referred to as "agreements subject to notification") ;
 - belonging to the categories listed in Article 4(2) of Regulation 17, i.e. agreements exempt from notification").

2. Categories of agreements subject to notification

There are grounds for notifying agreements caught by Article 85(1) for which it is desired to obtain either a decision to issue a declaration under Article 85 (3), or to claim benefit of the special provisions of Article 7 of Regulation 17

(1) Regulation 17 came into force on 13 March 1962.

(see point 4 below).

For certain categories of agreements notification is a formal necessity since the ban in Article 85(1) can only be lifted by the Commission :

- a) provided notification has been made (Article 4(1) second sentence, Article 5(1) and Article 7(1) of Regulation 17) ;
- b) and in principle with effect from the date of notification (Article 6 of Regulation 17).

The categories of agreements subject to notification mainly comprise :

- international agreements to which firms of various Member States are parties and whose effect is to restrict competition (price-fixing, market-sharing, agreeing refunds and terms, rationalizing, imposing standards or types, etc.) ;
- agreements to which only firms of a single Member State are parties but which control imports and/or exports between Member States ;
- agreements to which firms from non-member countries are parties, in so far as they are liable to affect trade between Member States.

There are, however, exceptions which are dealt with in point 3 below.

3. Categories of agreements exempt from notification

The categories of agreements exempt from notification are listed in Article 4 (2) of Regulation 17; this list is valid both for new agreements and for old agreements coming under Article 85(1) (Article 5(2) of Regulation 17).

Notification of these categories of agreements is not formally necessary. They may always be voluntarily registered (Article 4(2) last sentence, and Article 5(2) last clause of Regulation 17) but it is not compulsory :

- a) because parties can obtain a decision from the Commission under Article 85(3) even without formal notification ;
- b) because the retroactive effect of a declaration that an agreement is free from the vice of Article 85(1) is not limited by the date of notification.

On the other hand, the benefit of the special provisions of Article 7 of Regulation 17 cannot be claimed without formal notification even if the conditions of Article 85(3) are not fulfilled (see point 4 below).

Agreements are exempt from notification when :

1. firms of only one Member State are parties to them and the agreements, decisions or practices involve neither imports nor exports between Member States ;
2. only two firms are parties to them and the sole effect is :
 - a) to restrict the freedom of one party to the contract to fix prices or conditions of trading in the resale of goods acquired from the other party to the contract, or
 - b) to impose restraint on the rights of any person acquiring or using industrial property rights - particularly patents, utility models, registered designs or trade marks - or on the rights of any person entitled, under a contract, to acquire or use manufacturing processes or knowledge relating to the utilization or

application of industrial techniques.

3. Their sole object is :

- a) the development or uniform application of standards and types ;
- b) joint research to improve techniques, provided that the result is accessible to all parties and that each of them can exploit it.

The first group of agreements exempt from compulsory notification is that of national agreements, i.e. agreements to which only firms from one Member States are parties.

Agreements to which firms from a non-member State are parties do not qualify for exemption. National agreements are subject to notification only if they affect imports and exports between Member States. Consequently, for example, specialization or "exclusive agency" agreements, of a purely regional character within a single country need not be registered, provided they only indirectly affect imports or exports, nor price agreements or agreements to limit output between firms of a single Member State, provided they do not affect imports or exports. For instance, national agreements allowing of exports to but forbidding reimports from another Member State, or for regulating joint purchasing in another Member State are subject to notification.

The other group of agreements exempt from compulsory notification comprises certain agreements to which only two firms are parties, irrespective of the State to which they belong.

The first sub-group (Article 4 (2) ii, a) includes, for example, - providing always that they are liable to affect trade between Member States - agreements imposing prices and terms of resale in so far as they do not contain any additional clause involving, say, a ban on exports.

The second sub-group (Article 4 (2) ii, b) concerns limitations imposed on a person (referred to hereinafter as "the licensee") acquiring or using the above-mentioned industrial property rights or technical "know-how". In particular it does not cover restrictions accepted by the licensor (e.g. a commitment not to engage in a particular type of business in the country of the licensee) nor restrictions contained in agreements for the joint exploitation of patents; except where these restrictions are covered by one of the other cases listed in Article 4(2), they come under the terms of Article 4(1), and a declaration that Article 85(1) is inapplicable can therefore only be granted on notification, and with effect from the date of notification.

With regard to the limitations imposed on the licensee, the following should be noted :

- a) It is also assumed here that the restriction is in any event caught by Article 85 (1). The ban in this Article does not, generally speaking, take in restrictions imposed on the licensee which are inherent in the exercise of the protected industrial property right itself, i.e. which stem from the fact that the licensor is exercising his protected right within the limits prescribed or allowed by domestic law. This will as a rule be the case where a specified area (within the territory in which the right is valid), a specified time (within the period during which it

remains valid) or a specified quantity or volume are prescribed for the exercise of that right. These restrictions are not caught by Article 85(1) and therefore require neither notification nor a decision to issue a declaration under Article 85(3).

b) Article 4(2) ii, b, therefore concerns only restraints imposed on the licensee going beyond the above limits. However, they must be restraints on the exercise of industrial property rights. Accordingly they must have a real bearing on the exercise of the industrial property right, i.e. be directly related to its exercise.

Restraints which no longer have any real bearing on the exercise of the industrial property right, i.e. which are no longer directly related to its exercise, are not affected, and fall within the terms of Article 4(1) in so far as one of the other cases in Article 4(2) does not apply. Such restraints might exist, for example, where the licensee :

- assumes commitments extending beyond the period of validity of the industrial property right ;
- may not acquire, manufacture or sell any competing product ;
- undertakes not to export to another Member State ;
- undertakes to impose competitive restrictions on his customers.

c) However, the exact delimitation of these different categories is not an easy matter and can only be done by examining particular cases. It will always be necessary to verify that, besides the restrictions contained in the licensing contract proper, there are no agreements or concerted practices among the various licensees, either between themselves, or between licensees and licensor, liable to come under Article 85(1) and not in any case covered by Article 4(2) ii, b.

4. Special arrangements for old agreements

A. Article 7 of Regulation 17 makes special provisions for old agreements so that they can be adapted to suit the rules of Article 85(1) or Article 85(3), in that the ban in Article 85(1) may be lifted even for the period during which the conditions of Article 85(3), were not, or not yet fulfilled.

The benefit of these special provisions is subject to two conditions :

- 1) The old agreements must be notified to the Commission :
 - a) provided they come into one of the categories covered by Article 4(2) of Regulation 17 (i.e. those in principle exempt from notification): before 1 January 1964 ;
 - b) provided they do not come into one of the categories covered by Article 4(2) of Regulation 17 (i.e. those in any case subject to notification) :
 - before 1 November 1962, when more than two firms are parties to it,
 - before 1 February 1963, when only two firms are parties to it.
- 2) The firms or associations of firms concerned must :
 - a) either terminate these agreements ;
 - b) or alter them so that they no longer fall under the ban of Article 85(1), or hence-

forward fulfil the conditions for the application of Article 85(3).

B. Taken in conjunction with Article 85(3), the effect of these special provisions is that it will be to a firm's advantage to notify the Commission within the prescribed time-limits:

- not only of agreements falling under Article 85(1), and "subject to notification", when the parties concerned wish to claim benefit of Article 85(3) without having to alter the content of the agreements (for specialization, rationalization, etc.);
- but also of old agreements caught by Article 85(1), when the parties concerned, although hardly hoping to claim benefit of Article 85(3), (because the conditions for its application are probably not fulfilled) are none the less anxious for the ban to be lifted under the conditions set forth in A.

In this last case, however, if the agreement was voluntarily terminated or adjusted so as to escape the ban of Article 85(1) altogether, notification would no longer be of any use, save where there was a fear of civil proceedings in respect of past events (from 13 March 1962 onwards).

8. The different cases :

A. First case : new agreements subject to notification

(agreements dating from after 12 March 1962, and not covered by Article 4(2) of Regulation 17 and in respect of which the parties concerned wish to claim benefit of Article 85(3)).

Procedure :

Any firm, party to the agreements in question, is entitled to notify the Commission of them. Where the notification is filed by some only of the parties to the agreement these must inform the other firms accordingly (Article 1(1) of Regulation 27).

Notification procedure and time-limits

- a) Notification must be filed on Form B (Article 4(2) of Regulation 27); it must contain the information requested on the form.
- b) Because the date of notification constitutes the limit for a retroactive decision of the Commission (Article 6 of Regulation 17), the notification must be filed before the entry into force of the agreement. No firm may claim benefit of Article 85(3) for a period prior to notification : for this period the agreement is null and void.

Effects of notification :

- a) No fine for infringement of Article 85(1) can be imposed for the period following the notification (provided the firm's business is kept within the limits described in the notification) so long as the Commission has not advised the parties to the agreement that after provisional examination it considers that the conditions for the application of Article 85(1) are fulfilled and there are no grounds for applying Article 85(3) (Article 15(5) and (6) of Regulation 17).
- b) The declaration that the ban is inapplicable may be made retroactive to the day on which the conditions of Article 85(3) were fulfilled, and up to but not beyond the date of notification (Article 6 of Regulation 17).
- c) If the application is rejected on grounds of the non-fulfilment of the conditions of Article 85(3), the agreement comes ex hypothesi under Article 85(1), and is banned from the start.

Consequences of late notification :

Should the notification be filed after the entry into force of the agreement, the Commission may impose fines on the firms concerned for infringement of Article 85(1) during the period prior to notification, and if it decides to grant exemption under Article 85(3) it cannot backdate the exemption beyond the date of the notification. For the preceding period, paragraphs (1) and (2) of Article 85 remain operative.

Consequences of failure to notify :

Since the Commission cannot grant the exemption (Article 4 of Regulation 17), the agreement is forbidden, with all the civil and administrative consequences

that this entails (fines, nullity, damages, etc) even if in fact the conditions of Article 85(3) are fulfilled.

B. Second case : new agreements exempt from notification

(agreements subsequent to 12 March 1963, coming under Article 4(2) of Regulation 17 and for which the parties concerned wish to claim benefit of Article 85(3).

Procedure :

Where the firms so desire, they may file the agreements with the Commission. Notification makes it possible for the Commission to backdate exemption under Article 85(3) to the date when the conditions of the Article were fulfilled, i.e. even further back than the date of notification (Article 6 of Regulation 17).

Any firm party to the agreements in question is entitled to register them. Where the notification is filed by some of the parties only, they must inform the others accordingly (Article 1(1) of Regulation 27).

This notification must also be filed on Form B (Article 4(2) of Regulation 27).

Effects of notification :

- a) No fine for infringement of Article 85(1) can be imposed for the period following notification (provided the firm's business is kept within the limits described in the notification). This period of grace comes to an end as soon as the Commission has advised the firms concerned that after provisional examination it considers that the conditions for the application of Article 85(1) are fulfilled and that there are no grounds for exemption under Article 85(3) (Article 15(5) and (6) of Regulation 17).
- b) Notification implies a request by the firms concerned for a decision of the Commission under Article 85(3).
- c) If the application is rejected on the grounds that the conditions of Article 85(3) are not fulfilled, the agreement comes ex hypothesi under Article 85(1) and is prohibited from the start.

Consequences of failure to notify :

- a) A fine for infringement of Article 85(1) may be imposed by the Commission unless the conditions of Article 85(3) are fulfilled.
- b) In the event of dispute between parties to the agreement or with a third party on the validity of the agreement, or institution of proceedings by the Commission or by the national authorities, ex officio or on a complaint, to put an end to the infringement, the Commission will only issue a declaration under Article 85(3) if the parties concerned invoke this clause. This they may do in particular through notification.

If the Commission then declares the ban to be inapplicable, exemption may be backdated to the time when the conditions of Article 85(3) were fulfilled. If the application is rejected on grounds of non-fulfilment of the conditions of Article 85(3), the agreement comes under Article 85(1) and is banned from the start.

C. Third case : old agreements subject to notification

(agreements already existing on 13 March 1962, not coming under Article 4(2) of Regulation 17 and for which the parties concerned wish to claim benefit of Article 85 (3)).

Procedure :

Any firm party to the agreements in question is entitled to notify the Commission. Where the notification is filed by some of the parties only they must inform the others accordingly (Article 1(1) of Regulation 27).

Notification procedure and time-limits :

- a) Notification must be made on Form B (Article 4(2) of Regulation 27). It must contain the information requested on the form.
- b) Notification must be filed before 1 November 1962. However, as an exception to this rule, agreements between only two firms must be notified before 1 February 1963 (Article 5(1) of Regulation 17, as amended). The latter time-limit applies inter alia to licence and sole agency contracts in so far as they are caught by Article 85(1), even if they form part of a uniform set of contracts.

Effects of notification filed within the time-limits prescribed in Article 5 :

- a) No fine for infringement of Article 85(1) can be imposed for the period prior to notification nor for that following it (provided the firm's business is kept within the limits described in the notification), so long as the Commission has not advised the parties to the agreement that it considers, after provisional examination, that the conditions for the application of Article 85(1) are fulfilled and there are no grounds for applying Article 85(3). (Article 15(5) and (6) of Regulation 17).
- b) The declaration that the ban is inapplicable may be backdated beyond the date of notification. The ban of Article 85(1) may be declared inapplicable from 13 March 1962, where the conditions of Article 85(3) have since been complied with. For the period prior to 13 March 1962, the Court of Justice has ruled in the Bosch case that no withdrawal of the ban is required (see Part I, section 1).
- c) Even if the conditions of Article 85(3) were not fulfilled for some time prior to the decision, firms may still request the Commission to decide that the agreement was only tainted because of the provisions of Article 85(1) for the period it stipulates.

In accordance with Article 7 of Regulation 17, the firms must accordingly either terminate the agreement or alter it so that it wholly escapes the ban of Article 85(1) or that it then satisfies the conditions of Article 85(3).

It would, however, be undesirable for one firm to be able to institute proceedings concerning the terms of an agreement against another firm that was once a party to it but had withdrawn.

For this reason, Article 7(1) of Regulation 17 stipulates that the Commission's decision cannot be invoked against firms or associations of firms

which have not given their express assent to the notification.

Note

Notification does not itself validate the agreement at issue. This can only become valid if the Commission declares that it is not tainted by Article 85(1), or decides to apply Article 7 of Regulation 17.

Where the Commission refuses to declare Article 85(1) inapplicable or to apply Article 7 of Regulation 17, the agreement is banned - in appropriate cases, from 13 March 1962.

For the period prior to the decision, the situation is not clear.

Consequences of late notification :

If the notification is filed after the time-limits prescribed in Article 5, the question arises as to whether it should be deemed to be the notification of a new agreement. In that case the consequences would be as stated for the first case, i.e. a decision to issue a declaration under Article 85(3) could not be backdated beyond the notification, the special provisions of Article 7 (1) of Regulation 17 mentioned in c) above would not apply, and firms might be liable to fines for the period prior to notification (Article 15(2) of Regulation 17).

Consequences of failure to notify :

Even where an agreement in fact satisfies the provisions of Article 85(3), it would be banned as from 13 March 1962, with all the civil and administrative consequences that this entails (fines, nullity, damages, etc.), since the Commission can only backdate the agreement if it has been notified (Article 5(1) and Article 6 of Regulation 17).

D. Fourth case : old agreements exempt from notification

(agreements already existing on 13 March 1962, which come under Article 4(2) of Regulation 17 and in respect of which Article 85(3) is invoked).

Procedure :

If the interested parties wish, they can notify the Commission of the agreement.

Any firm party to the agreement is entitled to register it. Where the notification is filed by some parties only, they must inform the others accordingly (Article 1(1) of Regulation 27).

Such notification must also be filed on Form B (Article 4(2) of Regulation 27), it must contain the information requested on the form.

The declaration that the ban is inapplicable may be backdated beyond the notification, if the Commission has in fact been notified. The agreement may be declared free of the taint of Article 85(1) from 13 March 1962, where the conditions of Article 85(3) have since been satisfied. For the period prior to 13 March 1962, the Court of Justice has ruled in the Bosch case that no lifting of the ban is required (see Part I, section I).

Effects of notification :

- a) No fine for infringement of Article 85(1) can be imposed for the period prior to notification (provided the agreement is filed before 1 January 1964), nor for any subsequent period (provided the firm's business is kept within the limits described in the notification). This period of grace ends as soon as the Commission has advised the firms concerned that after provisional examination it considers the conditions for applying Article 85(1) to be fulfilled and that there are no grounds for applying Article 85(3) (Article 15(5) and (6) of Regulation 17).
- b) Even if the conditions of Article 85(3) were not satisfied during the period prior to such decision, firms can still request the Commission to decide that the ban contained in Article 85(1) does not apply for a period which it shall determine.

In accordance with Article 7 of Regulation 17, the firms must accordingly either terminate the agreement or alter it so that it wholly escapes the ban of Article 85(1) or that it then satisfies the conditions of Article 85(3).

However, the Commission's decision can only be invoked against parties to the agreement who have made or assented to, notification (Article 7(1) of Regulation 17).

Nevertheless, this concession only covers agreements notified before 1 January 1964 (Article 7(2) of Regulation 17).

Note

Notification does not itself validate the agreement at issue. This can only become valid if the Commission declares that it is not tainted by Article 85(1), or decides to apply Article 7 of Regulation 17.

Where the Commission refuses to declare Article 85(1) inapplicable or to apply Article 7 of Regulation 17, the agreement is banned - in appropriate cases, from 13 March 1962.

For the period prior to the decision, the situation is not clear.

Consequence of late notification :

It will no longer be possible to claim benefit of Article 7 of Regulation 17.

6. Duration and revocation of exemption under Article 85(3) (Article 8 of Regulation 17)

Exemption under Article 85(3) is granted for a limited period, which can be extended on application provided the exempting conditions continue to be fulfilled. It may have certain conditions or stipulations attached.

The Commission may revoke or alter its decision :

- a) with future effect where the situation has changed with respect to a factor essential in the granting of the decision ;
- b) also with retroactive effect where :
 - those concerned infringe a stipulation attached to the decision ;

- the decision is based on false information or has been obtained fraudulently, or
- those concerned abuse the exemption from the provisions of Article 85(1).

Subject to appeal to the Court of Justice of the European Communities (see Part III, section VI), a decision granting exemption under Article 85(3), is operative in respect of all concerned and of third parties ; it is binding upon government departments and domestic courts.

IV. NEGATIVE CLEARANCE AND NOTIFICATION

An application for negative clearance (on Form A) and notification (Form B) can be filed with the Commission at one and the same time. There is, however, no need to apply for negative clearance if the only aim is to reserve the right to challenge the applicability of Article 85(1) : Form B expressly provides under Section IV for a statement of the facts and reasons supporting a contention that Article 85(1) is not applicable.

The application for negative clearance does not, however, extend the time-limit for notification

For further particulars, see part III, section VII below.

PART III

FORMALITIES, PROCEDURE, INVESTIGATION AND CHECKING, APPEALS

I. FORMALITIES

Applications for the purpose of establishing that the rules are being infringed, applications for the granting of negative clearance, and notification forms must be signed by one of the firms concerned, by its representative or by a joint representative. Evidence of authority to act as representatives must be given (Article 1 of Regulation 27).

Applications and notifications must be made in one of the official languages of the Community (Dutch, French, German or Italian). They should be sent in seven copies to the Commission, Directorate-General for Competition, Directorate for Restrictive Agreements and Monopolies, 12, avenue de Broqueville, Brussels 15, Belgium. Seven copies are required since one has to be passed on by the Commission to the government authorities of each Member State. Seven copies of accompanying documents must also be submitted; they must be the originals or certified copies.

Where the original language is not one of the official languages, a translation must be supplied (Article 2 of Regulation 27).

The applications and notifications must contain the information requested on the forms where these are compulsory. A collective application may be made on one form (Article 4(3) and (4) of Regulation 27).

A list of addresses from which forms and explanatory notes can be obtained is given in Annex III.

The Commission has power to impose fines of from 100 to 5,000 units of account (1) on firms which wilfully or through negligence supply false or misleading information when applying for negative clearance or filing notifications (Article 15(1) of Regulation 17).

II. CO-OPERATION WITH THE MEMBER STATES

When the Commission is requested to take cognizance of an infringement, or when an application for negative clearance or a notification are filed, copies must be sent to the competent authorities of the Member States.

In addition, for all procedures, copies of the chief documents must be sent to these authorities (Article 10(1) and (2) of Regulation 17). The Commission can seek information from the Member States (Article 11 of Regulation 17) and have agreements investigated by the services of the Member States (Articles 13 and 14 of Regulation 17).

Before any decision (other than one concerning a request for information), it must consult the Consultative Committee on Cartels and Monopolies, on which the Member States are represented (Article 10(3) to (6) of Regulation 17).

(1) The unit of account corresponds at present to DM. 4, Bfrs. 50, NF. 4.93706, Lire 625 and Fl. 3.62.

The officials and other employees of domestic authorities and of the Commission must not disclose any matters which have come to their knowledge through the application of Regulation 17 and which, by their nature, are professional secrets (Article 20(2) of Regulation 17).

III. INVESTIGATION AND CHECKING

In the execution of the duties assigned to it, the Commission is empowered to seek information from firms (Article 11 of Regulation 17), and itself to carry out all necessary investigations at the business premises of the firms and associations of firms covered by the investigation (Article 14 of Regulation 17). It can also request the authorities in the Member States to carry out such investigations as it thinks necessary (Article 13 of Regulation 17).

If in a given economic sector the trend of trade between Member States, price movements, price inflexibility or other circumstances suggest that competition is being restricted or distorted within the Common Market, the Commission may decide to institute a general inquiry in the sector (Article 12 of Regulation 17).

On the basis of its own domestic law, each State can also carry out investigations and checks and seek information on its own initiative if the Commission has not itself initiated proceedings (Article 9(3) of Regulation 17).

To simplify administrative formalities, it has been provided that requests for information may be sent to the firm concerned in the form of an ordinary letter from the appropriate department of the Commission.

All information given must be reliable : fines for false information may vary from 100 to 5,000 units of account (1) (Article 15(1)b, of Regulation 17).

If the information requested is not supplied within the time-limit set by the Commission, or if it is incomplete, the Commission's request for information may be made by means of a decision (Article 11(5) of Regulation 17), in which case, the firm is under an obligation to supply the required information.

The Commission can also compel firms, by means of a decision, to submit the documents required for inspection and to give free access to their premises and plant (Article 14(5) of Regulation 17).

To compel firms to observe these obligations, the Commission may impose daily penalties of from 50 to 1,000 units of account per day of delay (Article 16(1) of Regulation 17).

IV. PUBLICATION

When the Commission proposes to grant negative clearance or to issue a declaration under Article 85(3), it has to publish the main content of the application or notification, inviting all interested third parties to submit their observations (Article 19(3) of Regulation 17).

The Commission publishes the main content of its decisions :

- under Article 2 of Regulation 17 (negative clearance),

(1) See footnote to page 19.

- under Article 3 of Regulation 17 (ending of infringements);
- under Article 85 (3) (including renewal, amendment or withdrawal of such decisions);
- under Article 7 of Regulation 17.

Publication must take account of firms' legitimate interest that their business secrets should not be divulged (Article 19(3) and Article 21(2) of Regulation 17).

V. SANCTIONS

The Commission can by means of a decision impose fines of from 100 to 5,000 units of account (1) where, wilfully or through negligence,

- a) an application for negative clearance or a notification is filed containing false or misleading information;
- b) information is given incorrectly or is not given within the time-limit fixed by a decision, or
- c) the business documents requested are submitted in incomplete form, or an investigation ordered by means of a decision is refused.

Very heavy fines of up to 1 000 000 units of account, or even up to 10 % of turnover, can be imposed on firms which wilfully or through negligence, infringe Article 85(1) or Article 86 or infringe a stipulation accompanying the declaration that Article 85(1) is inapplicable under the terms of Article 85(3) (Article 15 of Regulation 17).

The Commission may, by means of a decision, impose daily penalties of up to 1,000 units of account per day of delay to compel firms to comply with the obligation laid on them by means of a decision taken under Article 3, Article 8(3), Article 11(5), and Article 14(3), of Regulation 17 (Article 16 of Regulation 17).

VI. APPEALS

Article 164 of the Treaty provides that the Court of Justice of the European Communities in Luxembourg shall ensure the observance of law in the interpretation and application of the Treaty. To this end it reviews, in accordance with Article 173 of the Treaty, the legality of acts other than recommendations or opinions of the Commission.

On the other hand it has full jurisdiction to pronounce on appeals against a fine or penalty; it may cancel, reduce or increase the fine or the penalty imposed (Article 17 of Regulation 17). Any individual or corporation may appeal, on grounds of incompetence, errors of substantial form, infringement of the Treaty or any statutory requirement concerning its application (e.g. Regulation 17), or misuse of powers, against any decision in its regard, and against any decision which, although in the form of a Regulation or a decision in regard to another person or firm, is of direct and specific concern to it.

The appeal must be lodged within the two months following the publication of the relevant enactment, reckoned from the date of its notification to the plaintiff, or, failing such notification, from the day on which the plaintiff first had cognizance of it.

(1) See footnote to page 19.

In addition, any individual or corporation may, in accordance with Article 175 of the Treaty, appeal to the Court of Justice on the grounds that the Commission has failed to address to it an act other than a recommendation or an opinion.

This appeal is only admissible if the Commission has previously been called upon to act. If within two months from being called upon to do so the Commission has not acted, the appeal may be lodged inside a further period of two months.

These Treaty provisions have been supplemented by the Protocol on the Statute of the Court of Justice of the European Communities (17 April 1957)-under Article 239 of the Treaty the protocol forms an integral part of it. They are also supplemented by the rules of procedure of the Court of Justice (including Annexes I and II) of 3 March 1959 (1) (official gazette of the European Communities, pages 349/59 and 13/60) and the additional rules of procedure of 9 March 1962 (official gazette of the European Communities, pages 1113/62).

According to Article 17 of the Statute of the Court of Justice, private parties must be represented by a member of the Bar of one of the Member States.

Certain academics who are nationals of Member States and entitled under their domestic law to plead, have the same rights before the Court as are accorded by this Article to members of the Bar.

Article 19 of the Statute provides that proceedings shall be instituted before the Court by a petition addressed to the registrar. The other rules concerning the content and form of the petition are given in Article 19 of the Statute and in Article 37 and 38 of the rules of procedure.

The petition must be submitted in one of the official Community languages.

VII. SCOPE OF NEGATIVE CLEARANCE AND OF NOTIFICATION WITHIN THE FRAMEWORK OF ARTICLE 85; COMPARISON OF THE TWO PROCEDURES

- 1) A form must be used in both cases.
- 2) Applications for negative clearance and notifications are subject to the same publication procedures; in both cases, a copy of the form is sent to the competent authorities of the Member State concerned; in both cases the Commission must, where it proposes to grant a decision favourable to the firms, publish the essential content of the application or notification in order to obtain the comments of interested third parties.
- 3) The procedure for conducting inquiries and the Commission's powers of investigation and oversight are in principle the same in either case. However, when negative clearance is applied for, the Commission reaches its decision on the basis of the facts as known.
- 4) The scope of a decision to issue a declaration under Article 85(3) following notification is wider in several respects than that of a decision granting negative clearance.

(1) As amended by the Court decision of 19 June 1962 (official gazette, pages 1605/62)

The ban in Article 85(1) can only be declared inoperative by a decision of the Commission under Article 85(3). This decision is granted for a specified period and can only be withdrawn on certain conditions.

Parties wishing to obtain such a decision must not merely file an application for negative clearance, which does not extend the prescribed time-limits for notification. This also applies if the agreement comes into the categories covered by Article 4(2) of Regulation 17, or if the parties consider their agreement as being of no importance.

Negative clearance merely signifies that the Commission considers in the light of the information available to it at the time of its decision, there are no grounds for intervening in respect of an agreement. As a rule, the Commission would only decide to intervene subsequently if changes in jurisprudence or the discovery of facts unknown to the Commission at the time of its decision made this necessary.

Lastly, notification suspends the application of sanctions under the terms of Article 15(5) of Regulation 17. No such suspension is provided for in the case of negative clearance.

ARTICLES 85 and 86 OF THE TREATY OF ROME

ARTICLE 85

1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreement between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in :
 - a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
 - b) the limitation or control of production, markets, technical development or investment;
 - c) market-sharing or the sharing of sources of supply;
 - d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
 - e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.
2. Any agreements or decisions prohibited pursuant to this Article shall be null and void.
3. Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of :
 - any agreements or classes of agreements between enterprises,
 - any decisions or classes of decisions by associations of enterprises, and
 - any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the benefit resulting therefrom, and which :
 - a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;
 - b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

ARTICLE 86

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.

Such improper practices may, in particular, consist in :

- a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

- b) the limitation of production, markets or technical development to the prejudice of consumers;
- c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
- d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

SALES OFFICES OF THE OFFICIAL GAZETTE OF THE EUROPEAN COMMUNITIES

GERMANY : BUNDESANZEIGER : Postfach
Cologne 1
Fernschreiber : Anzeiger Bonn 8 882 595

BELGIUM : MONITEUR BELGE
40, rue de Louvain, Brussels

FRANCE : SERVICE DE VENTE EN FRANCE DES PUBLICATIONS DES COMMUNAUTÉS EUROPÉENNES
26, rue Desaix, Paris 15
Compte courant postal - Paris 23.96

GRAND DUCHY OF LUXEMBOURG : SERVICE DE DIFFUSION DU MEMORIAL
8, avenue Pescatore, Luxembourg

ITALY : LIBRERIA DELLO STATO
Piazza G. Verdi, 10
Roma

Agencies :
Rome - Via del Tritone, 61/A and 61/B
Rome - Via XX Settembre
(Palazzo Ministero delle Finanze)
Milan - Galleria Vittorio Emanuele, 3
Naples - Via Chiaia, 5
Florence - Via Cavour, 46/R

NETHERLANDS : STAATSDRUKKERIJ - EN UITGEVERIJBEDRIJF
Fluwelen Burgwal 18, The Hague

GREAT BRITAIN AND COMMONWEALTH : H.M. STATIONERY OFFICE
P.O. Box 569 - London, S.E.1

OTHER COUNTRIES : SERVICES DES PUBLICATIONS DES COMMUNAUTÉS EUROPÉENNES
Sales Office : 2, place de Metz, Luxembourg
(C.C.P. N° 191-90)

ADDRESSES FROM WHICH THE FORMS MAY BE OBTAINED

A. INFORMATION OFFICES OF THE EUROPEAN COMMUNITIES

- Germany : Verbindungsbüro der Europäischen Gemeinschaften
Zitelmannstrasse 11, Bonn
- Belgium : Service de presse et d'information des Communautés européennes
244, rue de la Loi, Brussels 4
- France : Bureau d'information des Communautés européennes
61, rue des Belles Feuilles, Paris 16e
- Italy : Ufficio stampa e informazione delle Comunità Europee
Via Poli 29, Rome
- Luxembourg : Service de presse et d'information des Communautés européennes
18, rue Aldringer, Luxembourg
- Netherlands : Voorlichtingsdienst der Europese Gemeenschappen
Mauritskade 39, The Hague
- United Kingdom : Information Service of the European Communities
23, Chesham Street, London S.W.1.
- United States : Information Service of the European Communities
236, Southern Building, Washington 5, D.C.

B. EMPLOYERS' FEDERATIONS

- Germany : Bundesverband der Deutschen Industrie
Habsburgerring 2-12, Cologne 10
- Belgium : Fédération des industries belges
4, rue Ravenstein, Brussels 1
- France : Conseil national du patronat français
31, avenue Pierre 1er de Serbie, Paris 16e
- Italie : Confederazione generale dell'industria italiana
11, Piazza Venezia, Rome
- Luxembourg : Fédération des industriels luxembourgeois
8, avenue de l'Arsenal, Luxembourg
- Netherlands : Verbond van Nederlandse Werkgevers
Kneuterdijk 8, The Hague

C. ASSOCIATIONS OF CHAMBERS OF COMMERCE

- Germany : Deutscher Industrie und Handelstag
Postschliessfach 469, Bonn
- Belgium : Fédération nationale des chambres de commerce et d'industrie
de Belgique,
40, rue du Congrès, Brussels
- France : Assemblée des présidents des chambres de commerce et d'industrie
de l'Union française
27, avenue de Friedland, Paris 8e

Italy : Unione italiana delle Camere di commercio
Via Piemonte 26, Rome

Luxembourg : Chambre de commerce du grand-duché de Luxembourg
8, avenue de l'Arsenal, Luxembourg

Netherlands : Kamer van koophandel en fabrieken voor Amsterdam
Beursgebouw, Damrak 62a, Amsterdam

Austria : Austrian Federal Chamber of Commerce
Stubenring 12, Vienna 1

Denmark : Chamber of Commerce of Copenhagen
Börsen, Copenhagen

United Kingdom : The Association of British Chambers of Commerce
68, Queen Street, London, E.C.4

Sweden : The Stockholm Chamber of Commerce
Västra Trädgårdsgatan 9, P.U.B. 160-50, Stockholm.

COUNCIL REGULATION NO. 17

First implementing regulation pursuant to Articles 85 and 86
of the Treaty as amended by Council Regulation N° 59 of 3 July 1962 x)

Article 1

Basic provision

The agreements, decisions and concerted practices referred to in Article 85, paragraph 1, of the Treaty and any abuse of a dominant position on the market within the meaning of Article 86 of the Treaty shall be prohibited, no prior decision to this effect being required; Articles 6, 7 and 23 of the present Regulation shall not be affected by this provision.

Article 2

Negative clearance

At the request of the enterprises or associations of enterprises concerned, the Commission may find that, according to the information it has obtained, there are, under Article 85, paragraph 1, or Article 86 of the Treaty, no grounds for it to intervene with respect to an agreement, decision or practice.

Article 3

Ending of infringements

1. If, acting on request or ex officio, the Commission finds that an enterprise or association of enterprises is infringing Article 85 or Article 86 of the Treaty, it can by means of a decision oblige the enterprises or associations of enterprises concerned to put an end to such infringement.

2. A request to this effect may be submitted by :

- a) Member States;
- b) Natural and legal persons and associations of persons, who show a justified interest.

3. Without prejudice to the other provisions of the present Regulation, the Commission, before taking the decision mentioned in paragraph 1, may address to the enterprises or associations of enterprises concerned recommendations designed to put an end to the infringement.

Article 4

Notification of new agreements, decisions and practises

1. The Commission shall be notified of any agreements, decisions or concerted practices referred to in Article 85, paragraph 1, of the Treaty which have come into being after the entry into force of the present Regulation and for which those concerned wish to invoke Article 85, paragraph 3. As long as such notification has not taken place, no decision to issue a declaration under Article 85, paragraph 3, may be rendered

x) The amendments introduced by Regulation N° 59 are underlined.

2. Paragraph 1 shall not be applicable to agreements, decisions and concerted practices where :

- 1) enterprises of only one Member State take part and where such agreements, decisions and practices involve neither imports nor exports between Member States;
- 2) only two enterprises take part and the sole effect of these agreements is :
 - a) to restrict the freedom of one party to the contract to fix prices or conditions of trading in the resale of goods which have been acquired from the other party to the contract, or
 - b) to impose restraint on the exercise of the rights of any person acquiring or using industrial property rights - particularly patents, utility models, registered designs or trade marks - or on the exercise of the rights of any person entitled, under a contract, to acquire or use manufacturing processes or knowledge relating to the utilisation or application of industrial techniques ;
- 3) their sole object is :
 - a) the development or the uniform application of standards and types,
 - b) joint research to improve techniques, provided that the result is accessible to all parties and that each of them can exploit it.

The Commission may be notified of such agreements, decisions and practices.

Article 5

Notification of existing agreements, decisions and practices

1. The Commission must be notified before November 1, 1962, of any agreements, decisions and concerted practices referred to in Article 85, paragraph 1, of the Treaty which are already in existence at the date of entry into force of the present Regulation and in respect of which those concerned wish to invoke Article 85, paragraph 3, of the Treaty. Provided always that notwithstanding the foregoing provision, any agreements, decisions and concerted practices to which not more than two enterprises are parties must be notified before February 1, 1963.

2. Paragraph 1 is not applicable where the said agreements, decisions and concerted practices fall within the categories referred to in paragraph 2 of Article 4; the Commission may be notified of these.

Article 6

Decisions to issue a declaration under Article 85, paragraph 3

1. When the Commission decides to issue a declaration under Article 85, paragraph 3, it shall indicate the date from which the decision shall take effect. This date shall not be prior to the date of notification.

2. The second sentence of paragraph 1 shall not be applicable to the agreements, decisions and concerted practices referred to in Article 4, paragraph 2, and Article 5, paragraph 2, nor to those which are referred to in Article 5, paragraph 1, and of which the Commission has been notified within the time-limit fixed therein.

Article 7

Special provisions for existing agreements, decisions and practices

1. Where agreements, decisions and concerted practices already in existence at the date of the entry into force of the present Regulation and of which the Commission has been notified within the time-limits set out in Article 5, paragraph 1, do not meet the requirements of Article 85, paragraph 3, of the Treaty, and where the enterprises and associations of enterprises concerned put an end to them or modify them so that they no longer fall under the prohibition laid down in Article 85, paragraph 1, or so that they then meet the requirements of Article 85, paragraph 3, the prohibition laid down in Article 85, paragraph 1, shall be applicable only for a period fixed by the Commission. A decision by the Commission pursuant to the foregoing sentence cannot be invoked against enterprises or associations of enterprises which have not given their express assent to the notification.
2. Paragraph 1 shall be applicable to agreements, decisions and concerted practices which are already in existence at the date of the entry into force of the present Regulation and which fall within the categories referred to in Article 4, paragraph 2, provided that notification shall have taken place before January 1, 1964.

Article 8

Period of validity and revoking of decisions to issue a declaration under Article 85, paragraph 3

1. A decision to issue a declaration under Article 85, paragraph 3, of the Treaty shall be valid for a specified period and may have certain conditions and stipulations attached.
2. The decision may be renewed on request provided that the conditions laid down in Article 85, paragraph 3, of the Treaty continue to be fulfilled.
3. The Commission may revoke or alter its decision or prohibit those concerned from taking certain courses of action :
 - a. where the de facto situation has changed with respect to a factor essential in the granting of the decision,
 - b. where those concerned infringe a stipulation attached to the decision,
 - c. where the decision is based on false information or has been obtained fraudulently, or
 - d. where those concerned abuse the exemption from the provisions of Article 85, paragraph 1, of the Treaty granted to them by the decision.

In the cases covered by sub-paragraphs b, c en d, the decision can also be revoked with retroactive effect.

Article 9

Competence

1. Subject to review of its decision by the Court of Justice, the Commission shall have sole competence to declare Article 85, paragraph 1, inapplicable pursuant to Ar-

ticle 85, paragraph 3, of the Treaty.

2. The Commission shall have competence to apply Article 85, paragraph 1, and Article 86 of the Treaty, even if the time-limits for notification laid down in Article 5, paragraph 1, and Article 7, paragraph 2, have not expired.

3. As long as the Commission has not initiated any procedure pursuant to Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85, paragraph 1, and Article 86 in accordance with Article 88 of the Treaty, even if the time-limits for notification laid down in Article 5, paragraph 1, and Article 7 have not expired.

Article 10

Liaison with the authorities of the Member States

1. The Commission shall transmit without delay to the competent authorities of the Member States copies of the requests, applications and notifications together with copies of the most important documents which have been sent to it with the purpose of establishing the existence of infringements of Article 85 or Article 86 of the Treaty, or with the purpose of obtaining negative clearance or a decision to issue a declaration under Article 85, paragraph 3.

2. It shall carry out the procedures mentioned in paragraph 1 in close and constant liaison with the competent authorities of the Member States ; and these authorities may submit their views on the said procedures.

3. A Consultative Committee on Cartels and Monopolies shall be consulted prior to any decision consequent upon a course of procedure referred to in paragraph 1 and prior to any decision concerning the renewal, the alteration or the revocation of a decision to issue a declaration under Article 85, paragraph 3, of the Treaty.

4. The Consultative Committee shall be composed of officials competent in the field of cartels and monopolies. Each Member State shall appoint one official to represent it, who, if he is prevented from attending, may be replaced by another official.

5. The consultation shall take place at a joint meeting called by the Commission; the session shall take place fourteen days at the earliest after dispatch of the convocation letter. This letter shall be accompanied by an exposition of the case to be considered, indicating the most important documents, and a preliminary draft of the decision shall be enclosed.

6. The Consultative Committee may tender an opinion even if some members are absent and have not been replaced by another official. The result of the consultation shall be set out in a written statement which shall be attached to the draft of the decision. It shall not be made public.

Article 11

Requests for information

1. In the execution of the duties assigned to it by Article 89 and by provisions pursuant to Article 87 of the Treaty, the Commission shall have power to seek all

necessary information from the Governments and competent authorities of the Member States as well as from enterprises and associations of enterprises.

2. When sending a request for information to an enterprise or association of enterprises, the Commission shall at the same time address a copy of this request to the competent authority in the Member State in the territory of which the principal place of business of the enterprise or the association of enterprises is situated.

3. In its request the Commission shall indicate the legal basis and the purpose of the same, and the penalties for supplying false information laid down in Article 15, paragraph 1, sub-paragraph b.

4. Information must be supplied on request by the owners of the enterprises or by their representatives and in the case of legal persons, of companies or of associations without legal personality, by the persons responsible for representing them according to the law or the memorandum or articles of association.

5. Where the enterprise or association of enterprises does not supply the information required within the time-limit set by the Commission, or supplies incomplete information, the Commission's request for information shall be made by means of a decision. This decision shall specify the information requested, fix an appropriate time-limit within which it is to be supplied and specify the sanctions applicable under Article 15, paragraph 1, sub-paragraph b, and under Article 16, paragraph 1, sub-paragraph c, and shall indicate that there is a right to institute proceedings against the decision before the Court of Justice.

6. The Commission shall at the same time send a copy of its decision to the competent authority of the Member State in the territory of which the principal place of business of the enterprise or association of enterprises is situated.

Article 12

Enquiries by economic sectors

1. If in any sector of the economy the trend of trade between Member States, price movements, inflexibility of prices or other circumstances suggest that in the economic sector concerned competition is being restricted or distorted within the Common Market, the Commission may decide to conduct a general enquiry in the course of which it may request enterprises in the sector concerned to supply the information necessary for giving effect to the principles laid down in Articles 85 and 86 of the Treaty and for carrying out the tasks entrusted to the Commission.

2. The Commission may in particular request any enterprise or group of enterprises in the sector concerned to communicate to it all agreements, decisions and concerted practices which are exempted from notification by virtue of Article 4, paragraph 2, and Article 5, paragraph 2.

3. When making enquiries as provided for in paragraph 2, the Commission shall also request enterprises or groups of enterprises whose size suggest that they occupy a dominant position within the Common Market or within a substantial part thereof to supply any particulars relating to the structure of the enterprises and to the conduct of their affairs necessary to appraise their situation in the light of Article 86 of the Treaty.

4. Article 10, paragraphs 3 to 6, and Articles 11, 13 and 14 shall be applied mutatis mutandis.

Article 13

Investigations by authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall carry out the investigations which the Commission considers necessary under Article 14, paragraph 1, or which it has ordered by a decision taken pursuant to Article 14, paragraph 3. The servants of the competent authorities of the Member States carrying out this investigation shall exercise their powers on production of a written warrant issued by the competent authority of the Member State in the territory of which the investigation is to be carried out. This warrant shall indicate the subject and the purpose of the enquiry.

2. The servants of the Commission may, at its request or at that of the competent authority of the Member State in the territory of which the investigation is to be made, assist the servants of this authority in the execution of their duties.

Article 14

Investigating powers of the Commission

1. In execution of the duties assigned to it by Article 89 and by provisions laid down pursuant to Article 87 of the Treaty, the Commission may conduct all necessary investigations into the affairs of enterprises and associations of enterprises.

To this end the servants authorized by the Commission shall be vested with the following powers :

- a. to examine the books and other business documents,
- b. to make copies of, or extracts from the same,
- c. to ask for verbal explanations on the spot,
- d. to have access to all premises, land and vehicles of enterprises.

2. The servants authorized by the Commission for these investigations shall exercise their powers on production of a written warrant stating the nature and purpose of the enquiry and the fines provided for in Article 15, paragraph 1, sub-paragraph c, in the event of incomplete submission of the books or other business documents required. The Commission shall in good time advise the competent authority of the Member State in the territory of which the investigation is to take place, of this investigation, stating the name and office of the authorized servant.

3. The enterprises and associations of enterprises must submit to the investigations ordered by a decision of the Commission. The decision shall state the subject and purpose of the enquiry, fix the date when it is to begin and call attention to the sanctions provided for under Article 15, paragraph 1, sub-paragraph c, and Article 16, paragraph 1, sub-paragraph d, and shall indicate that there is a right to institute proceedings against the decision before the Court of Justice.

4. Before taking the decisions referred to in paragraph 3, the Commission shall consult the competent authority of the Member State in the territory of which the

investigation is to be carried out.

5. The servants of the competent authority of the Member State in the territory of which the investigation is to be carried out may, at the request of this authority or of the Commission, lend assistance to the Commission's servants in the execution of their duties.

6. Where an enterprise resists an investigation ordered pursuant to the present Article, the Member State concerned shall lend the servants authorized by the Commission the assistance necessary to enable them to carry out their investigation. The Member State shall, after consulting the Commission, take the necessary measures for this purpose before October 1, 1962.

Article 15

Fines

1. The Commission may by means of a decision impose on enterprises and associations of enterprises fines of from one hundred to five thousand units of account where, wilfully or through negligence :

- a. they supply false or misleading information in an application submitted pursuant to Article 2 or in a notification made pursuant to Articles 4 and 5,
- b. they supply false information in reply to a request made pursuant to Article 11, paragraph 3 or 5, or to Article 12, or do not supply information within a time-limit fixed by a decision taken under Article 11, paragraph 5, or
- c. they submit in incomplete form, on the occasion of investigations carried out under Article 13 or Article 14, the books or other business documents required, or decline to submit to an investigation ordered by means of a decision taken pursuant to Article 14, paragraph 3.

2. The Commission may by means of a decision impose on enterprises and associations of enterprises fines of from one thousand to one million units of account ; this last figure may be increased to 10 % of the turnover of the preceding business year of each of the enterprises having taken part in the infringement, where these enterprises, wilfully or through negligence :

- a. have infringed the provisions of Article 85, paragraph 1, or of Article 86 of the Treaty, or
- b. have infringed a stipulation made under Article 8, paragraph 1.

In determining the amount of the fine the duration of the infringement shall be considered in addition to its gravity.

3. Article 10, paragraphs 3 to 6, shall apply.

4. The decisions taken under paragraphs 1 and 2 shall have no penal character.

5. The fines provided for in paragraph 2, sub-paragraph a, may not be imposed for actions taking place :

- a. after the notification to the Commission and prior to its decision regarding the application of Article 85, paragraph 3, of the Treaty, in so far as these actions do not go beyond the limits of the activity described in the notification,

b. prior to the notification of and within the framework of the agreements, decisions and concerted practices existing at the date of entry into force of the present Regulation, provided that this notification has been made within the time-limits laid down in Article 5, paragraph 1, and Article 7, paragraph 2.

6. Paragraph 5 shall not apply once the Commission has informed the enterprises concerned that after a preliminary examination it considers that the conditions of Article 85, paragraph 1, of the Treaty have been fulfilled and that application of Article 85, paragraph 3, is not warranted.

Article 16

Penalties

1. The Commission may by means of a decision impose on enterprises or associations of enterprises penalties of from fifty to one thousand units of account per day of delay, reckoned from the date fixed in its decision, in order to oblige them :

- a. to put an end to an infringement of Article 85 or Article 86 of the Treaty in conformity with a decision taken pursuant to Article 3,
- b. to discontinue any action prohibited under Article 8, paragraph 3,
- c. to supply completely and truthfully any information which it has requested by a decision taken under Article 11, paragraph 5,
- d. to submit to any investigation it has ordered by a decision taken pursuant to Article 14, paragraph 3.

2. When the enterprises or associations of enterprises have fulfilled the obligation which it was the object of the penalty to enforce, the Commission may fix the final amount of the penalty at a figure lower than that which would result from the initial decision.

3. Article 10, paragraphs 3 to 6, shall apply.

Article 17

Review by the Court of Justice

The Court of Justice shall have full jurisdiction within the meaning of Article 172 of the Treaty to adjudicate on proceedings instituted against the decisions by which the Commission has fixed a fine or a penalty ; it may cancel, reduce or increase the fine or the penalty imposed.

Article 18

Unit of account

For the purposes of Articles 15 to 17 the unit of account shall be that adopted for drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 19

Hearing of the parties concerned and of third parties

1. Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15 and 16,

the Commission shall give the enterprises or associations of enterprises concerned an opportunity to express their views on the points objected to which have been taken into consideration by the Commission.

2. So far as the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons or associations of persons. If natural or legal persons or associations of persons who show that they have a sufficient interest ~~ask~~ to be heard, their request shall be granted.

3. When the Commission intends to give negative clearance pursuant to Article 2 or to issue a declaration under Article 85, paragraph 3, of the Treaty, it shall publish the essential content of the application or notification, inviting all interested third parties to submit their observations within a time-limit which it shall fix and which shall not be less than one month. Publication shall respect the justified interest of enterprises that their business secrets should not be divulged.

Article 20

Professional secrets

1. Information gathered pursuant to Articles 11, 12, 13 and 14 may not be used for any purpose other than that for which it was requested.

2. Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States as well as their officials and other employees may not disclose matters which have come to their knowledge through the application of the present Regulation and which by their nature are professional secrets.

3. The provisions of paragraphs 1 and 2 shall not hinder the publication of general surveys or reviews not containing information relating to particular enterprises or associations of enterprises.

Article 21

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Articles 2, 3, 6, 7 and 8.

2. The publication shall name the parties concerned and give the essential content of the decisions ; the justified interest of the enterprises that their business secrets should not be divulged shall be respected.

Article 22

Special provisions

1. The Commission shall submit to the Council proposals for making certain categories of agreements, decisions and concerted practices such as are referred to in Article 4, paragraph 2, and Article 5, paragraph 2, subject to the notification provided for in Articles 4 and 5.

2. Within one year from the entry into force of the present Regulation the Council shall examine, on a proposal of the Commission, any special provisions which could be made in derogation from the provisions contained in this Regulation with

respect to the agreements, decisions and concerted practices referred to in Article 4, paragraph 2, and Article 5, paragraph 2.

Article 23

Transitional system applicable to decisions
taken by authorities of Member States

1. Agreements, decisions and concerted practices referred to in Article 85, paragraph 1, of the Treaty to which, before the entry into force of this Regulation, the competent authority of a Member State has declared Article 85, paragraph 1, to be inapplicable pursuant to Article 85, paragraph 3, shall not be subject to the notification provided for in Article 5. The decision of the competent authority of the Member State shall be considered a decision within the meaning of Article 6 ; its validity shall expire at the latest on the date which the said authority has fixed, but may not exceed a duration of three years reckoned from the entry into force of the present Regulation. Article 8, paragraph 3 shall apply.
2. Applications for renewal of the decisions referred to in paragraph 1 shall be settled by the Commission in accordance with Article 8, paragraph 2.

Article 24

Implementing provisions

The Commission shall have authority to lay down implementing provisions concerning the form, content and other details of applications submitted pursuant to Articles 2 and 3 and of the notification provided for in Articles 4 and 5, and to lay down those concerning the hearings provided for in Article 19, paragraphs 1 and 2.

The present Regulation shall be binding in every respect and directly applicable in each Member State.

By the Council

The President

Done at Brussels, February 6, 1962.

M. COUVE DE MURVILLE

COMMISSION REGULATION No. 27

First Implementing Regulation pursuant to Council Regulation No. 17
of 6 February 1962

(Content and other details concerning applications and notifications)

Article 1

Persons authorized to file applications and notifications

1. Any enterprise party to the agreements, decisions, or practices coming under Article 85 or Article 86 of the Treaty shall be entitled to file an application under Article 2 or a notification under Articles 4 and 5 of Regulation No. 17. Where the application or notification is filed by only certain of the enterprises participating, they shall so inform the other enterprises.
2. Where representatives of enterprises, of associations of enterprises, or of natural or legal persons or of associations of persons sign the applications and notifications provided for in Article 2 and in Article 3, paragraph 1 and paragraph 2, subparagraph b) and in Articles 4 and 5 of Regulation No. 17, they must submit written evidence that they are authorized to act in this capacity.
3. Where an application or notification is filed jointly, a joint representative should be appointed.

Article 2

Filing of applications and notifications

1. Applications, notifications and relevant enclosures are to be filed with the Commission, in seven copies.
2. For enclosed documents, either the original or copies may be sent. Copies must be certified as being true copies of the original.
3. Applications and notifications shall be filed in one of the official languages of the Community. The documents shall be lodged in their original languages. Where the original language is not one of the official languages, a translation into one of these languages shall be enclosed.

Article 3

Date from which applications and notifications take effect

An application or notification shall take effect from the time it is received by the Commission. However, where the application or notification is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

Article 4

Content of applications and notifications

1. The applications provided for in Article 2 of Regulation No. 17 which concern Article 85, paragraph 1 of the Treaty, must be filed on Form A annexed hereto.

2. The notifications provided for in Article 4 or Article 5 of Regulation No. 17 must be filed on Form B annexed hereto.
3. Applications and notifications must give the information requested in the forms.
4. Several participating enterprises may submit an application or notification on a single form.
5. The applications provided for in Article 2 of Regulation No. 17 which concern Article 86 of the Treaty shall include a complete statement of the facts; this must cover, in particular, the practice in question and the position occupied by the enterprise or enterprises in the Common Market or in a substantial part of it with respect to the product or service concerned.

Article 5

Transitional provisions

1. Any applications and notifications filed without use of this Regulation shall be considered as complying with Article 4 of the present Regulation.
2. The Commission may require that a form, duly filled in, be submitted within such time as it shall determine. In this event, applications and notifications shall not be considered as properly filed unless the forms are submitted within the period so determined and in accordance with the provisions of the present Regulation.

Article 6

The present Regulation shall enter into force the day after its publication in the official gazette of the European Communities.

The present Regulation shall be binding in every respect and directly applicable in each Member State.

Done at Brussels on the third day
of May in the year one thousand nine
hundred and sixty-two.

by the Commission

W. HALLSTEIN
President

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