

COMMISSION OF THE EUROPEAN COMMUNITIES

**Competition law  
in the European Communities**

Volume I: Rules applicable to undertakings

(Situation at 31 December 1989)



COMMISSION OF THE EUROPEAN COMMUNITIES

**Competition law  
in the European Communities**

Volume I: Rules applicable to undertakings

(Situation at 31 December 1989)

BRUSSELS • LUXEMBOURG • 1990

This publication is also available in the following languages:

ES ISBN 92-826-1303-8  
DA ISBN 92-826-1304-6  
DE ISBN 92-826-1305-4  
GR ISBN 92-826-1306-2  
FR ISBN 92-826-1308-9  
IT ISBN 92-826-1309-7  
NL ISBN 92-826-1310-0  
PT ISBN 92-826-1311-9

Cataloguing data can be found at the end of this publication

Luxembourg: Office for Official Publications of the European Communities, 1990

Vol. I: ISBN 92-826-1307-0

Vol. I + Vol. II: ISBN 92-826-1298-8

Catalogue number: CV-42-90-001-EN-C

© ECSC-EEC-EAEC, Brussels ● Luxembourg, 1990

Reproduction is authorized, except for commercial purposes, provided the source is acknowledged

*Printed in Belgium*

# CONTENTS

<b>A — Competition rules applying to undertakings in the EEC and ECSC Treaties</b>	7
Article 85 to 91 of the EEC Treaty	9
Articles 65 and 66 of the ECSC Treaty	13
Article 136 of the Act of Accession of Denmark, Ireland and the United Kingdom	18
Article 131 of the Act of Accession of Greece	19
Article 380 of the Act of Accession of Spain and Portugal	20
<b>B — Council Regulation (EEC) No 4064/89 of 21 December 1989</b>	21
<b>C — Council and Commission Regulations, Directives, Decisions and Notices relating to the application of the EEC and ECSC competition rules applying to undertakings</b>	45
<b>I — GENERAL PROCEDURAL RULES</b>	47
— Council Regulation No 17/62 of 6 February 1962	47
— Commission Regulation No 27/62 of 3 May 1962	60
— Commission Regulation No 99/63/EEC of 25 July 1963	75
<b>II — BLOCK EXEMPTIONS (Article 85 (3) of the EEC Treaty)</b>	79
<b>1. Exclusive dealing agreements</b>	79
— Council Regulation No 19/65/EEC of 2 March 1965	79
— Commission Regulation No 67/67/EEC of 22 March 1967	84
— Commission Regulation (EEC) No 1983/83 of 22 June 1983	90
— Commission Regulation (EEC) No 1984/83 of 22 June 1983	96
Commission Notice (84/C 101/02) concerning Commission Regulations (EEC) Nos 1983/83 and 1984/83	107
— Commission Regulation (EEC) No 123/85 of 12 December 1984	121
Commission Notice (85/C 17/03) concerning Commission Regulation (EEC) No 123/85	134
	3



2.	<b>Patent licensing agreements</b>	139
	— Commission Regulation (EEC) No 2349/84 of 23 July 1984	139
3.	<b>Specialization and research and development agreements</b>	153
	— Council Regulation (EEC) No 2821/71 of 20 December 1971	153
	— Commission Regulation (EEC) No 417/85 of 19 December 1984	158
	— Commission Regulation (EEC) No 418/85 of 19 December 1984	164
4.	<b>Franchising agreements</b>	177
	— Commission Regulation (EEC) No 4087/88 of 30 November 1988	177
5.	<b>Know-how licensing agreements</b>	189
	— Commission Regulation (EEC) No 556/89 of 30 November 1988	189
III —	<i>NOTICES OF THE COMMISSION</i>	209
	— Exclusive dealing contracts with commercial agents (OJ 139, 24. 12. 1962, p. 2921)	209
	— Cooperation between enterprises (OJ C 75, 29. 7. 1968, p. 3)	212
	— Agreements of minor importance (OJ C 231, 12. 9. 1986, p. 2)	218
	— Subcontracting agreements (OJ C 1, 3. 1. 1979, p. 2)	222
	— Imports into the Community of Japanese goods (OJ C 111, 21. 10. 1972, p. 13)	225
IV —	<i>REGULATIONS IN THE FIELD OF TRANSPORT</i>	227
	— Council Regulation (EEC) No 2988/74 of 26 November 1974	227
	— Council Regulation No 141/62 of 26 November 1962	231
	— Council Regulation (EEC) No 1017/68 of 19 July 1968	233
	— Commission Regulation (EEC) No 1629/69 of 8 August 1969 concerning Council Regulation (EEC) No 1017/68	252
	— Commission Regulation (EEC) No 1630/69 of 8 August 1969 concerning Council Regulation (EEC) No 1017/68	255
	— Council Regulation (EEC) No 4056/86 of 22 December 1986	259

— Commission Regulation (EEC) No 4260/88 of 16 December 1988 concerning Council Regulation (EEC) No 4056/86	278
— Council Regulation (EEC) No 3975/87 of 14 December 1987	289
— Commission Regulation (EEC) No 4261/88 of 16 December 1988 concerning Council Regulation (EEC) No 3975/87	301
— Council Regulation (EEC) No 3976/87 of 14 December 1987	319
— Commission Regulation (EEC) No 2671/88 of 26 July 1988	324
— Commission Notice (88/C 257/04) concerning Commission Regulation (EEC) No 2671/88	331
— Commission Notice (89/C 119/04) concerning Commission Regulation (EEC) No 2671/88	332
— Commission Regulation (EEC) No 2672/88 of 26 July 1988	334
— Commission Regulation (EEC) No 2673/88 of 26 July 1988	340
V — <i>REGULATION IN THE FIELD OF AGRICULTURE</i>	345
— Council Regulation No 26/62 of 4 April 1962	345
VI — <i>STATUTORY DECISIONS IN THE FIELD OF COAL AND STEEL</i>	349
— High Authority Decision No 24-54 of 6 May 1954	349
— High Authority Decision No 26-54 of 6 May 1954	351
— High Authority Decision No 25-67 of 22 June 1967	354
— Commission Decision No 715/78/ECSC of 6 April 1978	362
— Commission Decision No 379/84/ECSC of 15 February 1984	366
VII — <i>PUBLIC UNDERTAKINGS</i>	369
<b>Directives under Article 90 (3) of the EEC Treaty</b>	369
— Commission Directive (88/301/EEC) of 16 May 1988	369
VIII — <i>INTRA-COMMUNITY DUMPING</i>	379
— Council Regulation (EEC) No 812/86 of 14 March 1986	379
— Council Decision No 813/86/ECSC of 14 March 1986	395



**A — Competition rules  
applying to undertakings  
in the EEC and ECSC Treaties**



## Articles 85 to 91 of the EEC Treaty

### *Article 85*

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

### *Article 86*

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

### *Article 87*

1. Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86.

If such provisions have not been adopted within the period mentioned, they shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the Assembly.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

- (a) to ensure compliance with the prohibitions laid down in Article 85 (1) and in Article 86 by making provision for fines and periodic penalty payments;
- (b) 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;
- (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 85 and 86;
- (d) to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph;
- (e) to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this Article.

### *Article 88*

Until the entry into force of the provisions adopted in pursuance of Article 87, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 85, in particular paragraph 3, and of Article 86.

### *Article 89*

1. Without prejudice to Article 88, the Commission shall, as soon as it takes up its duties, ensure the application of the principles laid down in Articles 85 and 86. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorize Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

### *Article 90*

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

### *Article 91*

1. If during the transitional period, the Commission, on application by a Member State or by any other interested party, finds that dumping is being practised within the common



market, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.

Should the practices continue, the Commission shall authorize the injured Member State to take protective measures, the conditions and details of which the Commission shall determine.

2. As soon as this Treaty enters into force, products which originate in or are in free circulation in one Member State and which have been exported to another Member State shall, on reimportation, be admitted into the territory of the first-mentioned State free of all customs duties, quantitative restrictions or measures having equivalent effect. The Commission shall lay down appropriate rules for the application of this paragraph.

## Articles 65 and 66 of the ECSC Treaty

### *Article 65<sup>1, 2, 3</sup>*

1. All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market shall be prohibited, and in particular those tending:

- (a) to fix or determine prices;
- (b) to restrict or control production, technical development or investment;
- (c) to share markets, products, customers or sources of supply.

2. However, the High Authority shall authorize specialization agreements or joint-buying or joint-selling agreements in respect of particular products, if it finds that:

- (a) such specialization or such joint-buying or selling will make for a substantial improvement in the production or distribution of those products;
- (b) the agreement in question is essential in order to achieve these results and is not more restrictive than is necessary for that purpose; and
- (c) the agreement is not liable to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the

---

#### <sup>1</sup> Documents concerning the accession

##### *Article 156:*

Agreements, decisions and concerted practices in existence at the time of accession which come within the scope of Article 65 of the ECSC Treaty by reason of accession must be notified to the Commission within three months of accession. Only agreements and decisions which have been notified shall remain provisionally in force until a decision has been taken by the Commission.

#### <sup>2</sup> Documents concerning the accession of the Hellenic Republic

##### *Article 148:*

Agreements, decisions and concerted practices in existence at the time of the accession of the Hellenic Republic which come within the scope of Article 65 of the ECSC Treaty by reason of this accession must be notified to the Commission within three months of accession. Only agreements and decisions which have been notified shall remain provisionally in force until a decision has been taken by the Commission.

#### <sup>3</sup> Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic

##### *Article 398:*

Agreements, decisions and concerted practices in existence at the time of accession which come within the scope of Article 65 of the ECSC Treaty by reason of the accession must be notified to the Commission within three months of accession. Only Agreements and decisions which have been notified shall remain provisionally in force until a decision has been taken by the Commission. (OJ L 302, 15.11.1985, p. 138).

products in question within the common market, or to shield them against effective competition from other undertakings within the common market.

If the High Authority finds that certain agreements are strictly analogous in nature and effect to those referred to above, having particular regard to the fact that this paragraph applies to distributive undertakings, it shall authorize them also when satisfied that they meet the same requirements.

Authorizations may be granted subject to specified conditions and for limited periods. In such cases the High Authority shall renew an authorization once or several times if it finds that the requirements of subparagraphs (a) to (c) are still met at the time of renewal.

The High Authority shall revoke or amend an authorization if it finds that as a result of a change in circumstances the agreement no longer meets these requirements, or that the actual results of the agreement or of the application thereof are contrary to the requirements for its authorization.

Decisions granting, renewing, amending, refusing or revoking an authorization shall be published together with the reasons therefor; the restrictions imposed by the second paragraph of Article 47 shall not apply thereto.

3. The High Authority may, as provided in Article 47, obtain any information needed for the application of this Article, either by making a special request to the parties concerned or by means of regulations stating the kinds of agreement, decision or practice which must be communicated to it.

4. Any agreement or decision prohibited by paragraph 1 of this Article shall be automatically void and may not be relied upon before any court or tribunal in the Member States.

The High Authority shall have sole jurisdiction, subject to the right to bring actions before the Court, to rule whether any such agreement or decision is compatible with this Article.

5. On any undertaking which has entered into an agreement which is automatically void, or has enforced or attempted to enforce, by arbitration, penalty, boycott or any other means, an agreement or decision which is automatically void or an agreement for which authorization has been refused or revoked, or has obtained an authorization by means of information which it knew to be false or misleading, or has engaged in practices prohibited by paragraph 1 of this Article, the High Authority may impose fines or periodic penalty payments not exceeding twice the turnover on the products which were the subject of the agreement, decision or practice prohibited by this Article; if, however, the purpose of the agreement, decision or practice is to restrict production, technical development or investment, this maximum may be raised to 10% of the annual turnover of the undertakings in question in the case of fines, and 20% of the daily turnover in the case of periodic penalty payments.

## *Article 66*

1. Any transaction shall require the prior authorization of the High Authority, subject to the provisions of paragraph 3 of this Article, if it has in itself the direct or indirect effect of bringing about within the territories referred to in the first paragraph of Article 79, as a result of action by any person or undertaking or group of persons or undertakings, a concentration between undertakings at least one of which is covered by Article 80, whether the transaction concerns a single product or a number of different products, and whether it is effected by merger, acquisition of shares or parts of the undertaking or assets, loan, contract or any other means of control. For the purpose of applying these provisions, the High Authority shall, by regulations made after consulting the Council, define what constitutes control of an undertaking.

2. The High Authority shall grant the authorization referred to in the preceding paragraph if it finds that the proposed transaction will not give to the persons or undertakings concerned the power, in respect of the product or products within its jurisdiction :

— to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products; or

— to evade the rules of competition instituted under this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

In assessing whether this is so, the High Authority shall, in accordance with the principle of non-discrimination laid down in Article 4 (b), take account of the size of like undertakings in the Community, to the extent it considers justified in order to avoid or correct disadvantages resulting from unequal competitive conditions.

The High Authority may make its authorization subject to any conditions which it considers appropriate for the purposes of this paragraph.

Before ruling on a transaction concerning undertakings at least one of which is not subject to Article 80, the High Authority shall obtain the comments of the governments concerned.

3. The High Authority shall exempt from the requirement of prior authorization such classes of transactions as it finds should, in view of the size of the assets or undertakings concerned, taken in conjunction with the kind of concentration to be effected, be deemed to meet the requirements of paragraph 2. Regulations made to this effect, with the assent of the Council, shall also lay down the conditions governing such exemption.

4. Without prejudice to the application of Article 47 to undertakings within its jurisdiction, the High Authority may, either by regulations made after consultation with the Council stating the kind of transaction to be communicated to it or by a special request under these regulations to the parties concerned, obtain from the natural or legal persons who have acquired or regrouped or are intending to acquire or regroup the rights or assets

in question any information needed for the application of this Article concerning transactions liable to produce the effect referred to in paragraph 1.

5. If a concentration should occur which the High Authority finds has been effected contrary to the provisions of paragraph 1 but which nevertheless meets the requirements of paragraph 2, the High Authority shall make its approval of that concentration subject to payment by the persons who have acquired or regrouped the rights or assets in question of the fine provided for in the second subparagraph of paragraph 6; the amount of the fine shall not be less than half of the maximum determined in that subparagraph should it be clear that authorization ought to have been applied for. If the fine is not paid, the High Authority shall take the steps hereinafter provided for in respect of concentrations found to be unlawful.

If a concentration should occur which the High Authority finds cannot fulfil the general or specific conditions to which an authorization under paragraph 2 would be subject, the High Authority shall, by means of a reasoned decision, declare the concentration unlawful and, after giving the parties concerned the opportunity to submit their comments, shall order separation of the undertakings or assets improperly concentrated or cessation of joint control, and any other measures which it considers appropriate to return the undertakings or assets in question to independent operation and restore normal conditions of competition. Any person directly concerned may institute proceedings against such decisions, as provided in Article 33. By way of derogation from Article 33, the Court shall have unlimited jurisdiction to assess whether the transaction effected is a concentration within the meaning of paragraph 1 and of regulations made in application thereof. The institution of proceedings shall have suspensory effect. Proceedings may not be instituted until the measures provided for above have been ordered, unless the High Authority agrees to the institution of separate proceedings against the decision declaring the transaction unlawful.

The High Authority may at any time, unless the third paragraph of Article 39 is applied, take or cause to be taken such interim measures of protection as it may consider necessary to safeguard the interests of competing undertakings and of third parties, and to forestall any step which might hinder the implementation of its decisions. Unless the Court decides otherwise, proceedings shall not have suspensory effect in respect of such interim measures.

The High Authority shall allow the parties concerned a reasonable period in which to comply with its decisions, on expiration of which it may impose daily penalty payments not exceeding one tenth of 1 % of the value of the rights or assets in question.

Furthermore, if the parties concerned do not fulfil their obligations, the High Authority shall itself take steps to implement its decision; it may in particular suspend the exercise, in undertakings within its jurisdiction, of the rights attached to the assets acquired irregularly, obtain the appointment by the judicial authorities of a receiver of such assets, organize the forced sale of such assets subject to the protection of the legitimate interests of their owners, and annul with respect to natural or legal persons who have acquired the rights or assets in question through the unlawful transaction, the acts, decisions, resolutions or proceedings of

the supervisory and managing bodies or undertakings over which control has been obtained irregularly.

The High Authority is also empowered to make such recommendations to the Member States concerned as may be necessary to ensure that the measures provided for in the preceding subparagraphs are implemented under their own law.

In the exercise of its powers, the High Authority shall take account of the rights of third parties which have been acquired in good faith.

6. The High Authority may impose fines not exceeding:

— 3% of the value of the assets acquired or regrouped or to be acquired or regrouped, on natural or legal persons who have evaded the obligations laid down in paragraph 4;

— 10% of the value of the assets acquired or regrouped, on natural or legal persons who have evaded the obligations laid down in paragraph 1; this maximum shall be increased by one twenty-fourth for each month which elapses after the end of the twelfth month following completion of the transaction until the High Authority establishes that there has been an infringement;

— 10% of the value of the assets acquired or regrouped or to be acquired or regrouped, on natural or legal persons who have obtained or attempted to obtain authorization under paragraph 2 by means of false or misleading information;

— 15% of the value of the assets acquired or regrouped, on undertakings within its jurisdiction which have engaged in or been party to transactions contrary to the provisions of this Article.

Persons fined under this paragraph may appeal to the Court as provided in Article 36.

7. If the High Authority finds that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the common market are using that position for purposes contrary to the objectives of this Treaty, it shall make to them such recommendations as may be appropriate to prevent the position from being so used. If these recommendations are not implemented satisfactorily within a reasonable time, the High Authority shall, by decisions taken in consultation with the government concerned, determine the prices and conditions of sale to be applied by the undertaking in question or draw up production or delivery programmes with which it must comply, subject to liability to the penalties provided for in Articles 58, 59 and 64.

## **Article 136 of the Act of Accession of Denmark, Ireland and the United Kingdom**

### *Article 136*

1. If, before 31 December 1977, the Commission, on application by a Member State or by any other interested party, finds that dumping is being practised between the Community as originally constituted and the new Member States or between the new Member States themselves, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.

Should the practices continue, the Commission shall authorize the injured Member State or States to take protective measures, the conditions and details of which the Commission shall determine.

2. For the application of this Article to the products listed in Annex II to the EEC Treaty, the Commission shall evaluate all relevant factors, in particular the level of prices at which these products are imported into the market in question from elsewhere, account being taken of the provisions of the EEC Treaty relating to agriculture in particular Article 39.

## **Article 131 of the Act of Accession of Greece**

### *Article 131*

1. If before the expiry of the period of application of the transitional measures laid down under this Act for each case the Commission, on application by a Member State or by any other interested party, finds that dumping is being practised between the Community as at present constituted and Greece, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.

Should the practices continue, the Commission shall authorize the injured Member State or States to take protective measures, the conditions and details of which the Commission shall determine.

2. For the application of this Article, to the products listed in Annex II to the EEC Treaty, the Commission shall evaluate all relevant factors, in particular the level of prices at which these products are imported into the market in question from elsewhere, account being taken of the provisions of the EEC Treaty relating to agriculture and in particular Article 39 thereof.



## **Article 380 of the Act of Accession of Spain and Portugal**

### *Article 380*

1. If, before the expiry of the period of application of the transitional measures laid down under this Act for each case, the Commission, on application by a Member State or by any other interested party and in accordance with rules of procedure to be adopted upon accession by the Council acting by a qualified majority on a proposal from the Commission, finds that dumping is being practised between the Community as at present constituted and the new Member States or between the new Member States, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.

Should the practices continue, the Commission shall authorize the injured Member State or States to take protective measures, the conditions and details of which the Commission shall determine.

2. For the application of this Article to the products listed in Annex II to the EEC Treaty, the Commission shall evaluate all relevant factors, in particular the level of prices at which these products are imported into the market in question from elsewhere, account being taken of the provisions of the EEC Treaty relating to agriculture and in particular Article 39.

3. The measures adopted before accession under Regulation (EEC) No 2176/84 and Decision 2177/84/ECSC with regard to the new Member States, and those adopted before accession under the anti-dumping legislation of the new Member States with regard to the Community as at present constituted, shall remain provisionally in force and shall be re-examined by the Commission which shall decide whether to amend or repeal them. Such amendment or repeal shall be implemented by the Commission or the national authorities concerned, as the case may be. Proceedings instituted before accession in Spain, Portugal or in the Community as at present constituted shall be pursued in accordance with the provisions of paragraph 1.

**B — Council Regulation (EEC) No 4064/89  
of 21 December 1989**



**COUNCIL REGULATION (EEC) No 4064/89<sup>1</sup> OF 21 DECEMBER 1989**

**on the control of concentrations between undertakings**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 235 thereof,

Having regard to the proposal from the Commission,<sup>2</sup>

Having regard to the opinion of the European Parliament,<sup>3</sup>

Having regard to the opinion of the Economic and Social Committee,<sup>4</sup>

Whereas, for the achievement of the aims of the Treaty establishing the European Economic Community, Article 3 (f) gives the Community the objective of instituting 'a system ensuring that competition in the common market is not distorted';

Whereas this system is essential for the achievement of the internal market by 1992 and its further development;

Whereas the dismantling of international frontiers is resulting and will continue to result in major corporate re-organizations in the Community, particularly in the form of concentrations;

Whereas such a development must be welcomed as being in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community;

Whereas, however, it must be ensured that the process of re-organization does not result in lasting damage to competition; whereas Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it;

Whereas Articles 85 and 86, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not, however, sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty;

---

<sup>1</sup> Text as published in OJ L 395, 30.12.1989, p. 1; a revised version will be published.

<sup>2</sup> OJ C 130, 19.5.1988, p. 4.

<sup>3</sup> OJ C 309, 5.12.1989, p. 55.

<sup>4</sup> OJ C 208, 8.8.1988, p. 11.

Whereas a new legal instrument should therefore be created in the form of a Regulation to permit effective monitoring of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations;

Whereas this Regulation should therefore be based not only on Article 87 but, principally, on Article 235 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also with regard to concentrations on the markets for agricultural products listed in Annex II to the Treaty;

Whereas the provisions to be adopted in this Regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State;

Whereas the scope of application of this Regulation should therefore be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension; whereas, at the end of an initial phase of the implementation of this Regulation, these thresholds should be reviewed in the light of the experience gained;

Whereas a concentration with a Community dimension exists where the aggregate turnover of the undertakings concerned exceeds given levels worldwide and throughout the Community and where at least two of the undertakings concerned have their sole or main fields of activities in different Member States or where, although the undertakings in question act mainly in one and the same Member State, at least one of them has substantial operations in at least one other Member State; whereas that is also the case where the concentrations are effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there;

Whereas the arrangements to be introduced for the control of concentrations should, without prejudice to Article 90 (2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors; whereas, in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them;

Whereas it is necessary to establish whether concentrations with a Community dimension are compatible or not with the common market from the point of view of the need to preserve and develop effective competition in the common market; whereas, in so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a;

Whereas this Regulation should establish the principle that a concentration with a Community dimension which creates or strengthens a position as a result of which effective competition in the common market or in a substantial part of it is significantly impeded is to be declared incompatible with the common market;

Whereas concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market; whereas, without prejudice to Articles 85 and 86 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it;

Whereas the Commission should have the task of taking all the decisions necessary to establish whether or not concentrations of a Community dimension are compatible with the common market, as well as decisions designed to restore effective competition;

Whereas to ensure effective control undertakings should be obliged to give prior notification of concentrations with a Community dimension and provision should be made for the suspension of concentrations for a limited period, and for the possibility of extending or waiving a suspension where necessary; whereas in the interests of legal certainty the validity of transactions must nevertheless be protected as much as necessary;

Whereas a period within which the Commission must initiate a proceeding in respect of a notified concentration and a period within which it must give a final decision on the compatibility or incompatibility with the common market of a notified concentration should be laid down;

Whereas the undertakings concerned must be accorded the right to be heard by the Commission as soon as a proceeding has been initiated; whereas the members of management and supervisory organs and recognized workers' representatives in the undertakings concerned, together with third parties showing a legitimate interest, must also be given the opportunity to be heard;

Whereas the Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information;

Whereas, for the purposes of this Regulation, and in accordance with the case-law of the Court of Justice, the Commission must be afforded the assistance of the Member States and must also be empowered to require information to be given and to carry out the necessary investigations in order to appraise concentrations;

Whereas compliance with this Regulation must be enforceable by means of fines and periodic penalty payments; whereas the Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 172 of the Treaty;

Whereas it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a durable change in the structure of the undertakings

concerned; whereas it is therefore necessary to exclude from the scope of this Regulation those operations which have as their object or effect the coordination of the competitive behaviour of independent undertakings, since such operations fall to be examined under the appropriate provisions of Regulations implementing Article 85 or Article 86 of the Treaty; whereas it is appropriate to make this distinction specifically in the case of the creation of joint ventures;

Whereas there is no coordination of competitive behaviour within the meaning of this Regulation where two or more undertakings agree to acquire jointly control of one or more other undertakings with the object and effect of sharing amongst themselves such undertakings or their assets;

Whereas the application of this Regulation is not excluded where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration;

Whereas the Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice;

Whereas the Member States may not apply their national legislation on competition to concentrations with a Community dimension, unless the Regulation makes provision therefor; whereas the relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise than by this Regulation; whereas the Member States concerned must act promptly in such cases; whereas this Regulation cannot, because of the diversity of national law, fix a single deadline for the adoption of remedies;

Whereas, furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 223 of the Treaty, and does not prevent the Member States' taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law;

Whereas concentrations not referred to in this Regulation come, in principle, within the jurisdiction of the Member States; whereas, however, the Commission should have the power to act, at the request of a Member State concerned, in cases where effective competition would be significantly impeded within that Member State's territory;

Whereas the conditions in which concentrations involving Community undertakings are carried out in non-member countries should be observed, and provision should be made for the possibility of the Council's giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for Community undertakings;

Whereas this Regulation in no way detracts from the collective rights of workers as recognized in the undertakings concerned,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

##### **Scope**

1. Without prejudice to Article 22 this Regulation shall apply to all concentrations with a Community dimension as defined in paragraph 2.
2. For the purposes of this Regulation, a concentration has a Community dimension where;
  - (a) the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 000 million, and
  - (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. The thresholds laid down in paragraph 2 will be reviewed before the end of the fourth year following that of the adoption of this Regulation by the Council acting by a qualified majority on a proposal from the Commission.

#### *Article 2*

##### **Appraisal of concentrations**

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

- (a) the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;
- (b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the



development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

### *Article 3*

#### **Definition of concentration**

1. A concentration shall be deemed to arise where:

- (a) two or more previously independent undertakings merge, or
- (b) one or more persons already controlling at least one undertaking, or  
— one or more undertakings

acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

2. An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1 (b).

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1 (b).

3. For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- (a) ownership or the right to use all or part of the assets of an undertaking;
- (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

4. Control is acquired by persons or undertakings which:

- (a) are holders of the rights or entitled to rights under the contracts concerned, or
- (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the sale of all or part of that undertaking or of its assets or the sale of those securities and that any such sale takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies justify the fact that the sale was not reasonably possible within the period set;

(b) control is acquired by an office holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1 (b) are carried out by the financial holding companies referred to in Article 5 (3) of the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies,<sup>1</sup> as last amended by Directive 84/569/EEC,<sup>2</sup> provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

#### *Article 4*

#### **Prior notification of concentrations**

1. Concentrations with a Community dimension as referred to by this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.

2. A concentration which consists of a merger within the meaning of Article 3 (1) (a) or in the acquisition of joint control within the meaning of Article 3 (1) (b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the parties, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

---

<sup>1</sup> OJ L 222, 14.8.1978, p. 11.

<sup>2</sup> OJ L 314, 4.12.1984, p. 28.

## *Article 5*

### **Calculation of turnover**

1. Aggregate turnover within the meaning of Article 1 (2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value-added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. In place of turnover the following shall be used :

(a) for credit institutions and other financial institutions, as regards Article 1 (2) (a), one-tenth of their total assets.

As regards Article 1 (2) (b) and the final part of Article 1 (2), total Community-wide turnover shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with Community residents and the total sum of those loans and advances.

As regards the final part of Article 1 (2), total turnover within one Member State shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with residents of that Member State and the total sum of those loans and advances;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1 (2) (b) and the final part of Article 1 (2), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the turnover of an undertaking concerned within the meaning of Article 1 (2) shall be calculated by adding together the respective turnover of the following:

- (a) the undertaking concerned;
- (b) those undertakings in which the undertaking concerned, directly or indirectly;
  - owns more than half the capital or business assets; or
  - has the power to exercise more than half the voting rights; or
  - has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings; or
- (c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);
- (d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
- (e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4 (b), in calculating the turnover of the undertakings concerned for the purposes of Article 1 (2);

- (a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4 (b) or (e);
- (b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

#### *Article 6*

##### **Examination of the notification and initiation of proceedings**

1. The Commission shall examine the notifications as soon as it is received.
  - (a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.
  - (b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

(c) If, on the other hand, it finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.

2. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

#### *Article 7*

#### **Suspension of concentrations**

1. For the purposes of paragraph 2 a concentration as defined in Article 1 shall not be put into effect either before its notification or within the first three weeks following its notification.

2. Where the Commission, following a preliminary examination of the notification within the period provided for in paragraph 1, finds it necessary in order to ensure the full effectiveness of any decision taken later pursuant to Article 8 (3) and (4), it may decide on its own initiative to continue the suspension of a concentration in whole or in part until it takes a final decision, or to take other interim measures to that effect.

3. Paragraphs 1 and 2 shall not impede the implementation of a public bid which has been notified to the Commission in accordance with Article 4 (1) by the date of its announcement, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission pursuant to paragraph 4.

4. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1, 2 or 3 in order to prevent serious damage to one or more undertakings concerned by a concentration or to a third party. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.

5. The validity of any transaction carried out in contravention of paragraph 1 or 2 shall be dependent on a decision pursuant to Article 6 (1) (b) or 8 (2) or (3) or by virtue of the presumption established by Article 10 (6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1 or 2.

## *Article 8*

### **Powers of decision of the Commission**

1. Without prejudice to Article 9, each proceeding initiated pursuant to Article 6 (1) (c) shall be closed by means of a decision as provided for in paragraphs 2 to 5.

2. Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2 (2), it shall issue a decision declaring the concentration compatible with the common market.

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to modifying the original concentration plan. The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion laid down in Article 2 (3), it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where a concentration has already been implemented, the Commission may, in a decision pursuant to paragraph 3 or by a separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.

5. The Commission may revoke the decision it has taken pursuant to paragraph 2 where:

- (a) the declaration of compatibility is based on incorrect information for which one of the undertakings concerned is responsible or where it has been obtained by deceit, or
- (b) the undertakings concerned commit a breach of an obligation attached to the decision.

6. In the case referred to in paragraph 5, the Commission may take a decision pursuant to paragraph 3, without being bound by the deadline referred to in Article 10 (3).

## *Article 9*

### **Referral to the competent authorities of the Member States**

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission which shall inform the undertakings concerned that a

concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market, within that Member State, which presents all the characteristics of a distinct market, be it a substantial part of the common market or not.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists either:

(a) it shall itself deal with the case in order to maintain or restore effective competition on the market concerned, or

(b) it shall refer the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist it shall adopt a decision to that effect which it shall address to the Member State concerned.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken where:

(a) as a general rule within the six-week period provided for in Article 10 (1), second subparagraph, where the Commission has not initiated proceedings pursuant to Article 6 (1) (b), or

(b) within three months at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6 (1) (c), without taking the preparatory steps in order to adopt the necessary measures pursuant to Article 8 (2), second subparagraph, (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the three months referred to in paragraph 4 (b) the Commission, despite a reminder from the Member State concerned, has taken no decision on referral in accordance with paragraph 3 or taken the preparatory steps referred to in paragraph 4 (b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3 (b).

6. The publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned shall be effected not more than four months after the Commission's referral.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 186, for the purpose of applying its national competition law.

10. This Article will be reviewed before the end of the fourth year following that of the adoption of this Regulation.

#### *Article 10*

#### **Time limits for initiating proceedings and for decisions**

1. The decisions referred to in Article 6 (1) must be taken within one month at most. That period shall begin on the day following the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information.

That period shall be increased to six weeks if the Commission receives a request from a Member State in accordance with Article 9 (2).

2. Decisions taken pursuant to Article 8 (2) concerning notified concentrations must be taken as soon as it appears that the serious doubts referred to in Article 6 (1) (c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the deadline laid down in paragraph 3.

3. Without prejudice to Article 8 (6), decisions taken pursuant to Article 8 (3) concerning notified concentrations must be taken within not more than four months of the date on which the proceeding is initiated.

4. The period set by paragraph 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an investigation by decision pursuant to Article 13.

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision taken under this Regulation, the periods laid down in this Regulation shall start again from the date of the judgment.

6. Where the Commission has not taken a decision in accordance with Article 6 (1) (b) or (c) or Article 8 (2) or (3) within the deadlines set in paragraphs 1 and 3 respectively, the concentration shall be deemed declared compatible with the common market, without prejudice to Article 9.



## *Article 11*

### **Requests for information**

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States, from the persons referred to in Article 3 (1) (b), and from undertakings and associations of undertakings.
2. When sending a request for information to a person, an undertaking or an association of undertakings, the Commission shall at the same time send a copy of the request to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.
3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 14 (1) (b) for supplying incorrect information.
4. The information requested shall be provided, in the case of undertakings, by their owners or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, by the persons authorized to represent them by law or by their statutes.
5. Where a person, an undertaking or an association of undertakings does not provide the information requested within the period fixed by the Commission or provides incomplete information, the Commission shall by decision require the information to be provided. The decision shall specify what information is required, fix an appropriate period within which it is to be supplied and state the penalties provided for in Articles 14 (1) (b) and 15 (1) (a) and the right to have the decision reviewed by 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 within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.

## *Article 12*

### **Investigations by the authorities of the Member States**

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary pursuant to Article 13 (1), or which it has ordered by decision pursuant to Article 13 (3). The officials of the competent authorities of the Member States responsible for conducting those investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State within the territory of which the investigation

is to be carried out. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State within the territory of which the investigation is to be carried out, officials of the Commission may assist the officials of that authority in carrying out their duties.

### *Article 13*

#### **Investigative powers of the Commission**

1. In carrying out the duties assigned to it by its Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To that end the officials authorized by the Commission shall be empowered:

- (a) to examine the books and other business records;
- (b) to take or demand copies of or extracts from the books and business records;
- (c) to ask for oral explanations on the spot;
- (d) to enter any premises, land and means of transport of undertakings.

2. The officials of the Commission authorized to carry out the investigations shall exercise their powers on production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 14 (1) (c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform, in writing, the competent authority of the Member State within the territory of which the investigation is to be carried out of the investigation and of the identities of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it shall begin and state the penalties provided for in Articles 14 (1) (c) and 15 (1) (b) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall in good time and in writing inform the competent authority of the Member State within the territory of which the investigation is to be carried out of its intention of taking a decision pursuant to paragraph 3. It shall hear the competent authority before taking its decision.

5. Officials of the competent authority of the Member State within the territory of which the investigation is to be carried out may, at the request of that authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking or association of undertakings opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance

to the officials authorized by the Commission to enable them to carry out their investigation. To this end the Member States shall, after consulting the Commission, take the necessary measures within one year of the entry into force of this Regulation.

#### *Article 14*

##### **Fines**

1. The Commission may by decision impose on the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings fines of from ECU 1 000 to 50 000 where intentionally or negligently:

(a) they omit to notify a concentration in accordance with Article 4;

(b) they supply incorrect or misleading information in a notification pursuant to Article 4;

(c) they supply incorrect information in response to a request made pursuant to Article 11 or fail to supply information within the period fixed by a decision taken pursuant to Article 11;

(d) they produce the required books or other business records in incomplete form during investigations pursuant to Article 12 or 13, or refuse to submit to an investigation ordered by decision taken pursuant to Article 13.

2. The Commission may by decision impose fines not exceeding 10% of the aggregate turnover of the undertakings concerned within the meaning of Article 5 on the persons or undertakings concerned where, either intentionally or negligently, they;

(a) fail to comply with an obligation imposed by decision pursuant to Article 7 (4) or 8 (2), second subparagraph;

(b) put into effect a concentration in breach of Article 7 (1) or disregard a decision taken pursuant to Article 7 (2);

(c) put into effect a concentration declared incompatible with the common market by decision pursuant to Article 8 (3) or do not take the measures ordered by decision pursuant to Article 8 (4).

3. In setting the amount of a fine, regard shall be had to the nature and gravity of the infringement.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

#### *Article 15*

##### **Periodic penalty payments**

1. The Commission may by decision impose on the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings concerned periodic penalty payments of up to

ECU 25 000 for each day of the delay calculated from the date set in the decision, in order to compel them :

(a) to supply complete and correct information which it has requested by decision pursuant to Article 11;

(b) to submit to an investigation which it has ordered by decision pursuant to Article 13.

2. The Commission may by decision impose on the persons referred to in Article 3 (1) (b) or on undertakings periodic penalty payments of up to ECU 100 000 for each day of the delay calculated from the date set in the decision, in order to compel them :

(a) to comply with an obligation imposed by decision pursuant to Article 7 (4) or 8 (2), second subparagraph, or

(b) to apply the measures ordered by decision pursuant to Article 8 (4).

3. Where the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may set the total amount of the periodic penalty payments at a lower figure than that which would arise under the original decision.

#### *Article 16*

#### **Review by the Court of Justice**

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

#### *Article 17*

#### **Professional secrecy**

1. Information acquired as a result of the application of Articles 11, 12, 13 and 18 shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Articles 4 (3), 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

## *Article 18*

### **Hearing of the parties and of third persons**

1. Before taking any decision provided for in Article 7 (2) and (4), 8 (2), second subparagraph, and (3) to (5), 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.
2. By way of derogation from paragraph 1, a decision to continue the suspension of a concentration or to grant a derogation from suspension as referred to in Article 7 (2) or (4) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.
3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.
4. Insofar as the Commission and the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a legitimate interest and especially members of the administrative or management organs of the undertakings concerned or recognized workers' representatives of those undertakings shall be entitled, upon application, to be heard.

## *Article 19*

### **Liaison with the authorities of the Member States**

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation.
2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.

3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Articles 8 (2) to (5), 14 or 15, or any provisions are adopted pursuant to Article 23.

4. The Advisory Committee shall consist of representatives of the authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the facts, together with the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 14 days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The Advisory Committee may recommend publication of the opinion. The Commission may carry out such publication. The decision to publish shall take due account of the legitimate interest of undertakings in the protection of their business secrets and of the interest of the undertakings concerned in such publication taking place.

#### *Article 20*

#### **Publication of decisions**

1. The Commission shall publish the decisions which it takes pursuant to Article 8 (2), where conditions and obligations are attached to them, and to Article 8 (2) to (5) in the *Official Journal of the European Communities*.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

#### *Article 21*

#### **Jurisdiction**

1. Subject to review by the Court of Justice, the Commission shall have sole competence to take the decisions provided for in this Regulation.

2. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Article 9 (2) or after referral, pursuant to Article 9 (3), first subparagraph, indent (b), or (5), to take the measures strictly necessary for the application of Article 9 (8).

3. Notwithstanding paragraphs 1 and 2, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognized by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within one month of that communication.

## *Article 22*

### **Application of the Regulation**

1. This Regulation alone shall apply to concentrations as defined in Article 3.

2. Regulations No 17,<sup>1</sup> (EEC) No 1017/68,<sup>2</sup> (EEC) No 4056/86<sup>3</sup> and (EEC) No 3975/87<sup>4</sup> shall not apply to concentrations as defined in Article 3.

3. If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned it may, insofar as the concentration affects trade between Member States, adopt the decisions provided for in Article 8 (2), second subparagraph, (3) and (4).

4. Articles 2 (1) (a) and (b), 5, 6, 8 and 10 to 20 shall apply. The period within which the proceedings defined in Article 10 (1) may be initiated shall begin on the date of the receipt of the request from the Member State. The request must be made within one month at most of the date on which the concentration was made known to the Member State or effected. This period shall begin on the date of the first of those events.

<sup>1</sup> OJ 13, 21.2.1962, p. 204/62.

<sup>2</sup> OJ L 175, 23.7.1968, p. 1.

<sup>3</sup> OJ L 378, 31.12.1986, p. 4.

<sup>4</sup> OJ L 374, 31.12.1987, p. 1.

5. Pursuant to paragraph 3 the Commission shall take only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State at the request of which it intervenes.

6. Paragraphs 3 to 5 shall continue to apply until the thresholds referred to in Article 1 (2) have been reviewed.

#### *Article 23*

#### **Implementing provisions**

The Commission shall have the power to adopt implementing provisions concerning the form, content and other details of notifications pursuant to Article 4, time limits pursuant to Article 10, and hearings pursuant to Article 18.

#### *Article 24*

#### **Relations with non-member countries**

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a non-member country.

2. Initially not more one year after the entry into force of this Regulation and thereafter periodically the Commission shall draw up a report examining the treatment accorded to Community undertakings, in the terms referred to in paragraphs 3 and 4, as regards concentrations in non-member countries. The Commission shall submit those reports to the Council, together with any recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a non-member country does not grant Community undertakings treatment comparable to that granted by the Community to undertakings from that non-member country, the Commission may submit proposals to the Council for the appropriate mandate for negotiation with a view to obtaining comparable treatment for Community undertakings.

4. Measures taken pursuant to this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 234 of the Treaty, under international agreements, whether bilateral or multilateral.

#### *Article 25*

#### **Entry into force**

1. This Regulation shall enter into force on 21 September 1990.



2. This Regulation shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4 (1) before the date of this Regulation's entry into force and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before that date by a Member State's authority with responsibility for competition.

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

**C — Council and Commission Regulations,  
Directives, Decisions and Notices  
relating to the application of the  
EEC and ECSC competition rules  
applying to undertakings**



## I — General procedural rules

### COUNCIL REGULATION No 17/62<sup>1</sup> OF 6 FEBRUARY 1962

**First Regulation implementing Articles 85 and 86 of the Treaty amended by Regulation No 59,<sup>2</sup> by Regulation No 118/63/EEC<sup>3</sup> and by Regulation (EEC) No 2822/71<sup>4</sup>**

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

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

Having regard to the proposal from the Commission,

Having regard to the Opinion of the Economic and Social Committee,

Having regard to the Opinion of the European Parliament,

Whereas, in order to establish a system ensuring that competition shall not be distorted in the common market, it is necessary to provide for balanced application of Articles 85 and 86 in a uniform manner in the Member States;

Whereas in establishing the rules for applying Article 85 (3) account must be taken of the need to ensure effective supervision and to simplify administration to the greatest possible extent;

Whereas it is accordingly necessary to make it obligatory, as a general principle, for undertakings which seek application of Article 85 (3) to notify to the Commission their agreements, decisions and concerted practices;

Whereas, on the one hand, such agreements, decisions and concerted practices are probably very numerous and cannot therefore all be examined at the same time and, on the other hand, some of them have special features which may make them less prejudicial to the development of the common market;

<sup>1</sup> OJ 13, 21.2.1962, p. 204 (Special Edition 1959-62, p. 87).

<sup>2</sup> OJ 58, 10.7.1962, p. 1655 (Special Edition 1959-62, p. 249).

<sup>3</sup> OJ 162, 7.11.1963, p. 2696 (Special Edition 1963-64, p. 55).

<sup>4</sup> OJ L 285, 29.12.1971, p. 49 (Special Edition 1971 (III), p. 1035).

Whereas there is consequently a need to make more flexible arrangements for the time being in respect of certain categories of agreement, decisions and concerted practices without prejudging their validity under Article 85;

Whereas it may be in the interest of undertakings to know whether any agreements, decisions or practices to which they are party, or propose to become party, may lead to action on the part of the Commission pursuant to Article 85 (1) or Article 86;

Whereas, in order to secure uniform application of Articles 85 and 86 in the common market, rules must be made under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the requisite measures for applying those Articles;

Whereas for this purpose the Commission must have the cooperation of the competent authorities of the Member States and be empowered, throughout the common market, to require such information to be supplied and to undertake such investigations as are necessary to bring to light any agreement, decision or concerted practice prohibited by Article 85 (1) or any abuse of a dominant position prohibited by Article 86;

Whereas in order to carry out its duty of ensuring that the provisions of the Treaty are applied the Commission must be empowered to address to undertakings or associations of undertakings recommendations and decisions for the purpose of bringing to an end infringements of Articles 85 and 86;

Whereas compliance with Articles 85 and 86 and the fulfilment of obligations imposed on undertakings and associations of undertakings under this Regulation must be enforceable by means of fines and periodic penalty payments;

Whereas undertakings concerned must be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision must be given the opportunity of submitting their comments beforehand, and it must be ensured that wide publicity is given to decisions taken;

Whereas all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice under the conditions specified in the Treaty; whereas it is moreover desirable to confer upon the Court of Justice, pursuant to Article 172, unlimited jurisdiction in respect of decisions under which the Commission imposes fines or periodic penalty payments;

Whereas this Regulation may enter into force without prejudice to any other provisions that may hereafter be adopted pursuant to Article 87,

HAS ADOPTED THIS REGULATION:

## *Article 1*

### **Basic provision**

Without prejudice to Articles 6, 7 and 23 of this Regulation, agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty and the abuse of a dominant position in the market, within the meaning of Article 86 of the Treaty, shall be prohibited, no prior decision to that effect being required.

## *Article 2*

### **Negative clearance**

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

## *Article 3*

### **Termination of infringements**

1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. Those entitled to make application are:

- (a) Member States;
- (b) natural or legal persons who claim a legitimate interest.

3. Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under paragraph 1, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

## *Article 4*

### **Notification of new agreements, decisions and practices**

1. Agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty which come into existence after the entry into force of this Regulation and in respect of which the parties seek application of Article 85 (3) must be notified to the Commission. Until they have been notified, no decision in application of Article 85 (3) may be taken.

2. Paragraph 1 shall not apply to agreements, decisions 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) specialization in the manufacture of products, including agreements necessary for achieving this,

— where the products which are the subject of specialization 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.

#### *Article 5*

#### **Notification of existing agreements, decisions and practices**

1. Agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty which are in existence at the date of entry into force of this Regulation and in respect of which the parties seek application of Article 85 (3) shall be notified to the Commission before 1 November 1962. However, notwithstanding the foregoing provisions any agreements, decisions and concerted practices to which not more than two undertakings are party shall be notified before 1 February 1963.

2. Paragraph 1 shall not apply to agreements, decisions or concerted practices falling within Article 4 (2); these may be notified to the Commission.

## *Article 6*

### **Decisions pursuant to Article 85 (3)**

1. Whenever the Commission takes a decision pursuant to Article 85 (3) of the Treaty, it shall specify therein the date from which the decision shall take effect. Such date shall not be earlier than the date of notification.
2. The second sentence of paragraph 1 shall not apply to agreements, decisions or concerted practices falling within Article 4 (2) and Article 5 (2), nor to those falling within Article 5 (1) which have been notified within the time limit specified in Article 5 (1).

## *Article 7*

### **Special provisions for existing agreements, decisions and practices**

1. Where agreements, decisions and concerted practices in existence at the date of entry into force of this Regulation and notified within the time limits specified in Article 5(1) do not satisfy the requirements of Article 85 (3) of the Treaty and the undertakings or associations of undertakings concerned cease to give effect to them or modify them in such a manner that they no longer fall within the prohibition contained in Article 85 (1) or that they satisfy the requirements of Article 85 (3), the prohibition contained in Article 85 (1) shall apply only for a period fixed by the Commission. A decision by the Commission pursuant to the foregoing sentence shall not apply as against undertakings and associations of undertakings which did not expressly consent to the notification.
2. Paragraph 1 shall apply to agreements, decisions and concerted practices falling within Article 4 (2) which are in existence at the date of entry into force of this Regulation if they are notified before 1 January 1967.

## *Article 8*

### **Duration and revocation of decisions under Article 85 (3)**

1. A decision in application of Article 85 (3) of the Treaty shall be issued for a specified period and conditions and obligations may be attached thereto.
2. A decision may on application be renewed if the requirements of Article 85 (3) of the Treaty continue to be satisfied.
3. The Commission may revoke or amend its decision or prohibit specified acts by the parties:
  - (a) where there has been a change in any of the facts which were basic to the making of the decision;
  - (b) where the parties commit a breach of any obligation attached to the decision;



- (c) where the decision is based on incorrect information or was induced by deceit;
- (d) where the parties abuse the exemption from the provisions of Article 85 (1) of the Treaty granted to them by the decision.

In cases to which subparagraphs (b), (c) or (d) apply, the decision may be revoked with retroactive effect.

#### *Article 9*

##### **Powers**

1. Subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty.
2. The Commission shall have power to apply Article 85 (1) and Article 86 of the Treaty; this power may be exercised notwithstanding that the time limits specified in Article 5 (1) and in Article 7 (2) relating to notification have not expired.
3. As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85 (1) and Article 86 in accordance with Article 88 of the Treaty; they shall remain competent in this respect notwithstanding that the time limits specified in Article 5 (1) and in Article 7 (2) relating to notification have not expired.

#### *Article 10*

##### **Liaison with the authorities of the Member States**

1. The Commission shall forthwith transmit to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86 of the Treaty or of obtaining negative clearance or a decision in application of Article 85 (3).
2. The Commission shall carry out the procedure set out in paragraph 1 in close and constant liaison with the competent authorities of the Member States; such authorities shall have the right to express their views upon that procedure.
3. An Advisory Committee on Restrictive Practices and Monopolies shall be consulted prior to the taking of any decision following upon a procedure under paragraph 1, and of any decision concerning the renewal, amendment or revocation of a decision pursuant to Article 85 (3) of the Treaty.
4. The Advisory Committee shall be composed of officials competent in the matter of restrictive practices and monopolies. Each Member State shall appoint an official to represent it who, if prevented from attending, may be replaced by another official.

5. The consultation shall take place at a joint meeting convened by the Commission; such meeting shall be held not earlier than fourteen days after dispatch of the notice convening it. The notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

### *Article 11*

#### **Requests for information**

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15 (1) (b) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorized to represent them by law or by their constitution, shall supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 15 (1) (b) and Article 16 (1) (c) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

## *Article 12*

### **Inquiry into sectors of the economy**

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 inquiry into that economic sector and in the course thereof may request undertakings in the sector concerned to supply the information necessary for giving effect to the principles formulated in Articles 85 and 86 of the Treaty and for carrying out the duties entrusted to the Commission.
2. The Commission may in particular request every undertaking or association of undertakings in the economic sector concerned to communicate to it all agreements, decisions and concerted practices which are exempt from notification by virtue of Article 4 (2) and Article 5 (2).
3. When making inquiries pursuant to paragraph 2, the Commission shall also request undertakings or groups of undertakings whose size suggests that they occupy a dominant position within the common market or a substantial part thereof to supply to the Commission such particulars of the structure of the undertakings and of their behaviour as are requisite to an appraisal of their position in the light of Article 86 of the Treaty.
4. Article 10 (3) to (6) and Articles 11, 13 and 14 shall apply correspondingly.

## *Article 13*

### **Investigations by the authorities of the Member States**

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 14 (1), or which it has ordered by decision pursuant to Article 14 (3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such authorization shall specify the subject matter and purpose of the investigation.
2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, the officials of the Commission may assist the officials of such authority in carrying out their duties.

## *Article 14*

### **Investigating powers of the Commission**

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may undertake all necessary investigations into

undertakings and associations of undertakings. To this end the officials authorized by the Commission are empowered :

- (a) to examine the books and other business records;
- (b) to take copies of or extracts from the books and business records;
- (c) to ask for oral explanations on the spot;
- (d) to enter any premises, land and means of transport of undertakings.

2. The officials of the Commission authorized for the purpose of these investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 15 (1) (c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 15 (1) (c) and Article 16 (1) (d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made may, at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end before 1 October 1962.

### *Article 15*

#### **Fines**

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 units of account where, intentionally or negligently :

- (a) they supply incorrect or misleading information in an application pursuant to Article 2 or in a notification pursuant to Articles 4 or 5; or

(b) they supply incorrect information in response to a request made pursuant to Article 11 (3) or (5) or to Article 12, or do not supply information within the time limit fixed by a decision taken under Article 11 (5); or

(c) they produce the required books or other business records in incomplete form during investigations under Article 13 or 14, or refuse to submit to an investigation ordered by decision issued in implementation of Article 14 (3).

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1000 to 1000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article 85 (1) or Article 86 of the Treaty; or

(b) they commit a breach of any obligation imposed pursuant to Article 8 (1).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

3. Article 10 (3) to (6) shall apply.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

5. The fines provided for in paragraph 2 (a) shall not be imposed in respect of acts taking place:

(a) after notification to the Commission and before its decision in application of Article 85 (3) of the Treaty, provided they fall within the limits of the activity described in the notification;

(b) before notification and in the course of agreements, decisions or concerted practices in existence at the date of entry into force of this Regulation, provided that notification was effected within the time limits specified in Article 5 (1) and Article 7 (2).

6. Paragraph 5 shall not have effect where the Commission has informed the undertakings concerned that after preliminary examination it is of the opinion that Article 85 (1) of the Treaty applies and that application of Article 85 (3) is not justified.

#### *Article 16*

#### **Periodic penalty payments**

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1 000 units of account per day, calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Articles 85 or 86 of the Treaty, in accordance with a decision taken pursuant to Article 3 of this Regulation;

- (b) to refrain from any act prohibited under Article 8 (3);
- (c) to supply complete and correct information which it has requested by decision taken pursuant to Article 11 (5);
- (d) to submit to an investigation which it has ordered by decision taken pursuant to Article 14 (3).

2. Where the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision.

3. Article 10 (3) to (6) shall apply.

#### *Article 17*

#### **Review by the Court of Justice**

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 17 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

#### *Article 18*

#### **Unit of account**

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

#### *Article 19*

#### **Hearing of the parties and of third persons**

1. Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15 and 16, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted.

3. Where the Commission intends to give negative clearance pursuant to Article 2 or take a decision in application of Article 85 (3) of the Treaty, it shall publish a summary of the

relevant application or notification and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

#### *Article 20*

##### **Professional secrecy**

1. Information acquired as a result of the application of Articles 11, 12, 13 and 14 shall be used only for the purpose of the relevant request or investigation.
2. Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.
3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

#### *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 state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

#### *Article 22*

##### **Special provisions**

1. The Commission shall submit to the Council proposals for making certain categories of agreement, decision and concerted practice falling within Article 4 (2) or Article 5 (2) compulsorily notifiable under Articles 4 or 5.
2. Within one year from the date of entry into force of this Regulation, the Council shall examine, on a proposal from the Commission, what special provisions might be made for exempting from the provisions of this Regulation agreements, decisions and concerted practices falling within Article 4 (2) or Article 5 (2).

## *Article 23*

### **Transitional provisions applicable to decisions of authorities of the Member States**

1. Agreements, decisions and concerted practices of the kind described in Article 85 (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 (1) to be inapplicable pursuant to Article 85 (3) shall not be subject to compulsory notification under Article 5. The decision of the competent authority of the Member State shall be deemed to be a decision within the meaning of Article 6; it shall cease to be valid upon expiration of the period fixed by such authority but in any event not more than three years after the entry into force of this Regulation. Article 8 (3) shall apply.

2. Applications for renewal of decisions of the kind described in paragraph 1 shall be decided upon by the Commission in accordance with Article 8 (2).

## *Article 24*

### **Implementing provisions**

The Commission shall have power to adopt implementing provisions concerning the form, content and other details of applications pursuant to Articles 2 and 3, and of notifications pursuant to Articles 4 and 5, and concerning hearings pursuant to Article 19 (1) and (2).

This Regulation shall be binding in its entirety and directly applicable in all Member States.<sup>1, 2</sup>

---

#### <sup>1</sup> **Documents concerning the accession**

##### *Article 25*

1. As regards agreements, decisions and concerted practices to which Article 85 of the Treaty applies by virtue of accession, the date of accession shall be substituted for the date of entry into force of this Regulation in every place where reference is made in this Regulation to this latter date.

2. Agreements, decisions and concerted practices existing at the date of accession to which Article 85 of the Treaty applies by virtue of accession shall be notified pursuant to Article 5 (1) or Article 7 (1) and (2) within six months from the date of accession.

3. Fines under Article 15 (2) (a) shall not be imposed in respect of any act prior to notification of the agreements, decisions and practices to which paragraph 2 applies and which have been notified within the period therein specified.

4. New Member States shall take the measures referred to in Article 14 (6) within six months from the date of accession after consulting the Commission.

(OJ L 173, 27.3.1972, p. 92)

#### <sup>2</sup> **Documents concerning the accession of the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic**

The following paragraph is added to Article 25:

‘5. The provisions of paragraphs 1-4 above still apply in the same way in the case of the accession of the Hellenic Republic, the Kingdom of Spain and of the Portuguese Republic.’

(OJ L 302, 15.11.1985, p. 165).



**COMMISSION REGULATION No 27/62<sup>1</sup> OF 3 MAY 1962**

**First Regulation implementing Council Regulation No 17 of 6 February 1962  
Amended by Regulation (EEC) No 1133/68<sup>2</sup> of 26 July 1968,  
by Regulation (EEC) No 1699/75<sup>3</sup> of 2 July 1975  
and by Regulation (EEC) No 2526/85<sup>4</sup> of 5 August 1985  
(Form, content and other details concerning applications and notifications)**

THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the provisions of the Treaty establishing the European Economic Community, and in particular Articles 87 and 155 thereof,

Having regard to Article 24 of Council Regulation No 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty),

Whereas under Article 24 of Council Regulation No 17 the Commission is authorized to adopt implementing provisions concerning the form, content and other details of applications under Articles 2 and 3 and of notifications under Articles 4 and 5 of that Regulation;

Whereas the submission of such applications and notifications may have important legal consequences for each of the undertakings which is party to an agreement, decision or concerted practice; whereas every undertaking should accordingly have the right to submit an application or a notification to the Commission; whereas, furthermore, an undertaking exercising this right must inform the other undertakings which are parties to the agreement, decision or concerted practice, in order to enable them to protect their interests;

Whereas it is for the undertakings and associations of undertakings to transmit to the Commission information as to facts and circumstances in support of applications under Article 2 and of notifications under Articles 4 and 5;

Whereas it is desirable to prescribe forms for use in applications for negative clearance relating to implementation of Article 85 (1) and for notifications relating to implementation of Article 85 (3) of the Treaty in order to simplify and accelerate consideration by the competent departments, in the interests of all concerned,

HAS ADOPTED THIS REGULATION :

---

<sup>1</sup> OJ 35, 10.5.1962, p. 1118 (Special Edition 1959-62, p. 132).

<sup>2</sup> OJ L 189, 1.8.1968, p. 1 (Special Edition 1968 II, p. 400).

<sup>3</sup> OJ L 172, 3.7.1975, p. 11.

<sup>4</sup> OJ L 240, 7.9.1985, p. 11.

## *Article 1*

### **Persons entitled to submit applications and notifications**

1. Any undertaking which is party to agreements, decisions or practices of the kind described in Articles 85 and 86 of the Treaty may submit an application under Article 2 or a notification under Articles 4 and 5 of Regulation No 17. Where the application or notification is submitted by some, but not all, of the undertakings concerned, they shall give notice to the others.
2. Where applications and notifications under Articles 2, 3 (1), 3 (2) (b), 4 and 5 of Regulation No 17 are signed by representatives of undertakings, or associations of undertakings, or natural or legal persons such representatives shall produce written proof that they are authorized to act.
3. Where a joint application or notification is submitted a joint representative should be appointed.

## *Article 2*

### **Submission of applications and notifications**

1. Thirteen copies of each application and notification shall be submitted to the Commission.<sup>1</sup>
2. The supporting documents shall be either original or copies; copies must be certified as true copies of the original.
3. Applications and notifications shall be in one of the official languages of the Community. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages, a translation in one of the official languages shall be attached.

## *Article 3*

### **Effective date of submission of applications and registrations**

The date of submission of an application or notification shall be the date on which it is received by the Commission. Where, however, the application or notification is sent by registered post, it shall be deemed to have been received on the date shown on the postmark of the place of posting.

---

<sup>1</sup> Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic. (OJ L 302, 15.11.1985, p. 166).

*Article 4*

**Content of applications and notifications**

1. Applications under Article 2 of Regulation No 17 relating to the applicability of Article 85 (1) of the Treaty and notifications under Article 4 or Article 5 (2) of Regulation No 17 shall be submitted on Form A/B, in the manner prescribed on the Form and in the Complementary Note thereto, as shown in the Annex to this Regulation.
2. Applications and notifications shall contain the information asked for in Form A/B and the Complementary Note.
3. Several participating undertakings may submit an application or notification on a single form.
4. Applications under Article 2 of Regulation No 17 relating to the applicability of Article 86 of the Treaty shall contain a full statement of the facts, specifying, in particular, the practice concerned and the position of the undertaking or undertakings within the common market or a substantial part thereof in regard to products or services to which the practice relates. Form A/B may be used.

*Article 5*

**Transitional provisions**

1. Applications and notifications submitted prior to the date of entry into force of this Regulation otherwise than on the prescribed forms shall be deemed to comply with Article 4 of this Regulation.
2. The Commission may require a duly completed form to be submitted to it within such time as it shall appoint. In that event, applications and notifications shall be treated as properly made only if the forms are submitted within the prescribed period and in accordance with the provisions of this Regulation.

*Article 6*

This Regulation shall enter into force on the day following 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.

## ANNEX

*Note.* This form must be accompanied by an Annex containing the information specified in the attached Complementary Note.

The form and Annex must be supplied in 13 copies (one for the Commission and one for each Member State). Supply three copies of any relevant agreement and one copy of other supporting documents.

Please do not forget to complete the Acknowledgement of Receipt annexed.

If space is insufficient, please use extra pages, specifying to which item on the form they relate.

**FORM A/B**

### TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

Directorate-General for Competition  
Rue de la Loi, 200  
B-1049 Brussels

A. Application for negative clearance pursuant to Article 2 of Council Regulation No 17 of 6 February 1962 relating to implementation of Article 85 (1) or of Article 86 of the Treaty establishing the European Economic Community.

B. Notification of an agreement, decision or concerted practice under Article 4 (or 5) of Council Regulation No 17 of 6 February 1962 with a view to obtaining exemption under Article 85 (3) of the Treaty establishing the European Economic Community, including notifications claiming benefit of an opposition procedure.

#### **Identity of the parties**

##### *1. Identity of applicant/notifier*

Full name and address, telephone, telex and facsimile numbers, and brief description<sup>1</sup> of the undertaking(s) or association(s) of undertakings submitting the application or notification.

For partnerships, sole traders or any other unincorporated body trading under a business name, give, also, the name, forename(s) and address of the proprietor(s) or partner(s).

<sup>1</sup> For example, 'Motor vehicle manufacturer', 'Computer service bureau', 'Conglomerate'.

Where an application or notification is submitted on behalf of some other person (or is submitted by more than one person) the name, address and position of the representative (or joint representative) must be given, together with proof of his authority to act. Where an application or notification is submitted by or on behalf of more than one person they should appoint a joint representative (Article 1 (2) and (3) of Commission Regulation No 27).

2. Identity of any other parties

Full name and address and brief description of any other parties to the agreement, decision or concerted practice (hereinafter referred to as 'the arrangements').

State what steps have been taken to inform these other parties of this application or notification.

(This information is not necessary in respect of standard contracts which an undertaking submitting the application or notification has concluded or intends to conclude with a number of parties (e.g. a contract appointing dealers).)

**Purpose of this application /notification**

*(please answer yes or no to the questions)*

(see Complementary Note)

Are you asking for negative clearance alone? (See Complementary Note — Section IV, end of first paragraph — for the consequence of such a request)

Are you applying for negative clearance, and also notifying the arrangements to obtain an exemption in case the Commission does not grant negative clearance?

Are you only notifying the arrangements in order to obtain an exemption?

Do you claim that this application may benefit from an opposition procedure? (See Complementary Note — Sections III, IV, VI and VII and Annex 2). If you answer 'yes', please specify the Regulation and Article number on which you are relying.

Would you be satisfied with a comfort letter? (See the end of Section VII of the Complementary Note)

The undersigned declare that the information given above and in the ... pages annexed hereto is correct to the best of their knowledge and belief, that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere.

They are aware of the provisions of Article 15(1)(a) of Regulation No 17 (see attached Complementary Note).

Place and date: .....

Signatures: .....  
.....  
.....

COMMISSION  
OF THE  
EUROPEAN COMMUNITIES

Brussels .....

Directorate-General for Competition

To
----

**ACKNOWLEDGEMENT OF RECEIPT**

(This form will be returned to the address inserted above if the top half is completed in a single copy by the person lodging it)

Your application for negative clearance dated: .....

Your notification dated: .....

concerning: .....

Your reference: .....

Parties: .....

1. ....

2. ....

and others

(There is no need to name the other undertakings party to the agreement)

---

(To be completed by the Commission)

was received on: .....

and registered under No IV/: .....

**Please quote the above number in all correspondence**

---

*Provisional address: Telephone:*

Rue de la Loi 200 Direct line: 235 ...

B-1049 Brussels

*Telex:*

COMEU B 21877 COMEUR Brussels

Telephone exchange: 235 11 11

*Telegraphic address:*

## COMPLEMENTARY NOTE

### CONTENTS

- I. Purpose of Community rules on competition
- II. Negative clearance
- III. Exemption under Article 85 (3)
- IV. Purpose of the form
- V. Nature of the form
- VI. The need for complete and accurate information
- VII. Subsequent procedure
- VIII. Secrecy
- IX. Further information and headings to be used in Annex to Form A/B

*Nota bene:* Any undertaking uncertain about how to complete a notification or wishing further explanation may contact the Directorate-General for Competition (DG IV) in Brussels. Alternatively, any Commission Information Office will be able to obtain guidance or indicate an official in Brussels who speaks the preferred official Community language.

#### **I. Purpose of Community rules on competition**

The purpose of these rules is to prevent the distortion of competition in the common market by monopolies or restrictive practices; they apply to any enterprise trading directly or indirectly in the common market, wherever established. Article 85 (1) of the Treaty establishing the European Economic Community (the text of Articles 85 and 86 is reproduced in Annex 1 to this note) prohibits restrictive agreements or concerted practices which may affect trade between Member States, and Article 85 (2) declares contracts or other otherwise legally binding arrangements containing such restrictions void (although the European Court of Justice has held that if restrictive terms of contracts are severable, only those terms are void); Article 85 (3), however, gives the Commission power to exempt practices with beneficial effects. Article 86 prohibits the abuse of a dominant position. The original procedures for implementing these Articles, which provide for 'negative clearance' and exemption under Article 85 (3), were laid down in Council Regulation No 17 (the references to this and all other acts mentioned in this note or relevant to applications made on Form A/B are listed in Annex 2 to this note).



## **II. Negative clearance**

The purpose of the negative clearance procedure is to allow businesses ('undertakings') to ascertain whether or not the Commission considers that any of their arrangements or behaviour are prohibited under Articles 85 (1) or 86 of the Treaty. (It is governed by Article 2 of Regulation No 17.) Clearance takes the form of a decision by the Commission certifying that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) or 86 of the Treaty for action on its part in respect of the arrangements or behaviour.

Any party may apply for negative clearance, even without the consent (but not without the knowledge) of other parties to arrangements. There would be little point in applying, however, where arrangements or behaviour clearly do not fall within the scope of Article 85 (1) or Article 86. (In this connection, your attention is drawn to the last paragraph of IV below and to Annex 2.) Nor is the Commission obliged to give negative clearance — Article 2 of Regulation No 17 states that '...the Commission *may* certify...' The Commission does not usually issue negative clearance decisions in cases which, in its opinion, so clearly do not fall within the scope of the prohibition of Article 85 (1) that there is no reasonable doubt for it to resolve by such a decision.

## **III. Exemption under Article 85 (3)**

The purpose of the procedure for exemption under Article 85 (3) is to allow undertakings to enter into arrangements which, in fact, offer economic advantages but which, without an exemption, would be prohibited under Article 85 (1). (It is governed by Articles 4, 6 and 8 of Regulation No 17 and, for new Member States, by Articles 5, 7 and 25.) It takes the form of a decision by the Commission declaring Article 85 (1) to be inapplicable to the arrangements described in the decision. Article 8 requires the Commission to specify the period of validity of any such decision, allows the Commission to attach conditions and obligations and provides for decisions to be amended or revoked or specified acts by the parties to be prohibited in certain circumstances, notably if the decisions were based on incorrect information or if there is any material change in the facts.

Any party may notify arrangements, even without the consent (but not without the knowledge) of other parties.

The Commission has adopted a number of Regulations granting exemption to categories of agreements. Some of these Regulations (see Annex 2 for the latest list) provide that some agreements may benefit by such an exemption only if they are notified to the Commission under Article 4 (or 5) of Regulation No 17 with a view to obtaining exemption under Article 85 (3) of the Treaty and the benefit of an opposition procedure is claimed in the notification.

A decision granting exemption under Article 85 (3) may have retroactive effect but, with certain exceptions, cannot be made effective earlier than the date of notification (Article 6

of Regulation No 17). Should the Commission find that notified arrangements are indeed prohibited by Article 85 (1) and cannot be exempted under Article 85 (3) and, therefore, take a decision condemning them, the parties are nevertheless protected, from the date of notification, against fines for any infringement described in the notification (Articles 3 and 15 (5) and (6)).

#### **IV. Purpose of the form**

The purpose of Form A/B is to allow undertakings, or associations of undertakings, wherever situated, to apply to the Commission for negative clearance for arrangements or behaviour, or to notify such arrangements and apply to have them exempted from the prohibition of Article 85 (1) of the Treaty by virtue of Article 85 (3). The form allows undertakings applying for negative clearance to notify, at the same time, in order to obtain an exemption. It should be noted that only a notification in order to obtain exemption affords immunity from fines (Article 15 (5)).

To be valid, applications for negative clearance in respect of Article 85, notifications to obtain an exemption and notifications claiming the benefit of an opposition procedure must be made on Form A/B (by virtue of Article 4 of Commission Regulation No 27). (Undertakings applying for negative clearance for their behaviour in relation to a possible dominant position — Article 86 — need not use Form A/B (see Article 4 (4) of Regulation No 27), but they are strongly recommended to give all the information requested at IX below in order to ensure that their application gives a full statement of the facts.)

Before completing a form, your attention is particularly drawn to the Regulations granting block exemption and the notices listed in Annex 2 — these were published to allow undertakings to judge for themselves, in many cases, whether there was any doubt about their arrangements. This would allow them to avoid the considerable bother and expense, both for themselves and for the Commission, of submitting and examining an application or notification where there is clearly no doubt.

#### **V. Nature of the form**

The form consists of a single sheet calling for the identity of the applicant(s) or notifier(s) and of any other parties. This must be supplemented by further information given under the headings and references detailed below (see IX). For preference the paper used should be A4 (21 × 29.7 cm — the same size as the form) but must not be bigger. Leave a margin of at least 25 mm or one inch on the left-hand side of the page and, if you use both sides, on the right-hand side of the reverse.

#### **VI. The need for complete and accurate information**

It is important that applicants give all the relevant facts. Although the Commission has the right to seek further information from applicants or third parties, and is obliged to publish

a summary of the application before granting negative clearance or exemption under Article 85 (3), it will usually base its decision on the information provided by the applicant. Any decision taken on the basis of incomplete information could be without effect in the case of a negative clearance, or voidable in that of an exemption. For the same reason, it is also important to inform the Commission of any material changes to your arrangements made after your application or notification.

Complete information is of particular importance if you are claiming the benefit of a block exemption through an opposition procedure. Such exemption is dependent on the information supplied being '...complete and in accordance with the facts.' If the Commission does not oppose a claim to benefit under this procedure on the basis of the facts in a notification and, subsequently, additional or different facts come to light that could and should have been in the notification, then the benefit of the exemption will be lost, and with retroactive effect. Similarly, there would be little point in claiming the benefit of an opposition procedure with clearly incomplete information; the Commission would be bound either to reject such a notification or oppose exemption in order to allow time for further information to be provided.

Moreover, you should be aware of the provisions of Article 15 (1) (a) of Regulation No 17 which reads:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 units of account<sup>1</sup> where, intentionally or negligently, they supply incorrect or misleading information in an application pursuant to Article 2 or in a notification pursuant to Articles 4 or 5.'

The key words here are 'incorrect or misleading information'. However, it often remains a matter of judgement how much detail is relevant; the Commission accepts estimates where accurate information is not readily available in order to facilitate notifications; and the Commission calls for opinions as well as facts.

You should therefore note that the Commission will use these powers only where applicants or notifiers have, intentionally or negligently, provided false information or grossly inaccurate estimates of suppressed readily available information or estimates, or have deliberately expressed false opinions in order to obtain negative clearance or exemption.

## **VII. Subsequent procedure**

The application or notification is registered in the Registry of the Directorate-General for Competition (DG IV). The date of receipt by the Commission (or the date of posting if sent by registered post) is the effective date of the submission. The application or notification might be considered invalid if obviously incomplete or not on the obligatory form.

---

<sup>1</sup> The value of the European currency unit, which has replaced the unit of account, is published daily in the 'C' series of the *Official Journal of the European Communities*.

Further information might be sought from the applicants or from third parties (Articles 11 or 14 of Regulation No 17) and suggestions might be made as to amendments to the arrangements that might make them acceptable.

A notification claiming the benefit of an opposition procedure may be opposed by the Commission either because the Commission does not agree that the arrangements should benefit from a block exemption or to allow for more information to be sought. If the Commission opposes a claim, and unless the Commission subsequently withdraws its opposition, that notification will then be treated as an application for an individual exemption decision.

If, after examination, the Commission intends to grant the application, it is obliged (by Article 19 (3) of Regulation No 17) to publish a summary and invite comments from third parties. Subsequently, a preliminary draft decision has to be submitted to and discussed with the Advisory Committee on Restrictive Practices and Dominant Positions composed of officials of the Member State competent in the matter of restrictive practices and monopolies (Article 10 of Regulation No 17) — they will already have received a copy of the application or notification. Only then, and providing nothing has happened to change the Commission's intention, can it adopt a decision.

Sometimes files are closed without any formal decision being taken, for example, because it is found that the arrangements are already covered by a block exemption, or because the applicants are satisfied by a less formal letter from the Commission's departments (sometimes called a 'comfort letter') indicating that the arrangements do not call for any action by the Commission, at least in present circumstances. Although not a Commission decision, a comfort letter indicates how the Commission's departments view the case on the facts currently in their possession which means that the Commission could if necessary — if, for example, it were to be asserted that a contract was void under Article 85 (2) — take an appropriate decision.

### VIII. Secrecy

Article 214 of the Treaty and Articles 20 and 21 of Regulation No 17 require the Commission and Member States not to disclose information of the kind covered by the obligation of professional secrecy. On the other hand, Article 19 of the Regulation requires the Commission to publish a summary of your application, should it intend to grant it, before taking the relevant decision. In this publication, the Commission '...shall have regard to the legitimate interest of undertakings in the protection of their business secrets (Article 19 (3))'. In this connection, if you believe that your interests would be harmed if any of the information you are asked to supply were to be published or otherwise divulged to other parties, please put all such information in a second annex, with each page clearly marked 'Business Secrets'; in the principal annex, under any affected heading state 'see second annex' or 'also see second annex'; in the second annex repeat the affected heading(s) and reference(s) and give the information you do not wish to have published, together with your reasons for this. Do not overlook the fact that the Commission may have to publish a summary of your application.

Before publishing an Article 19 (3) notice, the Commission will show the undertakings concerned a copy of the proposed text.

### **IX. Further information and headings to be used in the Annex to Form A/B**

The further information is to be given under the following headings and reference numbers. Wherever possible, give exact information. If this is not readily available, give your best estimate, and identify what you give as an estimate. If you believe any detail asked for to be unavailable or irrelevant, please explain why. This may, in particular, be the case if one party is notifying arrangements alone without the cooperation of other parties. Do not overlook the fact that Commission officials are ready to discuss what detail is relevant (see the *nota bene* at the beginning of this Complementary Note). An example that might help you is available on request.

#### *1. Brief description*

Give a brief description of the arrangements or behaviour (nature, purpose, date(s) and duration) — (full details are requested below).

#### *2. Market*

The nature of the goods or services affected by the arrangements or behaviour (include the customs tariff heading number according to the CCC Nomenclature or the Community's Common Customs Tariff or the Nimex code if you know it — specify which). A brief description of the structure of the market (or markets) for these goods or services — e.g. who sells in it, who buys in it, its geographical extent, the turnover in it, how competitive it is, whether it is easy for new suppliers to enter the market, whether there are substitute products. If you are notifying a standard contract (e.g. a contract appointing dealers), say how many you expect to conclude. If you know of any studies of the market, it would be helpful to refer to them.

#### *3. Fuller details of the party or parties*

3.1. Do any of the parties form part of a group of companies? A group relationship is deemed to exist where a firm:

- owns more than half the capital or business assets, or
- has the power to exercise more than half the voting rights, or
- has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or
- has the right to manage the affairs of another.

If the answer is yes, give:

- the name and address of the ultimate parent company,
- a brief description of the business of the group<sup>1</sup> (and, if possible, one copy of the last set of group accounts),

---

<sup>1</sup> For example, 'Motor vehicle manufacturer', 'Computer service bureau', 'Conglomerate'.

— the name and address of any other company in the group competing in a market affected by the arrangements or in any related market, that is to say any other company competing directly or indirectly with the parties ('relevant associated company').

3.2. The most recently available total turnover of each of the parties and, as the case may be, of the group of which it forms part (it could be helpful also if you could provide one copy of the last set of accounts).

3.3. The sales or turnover of each party in the goods or services affected by the arrangements in the Community and worldwide. If the turnover in the Community is material (say more than a 5% market share), please also give figures for each Member State, and for previous years (in order to show any significant trends), and give each party's sales targets for the future. Provide the same figures for any relevant associated company. (Under this heading, in particular, your best estimate might be all that you can readily supply.)

3.4. In relation to the market (or markets) for the goods or services described at 2 above, give, for each of the sales or turnover figures in 3.3, your estimate of the market share it represents.

3.5. If you have a substantial interest falling short of control (more than 25% but less than 50%) in some other company competing in a market affected by the arrangements, or if some other such company has a substantial interest in yours, give its name and address and brief details.

#### 4. *Full details of the arrangements*

4.1. If the contents are reduced to writing give a brief description of the purpose of the arrangements and attach three copies of the text (except that the technical descriptions often contained in know-how agreements may be omitted; in such cases, however, indicate parts omitted).

If the contents are not, or are only partially, reduced to writing, give a full description.

4.2. Detail any provisions contained in the arrangements which may restrict the parties in their freedom to take independent commercial decisions, for examples regarding:

- buying or selling prices, discounts or other trading conditions;
- the quantities of goods to be manufactured or distributed or services to be offered;
- technical development or investment;
- the choice of markets or sources of supply;
- purchases from or sales to third parties;
- whether to apply similar terms for the supply of equivalent goods or services;
- whether to offer different goods or services separately or together.

(If you are claiming the benefit of an opposition procedure, identify particularly in this list the restrictions that exceed those automatically exempted by the relevant Regulation.)

4.3. State between which Member States trade may be affected by the arrangements, and whether trade between the Community and any third countries is affected.

## 5. *Reasons for negative clearance*

If you are applying for negative clearance state, under the reference:

5.1. why, i.e. state which provision or effects of the arrangements or behaviour might, in your view, raise questions of compatibility with the Community's rules of competition. The object of this subheading is to give the Commission the clearest possible idea of the doubts you have about your arrangements or behaviour that you wish to have resolved by a negative clearance decision.

Then, under the following two references, give a statement of the relevant facts and reasons as to why you consider Articles 85 (1) or 86 to be inapplicable, i.e.:

5.2. why the arrangements do not have the object or effect of preventing, restricting or distorting competition within the common market to any appreciable extent, or why your undertaking does not have or its behaviour does not abuse a dominant position; and/or

5.3. why the arrangements or behaviour are not such as may affect trade between Member States to any appreciable extent.

## 6. *Reasons for exemption under Article 85 (3)*

If you are notifying the arrangements, even if only as a precaution, in order to obtain an exemption under Article 85 (3), explain how:

6.1. the arrangements contribute to improving production or distribution, and/or promoting technical or economic progress;

6.2. a proper share of the benefits arising from such improvement or progress accrues to consumers;

6.3. all restrictive provisions of the arrangements are indispensable to the attainment of the aims set out under 6.1 above (if you are claiming the benefit of an opposition procedure, it is particularly important that you should identify and justify restrictions that exceed those automatically exempted by the relevant Regulation); and

6.4. the arrangements do not eliminate competition in respect of a substantial part of the goods or services concerned.

## 7. *Other information*

7.1. Mention any earlier proceedings or informal contacts, of which you are aware, with the Commission and any earlier proceedings with any national authorities or courts concerning these or any related arrangements.

7.2. Give any other information presently available that you think might be helpful in allowing the Commission to appreciate whether there are any restrictions contained in the agreement, or any benefits that might justify them.

7.3. State whether you intend to produce further supporting facts or arguments not yet available and, if so, on which points.

7.4. State, with reasons, the urgency of your application or notification.

## COMMISSION REGULATION No 99/63/EEC<sup>1</sup> OF 25 JULY 1963

on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17

THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 155 thereof,

Having regard to Article 24 of Council Regulation No 17<sup>2</sup> of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty),

Whereas the Commission has power under Article 24 of Council Regulation No 17 to lay down implementing provisions concerning the hearings provided for in Article 19(1) and (2) of that Regulation;

Whereas in most cases the Commission will in the course of its inquiries already be in close touch with the undertakings or associations of undertakings which are the subject thereof and they will accordingly have the opportunity of making known their views regarding the objections raised against them;

Whereas, however, in accordance with Article 19(1) of Regulation No 17 and with the rights of defence, the undertakings and associations of undertakings concerned must have the right on conclusion of the inquiry to submit their comments on the whole of the objections raised against them which the Commission proposes to deal with in its decisions;

Whereas persons other than the undertakings or associations of undertakings which are the subject of the inquiry may have an interest in being heard; whereas, by the second sentence of Article 19(2) of Regulation No 17, such persons must have the opportunity of being heard if they apply and show that they have a sufficient interest;

Whereas it is desirable to enable persons who pursuant to Article 3(2) of Regulation No 17 have applied for an infringement to be terminated to submit their comments where the Commission considers that on the basis of the information in its possession there are insufficient grounds for granting the application;

Whereas the various persons entitled to submit comments must do so in writing, both in their own interest and in the interests of good administration, without prejudice to oral procedure where appropriate to supplement the written evidence;

Whereas it is necessary to define the rights of persons who are to be heard, and in particular the conditions upon which they may be represented or assisted and the setting and calculation of time limits;

---

<sup>1</sup> OJ 127, 20.8.1962, p. 2263 (Special Edition 1963-64, p. 47).

<sup>2</sup> OJ 13, 21.2.1962, p. 204 (Special Edition 1959-62, p. 87).



Whereas the Advisory Committee on Restrictive Practices and Monopolies delivers its Opinion on the basis of a preliminary draft decision; whereas it must therefore be consulted concerning a case after the inquiry in respect thereof has been completed; whereas such consultation does not prevent the Commission from re-opening an inquiry if need be,

HAS ADOPTED THIS REGULATION:

*Article 1*

Before consulting the Advisory Committee on Restrictive Practices and Monopolies, the Commission shall hold a hearing pursuant to Article 19(1) of Regulation No 17.

*Article 2*

1. The Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them. The communication shall be addressed to each of them or to a joint agent appointed by them.
2. The Commission may inform the parties by giving notice in the *Official Journal of the European Communities*, if from the circumstances of the case this appears appropriate, in particular where notice is to be given to a number of undertakings but no joint agent has been appointed. The notice shall have regard to the legitimate interest of the undertakings in the protection of their business secrets.
3. A fine or a periodic penalty payment may be imposed on an undertaking or association of undertakings only if the objections were notified in the manner provided for in paragraph 1.
4. The Commission shall, when giving notice of objections, fix a time limit up to which the undertakings and associations of undertakings may inform the Commission of their views.

*Article 3*

1. Undertakings and associations of undertakings shall, within the appointed time limit, make known in writing their views concerning the objections raised against them.
2. They may in their written comments set out all matters relevant to their defence.
3. They may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts.

#### *Article 4*

The Commission shall in its decisions deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views.

#### *Article 5*

If natural or legal persons showing a sufficient interest apply to be heard pursuant to Article 19 (2) of Regulation No 17, the Commission shall afford them the opportunity of making known their views in writing within such time limit as it shall fix.

#### *Article 6*

Where the Commission, having received an application pursuant to Article 3(2) of Regulation No 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time limit for them to submit any further comments in writing.

#### *Article 7*

1. The Commission shall afford to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment.

2. The Commission may likewise afford to any other person the opportunity of orally expressing his views.

#### *Article 8*

1. The Commission shall summon the persons to be heard to attend on such date as it shall appoint.

2. It shall forthwith transmit a copy of the summons to the competent authorities of the Member States, who may appoint an official to take part in the hearing.

#### *Article 9*

1. Hearings shall be conducted by the persons appointed by the Commission for that purpose.

2. Persons summoned to attend shall appear either in person or be represented by legal representatives or by representatives authorized by their constitution. Undertakings and associations of undertakings may moreover be represented by a duly authorized agent appointed from among their permanent staff.

Persons heard by the Commission may be assisted by lawyers or university teachers who are entitled to plead before the Court of Justice of the European Communities in accordance with Article 17 of the Protocol on the Statute of the Court, or by other qualified persons.

3. Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend. In the latter case, regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets.

4. The essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him.

#### *Article 10*

Without prejudice to Article 2 (2), information and summonses from the Commission shall be sent to the addressees by registered letter with acknowledgement of receipt, or shall be delivered by hand against receipt.

#### *Article 11*

1. In fixing the time limits provided for in Articles 2, 5 and 6, the Commission shall have regard both to the time required for preparation of comments and to the urgency of the case. The time limit shall be not less than two weeks; it may be extended.

2. Time limits shall run from the day following receipt of a communication or delivery thereof by hand.

3. Written comments must reach the Commission or be dispatched by registered letter before expiry of the time limit. Where the time limit would expire on a Sunday or public holiday, it shall be extended up to the end of the next following working day. For the purpose of calculating this extension, public holidays shall, in cases where the relevant date is the date of receipt of written comments, be those set out in the Annex to this Regulation, and in cases where the relevant date is the date of dispatch, those appointed by law in the country of dispatch.

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

## II — Block exemptions (Article 85 (3) of the EEC Treaty)

### *1. Exclusive dealing agreements*

**COUNCIL REGULATION No 19/65/EEC<sup>1</sup> OF 2 MARCH 1965**

**on the application of Article 85 (3) of the Treaty to certain categories  
of agreements and concerted practices**

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

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

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,<sup>2</sup>

Having regard to the Opinion of the Economic and Social Committee,<sup>3</sup>

Whereas Article 85 (1) of the Treaty may in accordance with Article 85 (3) be declared inapplicable to certain categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 85 (3);

Whereas the provisions for implementation of Article 85 (3) must be adopted by way of regulation pursuant to Article 87;

---

<sup>1</sup> OJ 36, 6.3.1965, p. 533 (Special Edition 1965-66, p. 35).

<sup>2</sup> OJ 81, 27.5.1964, p. 1275/64.

<sup>3</sup> OJ 197, 30.11.1964, p. 3320/64.

Whereas in view of the large number of notifications submitted in pursuance of Regulation No 17<sup>1</sup> it is desirable that in order to facilitate the task of the Commission it should be enabled to declare by way of regulation that the provisions of Article 85 (1) do not apply to certain categories of agreements and concerted practices;

Whereas it should be laid down under what conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers after sufficient experience has been gained in the light of individual decisions and it becomes possible to define categories of agreements and concerted practices in respect of which the conditions of Article 85 (3) may be considered as being fulfilled;

Whereas the Commission has indicated by the action it has taken, in particular by Regulation No 153,<sup>2</sup> that there can be no easing of the procedures prescribed by Regulation No 17 in respect of certain types of agreements and concerted practices that are particularly liable to distort competition in the common market;

Whereas under Article 6 of Regulation No 17 the Commission may provide that a decision taken pursuant to Article 85 (3) of the Treaty shall apply with retroactive effect; whereas it is desirable that the Commission be also empowered to adopt, by regulation, provisions to the like effect;

Whereas under Article 7 of Regulation No 17 agreements, decisions and concerted practices may, by decision of the Commission, be exempted from prohibition in particular if they are modified in such manner that they satisfy the requirements of Article 85 (3); whereas it is desirable that the Commission be enabled to grant like exemption by regulation to such agreements and concerted practices if they are modified in such manner as to fall within a category defined in an exempting regulation;

Whereas, since there can be no exemption if the conditions set out in Article 85 (3) are not satisfied, the Commission must have power to lay down by decision the conditions that must be satisfied by an agreement or concerted practice which owing to special circumstances has certain effects incompatible with Article 85 (3).

HAS ADOPTED THIS REGULATION :

#### *Article 1*

1. Without prejudice to the application of Council Regulation No 17 and in accordance with Article 85 (3) of the Treaty the Commission may by regulation declare that

---

<sup>1</sup> OJ 13, 21.2.1962, p. 204/62 (Regulation No 17 as amended by Regulation No 59); OJ 58, 10.7.1962, p. 1655/62 — and Regulation No 118/63/EEC — OJ 162, 7.11.1963, p. 2696/63.

<sup>2</sup> OJ 139, 24.12.1962, p. 2918/62.

Article 85 (1) shall not apply to categories of agreements to which only two undertakings are party and :

(a) — 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, as in the two preceding subparagraphs, with each other in respect of exclusive supply and purchase for resale;

(b) which include restrictions imposed in relation to the assignment or use of industrial property rights — in particular of patents, utility models, designs or trade marks — or to the rights arising 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.

2. The Regulation shall define the categories of agreements to which it applies and shall specify in particular :

(a) the restrictions or clauses which must not be contained in the agreements;

(b) the clauses which must be contained in the agreements, or the other conditions which must be satisfied.

3. Paragraphs 1 and 2 shall apply by analogy to categories of concerted practices to which only two undertakings are party.

#### *Article 2*

1. A Regulation pursuant to Article 1 shall be made for a specified period,

2. It may be repealed or amended where circumstances have changed with respect to any factor which was basic to its being made; in such case, a period shall be fixed for modification of the agreements and concerted practices to which the earlier Regulation applies.

#### *Article 3*

A regulation pursuant to Article 1 may stipulate that it shall apply with retroactive effect to agreements and concerted practices to which, at the date of entry into force of that Regulation, a decision issued with retroactive effect in pursuance of Article 6 of Regulation No 17 would have applied.

*Article 4*<sup>1, 2</sup>

1. A Regulation pursuant to Article 1 may stipulate that the prohibition contained in Article 85 (1) of the Treaty shall not apply, for such period as shall be fixed by that Regulation, to agreements and concerted practices already in existence on 13 March 1962 which do not satisfy the conditions of Article 85 (3), where:

— within three months from the entry into force of the Regulation, they are so modified as to satisfy the said conditions in accordance with the provisions of the Regulation; and

— the modifications are brought to the notice of the Commission within the time limit fixed by the Regulation.

2. Paragraph 1 shall apply to agreements and concerted practices which had to be notified before 1 February 1963, in accordance with Article 5 of Regulation No 17, only where they have been so notified before that date.

3. The benefit of the provisions laid down pursuant to paragraph 1 may not be claimed in actions pending at the date of entry into force of a Regulation adopted pursuant to Article 1; neither may it be relied on as grounds for claims for damages against third parties.

**<sup>1</sup> Acts concerning the conditions of accession and the adjustments to the Treaties**

The following is inserted at the end of the first subparagraph of Article 4 (1):

'A Regulation pursuant to Article 1 may stipulate that the prohibition contained in Article 85 (1) of the Treaty shall not apply, for such period as shall be fixed by that Regulation, to agreements and concerted practices already in existence at the date of accession to which Article 85 applies by virtue of accession and which do not satisfy the conditions of Article 85 (3), where:'

The following is inserted at the end of Article 4 (2):

'Paragraph 1 shall not apply to agreements and concerted practices to which Article 85 of the Treaty applies by virtue of accession and which must be notified before 1 July 1973, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.'

**<sup>2</sup> Documents concerning the accession of the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic**

In Article 4:

— the following is added to paragraph 1:

'The provisions of the preceding subparagraph shall apply in the same way as in the case of the accession of the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic'

— paragraph 2 is supplemented by the following:

'Paragraph 1 shall not apply to agreements and concerted practices to which Article 85 (1) of the Treaty applies by virtue of the accession of the Hellenic Republic and which must be notified before 1 July 1981, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.'

'Paragraph 2 shall not apply to agreements and concerted practices to which Article 85 (1) of the Treaty applies by virtue of the accession of the Kingdom of Spain and of the Portuguese Republic and which must be notified before 1 July 1986, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date'.

(OJ L 291, 19.11.1979, p. 94; OJ L 302, 15.11.1985, p. 166).

#### *Article 5*

Before adopting a regulation, the Commission shall publish a draft thereof and invite all persons concerned to submit their comments within such time limit, being not less than one month, as the Commission shall fix.

#### *Article 6*

1. The Commission shall consult the Advisory Committee on Restrictive Practices and Monopolies:

- (a) before publishing a draft regulation;
- (b) before adopting a regulation.

2. Article 10 (5) and (6) of Regulation No 17, relating to consultation with the Advisory Committee, shall apply by analogy, it being understood that joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice convening them.

#### *Article 7*

Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case agreements or concerted practices to which a Regulation adopted pursuant to Article 1 of this Regulation applies have nevertheless certain effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, it may withdraw the benefit of application of that Regulation and issue a decision in accordance with Articles 6 and 8 of Regulation No 17, without any notification under Article 4 (1) of Regulation No 17 being required.

#### *Article 8*

The Commission shall, before 1 January 1970, submit to the Council a proposal for a Regulation for such amendment of this Regulation as may prove necessary in the light of experience.

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



**COMMISSION REGULATION No 67/67/EEC OF 22 MARCH 1967<sup>1</sup>**

**on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements amended by Regulation (EEC) No 2591/72<sup>2</sup> of 8 December 1972 and by Regulation (EEC) No 3577/82<sup>3</sup> of 23 December 1982**

THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 155 thereof;

Having regard to Article 24 of Regulation No 17 of 6 February 1962,<sup>4</sup>

Having regard to Regulation No 19/65/EEC of 2 March 1965<sup>5</sup> on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices,

Having regard to the Opinions delivered by the Advisory Committee on Restrictive Practices and Monopolies in accordance with Article 6 of Regulation No 19/65/EEC,

Whereas under Regulation No 19/65/EEC the Commission has power to apply Article 85 (3) of the Treaty by regulation to certain categories of bilateral exclusive dealing agreements and concerted practices coming within Article 85;

Whereas the experience gained up to now, on the basis of individual decisions, makes it possible to define a first category of agreements and concerted practices which can be accepted as normally satisfying the conditions laid down in Article 85 (3);

Whereas since adoption of such a regulation would not conflict with the application of Regulation No 17 the right of undertakings to request the Commission, on an individual basis, for a declaration under Article 85 (3) of the Treaty would not be affected;

Whereas exclusive dealing agreements of the category defined in Article 1 of this Regulation may fall within the prohibition contained in Article 85 (1) of the Treaty; whereas since it is only in exceptional cases that exclusive dealing agreements concluded within a Member State affect trade between Member States, there is no need to include them in this Regulation;

Whereas it is not necessary expressly to exclude from the category as defined those agreements which do not fulfil the conditions of Article 85 (1) of the Treaty;

Whereas in the present state of trade exclusive dealing agreements relating to international trade lead in general to an improvement in distribution because the entrepreneur is able to

<sup>1</sup> OJ 57, 25.3.1967, p. 849 (Special Edition 1967, p. 10).

<sup>2</sup> OJ L 276, 9.12.1972, p. 15 (Special Edition 1972, 9-28 December, p. 7).

<sup>3</sup> OJ L 373, 31.12.1982, p. 58.

<sup>4</sup> OJ 13, 21.2.1962, p. 204/62 (Special Edition 1959-62, p. 87).

<sup>5</sup> OJ 36, 6.3.1965, p. 533/65 (Special Edition 1965-66, p. 35).

consolidate his sales activities; whereas he is not obliged to maintain numerous business contracts with a large number of dealers, and whereas the fact of maintaining contacts with only one dealer makes it easier to overcome sales difficulties resulting from linguistic, legal, and other differences; whereas exclusive dealing agreements facilitate the promotion of the sale of a product and make it possible to carry out more intensive marketing and to ensure continuity of supplies, while at the same time rationalizing distribution; whereas, moreover, the appointment of an exclusive distributor or of an exclusive purchaser who will take over, in place of the manufacturer, sales promotion, after-sales service and carrying of stocks, is often the sole means whereby small and medium-sized undertakings can compete in the market; whereas it should be left to the contracting parties to decide whether and to what extent they consider it desirable to incorporate in the agreements terms designed to promote sales; whereas there can only be an improvement in distribution if dealing is not entrusted to a competitor;

Whereas as a rule such exclusive dealing agreements also help to give consumers a proper share of the resulting benefit as they gain directly from the improvement in distribution, and their economic or supply position is thereby improved as they can obtain products manufactured in other countries more quickly and more easily;

Whereas this Regulation must determine the obligations restricting competition which may be included in an exclusive dealing agreement; whereas it may be left to the contracting parties to decide which of those obligations they include in exclusive dealing agreements in order to draw the maximum advantages from exclusive dealing;

Whereas any exemption must be subject to certain conditions; whereas it is in particular advisable to ensure through the possibility of parallel imports that consumers obtain a proper share of the advantages resulting from exclusive dealing; whereas it is therefore not possible to allow industrial property rights and other rights to be exercised in an abusive manner in order to create absolute territorial protection; whereas these considerations do not prejudice the relationship between the law of competition and industrial property rights, since the sole object here is to determine the condition for exemption of certain categories of agreements under this Regulation;

Whereas competition at the distribution stage is ensured by the possibility of parallel imports; whereas, therefore, the exclusive dealing agreements covered by this Regulation will not normally afford any possibility of preventing competition in respect of a substantial part of the products in question;

Whereas it is desirable to allow contracting parties a limited period of time within which they may, in accordance with Article 4 of Regulation No 19/65/EEC, modify their agreements and practices so as to satisfy the conditions laid down in this Regulation, without it being possible, under Article 4 (3) of Regulation No 19/65/EEC, to rely thereon in actions which are pending at the time of entry into force of this Regulation, or as grounds for claims for damages against third parties;

Whereas agreements and concerted practices which satisfy the conditions set out in this Regulation need no longer be notified; whereas Article 4 (2) (a) of Regulation No 27,<sup>1</sup> as amended by Regulation No 153,<sup>2</sup> can be repealed, since agreements which it was possible to notify on Form B 1 would normally come within the scope of the exemption;

Whereas agreements notified on Form B 1 and not amended so as to satisfy the conditions of this Regulation should be made subject to the normal notification procedure, in order that they may be examined individually,

HAS ADOPTED THIS REGULATION:

*Article 1*

1. Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation it is hereby declared that until 30 June 1983 Article 85 (1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby:

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

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

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

2. Paragraph 1 shall not apply to agreements to which undertakings from one Member State only are party and which concern the resale of goods within that Member State.

*Article 2*

1. Apart from an obligation falling within Article 1, no restriction on competition shall be imposed on the exclusive dealer other than:

(a) the obligation not to manufacture or distribute, during the duration of the contract or until one year after its expiration, goods which compete with the goods to which the contract relates;

(b) the obligation to refrain, outside the territory covered by the contract, from seeking customers for the goods to which the contract relates, from establishing any branch, or from maintaining any distribution depot.

---

<sup>1</sup> OJ 35, 10.5.1962, p. 1118/62 (Special Edition 1959-1962, p. 132).

<sup>2</sup> OJ 139, 24.12.1962, p. 2918/62.

2. Article 1 (1) shall apply notwithstanding that the exclusive dealer undertakes all or any of the following obligations:

- (a) to purchase complete ranges of goods or minimum quantities;
- (b) to sell the goods to which the contract relates under trade marks or packed and presented as specified by the manufacturer;
- (c) to take measures for promotion of sales, in particular
  - to advertise,
  - to maintain a sales network or stock of goods,
  - to provide after-sales and guarantee services,
  - to employ staff having specialized or technical training.

### *Article 3*

Article 1 (1) of this Regulation shall not apply where:

- (a) manufacturers of competing goods entrust each other with exclusive dealing in those goods;
- (b) the contracting parties make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the common market, in particular where the contracting parties:
  - (1) exercise industrial property rights to prevent dealers or consumers from obtaining from other parts of the common market or from selling in the territory covered by the contract goods to which the contract relates which are properly marked or otherwise properly placed on the market;
  - (2) exercise other rights, or take other measures to prevent dealers or consumers from obtaining from elsewhere<sup>1</sup> goods to which the contract relates or from selling them in the territory covered by the contract.

### *Article 4*

1. As regards agreements which were in existence on 13 March 1962 and were notified before 1 February 1963, the declaration contained in Article 1 (1) of inapplicability of Article 85 (1) of the Treaty shall have retroactive effect from the time when the conditions of application of this Regulation were fulfilled.

2. As regards all other agreements notified before the entry into force of this Regulation, the declaration contained in Article 1 (1) of inapplicability of Article 85 (1) of the Treaty shall have retroactive effect from the time when the conditions of application of this Regulation were fulfilled, but not earlier than the day of notification.

---

<sup>1</sup> Other language versions: 'elsewhere in the common market'.

### *Article 5<sup>1,2</sup>*

As regards agreements which were in existence on 13 March 1962, notified before 1 February 1962 and amended before 2 August 1967 so as to fulfil the conditions of application of this Regulation, the prohibition in Article 85 (1) of the Treaty shall not apply in respect of the period prior to the amendment, where such amendment is notified to the Commission before 3 October 1967. The notification shall take effect from the time of receipt thereof by the Commission. Where the notification is sent by registered post, it shall take effect from the date on the postmark of the place of dispatch.

### *Article 6*

The Commission shall examine whether Article 7 of Regulation No 19/65/EEC applies in individual cases, in particular when there are grounds for believing that:

- (a) the goods to which the contract relates are not subject, in the territory covered by the contract, to competition from goods considered by the consumer as similar goods in view of their properties, price and intended use;
- (b) it is not possible for other manufacturers to sell, in the territory covered by the contract, similar goods at the same stage of distribution as that of the exclusive dealer;
- (c) the exclusive dealer has abused the exemption:
  - (1) by refusing, without objectively valid reasons, to supply in the territory covered by the contract categories of purchasers who cannot obtain supplies elsewhere, on suitable terms, of the goods to which the contract relates;
  - (2) by selling the goods to which the contract relates at excessive prices.

### *Article 7*

1. Article 4 (2) (a) of Regulation No 27 of 3 May 1962, as amended by Regulation No 153, is hereby repealed.

---

#### <sup>1</sup> **Documents concerning the accession**

The following is inserted at the end of the first sentence of Article 5:

'As regards agreements, decisions or concerted practices for exclusive dealing already in existence at the date of accession to which Article 85 (1) applies by virtue of accession, the prohibition in Article 85 (1) of the Treaty shall not apply where they are modified within six months from the date of accession so as to fulfil the conditions contained in this Regulation.'

(OJ L 73, 27.3.1972, p. 93).

#### <sup>2</sup> **Documents concerning the accession of the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic**

The following is added to Article 5:

'This provision shall apply in the same way in the case of the accession of the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic.'

(OJ L 302, 15.11.1985, p. 166).

2. Notification, on Form B 1, of an exclusive dealing agreement which does not fulfil the conditions contained in Articles 1 to 3 of this Regulation shall, if such agreement is not amended so as to satisfy those conditions, be effected before 3 October 1967, by submission of Form B, with annexes, in accordance with the provisions of Regulation No 27.

*Article 8*

Articles 1 to 7 of this Regulation shall apply by analogy to the category of concerted practices defined in Article 1 (1).

*Article 9*

This Regulation shall enter into force on 1 May 1967.

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

**COMMISSION REGULATION (EEC) No 1983/83<sup>1</sup> OF 22 JUNE 1983**

**on the application of Article 85 (3) of the Treaty to categories  
of exclusive distribution agreements**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation 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<sup>2</sup> as last amended by the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation,<sup>3</sup>

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

(1) Whereas Regulation No 19/65/EEC empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of bilateral exclusive distribution agreements and analogous concerted practices falling within Article 85 (1);

(2) Whereas experience to date makes it possible to define a category of agreements and concerted practices which can be regarded as normally satisfying the conditions laid down in Article 85 (3);

(3) Whereas exclusive distribution agreements of the category defined in Article 1 of this Regulation may fall within the prohibition contained in Article 85 (1) of the Treaty; whereas this will apply only in exceptional cases to exclusive agreements of this kind to which only undertakings from one Member State are party and which concern the resale of goods within that Member State; whereas, however, to the extent that such agreements may affect trade between Member States and also satisfy all the requirements set out in this Regulation there is no reason to withhold from them the benefit of the exemption by category;

(4) Whereas it is not necessary expressly to exclude from the defined category those agreements which do not fulfil the conditions of Article 85 (1) of the Treaty;

(5) Whereas exclusive distribution agreements lead in general to an improvement in distribution because the undertaking is able to concentrate its sales activities, does not need to maintain numerous business relations with a larger number of dealers and is able, by dealing with only one dealer, to overcome more easily distribution difficulties in international trade resulting from linguistic, legal and other differences;

(6) Whereas exclusive distribution agreements facilitate the promotion of sales of a product and lead to intensive marketing and to continuity of supplies while at the same time

<sup>1</sup> OJ L73, 30.6.1983, p. 1; Corrigendum OJ L 281, 13.10.1983, p. 24.

<sup>2</sup> OJ 36, 6.3.1965, p. 533/65.

<sup>3</sup> OJ C 172, 10.7.1982, p. 3.

rationalizing distribution; whereas they stimulate competition between the products of different manufacturers; whereas the appointment of an exclusive distributor who will take over sales promotion, customer services and carrying of stocks is often the most effective way, and sometimes indeed the only way, for the manufacturer to enter a market and compete with other manufacturers already present; whereas this is particularly so in the case of small and medium-sized undertakings; whereas it must be left to the contracting parties to decide whether and to what extent they consider it desirable to incorporate in the agreements terms providing for the promotion of sales;

(7) Whereas, as a rule, such exclusive distribution agreements also allow consumers a fair share of the resulting benefit as they gain directly from the improvement in distribution, and their economic and supply position is improved as they can obtain products manufactured in particular in other countries more quickly and more easily;

(8) Whereas this Regulation must define the obligations restricting competition which may be included in exclusive distribution agreements; whereas the other restrictions on competition allowed under this Regulation in addition to the exclusive supply obligation produce a clear division of functions between the parties and compel the exclusive distributor to concentrate his sales efforts on the contract goods and the contract territory; whereas they are, where they are agreed only for the duration of the agreement, generally necessary in order to attain the improvement in the distribution of goods sought through exclusive distribution; whereas it may be left to the contracting parties to decide which of these obligations they include in their agreements; whereas further restrictive obligations and in particular those which limit the exclusive distributor's choice of customers or his freedom to determine his prices and conditions of sale cannot be exempted under this Regulation;

(9) Whereas the exemption by category should be reserved for agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 85 (3) of the Treaty;

(10) Whereas it is not possible, in the absence of a case-by-case examination, to consider that adequate improvements in distribution occur where a manufacturer entrusts the distribution of his goods to another manufacturer with whom he is in competition; whereas such agreements should, therefore, be excluded from the exemption by category; whereas certain derogations from this rule in favour of small and medium-sized undertakings can be allowed;

(11) Whereas consumers will be assured of a fair share of the benefits resulting from exclusive distribution only if parallel imports remain possible; whereas agreements relating to goods which the user can obtain only from the exclusive distributor should therefore be excluded from the exemption by category; whereas the parties cannot be allowed to abuse industrial property rights or other rights in order to create absolute territorial protection; whereas this does not prejudice the relationship between competition law and industrial property rights, since the sole object here is to determine the conditions for exemption by category;

(12) Whereas, since competition at the distribution stage is ensured by the possibility of parallel imports, the exclusive distribution agreements covered by this Regulation will not



normally afford any possibility of eliminating competition in respect of a substantial part of the products in question; whereas this is also true of agreements that allot to the exclusive distributor a contract territory covering the whole of the common market;

(13) Whereas, in particular cases in which agreements or concerted practices satisfying the requirements of this Regulation nevertheless have effects incompatible with Article 85 (3) of the Treaty, the Commission may withdraw the benefit of the exemption by category from the undertakings party to them;

(14) Whereas agreements and concerted practices which satisfy the conditions set out in this Regulation need not be notified; whereas an undertaking may none the less in a particular case where real doubt exists, request the Commission to declare whether its agreements comply with this Regulation;

(15) Whereas this Regulation does not affect the applicability of Commission Regulation (EEC) No 3604/82 of 23 December 1982 on the application of Article 85 (3) of the Treaty to categories of specialization agreements;<sup>1</sup> whereas it does not exclude the application of Article 86 of the Treaty,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party agrees with the other to supply certain goods for resale within the whole or a defined area of the common market only to that other.

#### *Article 2*

1. Apart from the obligation referred to in Article 1 no restriction on competition shall be imposed on the supplier other than the obligation not to supply the contract goods to users in the contract territory.

2. No restriction on competition shall be imposed on the exclusive distributor other than:

- (a) the obligation not to manufacture or distribute goods which compete with the contract goods;
- (b) the obligation to obtain the contract goods for resale only from the other party;
- (c) the obligation to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch and from maintaining any distribution depot.

---

<sup>1</sup> OJ L 376, 31.12.1982, p. 33.

3. Article 1 shall apply notwithstanding that the exclusive distributor undertakes all or any of the following obligations:

- (a) to purchase complete ranges of goods or minimum quantities;
- (b) to sell the contract goods under trademarks, or packed and presented as specified by the other party;
- (c) to take measures for promotion of sales in particular:
  - to advertise,
  - to maintain a sales network or stock of goods,
  - to provide customer and guarantee services,
  - to employ staff having specialized or technical training.

### *Article 3*

Article 1 shall not apply where:

- (a) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into reciprocal exclusive distribution agreements between themselves in respect of such goods;
- (b) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into a non-reciprocal exclusive distribution agreement between themselves in respect of such goods unless at least one of them has a total annual turnover of no more than ECU 100 million;
- (c) users can obtain the contract goods in the contract territory only from the exclusive distributor and have no alternative source of supply outside the contract territory;
- (d) one or both of the parties makes it difficult for intermediaries or users to obtain the contract goods from other dealers inside the common market or, in so far as no alternative source of supply is available there, from outside the common market, in particular where one or both of them:
  - (1) exercises industrial property rights so as to prevent dealers or users from obtaining outside, or from selling in, the contract territory properly marked or otherwise properly marketed contract goods;
  - (2) exercises other rights or takes other measures so as to prevent dealers or users from obtaining outside, or from selling in, the contract territory contract goods.

### *Article 4*

1. Article 3 (a) and (b) shall also apply where the goods there referred to are manufactured by an undertaking connected with a party to the agreement.

2. Connected undertakings are:

(a) undertakings in which a party to the agreement, directly or indirectly:

- owns more than half the capital or business assets, or
- has the power to exercise more than half the voting rights, or
- has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or
- has the right to manage the affairs;

(b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).

3. Undertakings in which the parties to the agreement or undertakings connected with them jointly have the rights or powers set out in paragraph 2 (a) shall be considered to be connected with each of the parties to the agreement.

#### *Article 5*

1. For the purpose of Article 3(b), the ecu is the unit of account used for drawing up the budget of the Community pursuant to Articles 207 and 209 of the Treaty.

2. Article 1 shall remain applicable where during any period of two consecutive financial years the total turnover referred to in Article 3 (b) is exceeded by no more than 10%.

3. For the purpose of calculating total turnover within the meaning of Article 3 (b), the turnovers achieved during the last financial year by the party to the agreement and connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the agreement and its connected undertakings or between its connected undertakings.

#### *Article 6*

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, when it finds in a particular case that an agreement which is exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions set out in Article 85 (3) of the Treaty, and in particular where:

(a) the contract goods are not subject, in the contract territory, to effective competition from identical goods or goods considered by users as equivalent in view of their characteristics, price and intended use;

(b) access by other suppliers to the different stages of distribution within the contract territory is made difficult to a significant extent;

(c) for reasons other than those referred to in Article 3 (c) and (d) it is not possible for intermediaries or users to obtain supplies of the contract goods from dealers outside the contract territory on the terms there customary;

(d) the exclusive distributor:

(1) without any objectively justified reason refuses to supply in the contract territory categories of purchasers who cannot obtain contract goods elsewhere on suitable terms or applies to them differing prices or conditions of sale;

(2) sells the contract goods at excessively high prices.

#### *Article 7<sup>1</sup>*

In the period 1 July 1983 to 31 December 1986, the prohibition in Article 85 (1) of the Treaty shall not apply to agreements which were in force on 1 July 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions of Regulation No 67/67/EEC.<sup>2</sup>

#### *Article 8*

This Regulation shall not apply to agreements entered into for the resale of drinks in premises used for the sale and consumption of drinks or for the resale of petroleum products in service stations.

#### *Article 9*

This Regulation shall apply *mutatis mutandis* to concerted practices of the type defined in Article 1.

#### *Article 10*

This Regulation shall enter into force on 1 July 1983.

It shall expire on 31 December 1997.

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

---

<sup>1</sup> Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic

The following is added to Article 7:

'The provisions of the preceding paragraph shall apply in the same way to agreements which were in force on the date of accession of the Kingdom of Spain and of the Portuguese Republic and which, as a result of accession, fall within the scope of Article 85 (1) of the Treaty.'

(OJ L 302, 15.11.1985, p. 166).

<sup>2</sup> OJ 57, 25.3.1967, p. 849/67.

**COMMISSION REGULATION (EEC) No 1984/83<sup>1</sup> OF 22 JUNE 1983**

**on the application of Article 85 (3) of the Treaty to categories  
of exclusive purchasing agreements**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation 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,<sup>2</sup> as last amended by the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation,<sup>3</sup>

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

(1) Whereas Regulation No 19/65/EEC empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of bilateral exclusive purchasing agreements entered into for the purpose of the resale of goods and corresponding concerted practices falling within Article 85(1);

(2) Whereas experience to date makes it possible to define three categories of agreements and concerted practices which can be regarded as normally satisfying the conditions laid down in Article 85 (3); whereas the first category comprises exclusive purchasing agreements of short and medium duration in all sectors of the economy; whereas the other two categories comprise long-term exclusive purchasing agreements entered into for the resale of beer in premises used for the sale and consumption of drinks (beer-supply agreements) and of petroleum products in filling stations (service-station agreements);

(3) Whereas exclusive purchasing agreements of the categories defined in this Regulation may fall within the prohibition contained in Article 85 (1) of the Treaty; whereas this will often be the case with agreements concluded between undertakings from different Member States; whereas an exclusive purchasing agreement to which undertakings from only one Member State are party and which concerns the resale of goods within that Member State may also be caught by the prohibition; whereas this is in particular the case where it is one of a number of similar agreements which together may affect trade between Member States;

(4) Whereas it is not necessary expressly to exclude from the defined categories those agreements which do not fulfil the conditions of Article 85 (1) of the Treaty;

(5) Whereas the exclusive purchasing agreements defined in this Regulation lead in general to an improvement in distribution; whereas they enable the supplier to plan the sales of his goods with greater precision and for a longer period and ensure that the reseller's

<sup>1</sup> OJ L 173, 30.6.1983, p. 5; Corrigendum OJ L 281, 13.10.1983, p. 24.

<sup>2</sup> OJ 36, 6.3.1965, p. 533/65.

<sup>3</sup> OJ C 172, 10.7.1982, p. 7.

requirements will be met on a regular basis for the duration of the agreement; whereas this allows the parties to limit the risk to them of variations in market conditions and to lower distribution costs;

(6) Whereas such agreements also facilitate the promotion of the sales of a product and lead to intensive marketing because the supplier in consideration for the exclusive purchasing obligation, is as a rule under an obligation to contribute to the improvement of the structure of the distribution network, the quality of the promotional effort or the sales success; whereas, at the same time, they stimulate competition between the products of different manufacturers; whereas the appointment of several resellers, who are bound to purchase exclusively from the manufacturer and who take over sales promotion, customer services and carrying of stock, is often the most effective way, and sometimes the only way, for the manufacturer to penetrate a market and compete with other manufacturers already present; whereas this is particularly so in the case of small and medium-sized undertakings; whereas it must be left to the contracting parties to decide whether and to what extent they consider it desirable to incorporate in their agreements terms concerning the promotion of sales;

(7) Whereas, as a rule, exclusive purchasing agreements between suppliers and resellers also allow consumers a fair share of the resulting benefit as they gain the advantages of regular supply and are able to obtain the contract goods more quickly and more easily;

(8) Whereas this Regulation must define the obligations restricting competition which may be included in an exclusive purchasing agreement; whereas the other restrictions of competition allowed under this Regulation in addition to the exclusive purchasing obligation lead to a clear division of functions between the parties and compel the reseller to concentrate his sales efforts on the contract goods; whereas they are, where they are agreed only for the duration of the agreement, generally necessary in order to attain the improvement in the distribution of goods sought through exclusive purchasing; whereas further restrictive obligations and in particular those which limit the reseller's choice of customers or his freedom to determine his prices and conditions of sale cannot be exempted under this Regulation;

(9) Whereas the exemption by categories should be reserved for agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 85 (3) of the Treaty;

(10) Whereas it is not possible, in the absence of a case-by-case examination, to consider that adequate improvements in distribution occur where a manufacturer imposes an exclusive purchasing obligation with respect to his goods on a manufacturer with whom he is in competition; whereas such agreements should, therefore, be excluded from the exemption by categories; whereas certain derogations from this rule in favour of small and medium-sized undertakings can be allowed;

(11) Whereas certain conditions must be attached to the exemption by categories so that access by other undertakings to the different stages of distribution can be ensured; whereas, to this end, limits must be set to the scope and to the duration of the exclusive purchasing

obligation; whereas it appears appropriate as a general rule to grant the benefit of a general exemption from the prohibition on restrictive agreements only to exclusive purchasing agreements which are concluded for a specified product or range of products and for not more than five years;

(12) Whereas, in the case of beer-supply agreements and service-station agreements, different rules should be laid down which take account of the particularities of the markets in question;

(13) Whereas these agreements are generally distinguished by the fact that, on the one hand, the supplier confers on the reseller special commercial or financial advantages by contributing to his financing, granting him or obtaining for him a loan on favourable terms, equipping him with a site or premises for conducting his business, providing him with equipment or fittings, or undertaking other investments for his benefit and that, on the other hand, the reseller enters into a long-term exclusive purchasing obligation which in most cases is accompanied by a ban on dealing in competing products;

(14) Whereas beer-supply and service-station agreements, like the other exclusive purchasing agreements dealt with in this Regulation, normally produce an appreciable improvement in distribution in which consumers are allowed a fair share of the resulting benefit;

(15) Whereas the commercial and financial advantages conferred by the supplier on the reseller make it significantly easier to establish, modernize, maintain and operate premises used for the sale and consumption of drinks and service stations; whereas the exclusive purchasing obligation and the ban on dealing in competing products imposed on the reseller incite the reseller to devote all the resources at his disposal to the sale of the contract goods; whereas such agreements lead to durable cooperation between the parties allowing them to improve or maintain the quality of the contract goods and of the services to the consumer and sales efforts of the reseller; whereas they allow long-term planning of sales and consequently a cost effective organization of production and distribution; whereas the pressure of competition between products of different makes obliges the undertakings involved to determine the number and character of premises used for the sale and consumption of drinks and service stations, in accordance with the wishes of customers;

(16) Whereas consumers benefit from the improvements described, in particular because they are ensured supplies of goods of satisfactory quality at fair prices and conditions while being able to choose between the products of different manufacturers;

(17) Whereas the advantages produced by beer-supply agreements and service-station agreements cannot otherwise be secured to the same extent and with the same degree of certainty; whereas the exclusive purchasing obligation on the reseller and the non-competition clause imposed on him are essential components of such agreements and thus usually indispensable for the attainment of these advantages; whereas, however, this is true only as long as the reseller's obligation to purchase from the supplier is confined in the case of premises used for the sale and consumption of drinks to beers and other drinks of the types offered by the supplier, and in the case of service stations to petroleum-based fuel for motor vehicles and other petroleum-based fuels; whereas the exclusive purchasing obligation for lubricants and related petroleum-based products can be accepted only on condition that the supplier provides for the reseller or finances the procurement of specific equipment

for the carrying out of lubrication work; whereas this obligation should only relate to products intended for use within the service station;

(18) Whereas in order to maintain the reseller's commercial freedom and to ensure access to the retail level of distribution on the part of other suppliers, not only the scope but also the duration of the exclusive purchasing obligation must be limited; whereas it appears appropriate to allow drinks suppliers a choice between a medium-term exclusive purchasing agreement covering a range of drinks and a long-term exclusive purchasing agreement for beer; whereas it is necessary to provide special rules for those premises used for the sale and consumption of drinks which the supplier lets to the reseller; whereas, in this case, the reseller must have the right to obtain from other undertakings, under the conditions specified in this Regulation, other drinks, except beer, supplied under the agreement or of the same type but bearing a different trademark; whereas a uniform maximum duration should be provided for service-station agreements, with the exception of tenancy agreements between the supplier and the reseller, which takes account of the long-term character of the relationship between the parties;

(19) Whereas to the extent that Member States provide, by law or administrative measures, for the same upper limit of duration for the exclusive purchasing obligation upon the reseller in service-station agreements as laid down in this Regulation but provide for a permissible duration which varies in proportion to the consideration provided by the supplier or generally provide for a shorter duration than that permitted by this Regulation, such laws or measures are not contrary to the objectives of this Regulation which, in this respect, merely sets an upper limit to the duration of service-station agreements; whereas the application and enforcement of such national laws or measures must therefore be regarded as compatible with the provisions of this Regulation;

(20) Whereas the limitations and conditions provided for in this Regulation are such as to guarantee effective competition on the markets in question; whereas, therefore, the agreements to which the exemption by category applies do not normally enable the participating undertakings to eliminate competition for a substantial part of the products in question;

(21) Whereas, in particular cases in which agreements or concerted practices satisfying the conditions of this Regulation nevertheless have effects incompatible with Article 85 (3) of the Treaty, the Commission may withdraw the benefit of the exemption by category from the undertakings party thereto;

(22) Whereas agreements and concerted practices which satisfy the conditions set out in this Regulation need not be notified; whereas an undertaking may none the less, in a particular case where real doubt exists, request the Commission to declare whether its agreements comply with this Regulation;

(23) Whereas this Regulation does not affect the applicability of Commission Regulation (EEC) No 3604/82 of 23 December 1982 on the application of Article 85 (3) of the Treaty to categories of specialization agreements,<sup>1</sup> whereas it does not exclude the application of Article 86 of the Treaty,

**HAS ADOPTED THIS REGULATION:**

---

<sup>1</sup> OJ L 376, 31.12.1982, p. 33.



## TITLE I

### General provisions

#### *Article 1*

Pursuant to Article 85 (3) of the Treaty, and subject to the conditions set out in Articles 2 to 5 of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, to purchase certain goods specified in the agreement for resale only from the supplier or from a connected undertaking or from another undertaking which the supplier has entrusted with the sale of his goods.

#### *Article 2*

1. No other restriction of competition shall be imposed on the supplier than the obligation not to distribute the contract goods or goods which compete with the contract goods in the reseller's principal sales area and at the reseller's level of distribution.

2. Apart from the obligation described in Article 1, no other restriction of competition shall be imposed on the reseller than the obligation not to manufacture or distribute goods which compete with the contract goods.

3. Article 1 shall apply notwithstanding that the reseller undertakes any or all of the following obligations;

- (a) to purchase complete ranges of goods;
- (b) to purchase minimum quantities of goods which are subject to the exclusive purchasing obligation;
- (c) to sell the contract goods under trademarks, or packed and presented as specified by the supplier;
- (d) to take measures for the promotion of sales, in particular:
  - to advertise,
  - to maintain a sales network or stock of goods,
  - to provide customer and guarantee services,
  - to employ staff having specialized or technical training.

#### *Article 3*

Article 1 shall not apply where:

- (a) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into reciprocal exclusive purchasing agreements between themselves in respect of such goods;

- (b) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into a non-reciprocal exclusive purchasing agreement between themselves in respect of such goods, unless at least one of them has a total annual turnover of no more than ECU 100 million;
- (c) the exclusive purchasing obligation is agreed for more than one type of goods where these are neither by their nature nor according to commercial usage connected to each other;
- (d) the agreement is concluded for an indefinite duration or for a period of more than five years.

#### *Article 4*

1. Article 3 (a) and (b) shall also apply where the goods there referred to are manufactured by an undertaking connected with a party to the agreement.

2. Connected undertakings are:

(a) undertakings in which a party to the agreement, directly or indirectly:

- owns more than half the capital of business assets, or
- has the power to exercise more than half the voting rights, or
- has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or
- has the right to manage the affairs;

(b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).

3. Undertakings in which the parties to the agreement or undertakings connected with them jointly have the rights or powers set out in paragraph 2 (a) shall be considered to be connected with each of the parties to the agreement.

#### *Article 5*

1. For the purpose of Article 3(b), the ecu is the unit of account used for drawing up the budget of the Community pursuant to Articles 207 and 209 of the Treaty.

2. Article 1 shall remain applicable where during any period of two consecutive financial years the total turnover referred to in Article 3 (b) is exceeded by no more than 10%.

3. For the purpose of calculating total turnover within the meaning of Article 3 (b), the turnovers achieved during the last financial year by the party to the agreement and

connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the agreement and its connected undertakings or between its connected undertakings.

## TITLE II

### **Special provisions for beer-supply agreements**

#### *Article 6*

1. Pursuant to Article 85(3) of the Treaty, and subject to Articles 7 to 9 of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain beers, or certain beers and certain other drinks specified in the agreement for resale in premises used for the sale and consumption of drinks and designated in the agreement.

2. The declaration in paragraph 1 shall also apply where exclusive purchasing obligations of the kind described in paragraph 1 are imposed on the reseller in favour of the supplier by another undertaking which is itself not a supplier.

#### *Article 7*

1. Apart from the obligation referred to in Article 6, no restriction on competition shall be imposed on the reseller other than :

(a) the obligation not to sell beers and other drinks which are supplied by other undertakings and which are of the same type as the beers or other drinks supplied under the agreement in the premises designated in the agreement;

(b) the obligation, in the event that the reseller sells in the premises designated in the agreement beers which are supplied by other undertakings and which are of a different type from the beers supplied under the agreement, to sell such beers only in bottles, cans or other small packages, unless the sale of such beers in draught form is customary or is necessary to satisfy a sufficient demand from consumers;

(c) the obligation to advertise goods supplied by other undertakings within or outside the premises designated in the agreement only in proportion to the share of these goods in the total turnover realized in the premises.

2. Beers or other drinks are of different types where they are clearly distinguishable by their composition, appearance or taste.

## Article 8

1. Article 6 shall not apply where:

- (a) the supplier or a connected undertaking imposes on the reseller exclusive purchasing obligations for goods other than drinks or for services;
- (b) the supplier restricts the freedom of the reseller to obtain from an undertaking of his choice either services or goods for which neither an exclusive purchasing obligation nor a ban on dealing in competing products may be imposed;
- (c) the agreement is concluded for an indefinite duration or for a period of more than five years and the exclusive purchasing obligation relates to specified beers and other drinks;
- (d) the agreement is concluded for an indefinite duration or for a period of more than 10 years and the exclusive purchasing obligation relates only to specified beers;
- (e) the supplier obliges the reseller to impose the exclusive purchasing obligation on his successor for a longer period than the reseller would himself remain tied to the supplier.

2. Where the agreement relates to premises which the supplier lets to the reseller or allows the reseller to occupy on some other basis in law or in fact, the following provisions shall also apply:

- (a) notwithstanding paragraphs (1) (c) and (d), the exclusive purchasing obligations and bans on dealing in competing products specified in this Title may be imposed on the reseller for the whole period for which the reseller in fact operates the premises;
- (b) the agreement must provide for the reseller to have the right to obtain:
  - drinks, except beer, supplied under the agreement from other undertakings where these undertakings offer them on more favourable conditions which the supplier does not meet,
  - drinks, except beer, which are of the same type as those supplied under the agreement but which bear different trademarks, from other undertakings where the supplier does not offer them.

## Article 9

Articles 2 (1) and (3), 3 (a) and (b), 4 and 5 shall apply *mutatis mutandis*.

## TITLE III

### Special provisions for service-station agreements

## Article 10

Pursuant to Article 85 (3) of the Treaty and subject to Articles 11 to 13 of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements to which

only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain petroleum-based motor vehicle fuels or certain petroleum-based motor vehicle and other fuels specified in the agreement for resale in a service station designated in the agreement.

#### *Article 11*

Apart from the obligation referred to in Article 10, no restriction on competition shall be imposed on the reseller other than:

- (a) the obligation not to sell motor-vehicle fuel and other fuels which are supplied by other undertakings in the service station designated in the agreement;
- (b) the obligation not to use lubricants or related petroleum-based products which are supplied by other undertakings within the service station designated in the agreement where the supplier or a connected undertaking has made available to the reseller, or financed, a lubrication bay or other motor vehicle lubrication equipment;
- (c) the obligation to advertise goods supplied by other undertakings within or outside the service station designated in the agreement only in proportion to the share of these goods in the total turnover realized in the service station;
- (d) the obligation to have equipment owned by the supplier or a connected undertaking or financed by the supplier or a connected undertaking serviced by the supplier or an undertaking designated by him.

#### *Article 12*

1. Article 10 shall not apply where:

- (a) the supplier or a connected undertaking imposes on the reseller exclusive purchasing obligations for goods other than motor vehicle and other fuels or for services, except in the case of the obligations referred to in Article 11 (b) and (d);
- (b) the supplier restricts the freedom of the reseller to obtain from an undertaking of his choice goods or services for which under the provisions of this Title neither an exclusive purchasing obligation nor a ban on dealing in competing products may be imposed;
- (c) the agreement is concluded for an indefinite duration or for a period of more than 10 years;
- (d) the supplier obliges the reseller to impose the exclusive purchasing obligation on his successor for a longer period than the reseller would himself remain tied to the supplier.

2. Where the agreement relates to a service station which the supplier lets to the reseller, or allows the reseller to occupy on some other basis, in law or in fact, exclusive purchasing obligations or bans on dealing in competing products specified in this Title may,

notwithstanding paragraph 1 (c), be imposed on the reseller for the whole period for which the reseller in fact operates the premises.

### *Article 13*

Article 2(1) and (3), 3 (a) and (b), 4 and 5 of this Regulation shall apply *mutatis mutandis*.

## TITLE IV

### Miscellaneous provisions

### *Article 14*

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, when it finds in a particular case that an agreement which is exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions set out in Article 85 (3) of the Treaty, and in particular where:

- (a) the contract goods are not subject, in a substantial part of the common market, to effective competition from identical goods or goods considered by users as equivalent in view of their characteristics, price and intended use;
- (b) access by other suppliers to the different stages of distribution in a substantial part of the common market is made difficult to a significant extent;
- (c) the supplier without any objectively justified reason:
  - (1) refuses to supply categories of resellers who cannot obtain the contract goods elsewhere on suitable terms or applies to them differing prices or conditions of sale;
  - (2) applies less favourable prices or conditions of sale to resellers bound by an exclusive purchasing obligation as compared with other resellers at the same level of distribution.

### *Article 15<sup>1</sup>*

1. In the period 1 July 1983 to 31 December 1986, the prohibition in Article 85 (1) of the Treaty shall not apply to agreements of the kind described in Article 1 which either were in force on 1 July 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions of Regulation No 67/67/EEC.<sup>2</sup>

<sup>1</sup> Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic

The following paragraph is added to Article 15:

'4. The provisions of the preceding paragraphs shall apply in the same way to the agreements referred to respectively in those paragraphs, which were in force on the date of accession of the Kingdom of Spain and of the Portuguese Republic and which, as a result of accession, fall within the scope of Article 85 (1) of the Treaty.'

(OJ L 302, 15.11.1985, p. 166).

<sup>2</sup> OJ 57, 25.3.1967, p. 849/67.

2. In the period 1 July 1983 to 31 December 1988, the prohibition in Article 85 (1) of the Treaty shall not apply to agreements of the kinds described in Articles 6 and 10 which either were in force on 1 July 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions of Regulation No 67/67/EEC.

3. In the case of agreements of the kinds described in Articles 6 and 10, which were in force on 1 July 1983 and which expire after 31 December 1988, the prohibition in Article 85 (1) of the Treaty shall not apply in the period from 1 January 1989 to the expiry of the agreement but at the latest to the expiry of this Regulation to the extent that the supplier releases the reseller, before 1 January 1989, from all obligations which would prevent the application of the exemption under Titles II and III.

#### *Article 16*

This Regulation shall not apply to agreements by which the supplier undertakes with the reseller to supply only to the reseller certain goods for resale, in the whole or in a defined part of the Community, and the reseller undertakes with the supplier to purchase these goods only from the supplier.

#### *Article 17*

This Regulation shall not apply where the parties or connected undertakings, for the purpose of resale in one and the same premises used for the sale and consumption of drinks or service station, enter into agreements both of the kind referred to in Title I and of a kind referred to in Title II or III.

#### *Article 18*

This Regulation shall apply *mutatis mutandis* to the categories of concerted practices defined in Articles 1, 6 and 10.

#### *Article 19*

This Regulation shall enter into force on 1 July 1983.

It shall expire on 31 December 1997.

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

Commission Notice<sup>1</sup> concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements

*(This text replaces the previous text published in the Official Journal of the European Communities C 355 of 30 December 1983, p. 7)*

### **I. Introduction**

1. Commission Regulation No 67/67/EEC of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements<sup>2</sup> expired on 30 June 1983 after being in force over 15 years. With Regulations (EEC) No 1983/83 and (EEC) No 1984/83,<sup>3</sup> the Commission has adapted the block exemption of exclusive distribution agreements and exclusive purchasing agreements to the intervening developments in the common market and in Community law. Several of the provisions in the new Regulations are new. A certain amount of interpretative guidance is therefore called for. This will assist undertakings in bringing their agreements into line with the new legal requirements and will also help ensure that the Regulations are applied uniformly in all the Member States.

2. In determining how a given provision is to be applied, one must take into account, in addition to the ordinary meaning of the words used, the intention of the provision as this emerges from the preamble. For further guidance, reference should be made to the principles that have been evolved in the case-law of the Court of Justice of the European Communities and in the Commission's decisions on individual cases.

3. This notice sets out the main considerations which will determine the Commission's view of whether or not an exclusive distribution or purchasing agreement is covered by the block exemption. The notice is without prejudice to the jurisdiction of national courts to apply the Regulations, although it may well be of persuasive authority in proceedings before such courts. Nor does the notice necessarily indicate the interpretation which might be given to the provisions by the Court of Justice.

### **II. Exclusive distribution and exclusive purchasing agreements (Regulations (EEC) No 1983/83 and (EEC) No 1984/83)**

#### *1. Similarities and differences*

4. Regulations (EEC) No 1983/83 and (EEC) No 1984/83 are both concerned with exclusive agreements between two undertakings for the purpose of the resale of goods. Each

---

<sup>1</sup> OJ C 101, 13.4.1984, p. 2.

<sup>2</sup> OJ 57, 25.3.1967, p. 849/67.

<sup>3</sup> OJ L 173, 30.6.1983, pp. 1 and 5.



deals with a particular type of such agreements. Regulation (EEC) No 1983/83 applies to exclusive distribution agreements, Regulation (EEC) No 1984/83 to exclusive purchasing agreements. The distinguishing feature of exclusive distribution agreements is that one party, the supplier, allots to the other, the reseller, a defined territory (the contract territory) on which the reseller has to concentrate his sales effort, and in return undertakes not to supply any other reseller in that territory. In exclusive purchasing agreements, the reseller agrees to purchase the contract goods only from the other party and not from any other supplier. The supplier is entitled to supply other resellers in the same sales area and at the same level of distribution. Unlike an exclusive distributor, the tied reseller is not protected against competition from other resellers who, like himself, receive the contract goods direct from the supplier. On the other hand, he is free of restrictions as to the area over which he may make his sales effort.

5. In keeping with their common starting point, the Regulations have many provisions that are the same or similar in both Regulations. This is true of the basic provision in Article 1, in which the respective subject-matters of the block exemption, the exclusive supply or purchasing obligation, are defined, and of the exhaustive list of restrictions of competition which may be agreed in addition to the exclusive supply or purchasing obligation (Article 2 (1) and (2)), the non-exhaustive enumeration of other obligations which do not prejudice the block exemption (Article 2 (3)), the inapplicability of the block exemption in principle to exclusive agreements between competing manufacturers (Articles 3 (a) and (b), 4 and 5), the withdrawal of the block exemption in individual cases (Article 6 of Regulation (EEC) No 1983/83 and Article 14 of Regulation (EEC) No 1984/83), the transitional provisions (Article 7 of Regulation (EEC) No 1983/83 and Article 15 (1) of Regulation (EEC) No 1984/83), and the inclusion of concerted practices within the scope of the Regulations (Article 9 of Regulation (EEC) No 1983/83 and Article 18 of Regulation (EEC) No 1984/83). In so far as their wording permits, these parallel provisions are to be interpreted in the same way.

6. Different rules are laid down in the Regulations wherever they need to take account of matters which are peculiar to the exclusive distribution agreements or exclusive purchasing agreements respectively. This applies in Regulation (EEC) No 1983/83, to the provisions regarding the obligation on the exclusive distributor not actively to promote sales outside the contract territory (Article 2 (2) (c)) and the inapplicability of the block exemption to agreements which give the exclusive distributor absolute territorial protection (Article 3 (c) and (d)) and, in Regulation (EEC) No 1984/83, to the provisions limiting the scope and duration of the block exemption for exclusive purchasing agreements in general (Article 3 (c) and (d) and for beer-supply and service-station agreements in particular (Titles II and III).

7. The scope of the two Regulations has been defined so as to avoid any overlap (Article 16 of Regulation (EEC) No 1984/83).

## 2. *Basic provision*

### (Article 1)

8. Both Regulations apply only to agreements entered into for the purpose of the resale of goods to which not more than two undertakings are party.

#### (a) 'For resale'

9. The notion of resale requires that the goods concerned be disposed of by the purchasing party to others in return for consideration. Agreements on the supply or purchase of goods which the purchasing party transforms or processes into other goods or uses or consumes in manufacturing other goods are not agreement for resale. The same applies to the supply of components which are combined with other components into a different product. The criterion is that the goods distributed by the reseller are the same as those the other party has supplied to him for that purpose. The economic identity of the goods is not affected if the reseller merely breaks up and packages the goods in smaller quantities, or repackages them, before resale.

10. Where the reseller performs additional operations to improve the quality, durability, appearance or taste of the goods (such as rust-proofing of metals, sterilization of food or the addition of colouring matter or flavourings to drugs), the position will mainly depend on how much value the operation adds to the goods. Only a slight addition in value can be taken not to change the economic identity of the goods. In determining the precise dividing line in individual cases, trade usage in particular must be considered. The Commission applies the same principles to agreements under which the reseller is supplied with a concentrated extract for a drink which he has to dilute with water, pure alcohol or another liquid and to bottle before reselling.

#### (b) 'Goods'

11. Exclusive agreements for the supply of services rather than the resale of goods are not covered by the Regulations. The block exemption still applies, however, where the reseller provides customer or after-sales services incidentally to the resale of the goods. Nevertheless, a case where the charge for the service is higher than the price of the goods would fall outside the scope of the Regulations.

12. The hiring out of goods in return for payment comes closer, economically speaking, to a resale of goods than to provision of services. The Commission therefore regards exclusive agreements under which the purchasing party hires out or leases to others the goods supplied to him as covered by the Regulations.

#### (c) 'Only two undertakings party'

13. To be covered by the block exemption, the exclusive distribution or purchasing agreement must be between only one supplier and one reseller in each case. Several undertakings forming one economic unit count as one undertaking.

14. This limitation on the number of undertakings that may be party relates solely to the individual agreement. A supplier does not lose the benefit of the block exemption if he enters into exclusive distribution or purchasing agreements covering the same goods with several resellers.

15. The supplier may delegate the performance of his contractual obligations to a connected or independent undertaking which he has entrusted with the distribution of his goods, so that the reseller has to purchase the contract goods from the latter undertaking. This principle is expressly mentioned only in Regulation (EEC) No 1984/83 (Articles 1, 6 and 10), because the question of delegation arises mainly in connection with exclusive purchasing agreements. It also applies, however, to exclusive distribution agreements under Regulation (EEC) No 1983/83.

16. The involvement of undertakings other than the contracting parties must be confined to the execution of deliveries. The parties may accept exclusive supply or purchase obligations only for themselves, and not impose them on third parties, since otherwise more than two undertakings would be party to the agreement. The obligation of the parties to ensure that the obligations they have accepted are respected by connected undertakings is, however, covered by the block exemption.

### *3. Other restrictions on competition that are exempted*

(Article 2 (1) and (2))

17. Apart from the exclusive supply obligation (Regulation (EEC) No 1983/83) or exclusive purchase obligation (Regulation (EEC) No 1984/83), obligations defined in Article 1 which must be present if the block exemption is to apply, the only other restrictions of competition that may be agreed by the parties are those set out in Article 2 (1) and (2). If they agree on further obligations restrictive of competition, the agreement as a whole is no longer covered by the block exemption and requires individual exemption. For example, an agreement will exceed the bounds of the Regulations if the parties relinquish the possibility of independently determining their prices or conditions of business or undertake to refrain from, or even prevent, cross-border trade, which the Regulations expressly state must not be impeded. Among other clauses which in general are not permissible under the Regulations are those which impede the reseller in his free choice of customers.

18. The obligations restrictive of competition that are exempted may be agreed only for the duration of the agreement. This also applies to restrictions accepted by the supplier or reseller on competing with the other party.

### *4. Obligations upon the reseller which do not prejudice the block exemption*

(Article 2 (3))

19. The obligations cited in this provision are examples of clauses which generally do not restrict competition. Undertakings are therefore free to include one, several or all of these

obligations in their agreements. However, the obligations may not be formulated or applied in such away as to take on the character of restrictions of competition that are not permitted. To forestall this danger, Article 2 (3) (b) of Regulation (EEC) No 1984/83 expressly allows minimum purchase obligations only for goods that are subject to an exclusive purchasing obligation.

20. As part of the obligation to take measures for promotion of sales and in particular to maintain a distribution network (Article 2 (3) (c) of Regulation (EEC) No 1983/83 and Article 2 (3) (d) of Regulation (EEC) No 1984/83), the reseller may be forbidden to supply the contract goods to unsuitable dealers. Such clauses are unobjectionable if admission to the distribution network is based on objective criteria of a qualitative nature relating to the professional qualifications of the owner of the business or his staff or the suitability of his business premises, if the criteria are the same for all potential dealers, and if the criteria are actually applied in a non-discriminatory manner. Distribution systems which do not fulfil these conditions are not covered by the block exemption.

*5. Inapplicability of the block exemption to exclusive agreements  
between competing manufacturers*

(Articles 3 (a) and (b), 4 and 5)

21. The block exemption does not apply if either the parties themselves or undertakings connected with them are manufacturers, manufacture goods belonging to the same product market, and enter into exclusive distribution or purchasing agreements with one another in respect of those goods. Only identical or equivalent goods are regarded as belonging to the same product market. The goods in question must be interchangeable. Whether or not this is the case must be judged from the vantage point of the user, normally taking the characteristics, price and intended use of the goods together. In certain cases, however, goods can form a separate market on the basis of their characteristics, their price or their intended use alone. This is true especially where consumer preferences have developed. The above provisions are applicable regardless of whether or not the parties or the undertakings connected with them are based in the Community and whether or not they are already actually in competition with one another in the relevant goods inside or outside the Community.

22. In principle, both reciprocal and non-reciprocal exclusive agreements between competing manufacturers are not covered by the block exemption and are therefore subject to individual scrutiny of their compatibility with Article 85 of the Treaty, but there is an exception for non-reciprocal agreements of the abovementioned kind where one or both of the parties are undertakings with a total annual turnover of no more than ECU 100 million (Article 3 (b)). Annual turnover is used as a measure of the economic strength of the undertakings involved. Therefore, the aggregate turnover from goods and services of all types, and not only from the contract goods, is to be taken. Turnover taxes and other turnover-related levies are not included in turnover. Where a party belongs to a group of connected undertakings, the world-wide turnover of the group, excluding intra-group sales (Article 5 (3)), is to be used.

23. The total turnover limit can be exceeded during any period of two successive financial years by up to 10% without loss of the block exemption. The block exemption is lost if, at the end of the second financial year, the total turnover over the preceding two years has been over ECU 220 million (Article 5 (2)).

6. *Withdrawal of the block exemption in individual cases*

(Article 6 of Regulation (EEC) No 1983/83 and  
Article 14 of Regulation (EEC) No 1984/83)

24. The situations described are meant as illustrations of the sort of situations in which the Commission can exercise its powers under Article 7 of Council Regulation No 19/65/EEC<sup>1</sup> to withdraw a block exemption. The benefit of the block exemption can only be withdrawn by a decision in an individual case following proceedings under Regulation No 17. Such a decision cannot have retroactive effect. It may be coupled with an individual exemption subject to conditions or obligations or, in an extreme case, with the finding of an infringement and an order to bring it to an end.

7. *Transitional provisions*

(Article 7 of Regulation (EEC) No 1983/83 and  
Article 15 (1) of Regulation (EEC) No 1984/83)

25. Exclusive distribution or exclusive purchasing agreements which were concluded and entered into force before 1 January 1984 continue to be exempted under the provisions of Regulation No 67/67/EEC until 31 December 1986. Should the parties wish to apply such agreements beyond 1 January 1987, they will either have to bring them into line with the provisions of the new Regulations or to notify them to the Commission. Special rules apply in the case of beer-supply and service-station agreements (see paragraphs 64 and 65 below).

8. *Concerted practices*

(Article 9 of Regulation (EEC) No 1983/83 and  
Article 18 of Regulation (EEC) No 1984/83)

26. These provisions bring within the scope of the Regulations exclusive distribution and purchasing arrangements which are operated by undertakings but are not the subject of a legally-binding agreement.

---

<sup>1</sup> OJ 36, 6.3.1965, p. 533/65.

### **III. Exclusive distribution agreements (Regulation (EEC) No 1983/83)**

#### *1. Exclusive supply obligation*

(Article 1)

27. The exclusive supply obligation does not prevent the supplier from providing the contract goods to other resellers who afterwards sell them in the exclusive distributor's territory. It makes no difference whether the other dealers concerned are established outside or inside the territory. The supplier is not in breach of his obligation to the exclusive distributor provided that he supplies the resellers who wish to sell the contract goods in the territory only at their request and that the goods are handed over outside the territory. It does not matter whether the reseller takes delivery of the goods himself or through an intermediary, such as a freight forwarder. However, supplies of this nature are only permissible if the reseller and not the supplier pays the transport costs of the goods into the contract territory.

28. The goods supplied to the exclusive distributor must be intended for resale in the contract territory. This basic requirement does not, however, mean that the exclusive distributor cannot sell the contract goods to customers outside his contract territory should he receive orders from them. Under Article 2 (2) (c), the supplier can prohibit him only from seeking customers in other areas, but not from supplying them.

29. It would also be incompatible with the Regulation for the exclusive distributor to be restricted to supplying only certain categories of customers (e.g. specialist retailers) in his contract territory and prohibited from supplying other categories (e.g. department stores), which are supplied by other resellers appointed by the supplier for that purpose.

#### *2. Restriction on competition by the supplier*

(Article 2 (1))

30. The restriction on the supplier himself supplying the contract goods to final users in the exclusive distributor's contract territory need not be absolute. Clauses permitting the supplier to supply certain customers in the territory — with or without payment of compensation to the exclusive distributor — are compatible with the block exemption provided the customers in question are not resellers. The supplier remains free to supply the contract goods outside the contract territory to final users based in the territory. In this case the position is the same as for dealers (see paragraph 27 above).

#### *3. Inapplicability of the block exemption in cases of absolute territorial protection*

(Articles 3 (c) and (d))

31. The block exemption cannot be claimed for agreements that give the exclusive distributor absolute territorial protection. If the situation described in Article 3(c) obtains,

the parties must ensure either that the contract goods can be sold in the contract territory by parallel importers or that users have a real possibility of obtaining them from undertakings outside the contract territory, if necessary outside the Community, at the prices and on the terms there prevailing. The supplier can represent an alternative source of supply for the purposes of this provision if he is prepared to supply the contract goods on request to final users located in the contract territory.

32. Article 3(d) is chiefly intended to safeguard the freedom of dealers and users to obtain the contract goods in other Member States. Action to impede imports into the Community from third countries will only lead to loss of the block exemption if there are no alternative sources of supply in the Community. This situation can arise especially where the exclusive distributor's contract territory covers the whole or the major part of the Community.

33. The block exemption ceases to apply as from the moment that either of the parties takes measures to impede parallel imports into the contract territory. Agreements in which the supplier undertakes with the exclusive distributor to prevent his other customers from supplying into the contract territory are ineligible for the block exemption from the outset. This is true even if the parties agree only to prevent imports into the Community from third countries. In this case it is immaterial whether or not there are alternative sources of supply in the Community. The inapplicability of the block exemption follows from the mere fact that the agreement contains restrictions on competition which are not covered by Article 2 (1).

#### **IV. Exclusive purchasing agreements (Regulation (EEC) No 1984/83)**

##### *1. Structure of the Regulation*

34. Title I of the Regulation contains general provisions for exclusive purchasing agreements and Titles II and III special provisions for beer-supply and service-station agreements. The latter types of agreement are governed exclusively by the special provisions, some of which (Articles 9 and 13), however, refer to some of the general provisions. Article 17 also excludes the combination of agreements of the kind referred to in Titles I with those of the kind referred to in Titles II or III to which the same undertakings or undertakings connected with them are party. To prevent any avoidance of the special provisions for beer supply and service-station agreements, it is also made clear that the provisions governing the exclusive distribution of goods do not apply to agreements entered into for the resale of drinks on premises used for the sale or consumption of beer or for the resale of petroleum products in service stations (Article 8 of Regulation (EEC) No 1983/83).

##### *2. Exclusive purchasing obligation*

(Article 1)

35. The Regulation only covers agreements whereby the reseller agrees to purchase all his requirements for the contract goods from the other party. If the purchasing obligation

relates to only part of such requirements, the block exemption does not apply. Clauses which allow the reseller to obtain the contract goods from other suppliers, should these sell them more cheaply or on more favourable terms than the other party, are still covered by the block exemption. The same applies to clauses releasing the reseller from his exclusive purchasing obligation should the other party be unable to supply.

36. The contract goods must be specified by brand or denomination in the agreement. Only if this is done will it be possible to determine the precise scope of the reseller's exclusive purchasing obligation (Article 1) and of the ban on dealing in competing products (Article 2 (2)).

### *3. Restriction on competition by the supplier*

(Article 2 (1))

37. This provision allows the reseller to protect himself against direct competition from the supplier in his principal sales area. The reseller's principal sales area is determined by his normal business activity. It may be more closely defined in the agreement. However, the supplier cannot be forbidden to supply dealers who obtain the contract goods outside this area and afterwards resell them to customers inside it or to appoint other resellers in the area.

### *4. Limits of the block exemption*

(Article 3 (c) and (d))

38. Article 3 (c) provides that the exclusive purchasing obligation can be agreed for one or more products, but in the latter case the products must be so related as to be thought of as belonging to the same range of goods. The relationship can be founded on technical (e.g., a machine, accessories and spare parts for it) or commercial grounds (e.g. several products used for the same purpose) or on usage in the trade (different goods that are customarily offered for sale together). In the latter case, regard must be had to the usual practice at the reseller's level of distribution on the relevant market, taking into account all relevant dealers and not only particular forms of distribution. Exclusive purchasing agreements covering goods which do not belong together can only be exempted from the competition rules by an individual decision.

39. Under Article 3 (d), exclusive purchasing agreements concluded for an indefinite period are not covered by the block exemption. Agreements which specify a fixed term but are automatically renewable unless one of the parties gives notice to terminate are to be considered to have been concluded for an indefinite period.



## V. Beer-supply agreements (Title II of Regulation (EEC) No 1984/83)

### 1. *Exclusive purchasing obligation*

#### (Article 6)

40. The beers and other drinks covered by the exclusive purchasing obligation must be specified by brand or denomination in the agreement. An exclusive purchasing obligation can only be imposed on the reseller for drinks which the supplier carries at the time the contract takes effect and provided that they are supplied in the quantities required, at sufficiently regular intervals and at prices and on conditions allowing normal sales to the consumer. Any extension of the exclusive purchasing obligation to drinks not specified in the agreement requires an additional agreement, which must likewise satisfy the requirements of Title II of the Regulation. A change in the brand or denomination of a drink which in other respects remains unchanged does not constitute such an extension of the exclusive purchasing obligation.

41. The exclusive purchasing obligation can be agreed in respect of one or more premises used for the sale and consumption of drinks which the reseller runs at the time the contract takes effect. The name and location of the premises must be stated in the agreement. Any extension of the exclusive purchasing obligation to other such premises requires an additional agreement, which must likewise satisfy the provisions of Title II of the Regulation.

42. The concept of 'premises used for the sale and consumption of drinks' covers any licensed premises used for this purpose. Private clubs are also included. Exclusive purchasing agreements between the supplier and the operator of an off-licence shop are governed by the provisions of Title I of the Regulation.

43. Special commercial or financial advantages are those going beyond what the reseller could normally expect under an agreement. The explanations given in the 13th recital are illustrations. Whether or not the supplier is affording the reseller special advantages depends on the nature, extent and duration of the obligation undertaken by the parties. In doubtful cases usage in the trade is the decisive element.

44. The reseller can enter into exclusive purchasing obligations both with a brewery in respect of beers of a certain type and with a drinks wholesaler in respect of beers of another type and/or other drinks. The two agreements can be combined into one document. Article 6 also covers cases where the drinks wholesaler performs several functions at once, signing the first agreement on the brewery's and the second on his own behalf and also undertaking delivery of all the drinks. The provisions of Title II do not apply to the contractual relations between the brewery and the drinks wholesaler.

45. Article 6 (2) makes the block exemption also applicable to cases in which the supplier affords the owner of premises financial or other help in equipping them as a public house, restaurant, etc., and in return the owner imposes on the buyer or tenant of the premises an exclusive purchasing obligation in favour of the supplier. A similar situation, economically

speaking, is the transmission of an exclusive purchasing obligation from the owner of a public house to his successor. Under Article 8 (1) (e) this is also, in principle, permissible.

## *2. Other restrictions of competition that are exempted*

### (Article 7)

46. The list of permitted obligations given in Article 7 is exhaustive. If any further obligations restricting competition are imposed on the reseller, the exclusive purchasing agreement as a whole is no longer covered by the block exemption.

47. The obligation referred to in paragraph 1 (a) applies only so long as the supplier is able to supply the beers or other drinks specified in the agreement and subject to the exclusive purchasing obligation in sufficient quantities to cover the demand the reseller anticipates for the products from his customers.

48. Under paragraph 1 (b), the reseller is entitled to sell beer of other types in draught form if the other party has tolerated this in the past. If this is not the case, the reseller must indicate that there is sufficient demand from his customers to warrant the sale of other draught beers. The demand must be deemed sufficient if it can be satisfied without a simultaneous drop in sales of the beers specified in the exclusive purchasing agreement. It is definitely not sufficient if sales of the additional draught beer turn out to be so slow that there is a danger of its quality deteriorating. It is for the reseller to assess the potential demand of his customers for other types of beer; after all, he bears the risk if his forecasts are wrong.

49. The provision in paragraph 1 (c) is not only intended to ensure the possibility of advertising products supplied by other undertakings to the minimum extent necessary in any given circumstances. The advertising of such products should also reflect their relative importance *vis-à-vis* the competing products of the supplier who is party to the exclusive purchasing agreement. Advertising for products which the public house has just begun to sell may not be excluded or unduly impeded.

50. The Commission believes that the designations of types customary in inter-State trade and within the individual Member States may afford useful pointers to the interpretation of Article 7 (2). Nevertheless the alternative criteria stated in the provision itself are decisive. In doubtful cases, whether or not two beers are clearly distinguishable by their composition, appearance or taste depends on custom at the place where the public house is situated. The parties may, if they wish, jointly appoint an expert to decide the matter.

## *3. Agreements excluded from the block exemption*

### (Article 8)

51. The reseller's right to purchase drinks from third parties may be restricted only to the extent allowed by Articles 6 and 7. In his purchases of goods other than drinks and in his

procurement of services which are not directly connected with the supply of drinks by the other party, the reseller must remain free to choose his supplier. Under Article 8 (1) (a) and (b), any action by the other party or by an undertaking connected with or appointed by him or acting at his instigation or with his agreement to prevent the reseller exercising his rights in this regard will entail the loss of the block exemption. For the purposes of these provisions it makes no difference whether the reseller's freedom is restricted by contract, informal understanding, economic pressures or other practical measures.

52. The installation of amusement machines in tenanted public houses may by agreement be made subject to the owner's permission. The owner may refuse permission on the ground that this would impair the character of the premises or he may restrict the tenant to particular types of machines. However, the practice of some owners of tenanted public houses to allow the tenant to conclude contracts for the installation of such machines only with certain undertakings which the owner recommends is, as a rule, incompatible with this Regulation, unless the undertakings are selected on the basis of objective criteria of a qualitative nature that are the same for all potential providers of such equipment and are applied in a non-discriminatory manner. Such criteria may refer to the reliability of the undertaking and its staff and the quality of the services it provides. The supplier may not prevent a public house tenant from purchasing amusement machines rather than renting them.

53. The limitation of the duration of the agreement in Article 8 (1) (c) and (d) does not affect the parties' right to renew their agreement in accordance with the provisions of Title II of the Regulation.

54. Article 8 (2) (b) must be interpreted in the light both of the aims of the Community competition rules and of the general legal principle whereby contracting parties must exercise their rights in good faith.

55. Whether or not a third undertaking offers certain drinks covered by the exclusive purchasing obligation on more favourable terms than the other party for the purposes of the first indent of Article 8 (2) (b) is to be judged in the first instance on the basis of a comparison of prices. This should take into account the various factors that go to determine the prices. If a more favourable offer is available and the tenant wishes to accept it, he must inform the other party of his intentions without delay so that the other party has an opportunity of matching the terms offered by the third undertaking. If the other party refuses to do so or fails to let the tenant have his decision within a short period, the tenant is entitled to purchase the drinks from the other undertaking. The Commission will ensure that exercise of the brewery's or drinks wholesaler's right to match the prices quoted by another supplier does not make it significantly harder for other suppliers to enter the market.

56. The tenant's right provided for in the second indent of Article 8 (2) (b) to purchase drinks of another brand or denomination from third undertakings obtains in cases where the other party does not offer them. Here the tenant is not under a duty to inform the other party of his intentions.

57. The tenant's rights arising from Article 8 (2) (b) override any obligation to purchase minimum quantities imposed upon him under Article 9 in conjunction with Article 2 (3) (b) to the extent that this is necessary to allow the tenant full exercise of those rights.

## **VI. Service-station agreements (Title III of Regulation (EEC) No 1984/83)**

### *1. Exclusive purchasing obligation*

(Article 10)

58. The exclusive purchasing obligation can cover either motor vehicle fuels (e.g. petrol, diesel fuel, LPG, kerosene) alone or motor vehicle fuels and other fuels (e.g. heating oil, bottled gas, paraffin). All the goods concerned must be petroleum-based products.

59. The motor vehicle fuels covered by the exclusive purchasing obligations must be for use in motor-powered land or water vehicles or aircraft. The term 'service station' is to be interpreted in a correspondingly wide sense.

60. The Regulation applies to petrol stations adjoining public roads and fuelling installations on private property not open to public traffic.

### *2. Other restrictions on competition that are exempted*

(Article 11)

61. Under Article 11 (b) only the use of lubricants and related petroleum-based products supplied by other undertakings can be prohibited. This provision refers to the servicing and maintenance of motor vehicles, i.e. to the reseller's activity in the field of provision of services. It does not affect the reseller's freedom to purchase the said products from other undertakings for resale in the service station. The petroleum-based products related to lubricants referred to in paragraph (b) are additives and brake fluids.

62. For the interpretation of Article 11 (c), the considerations stated in paragraph 49 above apply by analogy.

### *3. Agreements excluded from the block exemption*

(Article 12)

63. These provisions are analogous to those of Article 8 (1) (a), (b), (d) and (e) and 8 (2) (a). Reference is therefore made to paragraphs 51 and 53 above.

## **VII. Transitional provisions for beer-supply and service-station agreements**

(Article 15 (2) and (3))

64. Under Article 15 (2), all beer-supply and service-station agreements which were concluded and entered into force before 1 January 1984 remain covered by the provisions of Regulation No 67/67/EEC until 31 December 1988. From 1 January 1989 they must comply with the provisions of Titles II and III of Regulation (EEC) No 1984/83. Under Article 15 (3), in the case of agreements which were in force on 1 July 1983, the same principle applies except that the 10-year maximum duration for such agreements laid down in Article 8 (1) (d) and Article 12 (1) (c) may be exceeded.

65. The sole requirement for the eligible beer-supply and service-station agreements to continue to enjoy the block exemption beyond 1 January 1989 is that they be brought into line with the new provisions. It is left to the undertakings concerned how they do so. One way is for the parties to agree to amend the original agreement, another for the supplier unilaterally to release the reseller from all obligations that would prevent the application of the block exemption after 1 January 1989. The latter method is only mentioned in Article 15 (3) in relation to agreements in force on 1 July 1983. However, there is no reason why this possibility should not also be open to parties to agreements entered into between 1 July 1983 and 1 January 1984.

66. Parties lose the benefit of application of the transitional provisions if they extend the scope of their agreement as regards persons, places or subject matter, or incorporate into it additional obligations restrictive of competition. The agreement then counts as a new agreement. The same applies if the parties substantially change the nature or extent of their obligations to one another. A substantial change in this sense includes a revision of the purchase price of the goods supplied to the reseller or of the rent for a public house or service station which goes beyond mere adjustment to the changing economic environment.

**COMMISSION REGULATION (EEC) No 123/85<sup>1</sup> OF 12 DECEMBER 1984**

**on the application of Article 85 (3) of the Treaty to certain categories  
of motor vehicle distribution and servicing agreements**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to 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,<sup>2</sup> as last amended by the Act of Accession of Greece,

Having published a draft of this Regulation,<sup>3</sup>

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

(1) Under Article 1 (1) (a) of Regulation No 19/65/EEC the Commission is empowered to declare by means of a Regulation that Article 85 (3) of the Treaty applies to certain categories of agreements falling within Article 85 (1) to which only two undertakings are party and by which one party agrees with the other to supply only to that other undertaking certain goods for resale within a defined territory of the common market. In the light of experience since Commission Decision 75/73/EEC<sup>4</sup> and of the many motor vehicle distribution and servicing agreements which have been notified to the Commission pursuant to Articles 4 and 5 of Council Regulation No 17,<sup>5</sup> as last amended by Regulation (EEC) No 2821/71,<sup>6</sup> a category of agreements can be defined as satisfying the conditions laid down in Regulation No 19/65/EEC. These are agreements, for a definite or an indefinite period, by which the supplying party entrusts to the reselling party the task of promoting the distribution and servicing of certain products of the motor vehicle industry in a defined area and by which the supplier undertakes to supply contract goods for resale only to the dealer, or only to a limited number of undertakings within the distribution network besides the dealer, within the contract territory.

A list of definitions for the purpose of this Regulation is set out in Article 13.

(2) Notwithstanding that the obligations imposed by distribution and servicing agreements which are listed in Articles 1, 2 and 3 of this Regulation normally have as their object or effect the prevention, restriction or distortion of competition within the common market

<sup>1</sup> OJ L 15, 18.1.1985, p. 16.

<sup>2</sup> OJ 36, 6.3.1965, p. 533/65.

<sup>3</sup> OJ C 165, 24.6.1983, p. 2.

<sup>4</sup> OJ L 29, 3.2.1975, p. 1.

<sup>5</sup> OJ 13, 21.2.1962, p. 204/62.

<sup>6</sup> OJ L 285, 29.12.1971, p. 49.

and are normally apt to affect trade between Member States, the prohibition in Article 85 (1) of the Treaty may nevertheless be declared inapplicable to these agreements by virtue of Article 85 (3), albeit only under certain restrictive conditions.

(3) The applicability of Article 85(1) of the Treaty to distribution and servicing agreements in the motor vehicle industry stems in particular from the fact that restrictions on competition and the obligations connected with the distribution system listed in Articles 1 to 4 of this Regulation are regularly imposed in the same or similar form throughout the common market for the products supplied within the distribution system of a particular manufacturer. The motor vehicle manufacturers cover the whole common market or substantial parts of it by means of a cluster of agreements involving similar restrictions on competition and affect in this way not only distribution and servicing within Member States but also trade between them.

(4) The exclusive and selective distribution clauses can be regarded as indispensable measures of rationalization in the motor vehicle industry because motor vehicles are consumer durables which at both regular and irregular intervals require expert maintenance and repair, not always in the same place. Motor vehicle manufacturers cooperate with the selected dealers and repairers in order to provide specialized servicing for the product. On grounds of capacity and efficiency alone, such a form of cooperation cannot be extended to an unlimited number of dealers and repairers. The linking of servicing and distribution must be regarded as more efficient than a separation between a distribution organization for new vehicles on the one hand and a servicing organization which would also distribute spare parts on the other, particularly as, before a new vehicle is delivered to the final consumer, the undertaking within the distribution system must give it a technical inspection according to the manufacturer's specification.

(5) However, obligatory recourse to the authorized network is not in all respects indispensable for efficient distribution. The exceptions to the block exemption provide that the supply of contract goods to resellers may not be prohibited where they:

— belong to the same distribution system (Article 3, point 10 (a)),

or

— purchase spare parts for their own use in effecting repairs or maintenance (Article 3, point 10 (b)).

Measures taken by a manufacturer or by undertakings within the distribution system with the object of protecting the selective distribution system are compatible with the exemption under this Regulation. This applies in particular to a dealer's obligation to sell vehicles to a final consumer using the services of an intermediary only where that consumer has authorized that intermediary to act as his agent (Article 3, point 11).

(6) It should be possible to bar wholesalers not belonging to the distribution system from reselling parts originating from motor vehicle manufacturers. It may be supposed that the system of rapid availability of spare parts across the whole contract programme, including those with a low turnover, which is beneficial to the consumer, could not be maintained without obligatory recourse to the authorized network.

(7) The ban on dealing in competing products and that on dealing in other vehicles at stated premises may in principle be exempted, because they contribute to concentration by the undertakings in the distribution network of their efforts on the products supplied by the manufacturer or with his consent, and thus ensure distribution and servicing appropriate for the vehicles (Article 3, point 3). Such obligations provide an incentive for the dealer to develop sales and servicing of contract goods and thus promote competition in the supply of those products as well as between those products and competing products.

(8) However, bans on dealing in competing products cannot be regarded as indispensable in all circumstances to efficient distribution. Dealers must be free to obtain from third parties supplies of parts which match the quality of those offered by the manufacturer, for example where the parts are produced by a sub-contract manufacturer who also supplies the motor vehicle manufacturer, and to use and sell them. They must also keep their freedom to choose parts which are usable in motor vehicles within the contract programme and which not only match but exceed the quality standard. Such a limit on the ban on dealing in competing products takes account of the importance of vehicle safety and of the maintenance of effective competition (Article 3, point 4 and Article 4(1), points 6 and 7).

(9) The restrictions imposed on the dealer's activities outside the allotted area lead to more intensive distribution and servicing efforts in an easily supervised contract territory, to knowledge of the market based on closer contact with consumers, and to more demand-orientated supply (Article 3, points 8 and 9). However, demand for contract goods must remain flexible and should not be limited on a regional basis. Dealers must not be confined to satisfying the demand for contract goods within their contract territories, but must also be able to meet demand from persons and undertakings in other areas of the common market. Dealers' advertising in a medium which is directed to customers in the contract territory but also covers a wider area should not be prevented, because it does not run counter to the obligation to promote sales within the contract territory.

(10) The obligations listed in Article 4(1) are directly related to the obligations in Articles 1, 2 and 3, and influence their restrictive effect. These obligations, which might in individual cases be caught by the prohibition in Article 85(1) of the Treaty, may also be exempted because of their direct relationship with one or more of the obligations exempted by Articles 1, 2 and 3 (Article 4(2)).

(11) According to Article 1(2)(b) of Regulation No 19/65/EEC, conditions which must be satisfied if the declaration of inapplicability is to take effect must be specified.

(12) Under Article 5(1), points 1(a) and (b) it is a condition of exemption that the undertaking should honour the minimum guarantee and provide the minimum free servicing and vehicle recall work laid down by the manufacturer, irrespective of where in the common market the vehicle was purchased. These provisions are intended to prevent the consumer's freedom to buy anywhere in the common market from being limited.

(13) Article 5(1), point 2(a) is intended to allow the manufacturer to build up a coordinated distribution system, but without hindering the relationship of confidence



between dealers and subdealers. Accordingly, if the supplier reserves the right to approve appointments of subdealers by the dealer, he must not be allowed to withhold approval arbitrarily.

(14) Article 5(1), point 2(b) obliges the supplier not to impose on a dealer within the distribution system requirements, as defined in Article 4 (1), which are discriminatory or inequitable.

(15) Article 5 (1), point 2 (c) is intended to counter the concentration of the dealer's demand on the supplier which might follow from cumulation of discounts. The purpose of this provision is to allow spare-parts suppliers which do not offer as wide a range of goods as the manufacturer to compete on equal terms.

(16) Article 5 (1), point 2 (d) makes exemption subject to the conditions that the dealer must be able to purchase for customers in the common market volume-produced passenger cars with the specifications appropriate for their place of residence or where the vehicle is to be registered, in so far as the corresponding model is also supplied by the manufacturer through undertakings within the distribution system in that place (Article 13, Point 10). This provision obviates the danger that the manufacturer and undertakings within the distribution network might make use of product differentiation as between parts of the common market to partition the market.

(17) Article 5 (2) makes the exemption of the no-competition clause and of the ban on dealing in other makes of vehicle subject to further threshold conditions. This is to prevent the dealer from becoming economically overdependent on the supplier because of such obligations, and abandoning the competitive activity which is nominally open to him, because to pursue it would be against the interests of the manufacturer or other undertakings within the distribution network.

(18) Under Article 5 (2), point 1 (a), the dealer may, where there are exceptional reasons, oppose application of excessive obligations covered by Article 3, point 3 or 5.

(19) The supplier may reserve the right to appoint further distribution and servicing undertakings in the contract territory or to alter the territory, but only if he can show that there are exceptional reasons for doing so (Article 5 (2) point 1 (b) and Article 5 (3)). This is, for example, the case where there would otherwise be reason to apprehend a serious deterioration in the distribution or servicing of contract goods.

(20) Article 5 (2), points 2 and 3 lay down minimum requirements for exemption which concern the duration and termination of the distribution and servicing agreement; the combined effect of a no-competition clause or a ban on dealing in other makes of vehicle, the investments the dealer makes in order to improve the distribution and servicing on contract goods and a short-term agreement or one terminable at short notice is greatly to increase the dealer's dependence on the supplier.

(21) In accordance with Article 1 (2) (a) of Regulation No 19/65/EEC, restrictions or provisions which must not be contained in the agreements, if the declaration of inapplicability of Article 85 (1) by this Regulation is to take effect, are to be specified.

(22) Agreements under which one motor vehicle manufacturer entrusts the distribution of its products to another must be excluded from the block exemption under this Regulation because of their far-reaching impact on competition (Article 6, point 1).

(23) An obligation to apply minimum resale prices or maximum trade discounts precludes exemption under this Regulation (Article 6, point 2).

(24) The exemption does not apply where the parties agree between themselves obligations concerning goods covered by this Regulation which would be acceptable in the combination of obligations which is exempted by Commission Regulations (EEC) No 1983/83<sup>1</sup> or (EEC) No 1984/83<sup>2</sup> on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements and exclusive purchasing agreements respectively, but which go beyond the scope of the obligations exempted by this Regulation (Article 6, point 3).

(25) Distribution and servicing agreements can be exempted, subject to the conditions laid down in Articles 5 and 6, so long as the application of obligations covered by Articles 1 to 4 of this Regulation brings about an improvement in distribution and servicing to the benefit of the consumer and effective competition exists, not only between manufacturers' distribution systems but also to a certain extent within each system within the common market. As regards the categories of products set out in Article 1 of this Regulation, the conditions necessary for effective competition, including competition in trade between Member States, may be taken to exist at present, so that European consumers may be considered in general to take an equitable share in the benefit from the operation of such competition.

(26) Articles 7, 8 and 9, concerning the retroactive effect of the exemption, are based on Articles 3 and 4 of Regulation No 19/65/EEC and Articles 4 to 7 of Regulation No 17. Article 10 embodies the Commission's powers under Article 7 of Regulation No 19/65/EEC to withdraw the benefit of its exemption or to alter its scope in individual cases, and lists several important examples of such cases.

(27) In view of the extensive effect of this Regulation on the persons it concerns, it is appropriate that it should not enter into force until 1 July 1985. In accordance with Article 2 (1) of Regulation No 19/65/EEC, the exemption may be made applicable for a definite period. A period extending until 30 June 1995 is appropriate, because overall distribution schemes in the motor vehicle sector must be planned several years in advance.

(28) Agreements which fulfil the conditions set out in this Regulation need not be notified.

(29) This Regulation does not affect the application of Regulations (EEC) No 1983/83 or (EEC) No 1984/83 or of Commission Regulation (EEC) No 3604/82 of 23 December 1982 on the application of Article 85 (3) of the Treaty to categories of specialization agreements,<sup>3</sup>

---

<sup>1</sup> OJ L 173, 30.6.1983, p. 1.

<sup>2</sup> OJ L 173, 30.6.1983, p. 5.

<sup>3</sup> OJ L 376, 31.12.1982, p. 33.

or the right to request a Commission decision in an individual case pursuant to Council Regulation No 17. It is without prejudice to laws and administrative measures of the Member States by which the latter, having regard to particular circumstances, prohibit or declare unenforceable particular restrictive obligations contained in an agreement exempted under this Regulation; the foregoing cannot, however, affect the primacy of Community law,

HAS ADOPTED THIS REGULATION:

*Article 1*

Pursuant to Article 85 (3) of the Treaty it is hereby declared that subject to the conditions laid down in this Regulation Article 85 (1) shall not apply to agreements to which only two undertakings are party and in which one contracting party agrees to supply within a defined territory of the common market

— only to the other party, or

— only to the other party and to a specified number of other undertakings within the distribution system,

for the purpose of resale certain motor vehicles intended for use on public roads and having three or more road wheels, together with spare parts therefor.

*Article 2*

The exemption under Article 85 (3) of the Treaty shall also apply where the obligation referred to in Article 1 is combined with an obligation on the supplier neither to sell contract goods to final consumers nor to provide them with servicing for contract goods in the contract territory.

*Article 3*

The exemption under Article 85 (3) of the Treaty shall also apply where the obligation referred to in Article 1 is combined with an obligation on the dealer:

- (1) not, without the supplier's consent, to modify contract goods or corresponding goods, unless such modification is the subject of a contract with a final consumer and concerns a particular motor vehicle within the contract programme purchased by that final consumer;
- (2) not to manufacture products which compete with contract goods;
- (3) neither to sell new motor vehicles which compete with contract goods nor to sell, at the premises used for the distribution of contract goods, new motor vehicles other than those offered for supply by the manufacturer;

- (4) neither to sell spare parts which compete with contract goods and do not match the quality of contract goods nor to use them for repair or maintenance of contract goods or corresponding goods;
- (5) not to conclude with third parties distribution or servicing agreements for goods which compete with contract goods;
- (6) without the supplier's consent, neither to conclude distribution or servicing agreements with undertakings operating in the contract territory for contract goods or corresponding goods nor to alter or terminate such agreements;
- (7) to impose upon undertakings with which the dealer has concluded agreements in accordance with point 6 obligations corresponding to those which the dealer has accepted in relation to the supplier and which are covered by Articles 1 to 4 and are in conformity with Articles 5 and 6;
- (8) outside the contract territory
  - (a) not to maintain branches or depots for the distribution of contract goods or corresponding goods,
  - (b) not to seek customers for contract goods or corresponding goods;
- (9) not to entrust third parties with the distribution or servicing of contract goods or corresponding goods outside the contract territory;
- (10) to supply to a reseller:
  - (a) contract goods or corresponding goods only where the reseller is an undertaking within the distribution system, or
  - (b) spare parts within the contract programme only where they are for the purposes of repair or maintenance of a motor vehicle by the reseller;
- (11) to sell motor vehicles within the contract programme or corresponding goods to final consumers using the services of an intermediary only if that intermediary has prior written authority to purchase a specified motor vehicle and, as the case may be, to accept delivery thereof on their behalf;
- (12) to observe the obligations referred to in points 1 and 6 to 11 for a maximum period of one year after termination or expiry of the agreement.

#### *Article 4*

1. Articles 1, 2 and 3 shall apply notwithstanding any obligation imposed on the dealer to:
  - (1) observe, for distribution and servicing, minimum standards which relate in particular to:
    - (a) the equipment of the business premises and of the technical facilities for servicing;
    - (b) the specialized and technical training of staff;
    - (c) advertising;

- (d) the collection, storage and delivery to customers of contract goods or corresponding goods and servicing relating to them;
  - (e) the repair and maintenance of contract goods and corresponding goods, particularly as concerns the safe and reliable functioning of motor vehicles;
- (2) order contract goods from the supplier only at certain times or within certain periods, provided that the interval between ordering dates does not exceed three months;
- (3) endeavour to sell, within the contract territory and within a specified period, such minimum quantity of contract goods as may be determined by agreement between the parties or, in the absence of such agreement, by the supplier on the basis of estimates of the dealer's potential sales;
- (4) keep in stock such quantity of contract goods as may be determined by agreement between the parties or, in the absence of such agreement, by the supplier on the basis of estimates of the dealer's potential sales of contract goods within the contract territory and within a specified period;
- (5) keep such demonstration vehicles within the contract programme, or such number thereof, as may be determined by agreement between the parties or, in the absence of such agreement, by the supplier on the basis of estimates of the dealer's potential sales of motor vehicles within the contract programme;
- (6) perform guarantee work, free servicing and vehicle recall work for contract goods and corresponding goods;
- (7) use only spare parts within the contract programme or corresponding goods for guarantee work, free servicing and vehicle recall work in respect of contract goods or corresponding goods;
- (8) inform customers, in a general manner, of the extent to which spare parts from other sources might be used for the repair or maintenance of contract goods or corresponding goods;
- (9) inform customers whenever spare parts from other sources have been used for the repair or maintenance of contract goods or corresponding goods for which spare parts within the contract programme or corresponding goods, bearing a mark of the manufacturer, were also available.

2. The exemption under Article 85 (3) of the Treaty shall also apply where the obligation referred to in Article 1 is combined with obligations referred to in paragraph 1 above and such obligations fall in individual cases under the prohibition contained in Article 85 (1).

#### *Article 5*

1. Articles 1, 2 and 3 and Article 4 (2) shall apply provided that:

- (1) the dealer undertakes:

- (a) in respect of motor vehicles within the contract programme or corresponding thereto which have been supplied in the common market by another undertaking within the distribution network, to honour guarantees and to perform free servicing and vehicle recall work to an extent which corresponds to the dealer's obligation covered by point 6 of Article 4 (1) but which need not exceed that imposed upon the undertaking within the distribution system or accepted by the manufacturer when supplying such motor vehicles;
  - (b) to impose upon the undertakings operating within the contract territory with which the dealer has concluded distribution and servicing agreements as provided for in point 6 of Article 3 an obligation to honour guarantees and to perform free servicing and vehicle recall work at least to the extent to which the dealer himself is so obliged;
- (2) the supplier :
- (a) shall not without objectively valid reasons withhold consent to conclude, alter or terminate sub-agreements referred to in Article 3, point 6;
  - (b) shall not apply, in relation to the dealer's obligations referred to in Article 4 (1), minimum requirements or criteria for estimates such that the dealer is subject to discrimination without objectively valid reasons or is treated inequitably;
  - (c) shall, in any scheme for aggregating quantities or values of goods obtained by the dealer from the supplier and from connected undertakings within a specified period for the purpose of calculating discounts, at least distinguish between supplies of
    - motor vehicles within the contract programme,
    - spare parts within the contract programme, for supplies of which the dealer is dependent on undertakings within the distribution network, and
    - other goods;
  - (d) shall also supply to the dealer for the purpose of performance of a contract of sale concluded between the dealer and a final customer in the common market, any passenger car which corresponds to a model within the contract programme and which is marketed by the manufacturer or with the manufacturer's consent in the Member State in which the vehicle is to be registered.

2. In so far as the dealer has, in accordance with Article 5 (1), assumed obligations for the improvement of distribution and servicing structures, the exemption referred to in Article 3, points 3 and 5 shall apply to the obligation not to sell new motor vehicles other than those within the contract programme or not to make such vehicles the subject of a distribution and servicing agreement, provided that

- (1) the parties :
  - (a) agree that the supplier shall release the dealer from the obligations referred to in Article 3, points 3 and 5 where the dealer shows that there are objectively valid reasons for doing so;
  - (b) agree that the supplier reserves the right to conclude distribution and servicing agreements for contract goods with specified further undertakings operating within the contract territory or to alter the contract territory only where the supplier shows that there are objectively valid reasons for doing so;

(2) the agreement is for a period of at least four years or, if for an indefinite period, the period of notice for regular termination of the agreement is at least one year for both parties, unless

- the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement, or
- the dealer is a new entrant to the distribution system and the period of the agreement, or the period of notice for regular termination of the agreement, is the first agreed by that dealer.

(3) each party undertakes to give the other at least six months prior notice of intention not to renew an agreement concluded for a definite period.

3. A party may only invoke particular objectively valid grounds within the meaning of this Article which have been exemplified in the agreement if such grounds are applied without discrimination to undertakings within the distribution system in comparable cases.

4. The conditions for exemption laid down in this Article shall not affect the right of a party to terminate the agreement for cause.

#### *Article 6*

Articles 1, 2 and 3 and Article 4 (2) shall not apply where:

(1) both parties to the agreement or their connected undertakings are motor vehicle manufacturers; or

(2) the manufacturer, the supplier or another undertaking within the distribution system obliges the dealer not to resell contract goods or corresponding goods below stated prices or not to exceed stated rates of trade discount; or

(3) the parties make agreements or engage in concerted practices concerning motor vehicles having three or more road wheels or spare parts therefor which are exempted from the prohibition in Article 85 (1) of the Treaty under Regulations (EEC) No 1983/83, or (EEC) No 1984/83 to an extent exceeding the scope of this Regulation.

#### *Article 7*

1. As regards agreements existing on 13 March 1962 and notified before 1 February 1963 and agreements, whether notified or not, falling under Article 4 (2), point 1 of Regulation No 17, the declaration of inapplicability of Article 85 (1) of the Treaty contained in this Regulation shall apply with retroactive effect from the time at which the conditions of this Regulation were fulfilled.

2. As regards all other agreements notified before this Regulation entered into force, the declaration of inapplicability of Article 85 (1) of the Treaty contained in this Regulation shall apply from the time at which the conditions of this Regulation were fulfilled, or from the date of notification, whichever is the later.

## *Article 8*

If agreements existing on 13 March 1962 and notified before 1 February 1963 or agreements to which Article 4 (2), point 1 of Regulation No 17 applies and which were notified before 1 January 1967 are amended before 1 October 1985 so as to fulfil the conditions for application of this Regulation, and if the amendment is communicated to the Commission before 31 December 1985, the prohibition in Article 85 (1) of the Treaty shall not apply in respect of the period prior to the amendment. The communication shall take effect from the time of its receipt by the Commission. Where the communication is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

## *Article 9<sup>1</sup>*

1. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of the United Kingdom, Ireland and Denmark, Articles 7 and 8 shall apply except that the relevant dates shall be 1 January 1973 instead of 13 March 1962 and 1 July 1973 instead of 1 February 1963 and 1 January 1967.

2. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of Greece, Articles 7 and 8 shall apply except that the relevant dates shall be 1 January 1981 instead of 13 March 1962 and 1 July 1981 instead of 1 February 1963 and 1 January 1967.

## *Article 10*

The Commission may withdraw the benefit of the application of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds that in an individual case an agreement which falls within the scope of this Regulation nevertheless has effects which are incompatible with the provisions of Article 85 (3) of the Treaty, and in particular:

(1) where, in the common market or a substantial part thereof, contract goods or corresponding goods are not subject to competition from products considered by consumers as similar by reason of their characteristics, price and intended use;

(2) where the manufacturer or an undertaking within the distribution system continuously or systematically, and by means not exempted by this Regulation, makes it difficult for final consumers or other undertakings within the distribution system to obtain contract goods or corresponding goods, or to obtain servicing for such goods, within the common market;

---

<sup>1</sup> **Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic**

The following paragraph is added to Article 9:

'3. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of the Kingdom of Spain and of the Portuguese Republic, Articles 7 and 8 shall apply except that the relevant dates shall be 1 January 1986 instead of 13 March 1962 and 1 July 1986 instead of 1 February 1963, 1 January 1967 and 1 October 1985. The amendment made to the agreements in accordance with Article 8 need not be notified to the Commission.'

(OJ L 302, 15.11.1985, p. 167).



(3) where, over a considerable period, prices or conditions of supply for contract goods or for corresponding goods are applied which differ substantially as between Member States, and such substantial differences are chiefly due to obligations exempted by this Regulation;

(4) where, in agreements concerning the supply to the dealer of passenger cars which correspond to a model within the contract programme, prices or conditions which are not objectively justifiable are applied, with the object or the effect of partitioning the common market.

#### *Article 11*

The provisions of this Regulation shall also apply in so far as the obligations referred to in Articles 1 to 4 apply to undertakings which are connected with a party to an agreement.

#### *Article 12*

This Regulation shall apply *mutatis mutandis* to concerted practices of the types defined in Articles 1 to 4.

#### *Article 13*

For the purposes of this Regulation the following terms shall have the following meanings.

(1) 'Distribution and servicing agreements' are framework agreements between two undertakings, for a definite or indefinite period, whereby the party supplying goods entrusts to the other the distribution and servicing of those goods.

(2) 'Parties' are the undertakings which are party to an agreement within the meaning of Article 1: 'the supplier' being the undertaking which supplies the contract goods, and 'the dealer', the undertaking entrusted by the supplier with the distribution and servicing of contract goods.

(3) The 'contract territory' is the defined territory of the common market to which the obligation of exclusive supply in the meaning of Article 1 applies.

(4) 'Contract goods' are motor vehicles intended for use on public roads and having three or more road wheels, and spare parts therefor, which are the subject of an agreement within the meaning of Article 1.

(5) 'The contract programme' refers to the totality of the contract goods.

(6) 'Spare parts' are parts which are to be installed in or upon a motor vehicle so as to replace components of that vehicle. They are to be distinguished from other parts and accessories according to customary usage in the trade.

- (7) The 'manufacturer' is the undertaking:
- (a) which manufactures or procures the manufacture of the motor vehicles in the contract programme, or
  - (b) which is connected with an undertaking described at (a).
- (8) 'Connected undertakings' are:
- (a) undertakings one of which directly or indirectly
    - holds more than half of the capital or business assets of the other, or
    - has the power to exercise more than half the voting rights in the other, or
    - has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the other, or
    - has the right to manage the affairs of the other;
  - (b) undertakings in relation to which a third undertaking is able directly or indirectly to exercise such rights or powers as are mentioned in (a) above.
9. 'Undertakings within the distribution system' are besides the parties to the agreement, the manufacturer and undertakings which are entrusted by the manufacturer or with the manufacturer's consent with the distribution or servicing of contract goods or corresponding goods.
10. A 'passenger car which corresponds to a model within the contract programme' is a passenger car
- manufactured or assembled in volume by the manufacturer, and
  - identical as to body style, drive-line, chassis, and type of motor with a passenger car within the contract programme.
11. 'Corresponding goods', 'corresponding motor vehicles' and 'corresponding parts' are those which are similar in kind to those in the contract programme, are distributed by the manufacturer or with the manufacturer's consent, and are the subject of a distribution or servicing agreement with an undertaking within the distribution system.
12. 'Distribute' and 'sell' include other forms of supply such as leasing.

#### *Article 14*

This Regulation shall enter into force on 1 July 1985.

It shall remain in force until 30 June 1995.

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

# Commission Notice<sup>1</sup> concerning Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements

In Regulation (EEC) No 123/85 on the block exemption of motor vehicle distribution agreements the Commission recognizes that exclusive and selective distribution in this industry is in principle compatible with Article 85 (3) of the Treaty. This assessment is subject to a number of conditions. At the request of some of the commercial sectors involved, this notice sets out some of those conditions and lays down certain administrative principles for the procedures which the Commission might initiate under Article 7 of Council Regulation No 19/65/EEC<sup>2</sup> in combination with Article 10, point 3 and 4 of Regulation (EEC) No 123/85,<sup>3</sup> taking account of the present stage of integration of the European Community.

## I

### **1. Freedom of movement of European consumers and limited availability of vehicle models**

The Commission starts from the position that the common market affords advantages to European consumers, and that this is especially so where there is effective competition. Accordingly, Regulation (EEC) No 123/85 presupposes that in the motor vehicle sector effective competition exists between manufacturers and between their distribution networks.

The European consumer must derive a fair share of the benefits which flow from the distribution and servicing agreements. Admittedly, the consumer may benefit from the fact that servicing is carried out by specialists (Article 3, points 3 and 5) and that such service can be obtained throughout the network from dealers and repairers who are obliged to observe minimum requirements (Article 4 (1)).

However, the European consumer's basic rights include above all the right to buy a motor vehicle and to have it maintained or repaired wherever prices and quality are most advantageous to him.

(a) This right to buy relates to new vehicles from a manufacturer each of whose dealers offers them in a form and specification mainly required by final consumers in the dealer's contract territory (contract goods).

(b) In the interests of competition at the various stages of distribution in the common market and in those of European consumers, a certain limited availability of other vehicles

<sup>1</sup> OJ C 17, 18.1.1985, p. 4.

<sup>2</sup> OJ 36, 6.3.1965, p. 533/65.

<sup>3</sup> OJ L 15, 18.1.1985, p. 16.

within the distribution system is also considered indispensable. Any dealer within the distribution system must be able to order from a supplier within the distribution system any volume-produced passenger car which a final consumer has ordered from him and intends to register in another Member State, in the form and specification marketed by the manufacturer or with his consent in that Member State (passenger cars corresponding to those in the contract programme, Article 5 (1), point 2 (d) and Article 13, point 10 of Regulation (EEC) No 123/85).

This provision does not oblige the manufacturer to produce vehicles which he would not otherwise offer within the common market. Nor does it oblige the manufacturer to sell particular vehicle models in any particular part of the common market where he does not, or does not yet, wish to market them. He is only obliged to supply to a dealer within his distribution system a new passenger car required by that dealer to fulfil a contract with a final consumer and intended for another Member State where that dealer's contract programme includes cars of a corresponding kind.

## **2. Abusive hindrance**

The European consumer must not be subject to abusive hindrance, either in the exporting country, where he wishes to buy a vehicle, or in the country of destination, where he seeks to register it. The restrictions inherent in an exempted exclusive and selective distribution system do not represent abuses. However, further agreements or concerted practices between undertakings in the distribution system that limit the European consumer's final freedom to purchase do jeopardize the exemption given by the Regulation, as do unilateral measures on the part of a manufacturer or his importers or dealers which have a widespread effect against consumer's interests (Article 10, point 2). Examples are: dealers refuse to perform guarantee work on vehicles which they have not sold and which have been imported from other Member States; manufacturers or their importers withhold their cooperation in the registration of vehicles which European consumers have imported from other Member States; abnormally long delivery periods.

## **3. Intermediaries**

The European consumer must be able to make use of the services of individuals or undertakings to assist in purchasing a new vehicle in another Member State (Article 3, points 10 and 11). However, except as regards contracts between dealers within the distribution system for the sale of contract goods, undertakings within the distribution system can be obliged not to supply new motor vehicles within the contract programme or corresponding vehicles to or through a third party who represents himself as an authorized reseller of new vehicles within the contract programme or corresponding vehicles or carries on an activity equivalent to that of a reseller. It is for the intermediary or the consumer to give the dealer within the distribution system documentary evidence that the intermediary, in buying and accepting delivery of a vehicle, is acting on behalf and for account of the consumer.

## II

The Commission may withdraw the benefit of the application of Regulation (EEC) No 123/85, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds that in an individual case an agreement which falls within the scope of Regulation (EEC) No 123/85 nevertheless has effects which are incompatible with the provisions of Article 85 (3) of the Treaty, and in particular

— where, over a considerable period, prices or conditions of supply for contract goods or for corresponding goods are applied which differ substantially as between Member States, and such substantial differences are chiefly due to obligations exempted by Regulation (EEC) No 123/85 (Article 10, point 3);

— where, in agreements concerning the supply to the dealer of passenger cars which correspond to a model within the contract programme, prices or conditions which are not objectively justifiable are applied, with the object or effect of partitioning the common market (Article 10, point 4).

The Commission may pursue such proceedings in individual cases, upon application (particularly on the basis of complaints from consumers) or on its own initiative, in accordance with the procedural rules laid down in Council Regulation No 17<sup>1</sup> and Commission Regulation No 99/63/EEC,<sup>2</sup> under which the parties concerned must be informed of the objections raised and given an opportunity to respond to them before the Commission adopts a decision. Whether the Commission initiates such proceedings depends chiefly on the results of preliminary inquiries, the circumstances of the case and the degree of prejudice to the public interest.

Price differentials for motor vehicles as between Member States are to a certain extent a reflection of the particular play of supply and demand in the areas concerned. Substantial price differences generally give reason to suspect that national measures or private restrictive practices are behind them.

In view of the present stage of integration of the common market, for the time being certain circumstances will not of themselves justify an investigation of whether an agreement exempted by Regulation (EEC) No 123/85 is incompatible with the conditions of Article 85 (3) of the Treaty. For the time being, the Commission does not propose to carry out investigations into private practices under Article 10, point 3 or 4 of Regulation (EEC) No 123/85 where the following circumstances obtain (this does not exclude intervention by the Commission in particular cases):

---

<sup>1</sup> OJ 13, 21.2.1962, p. 204/62, as last amended by Regulation (EEC) No 2821/71, OJ L 285, 29.12.1971, p. 49.

<sup>2</sup> OJ 127, 20.8.1963, p. 2268/63.

**1. Price differentials between Member States**  
**(Article 10, point 3 in association with Article 13, point 11)**

Recommended net prices for resale to final consumers (list prices) of a motor vehicle within the contract programme in one Member State and of the same or a corresponding motor vehicle in another Member State differ, and

(a) the difference expressed in ecus does not exceed 12% of the lower price, or, over a period of less than one year, exceeds that percentage either

- by not more than a further 6% of the list price, or
- only in respect of an insignificant portion of the motor vehicles within the contract programme, or

(b) the difference is to be attributed, following analysis of the objective data, to the fact that

- the purchaser of the vehicle in one of those Member States must pay taxes, charges or fees amounting in total to more than 100% of the net price, or
- the freedom to set the price or margin for the resale of the vehicle is directly or indirectly subject in one of those Member States to restriction by national measures lasting longer than one year;

and that such measures do not represent infringements of the Treaty.

In so far as they are public knowledge, prices net of discounts shall replace recommended net prices. Particular account will be taken, for an appropriate period, of alterations of the parities within the European monetary system or fluctuations in exchange rates in a Member State.

**2. Price differentials between passenger cars within the contract programme  
and corresponding cars**

**(Article 10, point 4 in association with Article 5 (1), point 2 (d) and Article 13, point 10)**

When selling to a dealer a passenger car corresponding to a model within the contract programme, the supplier charges an objectively justifiable supplement on account of special distribution costs and any differences in equipment and specification.

In a Member State where pricing is affected in the manner described at II 1 (b) above, the supplier charges a further supplement; however, he does not exceed the price which would be charged in similar cases in that Member State not subject to such effects in which the lowest price net of tax is recommended for the sale to a final consumer of that vehicle within the contract programme (or, as the case may be, of a corresponding vehicle).

Where the limits indicated above are exceeded, the Commission may open a procedure on its own initiative under Article 10, points 3 and 4 of Regulation (EEC) No 123/85; whether it does so or not will depend mainly on the results of investigations that may be made as to

whether the exempted agreement is in fact the principal cause of actual price differences in the meaning of Article 10, point 3 or 4 or, as the case may be, has led to a partitioning of the common market or is, in the light of experience, liable to do so. Price comparisons made in this connection will take account of differences in equipment and specification and in ancillary items such as the extent of the guarantee, delivery services or registration formalities.

### III

1. The rights of Member States, persons and associations of persons to make applications to the Commission under Article 3 of Council Regulation No 17 (i.e. complaints) are unaffected. The Commission will examine such complaints with all due diligence.
2. This notice is without prejudice to any finding of the Court of Justice of the European Communities or of courts of the Member States.
3. Any withdrawal of or amendment to this notice will be effected by publication in the *Official Journal of the European Communities*.

## *2. Patent licensing agreements*

**COMMISSION REGULATION (EEC) No 2349/84<sup>1</sup> OF 23 JULY 1984**

**on the application of Article 85 (3) of the Treaty to certain categories  
of patent licensing agreements**

THE COMMISSION OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Economic Community,

Having regard to 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,<sup>2</sup> as last amended by the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation,<sup>3</sup>

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

Whereas :

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements and concerted practices falling within the scope of Article 85 (1) 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 patents, utility models, designs or trade marks, or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or application of industrial processes.

(2) Patent licensing agreements are agreements whereby one undertaking, the holder of a patent (the licensor), permits another undertaking (the licensee) to exploit the patented invention by one or more of the means of exploitation afforded by patent law, in particular manufacture, use or putting on the market.

---

<sup>1</sup> OJ L 219, 16.8.1984, p. 15; Corrigendum OJ L 280, 22.10.1985, p. 32.

<sup>2</sup> OJ 36, 6.3.1965, p. 533/65.

<sup>3</sup> OJ C 58, 3.3.1979, p. 12.



(3) In the light of experience acquired so far, it is possible to define a category of patent licensing agreements which are capable of falling within the scope of Article 85 (1), but which can normally be regarded as satisfying the conditions laid down in Article 85 (3). To the extent that patent licensing agreements to which undertakings in only one Member State are party and which concern only one or more patents for that Member State are capable of affecting trade between Member States, it is appropriate to include them in the exempted category.

(4) The present Regulation applies to licences issued in respect of national patents of the Member States, Community patents,<sup>1</sup> or European patents<sup>2</sup> granted for Member States, licences in respect of utility models or 'certificats d'utilité' issued in the Member States, and licences in respect of inventions for which a patent application is made within one year.

Where such patent licensing agreements contain obligations relating not only to territories within the common market but also obligations relating to non-member countries, the presence of the latter does not prevent the present Regulation from applying to the obligations relating to territories within the common market.

(5) However, where licensing agreements for non-member countries or for territories which extend beyond the frontiers of the Community have effects within the common market which may fall within the scope of Article 85 (1), such agreements should be covered by the Regulation to the same extent as would agreements for territories within the common market.

(6) The Regulation should also apply to agreements concerning the assignment and acquisition of the rights referred to in point 4 above where the risk associated with exploitation remains with the assignor, patent licensing agreements in which the licensor is not the patentee but is authorized by the patentee to grant the licence (as in the case of sub-licences) and patent licensing agreements in which the parties' rights or obligations are assumed by connected undertakings.

(7) The Regulation does not apply to agreements concerning sales alone, which are governed by the provisions of Commission Regulation (EEC) No 1983/83 of 22 June 1983 concerning the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements.<sup>3</sup>

(8) Since the experience so far acquired is inadequate, it is not appropriate to include within the scope of the Regulation patent pools, licensing agreements entered into in connection with joint ventures, reciprocal licensing, or licensing agreements in respect of plant breeder's rights. Reciprocal agreements which do not involve any territorial restrictions within the common market should, however, be so included.

---

<sup>1</sup> Convention for the European patent for the common market (Community Patent Convention) of 15 December 1975 (OJ L 17, 26.1.1976, p. 1).

<sup>2</sup> Convention on the grant of European patents of 5 October 1973.

<sup>3</sup> OJ L 173, 30.6.1983, p. 1.

(9) On the other hand, it is appropriate to extend the scope of the Regulation to patent licensing agreements which also contain provisions assigning, or granting the right to use, non-patented technical knowledge, since such mixed agreements are commonly concluded in order to allow the transfer of a complex technology containing both patented and non-patented elements. Such agreements can only be regarded as fulfilling the conditions of Article 85 (3) for the purposes of this Regulation where the communicated technical knowledge is secret and permits a better exploitation of the licensed patents (know-how). Provisions concerning know-how are covered by the Regulation only in so far as the licensed patents are necessary for achieving the objects of the licensed technology and as long as at least one of the licensed patents remains in force.

(10) It is also appropriate to extend the scope of the Regulation to patent licensing agreements containing ancillary provisions relating to trade marks, subject to ensuring that the trademark licence is not used to extend the effects of the patent licence beyond the life of the patents. For this purpose it is necessary to allow the licensee to identify himself within the 'licensed territory', i.e. the territory covering all or part of the common market where the licensor holds patents which the licensee is authorized to exploit, as the manufacturer of the 'licensed product', i.e. the product which is the subject matter of the licensed patent or which has been obtained directly from the process which is the subject matter of the licensed patent, to avoid his having to enter into a new trademark agreement with the licensor when the licensed patents expire in order not to lose the goodwill attaching to the licensed product.

(11) Exclusive licensing agreements, i.e. agreements in which the licensor undertakes not to exploit the 'licensed invention', i.e. the licensed patented invention and any know-how communicated to the licensee, in the licensed territory himself and not to grant further licences there, are not in themselves incompatible with Article 85 (1) where they are concerned with the introduction and protection of a new technology in the licensed territory, by reason of the scale of the research which has been undertaken and of the risk that is involved in manufacturing and marketing a product which is unfamiliar to users in the licensed territory at the time the agreement is made. This may also be the case where the agreements are concerned with the introduction and protection of a new process for manufacturing a product which is already known. In so far as in other cases agreements of this kind may fall within the scope of Article 85 (1), it is useful for the purposes of legal certainty to include them in Article 1, in order that they may also benefit from the exemption. However, the exemption of exclusive licensing agreements and certain export bans imposed on the licensor and his licensees is without prejudice to subsequent developments in the case law of the Court of Justice regarding the status of such agreements under Article 85 (1).

(12) The obligations listed in Article 1 generally contribute to improving the production of goods and to promoting technical progress; they make patentees more willing to grant licences and licensees more inclined to undertake the investment required to manufacture, use and put on the market a new product or to use a new process, so that undertakings other than the patentee acquire the possibility of manufacturing their products with the aid of the latest techniques and of developing those techniques further. The result is that the number of production facilities and the quantity and quality of goods produced in the

common market are increased. This is true, in particular, of obligations on the licensor and on the licensee not to exploit the licensed invention in, and in particular not to export the licensed product into, the licensed territory in the case of the licensor and the 'territories reserved for the licensor', that is to say, territories within the common market in which the licensor has patent protection and has not granted any licences, in the case of the licensee. This is also true both of the obligation of the licensee not to conduct an active policy of putting the product on the market (i.e. prohibition of active competition as defined in Article 1 (1) (5)) in the territories of other licensees for a period which may equal the duration of the licence and also the obligation of the licensee not to put the licensed product on the market in the territories of other licensees for a limited period of a few years (i.e. a prohibition not only of active competition but also of 'passive competition' whereby the licensee of a territory simply responds to requests which he has not solicited from users or resellers established in the territories of other licensees — Article 1 (1) (6)). However, such obligations may be permitted under the Regulation only in respect of territories in which the licensed product is protected by 'parallel patents', that is to say, patents covering the same invention, within the meaning of the case law of the Court of Justice, and as long as the patents remain in force.

(13) Consumers will as a rule be allowed a fair share of the benefit resulting from this improvement in the supply of goods on the market. To safeguard this effect, however, it is right to exclude from the application on Article 1 cases where the parties agree to refuse to meet demand from users or resellers within their respective territories who would resell for export, or to take other steps to impede parallel imports, or where the licensee is obliged to refuse to meet unsolicited demand from the territory of other licensees (passive sales). The same applies where such action is the result of a concerted practice between the licensor and the licensee.

(14) The obligations referred to above thus do not impose restrictions which are not indispensable to the attainment of the abovementioned objectives.

(15) Competition at the distribution stage is safeguarded by the possibility of parallel imports and passive sales. The exclusivity obligations covered by the Regulation thus do not normally entail the possibility of eliminating competition in respect of a substantial part of the products in question. This is so even in the case of agreements which grant exclusive licences for a territory covering the whole of the common market.

(16) To the extent that in their agreements the parties undertake obligations of the type referred to in Articles 1 and 2 but which are of more limited scope and thus less restrictive of competition than is permitted by those Articles, it is appropriate that these obligations should also benefit under the exemptions provided for in the Regulation.

(17) If in a particular case an agreement covered by this Regulation is found to have effects which are incompatible with the provisions of Article 85 (3) of the Treaty, the Commission may withdraw the benefit of the block exemption from the undertakings concerned, in accordance with Article 7 of Regulation No 19/65/EEC.

(18) It is not necessary expressly to exclude from the category defined in the Regulation agreements which do not fulfil the conditions of Article 85 (1). Nevertheless it is advisable, in the interests of legal certainty for the undertakings concerned, to list in Article 2 a number of obligations which are not normally restrictive of competition, so that these also may benefit from the exemption in the event that, because of particular economic or legal circumstances, they should exceptionally fall within the scope of Article 85 (1). The list of such obligations given in Article 2 is not exhaustive

(19) The Regulation must also specify what restrictions or provisions may not be included in patent licensing agreements if these are to benefit from the block exemption. The restrictions listed in Article 3 may fall under the prohibition of Article 85 (1); in these cases there can be no general presumption that they will lead to the positive effects required by Article 85 (3), as would be necessary for the granting of a block exemption.

(20) Such restrictions include those which deny the licensee the right enjoyed by any third party to challenge the validity of the patent or which automatically prolong the agreement by the life of any new patent granted during the life of the licensed patents which are in existence at the time the agreement is entered into. Nevertheless, the parties are free to extend their contractual relationship by entering into new agreements concerning such new patents, or to agree the payment of royalties for as long as the licensee continues to use know-how communicated by the licensor which has not entered into the public domain, regardless of the duration of the original patents and of any new patents that are licensed.

(21) They also include restrictions on the freedom of one party to compete with the other and in particular to involve himself in techniques other than those licensed, since such restrictions impede technical and economic progress. The prohibition of such restrictions should however be reconciled with the legitimate interest of the licensor in having his patented invention exploited to the full and to this end to require the licensee to use his best endeavours to manufacture and market the licensed product.

(22) Such restrictions include, further, an obligation on the licensee to continue to pay royalties after all the licensed patents have ceased to be in force and the communicated know-how has entered into the public domain, since such an obligation would place the licensee at a disadvantage by comparison with his competitors, unless it is established that this obligation results from arrangements for spreading payments in respect of previous use of the licensed invention.

(23) They also include restrictions imposed on the parties regarding prices, customers or marketing of the licensed products or regarding the quantities to be manufactured or sold, especially since restrictions of the latter type may have the same effect as export bans.

(24) Finally, they include restrictions to which the licensee submits at the time the agreement is made because he wishes to obtain the licence, but which give the licensor an unjustified competitive advantage, such as an obligation to assign to the licensor any improvements the licensee may make to the invention, or to accept other licences or goods and services that the licensee does not want from the licensor.

(25) It is appropriate to offer to parties to patent licensing agreements containing obligations which do not come within the terms of Articles 1 and 2 and yet do not entail any of the effects restrictive of competition referred to in Article 3 a simplified means of benefiting, upon notification, from the legal certainty provided by the block exemption (Article 4). This procedure should at the same time allow the Commission to ensure effective supervision as well as simplifying the administrative control of agreements.

(26) The Regulation should apply with retroactive effect to patent licensing agreements in existence when the Regulation comes into force where such agreements already fulfil the conditions for application of the Regulation or are modified to do so (Articles 6 to 8). Under Article 4 (3) of Regulation No 19/65/EEC, the benefit of these provisions may not be claimed in actions pending at the date of entry into force of this Regulation, nor may it be relied on as grounds for claims for damages against third parties.

(27) Agreements which come within the terms of Articles 1 and 2 and which have neither the object nor the effect of restricting competition in any other way need no longer be notified. Nevertheless, undertakings will still have the right to apply in individual cases for negative clearance under Article 2 of Council Regulation No 17<sup>1</sup> or for exemption under Article 85 (3),

HAS ADOPTED THIS REGULATION:

#### *Article 1*

1. Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to patent licensing agreements, and agreements combining the licensing of patents and the communication of know-how, to which only two undertakings are party and which include one or more of the following obligations:

- (1) an obligation on the licensor not to license other undertakings to exploit the licensed invention in the licensed territory, covering all or part of the common market, in so far and as long as one of the licensed patents remains in force;
- (2) an obligation on the licensor not to exploit the licensed invention in the licensed territory himself in so far and as long as one of the licensed patents remains in force;
- (3) an obligation on the licensee not to exploit the licensed invention in territories within the common market which are reserved for the licensor, in so far and as long as the patented product is protected in those territories by parallel patents;
- (4) an obligation on the licensee not to manufacture or use the licensed product, or use the patented process or the communicated know-how, in territories within the common market which are licensed to other licensees, in so far and as long as the licensed product is protected in those territories by parallel patents;

---

<sup>1</sup> OJ 13, 21.2.1962, p. 204/62.

(5) an obligation on the licensee not to pursue an active policy of putting the licensed product on the market in the territories within the common market which are licensed to other licensees, and in particular not to engage in advertising specifically aimed at those territories or to establish any branch or maintain any distribution depot there, in so far and as long as the licensed product is protected in those territories by parallel patents;

(6) an obligation on the licensee not to put the licensed product on the market in the territories licensed to other licensees within the common market for a period not exceeding five years from the date when the product is first put on the market within the common market by the licensor or one of his licensees, in so far as and for as long as the product is protected in these territories by parallel patents;

(7) an obligation on the licensee to use only the licensor's trade mark or the get-up determined by the licensor to distinguish the licensed product, provided that the licensee is not prevented from identifying himself as the manufacturer of the licensed product.

2. The exemption of restrictions on putting the licensed product on the market resulting from the obligations referred to in paragraph 1 (2), (3), (5) and (6) shall apply only if the licensee manufactures the licensed product himself or has it manufactured by a connected undertaking or by a subcontractor.

3. The exemption provided for in paragraph 1 shall also apply where in a particular agreement the parties undertake obligations of the types referred to in that paragraph but with a more limited scope than is permitted by the paragraph.

## *Article 2*

1. Article 1 shall apply notwithstanding the presence in particular of any of the following obligations, which are generally not restrictive of competition:

(1) an obligation on the licensee to procure goods or services from the licensor or from an undertaking designated by the licensor, in so far as such products or services are necessary for a technically satisfactory exploitation of the licensed invention;

(2) an obligation on the licensee to pay a minimum royalty or to produce a minimum quantity of the licensed product or to carry out a minimum number of operations exploiting the licensed invention;

(3) an obligation on the licensee to restrict his exploitation of the licensed invention to one or more technical fields of application covered by the licensed patent;

(4) an obligation on the licensee not to exploit the patent after termination of the agreement in so far as the patent is still in force;

(5) an obligation on the licensee not to grant sub-licences or assign the licence;

(6) an obligation on the licensee to mark the licensed product with an indication of the patentee's name, the licensed patent or the patent licensing agreement;

(7) an obligation on the licensee not to divulge know-how communicated by the licensor; the licensee may be held to this obligation even after the agreement has expired;

(8) obligations:

- (a) to inform the licensor of infringements of the patent,
- (b) to take legal action against an infringer,
- (c) to assist the licensor in any legal action against an infringer,

provided that these obligations are without prejudice to the licensee's right to challenge the validity of the licensed patent;

(9) an obligation on the licensee to observe specifications concerning the minimum quality of the licensed product, provided that such specifications are necessary for a technically satisfactory exploitation of the licensed invention, and to allow the licensor to carry out related checks;

(10) an obligation on the parties to communicate to one another any experience gained in exploiting the licensed invention and to grant one another a licence in respect of inventions relating to improvements and new applications, provided that such communication or licence is non-exclusive;

(11) an obligation on the licensor to grant the licensee any more favourable terms that the licensor may grant to another undertaking after the agreement is entered into.

2. In the event that, because of particular circumstances, the obligations referred to in paragraph 1 fall within the scope of Article 85 (1), they shall also be exempted even if they are not accompanied by any of the obligations exempted by Article 1.

The exemption provided for in this paragraph shall also apply where in an agreement the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

### *Article 3*

Articles 1 and 2 (2) shall not apply where:

(1) the licensee is prohibited from challenging the validity of licensed patents or other industrial or commercial property rights within the common market belonging to the licensor or undertakings connected with him, without prejudice to the right of the licensor to terminate the licensing agreement in the event of such a challenge;

(2) the duration of the licensing agreement is automatically prolonged beyond the expiry of the licensed patents existing at the time the agreement was entered into by the inclusion in it of any new patent obtained by the licensor, unless the agreement provides each party with the right to terminate the agreement at least annually after the expiry of the licensed patents existing at the time the agreement was entered into, without prejudice to the right of the licensor to charge royalties for the full period during which the licensee continues to use know-how communicated by the licensor which has not entered into the public domain, even if that period exceeds the life of the patents;

- (3) one party is restricted from competing with the other party, with undertakings connected with the other party or with other undertakings within the common market in respect of research and development, manufacture, use or sales, save as provided in Article 1 and without prejudice to an obligation on the licensee to use his best endeavours to exploit the licensed invention;
- (4) the licensee is charged royalties on products which are not entirely or partially patented or manufactured by means of a patented process, or for the use of know-how which has entered into the public domain otherwise than by the fault of the licensee or an undertaking connected with him, without prejudice to arrangements whereby, in order to facilitate payment, the royalty payments for the use of a licensed invention are spread over a period extending beyond the life of the licensed patents or the entry of the know-how into the public domain;
- (5) the quantity of licensed products one party may manufacture or sell or the number of operations exploiting the licensed invention he may carry out are subject to limitations;
- (6) one party is restricted in the determination of prices, components of prices or discounts for the licensed products;
- (7) one party is restricted as to the customers he may serve, in particular by being prohibited from supplying certain classes of user, employing certain forms of distribution or, with the aim of sharing customers, using certain types of packaging for the products, save as provided in Article 1 (1) (7) and Article 2 (1) (3);
- (8) the licensee is obliged to assign wholly or in part to the licensor rights in or to patents for improvements or for new applications of the licensed patents;
- (9) the licensee is induced at the time the agreement is entered into to accept further licences which he does not want or to agree to use patents, goods or services which he does not want, unless such patents, products or services are necessary for a technically satisfactory exploitation of the licensed invention;
- (10) without prejudice to Article 1 (1) (5), the licensee is required, for a period exceeding that permitted under Article 1 (1) (6), not to put the licensed product on the market in territories licensed to other licensees within the common market or does not do so as a result of a concerted practice between the parties;
- (11) one or both of the parties are required:
  - (a) to refuse without any objectively justified reason to meet demand from users or resellers in their respective territories who would market products in other territories within the common market;
  - (b) to make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular to exercise industrial or commercial property rights or take measures so as to prevent users or resellers from obtaining outside, or from putting on the market in, the licensed territory products which have been lawfully put on the market within the common market by the patentee or with his consent;

or do so as a result of a concerted practice between them.



#### Article 4

1. The exemption provided for in Articles 1 and 2 shall also apply to agreements containing obligations restrictive of competition which are not covered by those Articles and do not fall within the scope of Article 3, on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation No 27,<sup>1</sup> as last amended by Regulation (EEC) No 1699/75,<sup>2</sup> and that the Commission does not oppose such exemption within a period of six months.

2. The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date shown on the postmark of the place of posting.

3. Paragraph 1 shall apply only if:

(a) express reference is made to this Article in the notification or in a communication accompanying it; and

(b) the information furnished with the notification is complete and in accordance with the facts.

4. The benefit of paragraph 1 may be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraph 2 and 3 (b) shall apply *mutatis mutandis*.

5. The Commission may oppose the exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the transmission to the Member State of the notification referred to in paragraph 1 or of the communication referred to in paragraph 4. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

6. The Commission may withdraw the opposition to the exemption at any time. However, where the opposition was raised at the request of a Member State and this request is maintained, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.

7. If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date of notification.

8. If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

<sup>1</sup> OJ 35, 10.5.1962, p. 1118/62.

<sup>2</sup> OJ L 172, 3.7.1975, p. 11. Amended most recently by Regulation (EEC) No 2526/85 of 5 August 1985.

9. If the Commission opposes exemption and the opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

#### *Article 5*

1. This Regulation shall not apply:

- (1) to agreements between members of a patent pool which relate to the pooled patents;
- (2) to patent licensing agreements between competitors who hold interests in a joint venture or between one of them and the joint venture, if the licensing agreements relate to the activities of the joint venture;
- (3) to agreements under which one party grants to the other party a patent licence and that other party, albeit in separate agreements or through connected undertakings, grants to the first party a licence under patents or trademarks or reciprocal sales rights for unprotected products or communicates to him know-how, where the parties are competitors in relation to the products covered by those agreements;
- (4) to licensing agreements in respect of plant breeder's rights.

2. However, this Regulation shall apply to reciprocal licences of the types referred to in paragraph 1 (3) where the parties are not subject to any territorial restriction within the common market on the manufacture, use or putting on the market of the products covered by these agreements or on the use of the licensed processes.

#### *Article 6*

1. As regards agreements existing on 13 March 1962 and notified before 1 February 1963 and agreements, whether notified or not, to which Article 4 (2) (2) (b) of Regulation No 17 applies, the declaration of inapplicability of Article 85 (1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled.

2. As regards all other agreements notified before this Regulation entered into force, the declaration of inapplicability of Article 85 (1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled, or from the date of notification, whichever is the later.

#### *Article 7*

If agreements existing on 13 March 1962 and notified before 1 February 1963 or agreements to which Article 4 (2) (2) (b) of Regulation No 17 applies and notified before 1 January 1967 are amended before 1 April 1985 so as to fulfil the conditions for application of this Regulation and if the amendment is communicated to the Commission before 1 July 1985

the prohibition in Article 85 (1) of the Treaty shall not apply in respect of the period prior to the amendment. The communication shall take effect from the time of its receipt by the Commission. Where the communication is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

#### *Article 8<sup>1</sup>*

1. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of the United Kingdom, Ireland and Denmark, Articles 6 and 7 shall apply except that the relevant dates shall be 1 January 1973 instead of 13 March 1962 and 1 July 1973 instead of 1 February 1963 and 1 January 1967.

2. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of Greece, Articles 6 and 7 shall apply except that the relevant dates shall be 1 January 1981 instead of 13 March 1962 and 1 July 1981 instead of 1 February 1963 and 1 January 1967.

#### *Article 9*

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, and in particular where:

- (1) such effects arise from an arbitration award;
- (2) the licensed products or the services provided using a licensed process are not exposed to effective competition in the licensed territory from identical products or services or products or services considered by users as equivalent in view of their characteristics, price and intended use;
- (3) the licensor does not have the right to terminate the exclusivity granted to the licensee at the latest five years from the date the agreement was entered into and at least annually thereafter if, without legitimate reason, the licensee fails to exploit the patent or to do so adequately;
- (4) without prejudice to Article 1 (1) (6), the licensee refuses, without objectively valid reason, to meet unsolicited demand from users or resellers in the territory of other licensees;

---

<sup>1</sup> **Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic**

The following paragraph is added to Article 8:

'3. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of the Kingdom of Spain and of the Portuguese Republic, Articles 6 and 7 shall apply except that the relevant dates shall be 1 January 1986 instead of 13 March 1962 and 1 July 1986 instead of 1 February 1963, 1 January 1967 and 1 April 1985. The amendment made to these agreements in accordance with Article 7 need not be notified to the Commission.'

(OJ L 302, 15.11.1985, p. 166).

(5) one or both of the parties :

- (a) without any objectively justified reason, refuse to meet demand from users or resellers in their respective territories who would market the products in other territories within the common market; or
- (b) make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular where they exercise industrial or commercial property rights or take measures so as to prevent resellers or users from obtaining outside, or from putting on the market in, the licensed territory products which have been lawfully put on the market within the common market by the patentee or with his consent.

#### *Article 10*

1. This Regulation shall apply to :

- (a) patent applications;
- (b) utility models;
- (c) applications for registration of utility models;
- (d) 'certificats d'utilité' and 'certificats d'addition' under French law; and
- (e) applications for 'certificats d'utilité' and 'certificats d'addition' under French law;

equally as it applies to patents.

2. This Regulation shall also apply to agreements relating to the exploitation of an invention if an application within the meaning of paragraph 1 is made in respect of the invention for the licensed territory within one year from the date when the agreement was entered into.

#### *Article 11*

This Regulation shall also apply to :

- 1. patent licensing agreements where the licensor is not the patentee but is authorized by the patentee to grant a licence or a sub-licence;
- 2. assignments of a patent or of a right to a patent where the sum payable in consideration of the assignment is dependent upon the turnover attained by the assignee in respect of the patented products, the quantity of such products manufactured or the number of operations carried out employing the patented invention;
- 3. patent licensing agreements in which rights or obligations of the licensor or the licensee are assumed by undertakings connected with them.

#### *Article 12*

1. 'Connected undertakings' for the purposes of this Regulation means:
  - (a) undertakings in which a party to the agreement, directly or indirectly:
    - owns more than half the capital or business assets, or
    - has the power to exercise more than half the voting rights, or
    - has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or
    - has the right to manage the affairs of the undertaking;
  - (b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a);
  - (c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).
2. Undertakings in which the parties to the agreement or undertakings connected with them jointly have directly or indirectly the rights or powers set out in paragraph 1 (a) shall be considered to be connected with each of the parties to the agreement.

#### *Article 13*

1. Information acquired pursuant to Article 4 shall be used only for the purposes of this Regulation.
2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation of the kind covered by the obligation of professional secrecy.
3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

#### *Article 14*

This Regulation shall enter into force on 1 January 1985.

It shall apply until 31 December 1994.

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

### *3. Specialization and research and development agreements*

#### **COUNCIL REGULATION (EEC) No 2821/71<sup>1</sup> OF 20 DECEMBER 1971**

**on the application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices modified by Regulation (EEC) No 2743/72 of 19 December 1972<sup>2</sup>**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Having regard to the Opinion of the Economic and Social Committee,

Whereas Article 85 (1) of the Treaty may in accordance with Article 85 (3) be declared inapplicable to categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 85 (3);

Whereas the provisions for implementation of Article 85 (3) must be adopted by way of regulation pursuant to Article 87;

Whereas the creation of a common market requires that undertakings be adopted to the conditions of the enlarged market and whereas cooperation between undertakings can be a suitable means of achieving this;

Whereas agreements, decisions and concerted practices for cooperation between undertakings which enable the undertakings to work more rationally and adapt their productivity and competitiveness to the enlarged market may, in so far as they fall within the prohibition contained in Article 85 (1), be exempted therefrom under certain conditions; whereas this measure is necessary in particular as regards agreements, decisions and concerted practices relating to the application of standards and types, research and development of products or

<sup>1</sup> OJ L 285, 29.12.1971, p. 46; (Special Edition 1971 — III, p. 1032).

<sup>2</sup> OJ L 291, 28.12.1972, p. 144; (Special Edition 1972, 28-30.12.1972, p. 60).

processes up to the stage of industrial application, exploitation of the results thereof and specialization;

Whereas it is desirable that the Commission be enabled to declare by way of regulation that the provisions of Article 85 (1) do not apply to those categories of agreements, decisions and concerted practices, in order to make it easier for undertakings to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy;

Whereas it should be laid down under what conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers;

Whereas under Article 6 of Regulation No 17<sup>1</sup> the Commission may provide that a decision taken in accordance with Article 85 (3) of the Treaty shall apply with retroactive effect; whereas it is desirable that the Commission be empowered to issue regulations whose provisions are to the like effect;

Whereas under Article 7 of Regulation No 17 agreements, decisions and concerted practices may by decision of the Commission be exempted from prohibition, in particular if they are modified in such manner that Article 85 (3) applies to them; whereas it is desirable that the Commission be enabled to grant by regulation like exemption to such agreements, decisions and concerted practices if they are modified in such manner as to fall within a category defined in an exempting regulation;

Whereas the possibility cannot be excluded that, in a specific case, the conditions set out in Article 85 (3) may not be fulfilled; whereas the Commission must have power to regulate such a case in pursuance of Regulation No 17 by way of decision having effect for the future,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

1. Without prejudice to the application of Regulation No 17 the Commission may, by Regulation and in accordance with Article 85 (3) of the Treaty, declare that Article 85 (1) shall not apply to categories of agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object:

- (a) the application of standards or types;
- (b) the research and development of products or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding industrial property rights and confidential technical knowledge;

---

<sup>1</sup> OJ 13, 21.2.1962, p. 204/62; (Special Edition 1959-62, p. 87).

(c) specialization, including agreements necessary for achieving it.

2. Such regulation shall define the categories of agreements, decisions and concerted practices to which it applies and shall specify in particular:

(a) the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices;

(b) the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

#### *Article 2*

1. Any Regulation pursuant to Article 1 shall be made for a specified period.

2. It may be repealed or amended where circumstances have changed with respect to any of the facts which were basic to its being made; in such case, a period shall be fixed for modification of the agreements, decisions and concerted practices to which the earlier Regulation applies.

#### *Article 3*

A Regulation pursuant to Article 1 may provide that it shall apply with retroactive effect to agreements, decisions and concerted practices to which, at the date of entry into force of that Regulation, a decision issued with retroactive effect in pursuance of Article 6 of Regulation No 17 would have applied.

#### *Article 4*

1. A Regulation pursuant to Article 1 may provide that the prohibition contained in Article 85 (1) of the Treaty shall not apply, for such period as shall be fixed by that Regulation, to agreements, decisions and concerted practices already in existence on 13 March 1962 which do not satisfy the conditions of Article 85 (3), where:

— within six months from the entry into force of the Regulation, they are so modified as to satisfy the said conditions in accordance with the provisions of the Regulation; and

— the modifications are brought to the notice of the Commission within the time limit fixed by the Regulation.

2. Paragraph 1 shall apply to agreements, decisions and concerted practices which had to be notified before 1 February 1963, in accordance with Article 5 of Regulation No 17, only where they have been so notified before that date.



3. The benefit of the provisions laid down pursuant to paragraph 1 may not be claimed in actions pending at the date of entry into force of a regulation adopted pursuant to Article 1; neither may it be relied on as grounds for claims for damages against third parties.<sup>1,2</sup>

#### *Article 5*

Before making a regulation, the Commission shall publish a draft thereof to enable all persons and organizations concerned to submit their comments within such time limit, being not less than one month, as the Commission shall fix.

#### *Article 6*

1. The Commission shall consult the Advisory Committee on Restrictive Practices and Monopolies:

- (a) before publishing a draft regulation;
- (b) before making a regulation.

2. Paragraphs 5 and 6 of Article 10 of Regulation No 17, relating to consultation with the Advisory Committee, shall apply by analogy, it being understood that joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice convening them.

<sup>1</sup> **Council Regulation (EEC) No 2743/72 of 19 December 1972**

1. The following is inserted at the end of paragraph 1:

'A Regulation adopted pursuant to Article 1 may lay down that the prohibition referred to in Article 85 (1) of the Treaty shall not apply, for the period fixed in the same Regulation, to agreements and concerted practices which existed at the date of accession and which, by virtue of accession, come within the scope of Article 85 and do not fulfil the conditions set out in Article 85 (3).'

2. Paragraph 2 shall be supplemented by the following:

'Paragraph 1 shall be applicable to those agreements and concerted practices which, by virtue of the accession, come within the scope of Article 85 (1) of the Treaty and for which notification before 1 July 1973 is mandatory, in accordance with Articles 5 and 25 of Regulation No 17, only if notification was given before that date.'

<sup>2</sup> **Documents concerning the accession of the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic**

In Article 4:

— paragraph 1 is supplemented by the following:

'The provisions of the preceding subparagraph shall apply in the same way in the case of the accession of the Hellenic Republic, the Kingdom of Spain and of the Portuguese Republic.'

— paragraph 2 is supplemented by the following:

'Paragraph 1 shall not apply to agreements and concerted practices to which Article 85 (1) of the Treaty applies by virtue of the accession of the Kingdom of Spain and of the Portuguese Republic and which must be notified before 1 July 1986, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.'

(OJ L 291, 19.11.1979, p. 99; OJ L 302, 15.11.1985, p. 166).

### *Article 7*

Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case agreements, decisions or concerted practices to which a regulation made pursuant to Article 1 of this Regulation applies have nevertheless certain effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, it may withdraw the benefit of application of that regulation and take a decision in accordance with Article 6 and 8 of Regulation No 17, without any notification under Article 4 (1) of Regulation No 17 being required.

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

**COMMISSION REGULATION (EEC) No 417/85<sup>1</sup> OF 19 DECEMBER 1984**

**on the application of Article 85 (3) of the Treaty to categories of specialization agreements**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices,<sup>2</sup> as last amended by the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation,<sup>3</sup>

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 85 (1) which relate to specialization, including agreements necessary for achieving it.

(2) Agreements on specialization in present or future production may fall within the scope of Article 85 (1).

(3) Agreements on specialization in production generally contribute to improving the production or distribution of goods, because undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. It is likely that, given effective competition, consumers will receive a fair share of the resulting benefit.

(4) Such advantages can arise equally from agreements whereby each participant gives up the manufacture of certain products in favour of another participant and from agreements whereby the participants undertake to manufacture certain products or have them manufactured only jointly.

(5) The Regulation must specify what restrictions of competition may be included in specialization agreements. The restrictions of competition that are permitted in the Regulation in addition to reciprocal obligations to give up manufacture are normally essential for the making and implementation of such agreements. These restrictions are therefore, in general, indispensable for the attainment of the desired advantages for the participating undertakings and consumers. It may be left to the parties to decide which of these provisions they include in their agreements.

<sup>1</sup> OJ L 53, 22.2.1985, p. 1.

<sup>2</sup> OJ L 285, 29.12.1971, p. 46.

<sup>3</sup> OJ C 211, 11.8.1984, p. 2.

(6) The exemption must be limited to agreements which do not give rise to the possibility of eliminating competition in respect of a substantial part of the products in question. The Regulation must therefore apply only as long as the market share and turnover of the participating undertakings do not exceed a certain limit.

(7) It is, however, appropriate to offer undertakings which exceed the turnover limit set in the Regulation a simplified means of obtaining the legal certainty provided by the block exemption. This must allow the Commission to exercise effective supervision as well as simplifying its administration of such agreements.

(8) In order to facilitate the conclusion of long-term specialization agreements, which can have a bearing on the structure of the participating undertakings, it is appropriate to fix the period of validity of the Regulation at 13 years. If the circumstances on the basis of which the Regulation was adopted should change significantly within this period, the Commission will make the necessary amendments.

(9) Agreements, decisions and concerted practices which are automatically exempted pursuant to this Regulation need not be notified. Undertakings may none the less in an individual case request a decision pursuant to Council Regulation No 17,<sup>1</sup> as last amended by the Act of Accession of Greece,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements on specialization whereby, for the duration of the agreement, undertakings accept reciprocal obligations:

- (a) not to manufacture certain products or to have them manufactured, but to leave it to other parties to manufacture the products or have them manufactured; or
- (b) to manufacture certain products or have them manufactured only jointly.

#### *Article 2*

1. Apart from the obligations referred to in Article 1, no restrictions of competition may be imposed on the parties other than:

- (a) an obligation not to conclude with third parties specialization agreements relating to identical products or to products considered by users to be equivalent in view of their characteristics, price and intended use;
- (b) an obligation to procure products which are the subject of the specialization exclusively from another party, a joint undertaking or an undertaking jointly charged with their manufacture, except where they are obtainable on more favourable terms elsewhere

---

<sup>1</sup> OJ 13, 21.2.1962, p. 204/62.

and the other party, the joint undertaking or the undertaking charged with manufacture is not prepared to offer the same terms;

(c) an obligation to grant other parties the exclusive right to distribute products which are the subject of the specialization provided that intermediaries and users can also obtain the products from other suppliers and the parties do not render it difficult for intermediaries or users thus to obtain the products.

2. Article 1 shall also apply where the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

3. Article 1 shall apply notwithstanding that any of the following obligations, in particular, are imposed:

(a) an obligation to supply other parties with products which are the subject of the specialization and in so doing to observe minimum standards of quality;

(b) an obligation to maintain minimum stocks of products which are the subject of the specialization and of replacement parts for them;

(c) an obligation to provide customer and guarantee services for products which are the subject of specialization.

#### *Article 3*

1. Article 1 shall apply only if:

(a) the products which are the subject of the specialization together with the participating undertakings' other products which are considered by users to be equivalent in view of their characteristics, price and intended use do not represent more than 20% of the market for such products in the common market or a substantial part thereof;

(b) the aggregate annual turnover of all the participating undertakings does not exceed ECU 500 million.

2. Article 1 shall continue to apply if the market share referred to in paragraph 1 (a) or the turnover referred to in paragraph 1 (b) is exceeded during any period of two consecutive financial years by not more than one-tenth.

3. Where one of the limits laid down in paragraphs 1 and 2 is exceeded, Article 1 shall continue to apply for a period of six months following the end of the financial year during which it was exceeded.

#### *Article 4*

1. The exemption provided for in Article 1 shall also apply to agreements involving participating undertakings whose aggregate turnover exceeds the limits laid down in Article 3 (1) (b) and (2), on condition that the agreements in question are notified to the

Commission in accordance with the provisions of Commission Regulation No 27<sup>1</sup> and that the Commission does not oppose such exemption within a period of six months.

2. The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date shown on the postmark of the place of posting.

3. Paragraph 1 shall apply only if:

(a) express reference is made to this Article in the notification or in a communication accompanying it; and

(b) the information furnished with the notification is complete and in accordance with the facts.

4. The benefit of paragraph 1 may be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraphs 2 and 3 (b) shall apply *mutatis mutandis*.

5. The Commission may oppose the exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the forwarding to the Member State of the notification referred to in paragraph 1 or of the communication referred to in paragraph 4. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

6. The Commission may withdraw the opposition to the exemption at any time. However, where the opposition was raised at the request of a Member State and this request is maintained, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.

7. If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date of notification.

8. If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

9. If the Commission opposes exemption and the opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

---

<sup>1</sup> OJ 35, 10.5.1962, p. 1118/62. Amended most recently by Regulation (EEC) No 2526/85 of 5 August 1985.

### *Article 5*

1. Information acquired pursuant to Article 4 shall be used only for the purposes of this Regulation.
2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation of a kind that is covered by the obligation of professional secrecy.
3. Paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

### *Article 6*

For the purpose of calculating total annual turnover within the meaning of Article 3 (1) (b), the turnovers achieved during the last financial year by the participating undertakings in respect of all goods and services excluding tax shall be added together. For this purpose, no account shall be taken of dealings between the participating undertakings or between these undertakings and a third undertaking jointly charged with manufacture.

### *Article 7*

1. For the purposes of Article 3 (1) (a) and (b) and Article 6, participating undertakings are:
  - (a) undertakings party to the agreement;
  - (b) undertakings in which a party to the agreement, directly or indirectly:
    - owns more than half the capital or business assets,
    - has the power to exercise more than half the voting rights,
    - has the power to appoint at least half the members of the supervisory board, board of management or bodies legally representing the undertakings, or
    - has the right to manage the affairs;
  - (c) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (b);
  - (d) undertakings in or over which an undertaking referred to in (c) directly or indirectly has the rights or powers listed in (b).
2. Undertakings in which the undertakings referred to in paragraph 1 (a) to (d) directly or indirectly jointly have the rights or powers set out in paragraph 1 (b) shall also be considered to be participating undertakings.

### Article 8

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 2821/71, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has effects which are incompatible with the conditions set out in Article 85 (3) of the Treaty, and in particular where:

- (a) the agreement is not yielding significant results in terms of rationalization or consumers are not receiving a fair share of the resulting benefit; or
- (b) the products which are the subject of the specialization are not subject in the common market or a substantial part thereof to effective competition from identical products or products considered by users to be equivalent in view of their characteristics, price and intended use.

### Article 9<sup>1</sup>

This Regulation shall apply *mutatis mutandis* to decisions of associations of undertakings and concerted practices.

### Article 10

1. This Regulation shall enter into force on 1 March 1985. It shall apply until 31 December 1997.
2. Commission Regulation (EEC) No 3604/82<sup>2</sup> is hereby repealed.

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

---

<sup>1</sup> Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic

The following Article is inserted:

'Article 9 a

The prohibition in Article 85 (1) of the Treaty shall not apply to the specialization agreements which were in existence at the date of the accession of the Kingdom of Spain and of the Portuguese Republic and which, by reason of this accession, fall within the scope of Article 85 (1), if, before 1 July 1986, they are so amended that they comply with the conditions laid down in this Regulation.'

(OJ L 302, 15.11.1985, p. 167).

<sup>2</sup> OJ L 376, 31.12.1982, p. 33.



**COMMISSION REGULATION (EEC) No 418/85<sup>1</sup> OF 19 DECEMBER 1984**

**on the application of Article 85 (3) of the Treaty to categories  
of research and development agreements**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices,<sup>2</sup> as last amended by the Act of Accession of Greece, and in particular Article I thereof,

Having published a draft of this Regulation,<sup>3</sup>

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 85 (1) which have as their object the research and development of products or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding industrial property rights and confidential technical knowledge.

(2) As stated in the Commission's 1968 notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises,<sup>4</sup> agreements on the joint execution of research work or the joint development of the results of the research, up to but not including the stage of industrial application, generally do not fall within the scope of Article 85 (1) of the Treaty. In certain circumstances, however, such as where the parties agree not to carry out other research and development in the same field, thereby forgoing the opportunity of gaining competitive advantages over the other parties, such agreements may fall within Article 85 (1) and should therefore not be excluded from this Regulation.

(3) Agreements providing for both joint research and development and joint exploitation of the results may fall within Article 85 (1) because the parties jointly determine how the products developed are manufactured or the processes developed are applied or how related intellectual property rights or know-how are exploited.

(4) Cooperation in research and development and in the exploitation of the results generally promotes technical and economic progress by increasing the dissemination of technical knowledge between the parties and avoiding duplication of research and develop-

<sup>1</sup> OJ L 53, 22.2.1985, p. 5.

<sup>2</sup> OJ L 285, 19.12.1971, p. 46.

<sup>3</sup> OJ C 16, 21.1.1984, p. 3.

<sup>4</sup> OJ C 75, 29.7.1968, p. 3, corrected by OJ C 84, 28.8.1968, p. 14.

ment work, by stimulating new advances through the exchange of complementary technical knowledge, and by rationalizing the manufacture of the products or application of the processes arising out of the research and development. These aims can be achieved only where the research and development programme and its objectives are clearly defined and each of the parties is given the opportunity of exploiting any of the results of the programme that interest it; where universities or research institutes participate and are not interested in the industrial exploitation of the results, however, it may be agreed that they may use the said results solely for the purpose of further research.

(5) Consumers can generally be expected to benefit from the increased volume and effectiveness of research and development through the introduction of new or improved products or services or the reduction of prices brought about by new or improved processes.

(6) This Regulation must specify the restrictions of competition which may be included in the exempted agreements. The purpose of the permitted restrictions is to concentrate the research activities of the parties in order to improve their chances of success, and to facilitate the introduction of new products and services onto the market. These restrictions are generally necessary to secure the desired benefits for the parties and consumers.

(7) The joint exploitation of results can be considered as the natural consequence of joint research and development. It can take different forms ranging from manufacture to the exploitation of intellectual property rights or know-how that substantially contributes to technical or economic progress. In order to attain the benefits and objectives described above and to justify the restrictions of competition which are exempted, the joint exploitation must relate to products or processes for which the use of the results of the research and development is decisive. Joint exploitation is not therefore justified where it relates to improvements which were not made within the framework of a joint research and development programme but under an agreement having some other principal objective, such as the licensing of intellectual property rights, joint manufacture or specialization, and merely containing ancillary provisions on joint research and development.

(8) The exemption granted under the Regulation must be limited to agreements which do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. In order to guarantee that several independent poles of research can exist in the common market in any economic sector, it is necessary to exclude from the block exemption agreements between competitors whose combined share of the market for products capable of being improved or replaced by the results of the research and development exceeds a certain level at the time the agreement is entered into.

(9) In order to guarantee the maintenance of effective competition during joint exploitation of the results, it is necessary to provide that the block exemption will cease to apply if the parties' combined shares of the market for the products arising out of the joint research and development become too great. However, it should be provided that the exemption will continue to apply, irrespective of the parties' market shares, for a certain period after the commencement of joint exploitation, so as to await stabilization of their market shares, particularly after the introduction of an entirely new product, and to guarantee a minimum period of return on the generally substantial investments involved.

(10) Agreements between undertakings which do not fulfil the market share conditions laid down in the Regulation may, in appropriate cases, be granted an exemption by individual decision, which will in particular take account of world competition and the particular circumstances prevailing in the manufacture of high technology products.

(11) It is desirable to list in the Regulation a number of obligations that are commonly found in research and development agreements but that are normally not restrictive of competition and to provide that, in the event that, because of the particular economic or legal circumstances, they should fall within Article 85 (1), they also would be covered by the exemption. This list is not exhaustive.

(12) The Regulation must specify what provisions may not be included in agreements if these are to benefit from the block exemption by virtue of the fact that such provisions are restrictions falling within Article 85 (1) for which there can be no general presumption that they will lead to the positive effects required by Article 85 (3).

(13) Agreements which are not automatically covered by the exemption because they include provisions that are not expressly exempted by the Regulation and are not expressly excluded from exemption are none the less capable of benefiting from the general presumption of compatibility with Article 85 (3) on which the block exemption is based. It will be possible for the Commission rapidly to establish whether this is the case for a particular agreement. Such an agreement should therefore be deemed to be covered by the exemption provided for in this Regulation where it is notified to the Commission and the Commission does not oppose the application of the exemption within a specified period of time.

(14) Agreements covered by this Regulation may also take advantage of provisions contained in other block exemption Regulations of the Commission, and in particular Regulation (EEC) No 417/85<sup>1</sup> on specialization agreements, Regulation (EEC) No 1983/83<sup>2</sup> on exclusive distribution agreements, Regulation (EEC) No 1984/83,<sup>3</sup> on exclusive purchasing agreements and Regulation (EEC) No 2349/84<sup>4</sup> on patent licensing agreements, if they fulfil the conditions set out in these Regulations. The provisions of the aforementioned Regulations are, however, not applicable in so far as this Regulation contains specific rules.

(15) If individual agreements exempted by this Regulation nevertheless have effects which are incompatible with Article 85 (3), the Commission may withdraw the benefit of the block exemption.

(16) The Regulation should apply with retroactive effect to agreements in existence when the Regulation comes into force where such agreements already fulfil its conditions or are modified to do so. The benefit of these provisions may not be claimed in actions pending at the date of entry into force of this Regulation, nor may it be relied on as grounds for claims for damages against third parties.

---

<sup>1</sup> OJ L 53, 22.2.1985, p. 1.

<sup>2</sup> OJ L 173, 30.6.1983, p. 1.

<sup>3</sup> OJ L 173, 30.6.1983, p. 5.

<sup>4</sup> OJ L 219, 16.8.1984, p. 15.

(17) Since research and development cooperation agreements are often of a long-term nature, especially where the cooperation extends to the exploitation of the results, it is appropriate to fix the period of validity of the Regulation at 13 years. If the circumstances on the basis of which the Regulation was adopted should change significantly within this period, the Commission will make the necessary amendments.

(18) Agreements which are automatically exempted pursuant to this Regulation need not be notified. Undertakings may nevertheless in a particular case request a decision pursuant to Council Regulation No 17,<sup>1</sup> as last amended by the Act of Accession of Greece,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

1. Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements entered into between undertakings for the purpose of:

(a) joint research and development of products or processes and joint exploitation of the results of that research and development;

(b) joint exploitation of the results of research and development of products or processes jointly carried out pursuant to a prior agreement between the same undertakings; or

(c) joint research and development of products or processes excluding joint exploitation of the results, in so far as such agreements fall within the scope of Article 85 (1).

2. For the purposes of this Regulation:

(a) *research and development of products or processes* means the acquisition of technical knowledge and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results;

(b) *contract processes* means processes arising out of the research and development;

(c) *contract products* means products or services arising out of the research and development or manufactured or provided applying the contract processes;

(d) *exploitation of the results* means the manufacture of the contract products or the application of the contract processes or the assignment or licensing of intellectual property rights or the communication of know-how required for such manufacture or application;

(e) *technical knowledge* means technical knowledge which is either protected by an intellectual property right or is secret (know-how).

3. Research and development of the exploitation of the results are carried out jointly where:

(a) the work involved is:

---

<sup>1</sup> OJ 13, 21.2.1962, p. 204/62.

- carried out by a joint team, organization or undertaking,
  - jointly entrusted to a third party, or
  - allocated between the parties by way of specialization in research, development or production;
- (b) the parties collaborate in any way in the assignment or the licensing of intellectual property rights or the communication of know-how, within the meaning of paragraph 2(d), to third parties.

### *Article 2*

The exemption provided for in Article 1 shall apply on condition that:

- (a) the joint research and development work is carried out within the framework of a programme defining the objectives of the work and the field in which it is to be carried out;
- (b) all the parties have access to the results of the work;
- (c) where the agreement provides only for joint research and development, each party is free to exploit the results of the joint research and development and any pre-existing technical knowledge necessary therefor independently;
- (d) the joint exploitation relates only to results which are protected by intellectual property rights or constitute know-how which substantially contributes to technical or economic progress and that the results are decisive for the manufacture of the contract products or the application of the contract processes;
- (e) any joint undertaking or third party charged with manufacture of the contract products is required to supply them only to the parties;
- (f) undertakings charged with manufacture by way of specialization in production are required to fulfil orders for supplies from all the parties.

### *Article 3*

1. Where the parties are not competing manufacturers of products capable of being improved or replaced by the contract products, the exemption provided for in Article 1 shall apply for the duration of the research and development programme and, where the results are jointly exploited, for five years from the time the contract products are first put on the market within the common market.

2. Where two or more of the parties are competing manufacturers within the meaning of paragraph 1, the exemption provided for in Article 1 shall apply for the period specified in paragraph 1 only if, at the time the agreement is entered into, the parties' combined production of the products capable of being improved or replaced by the contract products does not exceed 20% of the market for such products in the common market or a substantial part thereof.

3. After the end of the period referred to in paragraph 1, the exemption provided for in Article 1 shall continue to apply as long as the production of the contract products together with the parties' combined production of other products which are considered by users to be equivalent in view of their characteristics, price and intended use does not exceed 20 % of the total market for such products in the common market or a substantial part thereof. Where contract products are components used by the parties of the manufacture of other products, reference shall be made to the markets for such of those latter products for which the components represent a significant part.

4. The exemption provided for in Article 1 shall continue to apply where the market share referred to in paragraph 3 is exceeded during any period of two consecutive financial years by not more than one tenth.

5. Where market shares referred to in paragraphs 3 and 4 are exceeded, the exemption provided for in Article 1 shall continue to apply for a period of six months following the end of the financial year during which it was exceeded.

#### *Article 4*

1. The exemption provided for in Article 1 shall also apply to the following restrictions of competition imposed on the parties:

(a) an obligation not to carry out independently research and development in the field to which the programme relates or in a closely connected field during the execution of the programme;

(b) an obligation not to enter into agreements with third parties on research and development in the field to which the programme relates or in a closely connected field during the execution of the programme;

(c) an obligation to procure the contract products exclusively from parties, joint organizations or undertakings or third parties, jointly charged with their manufacture;

(d) an obligation not to manufacture the contract products or apply the contract processes in territories reserved for other parties;

(e) an obligation to restrict the manufacture of the contract products or application of the contract processes to one or more technical fields of application, except where two or more of the parties are competitors within the meaning of Article 3 at the time the agreement is entered into;

(f) an obligation not to pursue, for a period of five years from the time the contract products are first put on the market within the common market, an active policy of putting the products on the market in territories reserved for other parties, and in particular not to engage in advertising specifically aimed at such territories or to establish any branch or maintain any distribution depot there for the distribution of the products, provided that users and intermediaries can obtain the contract products from other suppliers and the parties do not render it difficult for intermediaries and users to thus obtain the products;

(g) an obligation on the parties to communicate to each other any experience they may gain in exploiting the results and to grant each other non-exclusive licences for inventions relating to improvements or new applications.

2. The exemption provided for in Article 1 shall also apply where in a particular agreement the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

#### *Article 5*

1. Article 1 shall apply notwithstanding that any of the following obligations, in particular, are imposed on the parties during the currency of the agreement :

(a) an obligation to communicate patented or non-patented technical knowledge necessary for the carrying out of the research and development programme for the exploitation of its results;

(b) an obligation not to use any know-how received from another party for purposes other than carrying out the research and development programme and the exploitation of its results;

(c) an obligation to obtain and maintain in force intellectual property rights for the contract products or processes;

(d) an obligation to preserve the confidentiality of any know-how received or jointly developed under the research and development programme; this obligation may be imposed even after the expiry of the agreement;

(e) an obligation :

(i) to inform other parties of infringements of their intellectual property rights,

(ii) to take legal action against infringers, and

(iii) to assist in any such legal action or share with the other parties in the cost thereof;

(f) an obligation to pay royalties or render services to other parties to compensate for unequal contributions to the joint research and development or unequal exploitation of its results;

(g) an obligation to share royalties received from third parties with other parties;

(h) an obligation to supply other parties with minimum quantities of contract products and to observe minimum standards of quality.

2. In the event that, because of particular circumstances, the obligations referred to in paragraph 1 fall within the scope of Article 85 (1), they also shall be covered by the exemption. The exemption provided for in this paragraph shall also apply where in a particular agreement the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

## *Article 6*

The exemption provided for in Article 1 shall not apply where the parties, by agreement, decision or concerted practice:

- (a) are restricted in their freedom to carry out research and development independently or in cooperation with third parties in a field unconnected with that to which the programme relates or, after its completion, in the field to which the programme relates or in a connected field;
- (b) are prohibited after completion of the research and development programme from challenging the validity of intellectual property rights which the parties hold in the common market and which are relevant to the programme or, after the expiry of the agreement, from challenging the validity of intellectual property rights which the parties hold in the common market and which protect the results of the research and development;
- (c) are restricted as to the quantity of the contract products they may manufacture or sell or as to the number of operations employing the contract process they may carry out;
- (d) are restricted in their determination of prices, components of prices or discounts when selling the contract products to third parties;
- (e) are restricted as to the customers they may serve, without prejudice to Article 4 (1) (e);
- (f) are prohibited from putting the contract products on the market or pursuing an active sales policy for them in territories within the common market that are reserved for other parties after the end of the period referred to in Article 4 (1) (f);
- (g) are prohibited from allowing third parties to manufacture the contract products or apply the contract processes in the absence of joint manufacture;
- (h) are required:
  - to refuse without any objectively justified reason to meet demand from users or dealers established in their respective territories who would market the contract products in other territories within the common market, or
  - to make it difficult for users or dealers to obtain the contract products from other dealers within the common market, and in particular to exercise intellectual property rights or take measures so as to prevent users or dealers from obtaining, or from putting on the market within the common market, products which have been lawfully put on the market within the common market by another party or with its consent.

## *Article 7*

1. The exemption provided for in this Regulation shall also apply to agreements of the kinds described in Article 1 which fulfil the conditions laid down in Articles 2 and 3 and which contain obligations restrictive of competition which are not covered by Articles 4 and 5 and do not fall within the scope of Article 6, on condition that the agreements in question



are notified to the Commission in accordance with the provisions of Commission Regulation No 27<sup>1</sup> and that the Commission does not oppose such exemption within a period of six months.

2. The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date shown on the postmark of the place of posting.

3. Paragraph 1 shall apply only if:

(a) express reference is made to this Article in the notification or in a communication accompanying it, and

(b) the information furnished with the notification is complete and in accordance with the facts.

4. The benefit of paragraph 1 may be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraphs 2 and 3 (b) shall apply *mutatis mutandis*.

5. The Commission may oppose the exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the forwarding to the Member State of the notification referred to in paragraph 1 or of the communication referred to in paragraph 4. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

6. The Commission may withdraw the opposition to the exemption at any time. However, where the opposition was raised at the request of a Member State and this request is maintained, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.

7. If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date of notification.

8. If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

9. If the Commission opposes exemption and the opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

---

<sup>1</sup> OJ 35, 10.5.1962, p. 1118/62. Amended most recently by Regulation (EEC) No 2526/85 of 5 August 1985.

### *Article 8*

1. Information acquired pursuant to Article 7 shall be used only for the purposes of this Regulation.
2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation of a kind that is covered by the obligation of professional secrecy.
3. Paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

### *Article 9*

1. The provisions of this Regulation shall also apply to rights and obligations which the parties create for undertakings connected with them. The market shares held and the actions and measures taken by connected undertakings shall be treated as those of the parties themselves.
2. Connected undertakings for the purposes of this Regulation are:
  - (a) undertakings in which a party to the agreement, directly or indirectly:
    - owns more than half the capital or business assets,
    - has the power to exercise more than half the voting rights,
    - has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertakings, or
    - has the right to manage the affairs;
  - (b) undertakings which directly have in or over a party to the agreement the rights or powers listed in (a);
  - (c) undertakings in or over which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a);
3. Undertakings in which the parties to the agreement or undertakings connected with them jointly have, directly or indirectly, the rights or powers set out in paragraph 2 (a) shall be considered to be connected with each of the parties to the agreement.

### *Article 10*

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 2821/71, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, and in particular where:

- (a) the existence of the agreement substantially restricts the scope for third parties to carry out research and development in the relevant field because of the limited research capacity available elsewhere;
- (b) because of the particular structure of supply, the existence of the agreement substantially restricts the access of third parties to the market for the contract products;
- (c) without any objectively valid reason, the parties do not exploit the results of the joint research and development;
- (d) the contract products are not subject in the whole or a substantial part of the common market to effective competition from identical products or products considered by users as equivalent in view of their characteristics, price and intended use.

#### *Article 11<sup>1</sup>*

1. In the case of agreements notified to the Commission before 1 March 1985, the exemption provided for in Article 1 shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled or, where the agreement does not fall within Article 4 (2) (3) (b) of Regulation No 17, not earlier than the date of notification.
2. In the case of agreements existing on 13 March 1962 and notified to the Commission before 1 February 1963, the exemption shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled.
3. Where agreements which were in existence on 13 March 1962 and which were notified to the Commission before 1 February 1963, or which are covered by Article 4 (2) (3) (b) of Regulation No 17 and were notified to the Commission before 1 January 1967, are amended before 1 September 1985 so as to fulfil the conditions for application of this Regulation, such amendment being communicated to the Commission before 1 October 1985, the prohibition laid down in Article 85 (1) of the Treaty shall not apply in respect of the period prior to the amendment. The communication of amendments shall take effect from the date of their receipt by the Commission. Where the communication is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

---

<sup>1</sup> **Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic**

The following paragraph is added to Article 11:

'6. As regards agreements to which Article 83 of the Treaty applies as a result of the accession of the Kingdom of Spain and of the Portuguese Republic, paragraphs 1 to 3 shall apply except that the relevant dates should be 1 January 1986 instead of 13 March 1962 and 1 July 1986 instead of 1 February 1963, 1 January 1967, 1 March 1985 and 1 September 1985. The amendment made to the agreements in accordance with the provisions of paragraph 3 need not be notified to the Commission.'

(OJ L 302, 15.11.1985, p. 167).

4. In the case of agreements to which Article 85 of the Treaty applies as a result of the accession of the United Kingdom, Ireland and Denmark, paragraphs 1 to 3 shall apply except that the relevant dates shall be 1 January 1973 instead of 13 March 1962 and 1 July 1973 instead of 1 February 1963 and 1 January 1967.

5. In the case of agreements to which Article 85 of the Treaty applies as a result of the accession of Greece, paragraphs 1 to 3 shall apply except that the relevant dates shall be 1 January 1981 instead of 13 March 1962 and 1 July 1981 instead of 1 February 1963 and 1 January 1967.

#### *Article 12*

This Regulation shall apply *mutatis mutandis* to decisions of associations of undertakings.

#### *Article 13*

This Regulation shall enter into force on 1 March 1985.

It shall apply until 31 December 1997.

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

~

#### *4. Franchising agreements*

**COMMISSION REGULATION (EEC) No 4087/88<sup>1</sup> of 30 NOVEMBER 1988**

**on the application of Article 85 (3) of the Treaty to categories of franchise agreements**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to 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,<sup>2</sup> as last amended by the Act of Accession of Spain and Portugal, and in particular Article 1 thereof,

Having published a draft of this Regulation,<sup>3</sup>

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 85 (3) of the Treaty by Regulation to certain categories of bilateral exclusive agreements falling within the scope of Article 85 (1) which either have as their object the exclusive distribution or exclusive purchase of goods, or include restrictions imposed in relation to the assignment or use of industrial property rights.

(2) Franchise agreements consist essentially of licences of industrial or intellectual property rights relating to trade marks or signs and know-how, which can be combined with restrictions relating to supply or purchase of goods.

(3) Several types of franchise can be distinguished according to their object: industrial franchise concerns the manufacturing of goods, distribution franchise concerns the sale of goods, and service franchise concerns the supply of services.

<sup>1</sup> OJ L 359, 28.12.1988, p. 46.

<sup>2</sup> OJ 36, 6.3.1965, p. 533/65.

<sup>3</sup> OJ C 229, 27.8.1987, p. 3.

(4) It is possible on the basis of the experience of the Commission to define categories of franchise agreements which fall under Article 85 (1) but can normally be regarded as satisfying the conditions laid down in Article 85 (3). This is the case for franchise agreements whereby one of the parties supplies goods or provides services to end users. On the other hand, industrial franchise agreements should not be covered by this Regulation. Such agreements, which usually govern relationships between producers, present different characteristics than the other types of franchise. They consist of manufacturing licences based on patents and/or technical know-how, combined with trade-mark licences. Some of them may benefit from other block exemptions if they fulfil the necessary conditions.

(5) This Regulation covers franchise agreements between two undertakings, the franchisor and the franchisee, for the retailing of goods or the provision of services to end users, or a combination of these activities, such as the processing or adaptation of goods to fit specific needs of their customers. It also covers cases where the relationship between franchisor and franchisees is made through a third undertaking, the master franchisee. It does not cover wholesale franchise agreements because of the lack of experience of the Commission in that field.

(6) Franchise agreements as defined in this Regulation can fall under Article 85 (1). They may in particular affect intra-Community trade where they are concluded between undertakings from different Member States or where they form the basis of a network which extends beyond the boundaries of a single Member State.

(7) Franchise agreements as defined in this Regulation normally improve the distribution of goods and/or the provision of services as they give franchisors the possibility of establishing a uniform network with limited investments, which may assist the entry of new competitors on the market, particularly in the case of small and medium-sized undertakings, thus increasing interbrand competition. They also allow independent traders to set up outlets more rapidly and with higher chance of success than if they had to do so without the franchisor's experience and assistance. They have therefore the possibility of competing more efficiently with large distribution undertakings.

(8) As a rule, franchise agreements also allow consumers and other end users a fair share of the resulting benefit, as they combine the advantage of a uniform network with the existence of traders personally interested in the efficient operation of their business. The homogeneity of the network and the constant cooperation between the franchisor and the franchisees ensures a constant quality of the products and services. The favourable effect of franchising on interbrand competition and the fact that consumers are free to deal with any franchisee in the network guarantees that a reasonable part of the resulting benefits will be passed on to the consumers.

(9) This Regulation must define the obligations restrictive of competition which may be included in franchise agreements. This is the case in particular for the granting of an exclusive territory to the franchisees combined with the prohibition on actively seeking customers outside that territory, which allows them to concentrate their efforts on their allotted territory. The same applies to the granting of an exclusive territory to a master franchisee combined with the obligation not to conclude franchise agreements with third

parties outside that territory. Where the franchisees sell or use in the process of providing services, goods manufactured by the franchisor or according to its instructions and or bearing its trade mark, an obligation on the franchisees not to sell, or use in the process of the provision of services, competing goods, makes it possible to establish a coherent network which is identified with the franchised goods. However, this obligation should only be accepted with respect to the goods which form the essential subject-matter of the franchise. It should notably not relate to accessories or spare parts for these goods.

(10) The obligations referred to above thus do not impose restrictions which are not necessary for the attainment of the abovementioned objectives. In particular, the limited territorial protection granted to the franchisees is indispensable to protect their investment.

(11) It is desirable to list in the Regulation a number of obligations that are commonly found in franchise agreements and are normally not restrictive of competition and to provide that if, because of the particular economic or legal circumstances, they fall under Article 85 (1), they are also covered by the exemption. This list, which is not exhaustive, includes in particular clauses which are essential either to preserve the common identity and reputation of the network or to prevent the know-how made available and the assistance given by the franchisor from benefiting competitors.

(12) The Regulation must specify the conditions which must be satisfied for the exemption to apply. To guarantee that competition is not eliminated for a substantial part of the goods which are the subject of the franchise, it is necessary that parallel imports remain possible. Therefore, cross deliveries between franchisees should always be possible. Furthermore, where a franchise network is combined with another distribution system, franchisees should be free to obtain supplies from authorized distributors. To better inform consumers, thereby helping to ensure that they receive a fair share of the resulting benefits, it must be provided that the franchisee shall be obliged to indicate its status as an independent undertaking, by any appropriate means which does not jeopardize the common identity of the franchised network. Furthermore, where a franchise network is combined with another distribution system, franchisees should be free to obtain supplies from authorized distributors. To better inform consumers, thereby helping to ensure that they receive a fair share of the resulting benefits, it must be provided that the franchisee shall be obliged to indicate its status as an independent undertaking, by any appropriate means which does not jeopardize the common identity of the franchised network. Furthermore, where the franchisees have to honour guarantees for the franchisor's goods, this obligation should also apply to goods supplied by the franchisor, other franchisees or other agreed dealers.

(13) The Regulation must also specify restrictions which may not be included in franchise agreements if these are to benefit from the exemption granted by the Regulation, by virtue of the fact that such provisions are restrictions falling under Article 85 (1) for which there is no general presumption that they will lead to the positive effects required by Article 85 (3). This applies in particular to market sharing between competing manufacturers, to clauses unduly limiting the franchisee's choice of supplies or customers, and to cases where the franchisee is restricted in determining its prices. However, the franchisor should be free to recommend prices to the franchisees, where it is not prohibited by national laws and to the



extent that it does not lead to concerted practices for the effective application of these prices.

(14) Agreements which are not automatically covered by the exemption because they contain provisions that are not expressly exempted by the Regulation and not expressly excluded from exemption may nonetheless generally be presumed to be eligible for application of Article 85 (3). It will be possible for the Commission rapidly to establish whether this is the case for a particular agreement. Such agreements should therefore be deemed to be covered by the exemption provided for in this Regulation where they are notified to the Commission and the Commission does not oppose the application of the exemption within a specified period of time.

(15) If individual agreements exempted by this Regulation nevertheless have effects which are incompatible with Article 85 (3), in particular as interpreted by the administrative practice of the Commission and the case-law of the Court of Justice, the Commission may withdraw the benefit of the block exemption. This applies in particular where competition is significantly restricted because of the structure of the relevant market.

(16) Agreements which are automatically exempted pursuant to this Regulation need not be notified. Undertakings may nevertheless in a particular case request a decision pursuant to Council Regulation No 17<sup>1</sup> as last amended by the Act of Accession of Spain and Portugal.

(17) Agreements may benefit from the provisions either of this Regulation or of another Regulation, according to their particular nature and provided that they fulfil the necessary conditions of application. They may not benefit from a combination of the provisions of this Regulation with those of another block exemption Regulation,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

1. Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is thereby declared that Article 85 (1) of the Treaty shall not apply to franchise agreements to which two undertakings are party, which include one or more of the restrictions listed in Article 2.

2. The exemption provided for in paragraph 1 shall also apply to master franchise agreements to which two undertakings are party. Where applicable, the provisions of this Regulation concerning the relationship between franchisor and franchisee shall apply *mutatis mutandis* to the relationship between franchisor and master franchisee and between master franchisee and franchisee.

---

<sup>1</sup> OJ 13, 21.2.1962, p. 204/62.

3. For the purposes of this Regulation :

(a) 'franchise' means a package of industrial or intellectual property rights relating to trade marks, trade names, shop signs, utility models, designs, copyrights, know-how or patents, to be exploited for the resale of goods or the provision of services to end users;

(b) 'franchise agreement' means an agreement whereby one undertaking, the franchisor, grants the other, the franchisee, in exchange for direct or indirect financial consideration, the right to exploit a franchise for the purposes of marketing specified types of goods and/or services; it includes at least obligations relating to :

- the use of a common name or shop sign and a uniform presentation of contract premises and/or means of transport,
- the communication by the franchisor to the franchisee of know-how,
- the continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement;

(c) 'master franchise agreement' means an agreement whereby one undertaking, the franchisor, grants the other, the master franchisee, in exchange of direct or indirect financial consideration, the right to exploit a franchise for the purposes of concluding franchise agreements with third parties, the franchisees;

(d) 'franchisor's goods' means goods produced by the franchisor or according to its instructions, and/or bearing the franchisor's name or trade mark;

(e) 'contract premises' means the premises used for the exploitation of the franchise or, when the franchise is exploited outside those premises, the base from which the franchisee operates the means of transport used for the exploitation of the franchise (contract means of transport);

(f) 'know-how' means a package of non-patented practical information, resulting from experience and testing by the franchisor, which is secret, substantial and identified;

(g) 'secret' means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; it is not limited in the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the franchisor's business;

(h) 'substantial' means that the know-how includes information which is of importance for the sale of goods or the provision of services to end users, and in particular for the presentation of goods for sale, the processing of goods in connection with the provision of services, methods of dealing with customers, and administration and financial management; the know-how must be useful for the franchisee by being capable, at the date of conclusion of the agreement, of improving the competitive position of the franchisee, in particular by improving the franchisee's performance or helping it to enter a new market;

(i) 'identified' means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality; the description of the know-how can either be set out in the franchise agreement or in a separate document or recorded in any other appropriate form.

## *Article 2*

The exemption provided for in Article 1 shall apply to the following restrictions of competition:

- (a) an obligation on the franchisor, in a defined area of the common market, the contract territory, not to:
  - grant the right to exploit all or part of the franchise to third parties,
  - itself exploit the franchise, or itself market the goods or services which are the subject-matter of the franchise under a similar formula,
  - itself supply the franchisor's goods to third parties;
- (b) an obligation on the master franchisee not to conclude franchise agreements with third parties outside its contract territory;
- (c) an obligation on the franchisee to exploit the franchise only from the contract premises;
- (d) an obligation on the franchisee to refrain, outside the contract territory, from seeking customers for the goods or the services which are the subject-matter of the franchise;
- (e) an obligation on the franchisee not to manufacture, sell or use in the course of the provision of services, goods competing with the franchisor's goods which are the subject-matter of the franchise; where the subject-matter of the franchise is the sale or use in the course of the provision of services both certain types of goods and spare parts or accessories therefore, that obligation may not be imposed in respect of these spare parts or accessories.

## *Article 3*

1. Article 1 shall apply notwithstanding the presence of any of the following obligations on the franchisee, in so far as they are necessary to protect the franchisor's industrial or intellectual property rights or to maintain the common identity and reputation of the franchised network:

- (a) to sell, or use in the course of the provision of services, exclusively goods matching minimum objective quality specifications laid down by the franchisor;
- (b) to sell, or use in the course of the provision of services, goods which are manufactured only by the franchisor or by third parties designed by it, where it is impracticable, owing to the nature of the goods which are the subject-matter of the franchise, to apply objective quality specifications;
- (c) not to engage, directly or indirectly, in any similar business in a territory where it would compete with a member of the franchised network, including the franchisor; the franchisee may be held to this obligation after termination of the agreement, for a reasonable period which may not exceed one year, in the territory where it has exploited the franchise;

(d) not to acquire financial interests in the capital of a competing undertaking, which would give the franchisee the power to influence the economic conduct of such undertaking;

(e) to sell the goods which are the subject-matter of the franchise only to end users, to other franchisees and to resellers within other channels of distribution supplied by the manufacturer of these goods or with its consent;

(f) to use its best endeavours to sell the goods or provide the services that are the subject-matter of the franchise; to offer for sale a minimum range of goods, achieve a minimum turnover, plan its orders in advance, keep minimum stocks and provide customer and warranty services;

(g) to pay to the franchisor a specified proportion of its revenue for advertising and itself carry out advertising for the nature of which it shall obtain the franchisor's approval.

2. Article 1 shall apply notwithstanding the presence of any of the following obligations on the franchisee:

(a) not to disclose to third parties the know-how provided by the franchisor; the franchisee may be held to this obligation after termination of the agreement;

(b) to communicate to the franchisor any experience gained in exploiting the franchise and to grant it, and other franchisees, a non-exclusive licence for the know-how resulting from that experience;

(c) to inform the franchisor of infringements of licensed industrial or intellectual property rights, to take legal action against infringers or to assist the franchisor in any legal actions against infringers;

(d) not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise; the franchisee may be held to this obligation after termination of the agreement;

(e) to attend or have its staff attend training courses arranged by the franchisor;

(f) to apply the commercial methods devised by the franchisor, including any subsequent modification thereof, and use the licensed industrial or intellectual property rights;

(g) to comply with the franchisor's standards for the equipment and presentation of the contract premises and/or means of transport;

(h) to allow the franchisor to carry out checks of the contract premises and/or means of transport, including the goods sold and the services provided, and the inventory and accounts of the franchisee;

(i) not without the franchisor's consent to change the location of the contract premises;

(j) not without the franchisor's consent to assign the rights and obligations under the franchise agreement.

3. In the event that, because of particular circumstances, obligations referred to in paragraph 2 fall within the scope of Article 85 (1), they shall also be exempted even if they are not accompanied by any of the obligations exempted by Article 1.

#### *Article 4*

The exemption provided for in Article 1 shall apply on condition that:

- (a) the franchisee is free to obtain the goods that are the subject-matter of the franchise from other franchisees: where such goods are also distributed through another network of authorized distributors, the franchisee must be free to obtain the goods from the latter;
- (b) where the franchisor obliges the franchisee to honour guarantees for the franchisor's goods, that obligation shall apply in respect of such goods supplied by any member of the franchised network or other distributors which give a similar guarantee, in the common market;
- (c) the franchisee is obliged to indicate its status as an independent undertaking; this indication shall however not interfere with the common identity of the franchised network resulting in particular from the common name or shop sign and uniform appearance of the contract premises and/or means of transport.

#### *Article 5*

The exemption granted by Article 1 shall not apply where:

- (a) undertakings producing goods or providing services which are identical or are considered by users as equivalent in view of their characteristics, price and intended use, enter into franchise agreements in respect of such goods or services;
- (b) without prejudice to Article 2 (e) and Article 3 (1) (b), the franchisee is prevented from obtaining supplies of goods of a quality equivalent to those offered by the franchisor;
- (c) without prejudice to Article 2 (e), the franchisee is obliged to sell, or use in the process of providing services, goods manufactured by the franchisor or third parties designated by the franchisor and the franchisor refuses, for reasons other than protecting the franchisor's industrial or intellectual property rights, or maintaining the common identity and reputation of the franchised network, to designate as authorized manufacturers third parties proposed by the franchisee;
- (d) the franchisee is prevented from continuing to use the licensed know-how after termination of the agreement where the know-how has become generally known or easily accessible, other than by breach of an obligation by the franchisee;
- (e) the franchisee is restricted by the franchisor, directly or indirectly, in the determination of sale prices for the goods or services which are the subject-matter of the franchise, without prejudice to the possibility for the franchisor of recommending sale prices;
- (f) the franchisor prohibits the franchisee from challenging the validity of the industrial or intellectual property rights which form part of the franchise, without prejudice to the possibility for the franchisor of terminating the agreement in such a case;
- (g) franchisees are obliged not to supply within the common market the goods or services which are the subject-matter of the franchise to end users because of their place of residence.

## Article 6

1. The exemption provided for in Article 1 shall also apply to franchise agreements which fulfil the conditions laid down in Article 4 and include obligations restrictive of competition which are not covered by Articles 2 and 3 (3) and do not fall within the scope of Article 5, on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation No 27<sup>1</sup> and that the Commission does not oppose such exemption within a period of six months.
2. The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date on the postmark of the place of posting.
3. Paragraph 1 shall apply only if:
  - (a) express reference is made to this Article in the notification or in a communication accompanying it; and
  - (b) the information furnished with the notification is complete and in accordance with the facts.
4. The benefit of paragraph 1 can be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraphs 2 and 3 (b) shall apply *mutatis mutandis*.
5. The Commission may oppose exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the forwarding to the Member State of the notification referred to in paragraph 1 or the communication referred to in paragraph 4. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.
6. The Commission may withdraw its opposition to the exemption at any time. However, where that opposition was raised at the request of a Member State, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.
7. If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date of the notification.
8. If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

---

<sup>1</sup> OJ 35, 10.5.1962, p. 1118/62.

9. If the Commission opposes exemption and its opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

#### *Article 7*

1. Information acquired pursuant to Article 6 shall be used only for the purposes of this Regulation.
2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation of a kind that is covered by the obligation of professional secrecy.
3. Paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

#### *Article 8*

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85 (3) of the EEC Treaty, and in particular where territorial protection is awarded to the franchisee and:

- (a) access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar agreements established by competing manufacturers or distributors;
- (b) the goods or services which are the subject-matter of the franchise do not face, in a substantial part of the common market, effective competition from goods or services which are identical or considered by users as equivalent in view of their characteristics, price and intended use;
- (c) the parties, or one of them, prevent end users, because of their place of residence, from obtaining, directly or through intermediaries, the goods or services which are the subject-matter of the franchise within the common market, or use differences in specifications concerning those goods or services in different Member States, to isolate markets;
- (d) franchisees engage in concerted practices relating to the sale prices of the goods or services which are the subject-matter of the franchise;
- (e) the franchisor uses its right to check the contract premises and means of transport, or refuses its agreement to requests by the franchisee to move the contract premises or assign its rights and obligations under the franchise agreement, for reasons other than protecting the franchisor's industrial or intellectual property rights, maintaining the common identity and reputation of the franchised network or verifying that the franchisee abides by its obligations under the agreement.

*Article 9*

This Regulation shall enter into force on 1 February 1989.

It shall remain in force until 31 December 1999.

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





## 5. *Know-how licensing agreements*

### COMMISSION REGULATION (EEC) No 556/89<sup>1</sup> OF 30 NOVEMBER 1988

#### on the application of Article 85 (3) of the Treaty to certain categories of know-how licensing agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to 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,<sup>2</sup> as last amended by the Act of Accession of Spain and Portugal, and in particular to Article 1 thereof,

Having published a draft of this Regulation,<sup>3</sup>

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

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 85 (3) of the Treaty by Regulation to certain categories of bilateral agreements and concerted practices falling within the scope of Article 85 (1) which include restrictions imposed in relation to the acquisition or use of industrial property rights, in particular patents, utility models, designs or trade marks, or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or application of industrial processes.

The increasing economic importance of non-patented technical information (e.g. descriptions of manufacturing processes, recipes, formulae, designs or drawings), commonly termed 'know-how', the large number of agreements currently being concluded by undertakings including public research facilities solely for the exploitation of such information (so-called 'pure' know-how licensing agreements) and the fact that the transfer of

---

<sup>1</sup> OJ L 61, 4.3.1989, p. 1.

<sup>2</sup> OJ 36, 6.3.1965, p. 533/65.

<sup>3</sup> OJ C 214, 12.8.1987, p. 2.

know-how is, in practice, frequently irreversible make it necessary to provide greater legal certainty with regard to the status of such agreements under the competition rules, thus encouraging the dissemination of technical knowledge in the Community. In the light of experience acquired so far, it is possible to define a category of such know-how licensing agreements covering all or part of the common market which are capable of falling within the scope of Article 85 (1) but which can normally be regarded as satisfying the conditions laid down in Article 85 (3), where the licensed know-how is secret, substantial and identified in any appropriate form ('the know-how'). These definitional requirements are only intended to ensure that the communication of the know-how provides a valid justification for the application of the present Regulation and in particular for the exemption of obligations which are restrictive of competition.

A list of definitions for the purposes of this Regulation is set out in Article 1.

(2) As well as pure know-how agreements, mixed know-how and patent licensing agreements play an increasingly important role in the transfer of technology. It is therefore appropriate to include within the scope of this Regulation mixed agreements which are not exempted by Commission Regulation (EEC) No 2349/84 (Articles 1, 2 or 4)<sup>1</sup> and in particular the following:

- mixed agreements in which the licensed patents are not necessary for the achievement of the objects of the licensed technology containing both patented and non-patented elements; this may be the case where such patents do not afford effective protection against the exploitation of the technology by third parties;
- mixed agreements which, regardless of whether or not the licensed patents are necessary, for the achievement of the objects of the licensed technology, contain obligations which restrict the exploitation of the relevant technology by the licensor or the licensee in Member States without patent protection, in so far and as long as such obligations are based in whole or in part on the exploitation of the licensed know-how and fulfil the other conditions set out in this Regulation.

It is also appropriate to extend the scope of this Regulation to pure or mixed agreements containing ancillary provisions relating to trade marks and other intellectual property rights where there are no obligations restrictive of competition other than those also attached to the know-how and exempted under the present Regulation.

However, such agreements, too, can only be regarded as fulfilling the conditions of Article 85 (3) for the purposes of this Regulation where the licensed technical knowledge is secret, substantial and identified.

(3) The provisions of the present Regulation are not applicable to agreements covered by Regulation (EEC) No 2349/84 on patent licensing agreements.

(4) Where such pure or mixed know-how licensing agreements contain not only obligations relating to territories within the common market but also obligations relating to

---

<sup>1</sup> OJ L 219, 16.8.1984, p. 15.

non-member countries, the presence of the latter does not prevent the present Regulation from applying to the obligations relating to territories within the common market.

However, where know-how licensing agreements for non-member countries or for territories which extend beyond the frontiers of the Community have effects within the common market which may fall within the scope of Article 85 (1), such agreements should be covered by the Regulation to the same extent as would agreements for territories within the common market.

(5) It is not appropriate to include within the scope of the Regulation agreements solely for the purpose of sale, except where the licensor undertakes for a preliminary period before the licensee himself commences production using the licensed technology to supply the contract products for sale by the licensee. Also excluded from the scope of the Regulation are agreements relating to marketing know-how communicated in the context of franchising arrangements<sup>1</sup> or to know-how agreements entered into in connection with arrangements such as joint ventures or patent pools and other arrangements in which the licensing of the know-how occurs in exchange for other licences not related to improvements to or new applications of that know-how, as such agreements pose different problems which cannot at present be dealt with in one Regulation (Article 5).

(6) Exclusive licensing agreements, i.e. agreements in which the licensor undertakes not to exploit the licensed technology in the licensed territory himself or to grant further licences there, may not be in themselves incompatible with Article 85 (1) where they are concerned with the introduction and protection of a new technology in the licensed territory, by reason of the scale of the research which has been undertaken and of the increase in the level of competition, in particular interbrand competition, and in the competitiveness of the undertakings concerned resulting from the dissemination of innovation within the Community.

In so far as agreements of this kind fall in other circumstances within the scope of Article 85 (1), it is appropriate to include them in Article 1, in order that they may also benefit from the exemption.

(7) Both these and the other obligations listed in Article 1 encourage the transfer of technology and thus generally contribute to improving the production of goods and to promoting technical progress, by increasing the number of production facilities and the quality of goods produced in the common market and expanding the possibilities of further development of the licensed technology. This is true, in particular, of an obligation on the licensee to use the licensed product only in the manufacture of its own products, since it gives the licensor an incentive to disseminate the technology in various applications while reserving the separate sale of the licensed product to himself or other licensees. It is also true of obligations on the licensor and on the licensee to refrain not only from active but also from passive competition, in the licensed territory, in the case of the licensor, and in the territories reserved for the licensor or other licensees in the case of the licensee. The users of

---

<sup>1</sup> Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85 (3) of the Treaty to categories of franchising agreements (OJ L 359, 28.12.1988, p. 46).

technologically new or improved products requiring major investment are often not final consumers but intermediate industries which are well informed about prices and alternative sources of supply of the products within the Community. Hence, protection against active competition only would not afford the parties and other licensees the security they needed, especially during the initial period of exploitation of the licensed technology when they would be investing in tooling up and developing a market for the product and in effect increasing demand.

In view of the difficulty of determining the point at which know-how can be said to be no longer secret, and the frequent licensing of a continuous stream of know-how, especially where technology in the industry is rapidly evolving, it is appropriate to limit to a fixed number of years the periods of territorial protection, of the licensor and the licensee from one another, and as between licensees, which are automatically covered by the exemption. Since, as distinguished from patent licences, know-how licences are frequently negotiated after the goods or services incorporating the licensed technology have proved successful on the market, it is appropriate to take for each licensed territory the date of signature of the first licence agreement entered into for that territory by the licensor in respect of the same technology as the starting point for the permitted periods of territorial protection of the licensor and licensee from one another. As to the protection of a licensee from manufacture, use, active or passive sales by other licensees the starting point should be the date of signature of the first licence agreement entered into by the licensor within the EEC. The exemption of the territorial protection shall apply for the whole duration of such allowed periods as long as the know-how remains secret and substantial, irrespective of when the Member States in question joined the Community and provided that each of the licensees, the restricted as well as the protected one, manufactures the licensed product himself or has it manufactured.

Exemption under Article 85 (3) of longer periods of territorial protection, in particular to protect expensive and risky investment or where the parties were not already competitors before the grant of the licence, can only be granted by individual decision. On the other hand, parties are free to extend the term of their agreement to exploit any subsequent improvements and to provide for the payment of additional royalties. However, in such cases, further periods of territorial protection, starting from the date of licensing of the improvements in the EEC, may be allowed only by individual decision, in particular where the improvements to or new applications of the licensed technology are substantial and secret and not of significantly less importance than the technology initially granted or require new expensive and risky investment.

(8) However, it is appropriate in cases where the same technology is protected in some Member States by necessary patents within the meaning of recital 9 of Regulation (EEC) No 2349/84 to provide with respect to those Member States an exemption under this Regulation for the territorial protection of the licensor and licensee from one another and as between licensees against manufacture, use and active sales in each other's territory for the full life of the patents existing in such Member States.

(9) The obligations listed in Article 1 also generally fulfil the other conditions for the application of Article 85 (3). Consumers will as a rule be allowed a fair share of the benefit

resulting from the improvement in the supply of goods on the market. Nor do the obligations impose restrictions which are not indispensable to the attainment of the abovementioned objectives. Finally, competition at the distribution stage is safeguarded by the possibility of parallel imports, which may not be hindered by the parties in any circumstances. The exclusivity obligations covered by the Regulation thus do not normally entail the possibility of eliminating competition in respect of a substantial part of the products in question. This also applies in the case of agreements which grant exclusive licences for a territory covering the whole of the common market where there is the possibility of parallel imports from third countries, or where there are other competing technologies on the market, since then the territorial exclusivity may lead to greater market integration and stimulate Community-wide interbrand competition.

(10) It is desirable to list in the Regulation a number of obligations that are commonly found in know-how licensing agreements but are normally not restrictive of competition and to provide that in the event that because of the particular economic or legal circumstances they should fall within Article 85 (1), they also would be covered by the exemption. This list, in Article 2, is not exhaustive.

(11) The Regulation must also specify what restrictions or provisions may not be included in know-how licensing agreements if these are to benefit from the block exemption. The restrictions, which are listed in Article 3, may fall under the prohibition of Article 85 (1), but in their case there can be no general presumption that they will lead to the positive effects required by Article 85 (3), as would be necessary for the granting of a block exemption, and consequently an exemption can be granted only on an individual basis.

(12) Agreements which are not automatically covered by the exemption because they contain provisions that are not expressly exempted by the Regulation and not expressly excluded from exemption, including those listed in Article 4 (2) of the Regulation, may nonetheless generally be presumed to be eligible for application of the block exemption. It will be possible for the Commission rapidly to establish whether this is the case for a particular agreement. Such agreements should therefore be deemed to be covered by the exemption provided for in this Regulation where they are notified to the Commission and the Commission does not oppose the application of the exemption within a specified period of time.

(13) If individual agreements exempted by this Regulation nevertheless have effects which are incompatible with Article 85 (3), the Commission may withdraw the benefit of the block exemption (Article 7).

(14) The list in Article 2 includes among others obligations on the licensee to cease using the licensed know-how after the termination of the agreement ('post-term use ban') (Article 2 (1) (3)) and to make improvements available to the licensor (grant-back clause) (Article 2 (1) (4)). A post-term use ban may be regarded as a normal feature of the licensing of know-how as otherwise the licensor would be forced to transfer his know-how in perpetuity and this could inhibit the transfer of technology. Moreover, undertakings by the licensee to grant back to the licensor a licence for improvements to the licensed know-how and/or patents are generally not restrictive of competition if the licensee is entitled by the

contract to share in future experience and inventions made by the licensor and the licensee retains the right to disclose experience acquired or grant licences to third parties where to do so would not disclose the licensor's know-how.

On the other hand, a restrictive effect on competition arises where the agreement contains both a post-term use ban and an obligation on the licensee to make his improvements to the know-how available to the licensor, even on a non-exclusive and reciprocal basis, and to allow the licensor to continue using them even after the expiry of the agreement. This is so because in such a case the licensee has no possibility of inducing the licensor to authorize him to continue exploiting the originally licensed know-how, and hence the licensee's own improvements as well, after the expiry of the agreement.

(15) The list in Article 2 also includes an obligation on the licensee to keep paying royalties until the end of the agreement independently of whether or not the licensed know-how has entered into the public domain through the action of third parties (Article 2 (1) (7)). As a rule, parties do not need to be protected against the foreseeable financial consequences of an agreement freely entered into and should therefore not be restricted in their choice of the appropriate means of financing the technology transfer. This applies especially where know-how is concerned since here there can be no question of an abuse of a legal monopoly and, under the legal systems of the Member States, the licensee may have a remedy in an action under the applicable national law. Furthermore, provisions for the payment of royalties in return for the grant of a whole package of technology throughout an agreed reasonable period independently of whether or not the know-how has entered into the public domain, are generally in the interest of the licensee in that they prevent the licensor demanding a high initial payment up front with a view to diminishing his financial exposure in the event of premature disclosure. Parties should be free, in order to facilitate payment by the licensee, to spread the royalty payments for the use of the licensed technology over a period extending beyond the entry of the know-how into the public domain. Moreover, continuous payments should be allowed throughout the term of the agreement in cases where both parties are fully aware that the first sale of the product will necessarily disclose the know-how. Nevertheless, the Commission may, where it was clear from the circumstances that the licensee would have been able and willing to develop the know-how himself in a short period of time, in comparison with which the period of continuing payments is excessively long, withdraw the benefit of the exemption under Article 7 of this Regulation.

Finally, the use of methods of royalties calculation which are unrelated to the exploitation of the licensed technology or the charging of royalties on products whose manufacture at no stage includes the use of any of the licensed patents or secret techniques would render the agreement ineligible for the block exemption (Article 3 (5)). The licensee should also be freed from his obligation to pay royalties, where the know-how becomes publicly known through the action of the licensor. However, the mere sale of the product by the licensor or an undertaking connected with him does not constitute such an action (Article 2 (1) (7) and Article 3 (5)).

(16) An obligation on the licensee to restrict his exploitation of the licensed technology to one or more technical fields of application ('fields of use') or to one or more product

markets is also not caught by Article 85 (1) (Article 2 (1) (8)). This obligation is not restrictive of competition since the licensor can be regarded as having the right to transfer the know-how only for a limited purpose. Such a restriction must however not constitute a disguised means of customer sharing.

(17) Restrictions which give the licensor an unjustified competitive advantage, such as an obligation on the licensee to accept quality specifications, other licences or goods and services that the licensee does not want from the licensor, prevent the block exemption from being applicable. However, this does not apply where it can be shown that the licensee wanted such specifications, licences, goods or services for reasons of his own convenience (Article 3 (3)).

(18) Restrictions whereby the parties share customers within the same technological field of use or the same product market, either by an actual prohibition on supplying certain classes of customer or an obligation with an equivalent effect, would also render the agreement ineligible for the block exemption (Article 3 (6)).

This does not apply to cases where the know-how licence is granted in order to provide a single customer with a second source of supply. In such a case, a prohibition on the licensee from supplying persons other than the customer concerned may be indispensable for the grant of a licence to the second supplier since the purpose of the transaction is not to create an independent supplier in the market. The same applies to limitations on the quantities the licensee may supply to the customer concerned. It is also reasonable to assume that such restrictions contribute to improving the production of goods and to promoting technical progress by furthering the dissemination of technology. However, given the present state of experience of the Commission with respect to such clauses and the risk in particular that they might deprive the second supplier of the possibility of developing his own business in the fields covered by the agreement it is appropriate to make such clauses subject to the opposition procedure (Article 4 (2)).

(19) Besides the clauses already mentioned, the list of restrictions precluding application of the block exemption in Article 3 also includes restrictions regarding the selling prices of the licensed product or the quantities to be manufactured or sold, since they limit the extent to which the licensee can exploit the licensed technology and particularly since quantity restrictions may have the same effect as export bans (Article 3 (7) and (8)). This does not apply where a licence is granted for use of the technology in specific production facilities and where both a specific know-how is communicated for the setting-up, operation and maintenance of these facilities and the licensee is allowed to increase the capacity of the facilities or to set up further facilities for its own use on normal commercial terms. On the other hand, the licensee may lawfully be prevented from using the licensor's specific know-how to set up facilities for third parties, since the purpose of the agreement is not to permit the licensee to give other producers access to the licensor's know-how while it remains secret (Article 2 (1) (12)).

(20) To protect both the licensor and the licensee from being tied into agreements whose duration may be automatically extended beyond their initial term as freely determined by the parties, through a continuous stream of improvements communicated by the licensor, it



is appropriate to exclude agreements with such a clause from the block exemption (Article 3(10)). However, the parties are free at any time to extend their contractual relationship by entering into new agreements concerning new improvements.

(21) The Regulation should apply with retroactive effect to know-how licensing agreements in existence when the Regulation comes into force where such agreements already fulfil the conditions for application of the Regulation or are modified to do so (Articles 8 to 10). Under Article 4(3) of Regulation No 19/65/EEC, the benefit of these provisions may not be claimed in actions pending at the date of entry into force of this Regulation, nor may it be relied on as grounds for claims for damages against third parties.

(22) Agreements which come within the terms of Articles 1 and 2 and which have neither the object nor the effect of restricting competition in any other way need no longer be notified. Nevertheless, undertakings will still have the right to apply in individual cases for negative clearance under Article 2 of Council Regulation No 17<sup>1</sup> or for exemption under Article 85(3),

HAS ADOPTED THIS REGULATION:

*Article 1*

(1) Pursuant to Article 85(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to pure know-how licensing agreements and to mixed know-how and patent licensing agreements not exempted by Regulation (EEC) No 2349/84, including those agreements containing ancillary provisions relating to trademarks or other intellectual property rights, to which only two undertakings are party and which include one or more of the following obligations:

1. an obligation on the licensor not to license other undertakings to exploit the licensed technology in the licensed territory;
2. an obligation on the licensor not to exploit the licensed technology in the licensed territory himself;
3. an obligation on the licensee not to exploit the licensed technology in territories within the common market which are reserved for the licensor;
4. an obligation on the licensee not to manufacture or use the licensed product, or use the licensed process, in territories within the common market which are licensed to other licensees;
5. an obligation on the licensee not to pursue an active policy of putting the licensed product on the market in the territories within the common market which are licensed to other licensees, and in particular not to engage in advertising specifically aimed at those territories or to establish any branch or maintain any distribution depot there;

---

<sup>1</sup> OJ 13, 21.2.1962, p. 204/62.

6. an obligation on the licensee not to put the licensed product on the market in the territories licensed to other licensees within the common market;

7. an obligation on the licensee to use only the licensor's trademark or the get-up determined by the licensor to distinguish the licensed product during the term of the agreement, provided that the licensee is not prevented from identifying himself as the manufacturer of the licensed products;

8. an obligation on the licensee to limit his production of the licensed product to the quantities he requires in manufacturing his own products and to sell the licensed product only as an integral part of or a replacement part for his own products or otherwise in connection with the sale of his own products, provided that such quantities are freely determined by the licensee.

(2) The exemption provided for the obligations referred to in paragraph 1 (1) (2) and (3) shall extend for a period not exceeding for each licensed territory within the EEC 10 years from the date of signature of the first licence agreement entered into by the licensor for that territory in respect of the same technology.

The exemption provided for the obligations referred to in paragraph 1 (4) and (5) shall extend for a period not exceeding 10 years from the date of signature of the first licence agreement entered into by the licensor within the EEC in respect of the same technology.

The exemption provided for the obligation referred to in paragraph 1 (6) shall extend for a period not exceeding five years from the date of the signature of the first licence agreement entered into by the licensor within the EEC in respect of the same technology.

(3) The exemption provided for in paragraph 1 shall apply only where the parties have identified in any appropriate form the initial know-how and any subsequent improvements to it, which become available to the parties and are communicated to the other party pursuant to the terms of the agreement and for the purpose thereof, and only for as long as the know-how remains secret and substantial.

(4) In so far as the obligations referred to in paragraph 1 (1) to (5) concern territories including Member States in which the same technology is protected by necessary patents, the exemption provided for in paragraph 1 shall extend for those Member States as long as the licensed product or process is protected in those Member States by such patents, where the duration of such protection exceeds the periods specified in paragraph 2.

(5) The exemption of restrictions on putting the licensed product on the market resulting from the obligations referred to in paragraph 1 (2), (3), (5) and (6) shall apply only if the licensee manufactures or proposes to manufacture the licensed product himself or has it manufactured by a connected undertaking or by a subcontractor.

(6) The exemption provided for in paragraph 1 shall also apply where in a particular agreement the parties undertake obligations of the types referred to in that paragraph but with a more limited scope than is permitted by the paragraph.

(7) For the purposes of the present Regulation the following terms shall have the following meanings:

1. 'know-how' means a body of technical information that is secret, substantial and identified in any appropriate form;

2. the term 'secret' means that the know-how package as a body or in the precise configuration and assembly of its components is not generally known or easily accessible, so that part of its value consists in the lead-time the licence gains when it is communicated to him; it is not limited to the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the licensor's business;

3. the term 'substantial' means that the know-how includes information which is of importance for the whole or a significant part of (i) a manufacturing process, or (ii) a product or service, or (iii) for the development thereof and excludes information which is trivial. Such know-how must thus be useful, i.e. can reasonably be expected at the date of conclusion of the agreement to be capable of improving the competitive position of the licensee, for example by helping him to enter a new market or giving him an advantage in competition with other manufacturers or providers of services who do not have access to the licensed secret know-how or other comparable secret know-how;

4. the term 'identified' means that the know-how is described or recorded in such a manner as to make it possible to verify that it fulfils the criteria of secrecy and substantiality and to ensure that the licensee is not unduly restricted in his exploitation of his own technology. To be identified the know-how can either be set out in the licence agreement or in a separate document or recorded in any other appropriate form at the latest when the know-how is transferred or shortly thereafter, provided that the separate document or other record can be made available if the need arises;

5. 'pure know-how licensing agreements' are agreements whereby one undertaking, the licensor, agrees to communicate the know-how, with or without an obligation to disclose any subsequent improvements, to another undertaking, the licensee, for exploitation in the licensed territory;

6. 'mixed know-how and patent licensing agreements' are agreements not exempted by Regulation (EEC) No 2349/84 under which a technology containing both non-patented elements and elements that are patented in one or more Member States is licensed;

7. the terms 'licensed know-how' or 'licensed technology' mean the initial and any subsequent know-how communicated directly or indirectly by the licensor to a licensee by means of pure or mixed know-how and patent licensing agreements; however, in the case of mixed know-how and patent licensing agreements the term 'licensed technology' also includes any patents for which a licence is granted besides the communication of the know-how;

8. the term 'the same technology' means the technology as licensed to the first licensee and enhanced by any improvements made thereto subsequently, irrespective of whether and to what extent such improvements are exploited by the parties or the other licensees and irrespective of whether the technology is protected by necessary patents in any Member States;

9. 'the licensed products' are goods or services the production or provision of which requires the use of the licensed technology;
10. the term 'exploitation' refers to any use of the licensed technology in particular in the production, active or passive sales in a territory even if not coupled with manufacture in that territory, or leasing of the licensed products;
11. 'the licensed territory' is the territory covering all or at least part of the common market where the licensee is entitled to exploit the licensed technology;
12. 'territory reserved for the licensor' means territories in which the licensor has not granted any licences and which he has expressly reserved for himself;
13. 'connected undertakings' means:
  - (a) undertakings in which a party to the agreement, directly or indirectly;
    - owns more than half the capital or business assets, or
    - has the power to exercise more than half the voting rights, or
    - has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or
    - has the right to manage the affairs of the undertaking;
  - (b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a);
  - (c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a);
  - (d) undertakings in which the parties to the agreement or undertakings connected with them jointly have the rights or powers listed in (a): such jointly controlled undertakings are considered to be connected with each of the parties to the agreement.

## *Article 2*

- (1) Article 1 shall apply notwithstanding the presence in particular of any of the following obligations, which are generally not restrictive of competition:
  1. an obligation on the licensee not to divulge the know-how communicated by the licensor; the licensee may be held to this obligation after the agreement has expired;
  2. an obligation on the licensee not to grant sublicences or assign the licence;
  3. an obligation on the licensee not to exploit the licensed know-how after termination of the agreement in so far and as long as the know-how is still secret;
  4. an obligation on the licensee to communicate to the licensor any experience gained in exploiting the licensed technology and to grant him a non-exclusive licence in respect of improvements to or new applications of that technology, provided that:
    - (a) the licensee is not prevented during or after the term of the agreement from freely using his own improvements, in so far as these are severable from the licensor's know-how, or licensing them to third parties where licensing to third parties does not disclose the

know-how communicated by the licensor that is still secret; this is without prejudice to an obligation on the licensee to seek the licensor's prior approval to such licensing provided that approval may not be withheld unless there are objectively justifiable reasons to believe that licensing improvements to third parties will disclose the licensor's know-how, and

(b) the licensor has accepted an obligation, whether exclusive or not, to communicate his own improvements to the licensee and his right to use the licensee's improvements which are not severable from the licensed know-how does not extend beyond the date on which the licensee's right to exploit the licensor's know-how comes to an end, except for termination of the agreement for breach by the licensee; this is without prejudice to an obligation on the licensee to give the licensor the option to continue to use the improvements after that date, if at the same time he relinquishes the post-term use ban or agrees, after having had an opportunity to examine the licensee's improvements, to pay appropriate royalties for their use;

5. an obligation on the licensee to observe minimum quality specifications for the licensed product or to procure goods or services from the licensor or from an undertaking designated by the licensor, in so far as such quality specifications, products or services are necessary for:

(a) a technically satisfactory exploitation of the licensed technology, or

(b) for ensuring that the production of the licensee conforms to the quality standards that are respected by the licensor and other licensees,

and to allow the licensor to carry out related checks;

6. obligations:

(a) to inform the licensor of misappropriation of the know-how or of infringements of the licensed patents, or

(b) to take or to assist the licensor in taking legal action against such misappropriation or infringements,

provided that these obligations are without prejudice to the licensee's right to challenge the validity of the licensed patents or to contest the secrecy of the licensed know-how except where he himself has in some way contributed to its disclosure;

7. an obligation on the licensee, in the event of the know-how becoming publicly known other than by action of the licensor, to continue paying until the end of the agreement the royalties in the amounts, for the periods and according to the methods freely determined by the parties, without prejudice to the payment of any additional damages in the event of the know-how becoming publicly known by the action of the licensee in breach of the agreement;

8. an obligation on the licensee to restrict his exploitation of the licensed technology to one or more technical fields of application covered by the licensed technology or to one or more product markets;

9. an obligation on the licensee to pay a minimum royalty or to produce a minimum quantity of the licensed product or to carry out a minimum number of operations exploiting the licensed technology;

10. an obligation on the licensor to grant the licensee any more favourable terms that the licensor may grant to another undertaking after the agreement is entered into;

11. an obligation on the licensee to mark the licensed product with the licensor's name;

12. an obligation on the licensee not to use the licensor's know-how to construct facilities for third parties; this is without prejudice to the right of the licensee to increase the capacity of its facilities or to set up additional facilities for its own use on normal commercial terms, including the payment of additional royalties.

(2) In the event that, because of particular circumstances, the obligations referred to in paragraph 1 fall within the scope of Article 85 (1), they shall also be exempted even if they are not accompanied by any of the obligations exempted by Article 1.

(3) The exemption provided for in paragraph 2 shall also apply where in an agreement the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

### *Article 3*

Articles 1 and 2 (2) shall not apply where :

1. the licensee is prevented from continuing to use the licensed know-how after the termination of the agreement where the know-how has meanwhile become publicly known, other than by the action of the licensee in breach of the agreement;

2. the licensee is obliged either :

(a) to assign in whole or in part to the licensor rights to improvements to or new applications of the licensed technology;

(b) to grant the licensor an exclusive licence for improvements to or new applications of the licensed technology which would prevent the licensee during the currency of the agreement and/or thereafter from using his own improvements in so far as these are severable from the licensor's know-how, or from licensing them to third parties, where such licensing would not disclose the licensor's know-how that is still secret; or

(c) in the case of an agreement which also includes a post-term use ban, to grant back to the licensor, even on a non-exclusive and reciprocal basis, licences for improvements which are not severable from the licensor's know-how, if the licensor's right to use the improvements is of a longer duration than the licensee's right to use the licensor's know-how, except for termination of the agreement for breach by the licensee;

3. the licensee is obliged at the time the agreement is entered into to accept quality specifications or further licences or to procure goods or services which he does not want, unless such licences, quality specifications, goods or services are necessary for a technically satisfactory exploitation of the licensed technology or for ensuring that the production of the licensee conforms to the quality standards that are respected by the licensor and other licensees;

4. the licensee is prohibited from contesting the secrecy of the licensed know-how or from challenging the validity of licensed patents within the common market belonging to the licensor or undertakings connected with him, without prejudice to the right of the licensor to terminate the licensing agreement in the event of such a challenge;

5. the licensee is charged royalties on goods or services which are not entirely or partially produced by means of the licensed technology or for the use of know-how which has become publicly known by the action of the licensor or an undertaking connected with him;

6. one party is restricted within the same technological field of use or within the same product market as to the customers he may serve, in particular by being prohibited from supplying certain classes of uses, employing certain forms of distribution or, with the aim of sharing customers, using certain types of packaging for the products, save as provided in Article 1 (1) (7) and Article 4 (2);

7. the quantity of the licensed products one party may manufacture or sell or the number of operations exploiting the licensed technology he may carry out are subject to limitations, save as provided in Article 1 (1) (8) and Article 4 (2);

8. one party is restricted in the determination of prices, components of prices or discounts for the licensed products;

9. one party is restricted from competing with the other party, with undertakings connected with the other party or with other undertakings within the common market in respect of research and development, production or use of competing products and their distribution, without prejudice to an obligation on the licensee to use his best endeavours to exploit the licensed technology and without prejudice to the right of the licensor to terminate the exclusivity granted to the licensee and cease communicating improvements in the event of the licensee's engaging in any such competing activities and to require the licensee to prove that the licensed know-how is not used for the production of goods and services other than those licensed;

10. the initial duration of the licensing agreement is automatically prolonged by the inclusion in it of any new improvements communicated by the licensor, unless the licensee has the right to refuse such improvements or each party has the right to terminate the agreement at the expiry of the initial term of the agreement and at least every three years thereafter;

11. the licensor is required, albeit in separate agreements, for a period exceeding that permitted under Article 1 (2) not to license other undertakings to exploit the same technology in the licensed territory, or a party is required for periods exceeding those permitted under Articles 1 (2) or 1 (4) not to exploit the same technology in the territory of the other party or of other licensees;

12. one or both of the parties are required :

(a) to refuse without any objectively justified reason to meet demand from users or resellers in their respective territories who would market products in other territories within the common market;

(b) to make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular to exercise intellectual property rights or take measures so as to prevent users or resellers from obtaining outside, or from putting on the market in the licensed territory products which have been lawfully put on the market within the common market by the licensor or with his consent;

or do so as a result of a concerted practice between them.

#### *Article 4*

(1) The exemption provided for in Articles 1 and 2 shall also apply to agreements containing obligations restrictive of competition which are not covered by those Articles and do not fall within the scope of Article 3, on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation No 27<sup>1</sup> and that the Commission does not oppose such exemption within a period of six months.

(2) Paragraph 1 shall in particular apply to an obligation on the licensee to supply only a limited quantity of the licensed product to a particular customer, where the know-how licence is granted at the request of such a customer in order to provide him with a second source of supply within a licensed territory.

This provision shall also apply where the customer is the licensee and the licence, in order to provide a second source of supply, provides for the customer to make licensed products or have them made by a sub-contractor.

(3) The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date shown on the postmark of the place of posting.

(4) Paragraphs 1 and 2 shall apply only if:

(a) express reference is made to this Article in the notification or in a communication accompanying it; and

(b) the information furnished with the notification is complete and in accordance with the facts.

(5) The benefit of paragraphs 1 and 2 may be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraphs 3 and 4 (b) shall apply *mutatis mutandis*.

---

<sup>1</sup> OJ 35, 10.5.1962, p. 1118/62.



(6) The Commission may oppose the exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the transmission to the Member State of the notification referred to in paragraph 1 or of the communication referred to in paragraph 5. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

(7) The Commission may withdraw the opposition to the exemption at any time. However, where the opposition was raised at the request of a Member State and this request is maintained, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.

(8) If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date of notification.

(9) If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

(10) If the Commission opposes exemption and the opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

#### *Article 5*

(1) This Regulation shall not apply to:

1. agreements between members of a patent or know-how pool which relate to the pooled technologies;
2. know-how licensing agreements between competing undertakings which hold interests in a joint venture, or between one of them and the joint venture, if the licensing agreements relate to the activities of the joint venture;
3. agreements under which one party grants the other a know-how licence and the other party, albeit in separate agreements or through connected undertakings, grants the first party a patent, trademark or know-how licence or exclusive sales rights, where the parties are competitors in relation to the products covered by those agreements;
4. agreements including the licensing of intellectual property rights other than patents (in particular trademarks, copyright and design rights) or the licensing of software except where these rights or the software are of assistance in achieving the object of the licensed technology and there are no obligations restrictive of competition other than those also attached to the licensed know-how and exempted under the present Regulation.

(2) However, this Regulation shall apply to reciprocal licences of the types referred to in paragraph 1 (3) where the parties are not subject to any territorial restriction within the common market on the manufacture, use or putting on the market of the products covered by the agreements or on the use of the licensed technologies.

## *Article 6*

This Regulation shall also apply to:

1. pure know-how agreements or mixed agreements where the licensor is not the developer of the know-how or the patentee but is authorized by the developer or the patentee to grant a licence or a sublicense;
2. assignments of know-how or of know-how and patents where the risk associated with exploitation remains with the assignor, in particular where the sum payable in consideration of the assignment is dependent upon the turnover attained by the assignee in respect of products made using the know-how or the patents, the quantity of such products manufactured or the number of operations carried out employing the know-how or the patents;
3. pure know-how agreements or mixed agreements in which rights or obligations of the licensor or the licensee are assumed by undertakings connected with them.

## *Article 7*

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, and in particular where:

1. such effects arise from an arbitration award;
2. the effect of the agreement is to prevent the licensed products from being exposed to effective competition in the licensed territory from identical products or products considered by users as equivalent in view of their characteristics, price and intended use;
3. the licensor does not have the right to terminate the exclusivity granted to the licensee at the latest five years from the date the agreement was entered into and at least annually thereafter if, without legitimate reason, the licensee fails to exploit the licensed technology or to do so adequately;
4. without prejudice to Article 1 (1) (6), the licensee refuses, without objectively valid reason, to meet unsolicited demand from users or resellers in the territory of other licensees;
5. one or both of the parties:
  - (a) without objectively justified reason, refuse to meet demand from users or resellers in their respective territories who would market the products in other territories within the common market; or

(b) make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular where they exercise intellectual property rights or take measures so as to prevent resellers or users from obtaining outside, or from putting on the market in the licensed territory products which have been lawfully put on the market within the common market by the licensor or with his consent;

6. the operation of the post-term use ban referred to in Article 2 (1) (3) prevents the licensee from working an expired patent which can be worked by all other manufacturers;

7. the period for which the licensee is obliged to continue paying royalties after the know-how has become publicly known by the action of third parties, as referred to in Article 2 (1) (7), substantially exceeds the lead time acquired because of the head-start in production and marketing and this obligation is detrimental to competition in the market;

8. the parties were already competitors before the grant of the licence and obligations on the licensee to produce a minimum quantity or to use his best endeavours as referred to in Article 2 (1) (9) and Article 3 (9) have the effect of preventing the licensee from using competing technologies.

#### *Article 8*

(1) As regards agreements existing on 13 March 1962 and notified before 1 February 1963 and agreements, whether notified or not, to which Article 4 (2) (2) (b) of Regulation No 17 applies, the declaration of inapplicability of Article 85 (1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled.

(2) As regards all other agreements notified before this Regulation entered into force, the declaration of inapplicability of Article 85 (1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled, or from the date of notification, whichever is the later.

#### *Article 9*

If agreements existing on 13 March 1962 and notified before 1 February 1963 or agreements to which Article 4 (2) (2) (b) of Regulation No 17 applies and notified before 1 January 1967 are amended before 1 July 1989 so as to fulfil the conditions for application of this Regulation, and if the amendment is communicated to the Commission before 1 October 1989 the prohibition in Article 85 (1) of the Treaty shall not apply in respect of the period prior to the amendment. The communication shall take effect from the time of its receipt by the Commission. Where the communication is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

#### *Article 10*

(1) As regards agreements to which Article 85 of the Treaty applies as a result of the accession of the United Kingdom, Ireland and Denmark, Articles 8 and 9 shall apply except that the relevant dates shall be 1 January 1973 instead of 13 March 1962 and 1 July 1973 instead of 1 February 1963 and 1 January 1967.

(2) As regards agreements to which Article 85 of the Treaty applies as a result of the accession of Greece, Articles 8 and 9 shall apply except that the relevant dates shall be 1 January 1981 instead of 13 March 1962 and 1 July 1981 instead of 1 February 1963 and 1 January 1967.

(3) As regards agreements to which Article 85 of the Treaty applies as a result of the accession of Spain and Portugal, Articles 8 and 9 shall apply except that the relevant dates shall be 1 January 1986 instead of 13 March 1962 and 1 July 1986 instead of 1 February 1963 and 1 January 1967.

#### *Article 11*

(1) Information acquired pursuant to Article 4 shall be used only for the purposes of the Regulation.

(2) The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation of the kind covered by the obligation of professional secrecy.

(3) The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

#### *Article 12*

This Regulation shall enter into force on 1 April 1989.

It shall apply until 31 December 1999.

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



### III — Notices of the Commission

#### Notice on exclusive dealing contracts with commercial agents<sup>1</sup>

I. The Commission considers that contracts made with commercial agents in which those agents undertake, for a specified part of the territory of the common market,

— to negotiate transactions on behalf of an enterprise,

or

— to conclude transactions in the name and on behalf of an enterprise,

or

— to conclude transactions in their own name and on behalf of this enterprise,

do not fall under the prohibition in Article 85 (1) of the Treaty.

It is essential in this case that the contracting party, described as a commercial agent, should, in fact, be such, by the nature of his functions, and that he should neither undertake nor engage in activities proper to an independent trader in the course of commercial operations. The Commission regards as the decisive criterion which distinguishes the commercial agent from the independent trader, the agreement — express or implied — which deals with responsibility for the financial risks bound up with the sale or with the performance of the contract. Thus the Commission's assessment is not governed by the name used to describe the representative. Except for the usual *del credere* guarantee, a commercial agent must not by the nature of his functions assume any risk resulting from the transaction. If he does assume such risks, his function becomes economically akin to that of an independent trader and he must therefore be treated as such for the purposes of the rules of competition. In such a situation, the exclusive dealing contracts must be regarded as agreements made with independent traders.

The Commission considers that there is particular reason to assume that the function performed is that of an independent trader where the contracting party described as a commercial agent:

---

<sup>1</sup> OJ 139, 24.12.1962, p. 2921.

— is required to keep or does in fact keep, as his own property, a considerable stock of the products covered by the contract, or

— is required to organize, maintain or ensure at his own expense a substantial service to customers free of charge, or does in fact organize, maintain or ensure such a service, or

— can determine or does in fact determine prices or terms of business.

II. Unlike the contracts with commercial agents covered here, exclusive dealing contracts with independent traders may well fall within Article 85 (1). In the case of such exclusive contracts the restriction of competition lies either in the limitation of supply, when the vendor undertakes to supply a given product to one purchaser only, or in the limitation of demand, when the purchaser undertakes to obtain a given product from only one vendor. Where there are reciprocal undertakings competition is being restricted by both parties. The question whether a restriction of competition of this nature may affect trade between Member States depends on the circumstances of the particular case.

On the other hand, the Commission takes the view that the test for prohibition under Article 85 (1) is not met by exclusive dealing contracts with commercial agents, since these contracts have neither the object nor the effect of preventing, restricting or distorting competition within the common market. The commercial agent only performs an auxiliary function in the market for goods. In that market he acts on the instructions and in the interest of the enterprise on whose behalf he is operating. Unlike the independent trader, he himself is neither a purchaser nor a vendor, but seeks purchasers or vendors in the interest of the other party to the contract, who is the person doing the buying or selling. In this type of exclusive dealing contract, the selling or buying enterprise does not cease to be a competitor; it merely uses an auxiliary, i.e. the commercial agent, to distribute or acquire products on the market.

The legal status of commercial agents is determined, more or less uniformly, by statute law in most of the Member States and by case-law in others. The characteristic feature which all commercial agents have in common is their function as auxiliaries in the transaction of business. The powers of commercial agents are subject to the civil law provisions of agency. Within the limits of these provisions, the other party to the contract — who is the person selling or buying — is free to decide the product and the territory in respect of which he is willing to give these powers to his agent.

In addition to the competitive situation on the markets where the commercial agent functions as an auxiliary for the other party to the contract, the particular market on which the commercial agents offer their services for the negotiation or conclusion of transactions has to be considered. The obligation assumed by the agent — to work exclusively for one principal for a certain period of time — entails a limitation of supply on that market; the obligation assumed by the other party to the contract — to appoint him sole agent for a given territory — involves a limitation of demand on the market. Nevertheless, the Commission views these restrictions as a result of the special obligation between the commercial agent and his principal to protect each other's interests and therefore considers that they involve no restriction of competition.

The object of this Notice is to give enterprises some indication of the considerations by which the Commission will be guided when interpreting Article 85 (1) of the Treaty and applying it to exclusive dealing contracts with commercial agents. The situation having thus been clarified, it will as a general rule no longer be useful for enterprises to obtain negative clearance for the agreements mentioned, nor will it be necessary to have the legal position established through a Commission decision on an individual case; this also means that notification will no longer be necessary for agreements of this type. This Notice is without prejudice to any interpretation that may be given by other competent authorities and in particular by the courts.



Notice concerning agreements, decisions and concerted practices  
in the field of cooperation between enterprises<sup>1</sup>

Questions are frequently put to the Commission of the European Communities on the attitude it intends to take up, for purposes of implementation of the competition rules contained in the Treaties of Rome and Paris, with regard to cooperation between enterprises.

In this Notice, it endeavours to provide guidance which, though it cannot be exhaustive, may prove useful to enterprises in the correct interpretation, in particular, of Article 85 (1) of the EEC Treaty and Article 65 (1) of the ECSC Treaty.

I. The Commission welcomes cooperation among small and medium-sized enterprises where such cooperation enables them to work more efficiently and increase their productivity and competitiveness on a larger market. While considering that its duty is to facilitate cooperation among small and medium-sized enterprises in particular the Commission recognizes that cooperation among large enterprises, too, can be economically desirable without presenting difficulties from the angle of competition policy.

Article 85 (1) of the Treaty establishing the European Economic Community (EEC Treaty) and Article 65 (1) of the Treaty establishing the European Coal and Steel Community (ECSC Treaty) provide that all agreements, decisions and concerted practices (hereafter referred to as 'agreements') which have as their object or effect the prevention, restriction or distortion of competition within the common market (hereafter referred to as 'restraints of competition') are prohibited as incompatible with the common market; under Article 85 (1) of the EEC Treaty this applies, however, only if such agreements may affect trade between Member States.

The Commission feels that, in the interests of the small and medium-sized enterprises in particular, it should give some indication of the considerations by which it will be guided when interpreting Article 85 (1) of the EEC Treaty and Article 65 (1) of the ECSC Treaty and applying them to certain cooperation arrangements between enterprises, and should indicate which of these arrangements in its opinion do not come under these provisions. This Notice applies to all enterprises, irrespective of their size.

There may also be forms of cooperation between enterprises other than those listed below which are not prohibited by Article 85 (1) of the EEC Treaty or Article 65 (1) of the ECSC Treaty. This applies in particular if the market position of the enterprises cooperating with each other is in the aggregate too weak for the cooperation agreement between them to lead to an appreciable restraint of competition in the common market and — where the agreements fall within the scope of Article 85 of the EEC Treaty — to affect trade between Member States.

It is also pointed out that other forms of cooperation between enterprises or agreements containing additional clauses, to which the rules of competition of the Treaties apply, can

---

<sup>1</sup> OJ C 75, 29.7.1968, p. 3, corrected by OJ C 84, 28.8.1968, p. 14.

be exempted pursuant to Article 85 (3) of the EEC Treaty or be authorized pursuant to Article 65 (2) of the ECSC Treaty.

The Commission intends to clarify rapidly, by means of suitable decisions in individual cases or by general notices, the status of the various forms of cooperation in accordance with the provisions of the Treaties.

No general statement can be made at this stage on the application of Article 86 of the EEC Treaty on the abuse of dominant positions within the common market or in a part of it. The same applies to Article 66 (7) of the ECSC Treaty.

As a result of this Notice, as a general rule, it should no longer be useful for enterprises to obtain negative clearance, as defined by Article 2 of Regulation No 17,<sup>1</sup> for the agreements listed, nor should it be necessary to have the legal position established through a Commission decision on an individual case. This also means that notification with this end in view will no longer be necessary for agreements of this type. However, if it is doubtful whether in an individual case an agreement between enterprises restricts competition or if other forms of cooperation between enterprises which, in the view of the enterprises, do not restrict competition are not listed here, the enterprises are free to apply, where the matter comes under Article 85 (1) of the EEC Treaty, for negative clearance, or to file as a precautionary measure, where Article 65 (1) of the ECSC Treaty is the relevant provision, an application on the basis of Article 65 (2) of that Treaty.

This Notice is without prejudice to any interpretation to be given by the Court of Justice of the European Communities.

II. The Commission takes the view that the following agreements do not restrict competition.

1. *Agreements having as their sole object:*

- (a) An exchange of opinion or experience,
- (b) Joint market research,
- (c) The joint carrying out of comparative studies of enterprises or industries,
- (d) The joint preparation of statistics and calculation models.

Agreements whose sole purpose is the joint procurement of information which the various enterprises need to determine their future market behaviour freely and independently, or the use by each of the enterprises of a joint advisory body, do not have as their object or effect the restriction of competition. But if the freedom of action of the enterprises is restricted or if their market behaviour is coordinated either expressly or through concerted practices, there may be restraint of competition. This is in particular the case where concrete recommendations are made or where conclusions are given such a form that they induce at least some of the participating enterprises to behave in an identical manner on the market.

---

<sup>1</sup> OJ 13, 21.2.1962.

The exchange of information may take place between the enterprises themselves or through a body acting as an intermediary. It is, however, particularly difficult to distinguish between information which has no bearing on competition on the one hand and behaviour in restraint of competition on the other, if there are special bodies which have to register orders, turnover figures, investments and prices, so that it can as a rule not be automatically assumed that Article 85 (1) of the EEC Treaty or Article 65 (1) of the ECSC Treaty do not apply to them. A restraint of competition may occur in particular on an oligopolistic market for homogeneous products.

In the absence of more far-reaching cooperation between the participating enterprises, joint market research and comparative studies of different enterprises and industries to collect information and ascertain facts and market conditions do not in themselves affect competition. Other arrangements of this type, as for instance the joint establishment of economic and structural analyses, so obviously do not affect competition that there is no need to mention them specifically.

Calculation models containing specified rates of calculation must be regarded as recommendations that may lead to restraints of competition.

2. *Agreements having as their sole object :*

- (a) Cooperation in accounting matters,
- (b) Joint provision of credit guarantees,
- (c) Joint debt-collecting associations,
- (d) Joint business or tax consultant agencies.

In such cases, the cooperation involved covers fields that are not concerned with the supply of goods and services or the economic decisions of the enterprises taking part, and thus does not lead to restraints of competition.

Cooperation in accounting matters is neutral from the point of view of competition as it only assists in the technical handling of the accounting work. Nor is the creation of credit guarantee associations affected by the competition rules, since it does not modify the relationship between supply and demand.

Joint debt-collecting associations whose work is not confined to the collection of outstanding payments in line with the intentions and conditions of the participating enterprises, or which fix prices or exert in any other way an influence on price formation, may restrict competition. Application of uniform terms by all participating firms may constitute a concerted practice, and the making of joint price comparisons may have the same result. In this connection, no objection can be raised against the use of standardized printed forms; their use must, however, not be combined with an understanding or tacit agreement on uniform prices, rebates or conditions of sale.

3. *Agreements having as their sole object :*

- (a) The joint implementation of research and development projects,

- (b) The joint placing of research and development contracts,
- (c) The sharing out of research and development projects among participating enterprises.

In the field of research, too, the mere exchange of experience and results serves for information only and does not restrict competition. It therefore need not be mentioned expressly.

Agreements on the joint execution of research work or the joint development of the results of research up to the stage of industrial application do not affect the competitive position of the parties. This also applies to the sharing of research fields and development work if the results are available to all participating enterprises.

However, if the enterprises enter into commitments which restrict their own research and development activity or the utilization of the results of joint work so that they do not have a free hand with regard to their own research and development outside the joint projects, this may constitute an infringement of the Treaties' rules of competition. Where firms do not carry out joint research work, any contractual obligations or concerted practices binding them to refrain from research work of their own either completely or in certain sectors may result in a restraint of competition.

The sharing out of sectors of research without an understanding providing for mutual access to the results is to be regarded as a case of specialization that may restrict competition.

There may also be a restraint of competition if agreements are concluded or corresponding concerted practices applied with regard to the practical exploitation of the results of research and development work carried out jointly, particularly if the participating enterprises undertake or agree to manufacture only the products or types of product developed jointly or to share out future production among themselves.

It is of the essence of joint research that the results should be exploited by the participating enterprises in proportion to their participation. If the participation of certain enterprises is confined to a specific sector of the joint research project or to the provision of only limited financial assistance, there is no restraint of competition — in so far as there has been any joint research at all — if the results of research are made available to these enterprises only in relation with the degree of their participation. There may, however, be a restraint of competition if certain participating enterprises are excluded from exploitation of the results, either entirely or to an extent not commensurate with their participation.

If the granting of licences to third parties is expressly or tacitly excluded, there may be a restraint of competition. However, the fact that research is carried out jointly warrants arrangements binding the enterprises to grant licences to third parties only by common agreement or by majority decision.

For the assessment of the compatibility of the agreement with the rules of competition, the legal status of the joint research and development work is immaterial.

4. *Agreements which have as their sole object the joint use of production facilities and storing and transport equipment*

These forms of cooperation do not restrict competition because they are confined to organization and technical arrangements for the use of the facilities. There may be a restraint of competition if the enterprises involved do not bear the cost of utilization of the installation of equipment themselves or if agreements are concluded or concerted practices applied regarding joint production or the sharing out of production or the establishment or running of a joint enterprise.

5. *Agreements having as their sole object the setting up of consortia for the joint execution of orders, where the participating enterprises do not compete with each other as regards the work to be done or where each of them by itself is unable to execute the orders*

Where enterprises do not compete with each other they cannot restrict competition between them by setting up consortia. This applies in particular to enterprises belonging to different industries but also to firms in the same industry to the extent that their contribution under the consortium consists only of goods or services which cannot be supplied by the other participating enterprises. It is not a question of whether the enterprises compete with each other in other sectors so much as whether in the light of the concrete circumstances of a particular case there is a possibility that in the foreseeable future they may compete with each other with regard to the products or services involved. If the absence of competition between the enterprises and the maintenance of this situation are based on agreements or concerted practices, there may be a restraint of competition.

But even in the case of consortia formed by enterprises which normally compete with each other there is no restraint of competition if the participating enterprises cannot execute a specific order by themselves. This applies in particular if, for lack of experience, specialized knowledge, capacity or financial resources, these enterprises, when working alone, have no chance of success or cannot finish the work within the required time-limit or cannot bear the financial risk.

Nor is there a restraint of competition if it is only by the setting up of a consortium that the enterprises are put in a position to make an attractive offer. There may, however, be a restraint of competition if the enterprises undertake to work solely in the framework of a consortium.

6. *Agreements having as their sole object:*

- (a) Joint selling arrangements,
- (b) Joint after-sales and repairs service, provided the participating enterprises are not competitors with regard to the products or services covered by the agreement.

As already explained in detail under heading 5, cooperation between enterprises cannot restrict competition if the firms are not in competition with each other.

Very often joint selling by small or medium-sized enterprises — even if they are competing with each other — does not entail an appreciable restraint of competition; it is, however,

impossible to establish in this Notice any general criteria or to specify what enterprises may be deemed 'small or medium-sized'.

There is no joint after-sales and repair service if several manufacturers, without acting in concert with each other, arrange for an after-sales and repair service for their products to be provided by an enterprise which is independent of them. In such a case there is no restraint of competition even if the manufacturers are competitors.

*7. Agreements having joint advertising as their sole object*

Joint advertising is designed to draw the buyers' attention to the products of an industry or to a common brand; as such it does not restrict competition between the participating enterprises. However, if the participating enterprises are partly or wholly prevented, by agreements or concerted practices, from themselves advertising or if they are subjected to other restrictions, there may be a restraint of competition.

*8. Agreements having as their sole object the use of a common label to designate a certain quality, where the label is available to all competitors on the same conditions*

Such associations for the joint use of a quality label do not restrict competition if other competitors, whose products objectively meet the stipulated quality requirements, can use the label on the same conditions as the members. Nor do the obligations to accept quality control of the products provided with the label, to issue uniform instructions for use, or to use the label for the products meeting the quality standards constitute restraints of competition. But there may be restraint of competition if the right to use the label is linked to obligations regarding production, marketing, price formation or obligations of any other type, as is for instance the case when the participating enterprises are obliged to manufacture or sell only products of guaranteed quality.

Notice on agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community<sup>1,2</sup>

I

1. The Commission considers it important to facilitate cooperation between undertakings where such cooperation is economically desirable without presenting difficulties from the point of view of competition policy, which is particularly true of cooperation between small and medium-sized undertakings. To this end it published the 'Notice concerning agreements, decisions and concerted practices in the field of cooperation between undertakings'<sup>3</sup> listing a number of agreements that by their nature cannot be regarded as restraints of competition. Furthermore, in the Notice concerning its assessment of certain subcontracting agreements<sup>4</sup> the Commission considered that this type of contract which offers opportunities for development, in particular, to small and medium-sized undertakings is not in itself caught by the prohibition in Article 85 (1). By issuing the present Notice, the Commission is taking a further step towards defining the field of application of Article 85 (1), in order to facilitate cooperation between small and medium-sized undertakings.

2. In the Commission's opinion, agreements whose effects on trade between Member States or on competition are negligible do not fall under the ban on restrictive agreements contained in Article 85 (1). Only those agreements are prohibited which have an appreciable impact on market conditions, in that they appreciably alter the market position, in other words the sales or supply possibilities, of third undertakings and of users.

3. In the present Notice the Commission, by setting quantitative criteria and by explaining their application, has given a sufficiently concrete meaning to the concept 'appreciable' for undertakings to be able to judge for themselves whether the agreements they have concluded with other undertakings, being of minor importance, do not fall under Article 85 (1). The quantitative definition of 'appreciable' given by the Commission is, however, no absolute yardstick; in fact, in individual cases even agreements between undertakings which exceed these limits may still have only a negligible effect on trade between Member States or on competition, and are therefore not caught by Article 85 (1).

4. As a result of this Notice, there should no longer be any point in undertakings obtaining negative clearance, as defined by Article 2 of Council Regulation No 17,<sup>5</sup> for the agreements covered, nor should it be necessary to have the legal position established through Commission decisions in individual cases; notification with this end in view will no longer be necessary for such agreements. However, if it is doubtful whether in an individual

<sup>1</sup> OJ C 231, 12.9.1986, p. 2.

<sup>2</sup> The present Notice replaces the Commission Notice of 19 December 1977, OJ C 313, 29.12.1977, p. 3.

<sup>3</sup> OJ C 75, 29.7.1968, p. 3, corrected by OJ C 84, 28.8.1968, p. 14.

<sup>4</sup> OJ C 1, 3.1.1979, p. 2.

<sup>5</sup> OJ 13, 21.2.1962, p. 204/62.

case an agreement appreciably affects trade between Member States or competition, the undertakings are free to apply for negative clearance or to notify the agreement.

5. In cases covered by the present Notice the Commission, as a general rule, will not open proceedings under Regulation No 17, either upon application or upon its own initiative. Where, due to exceptional circumstances, an agreement which is covered by the present Notice nevertheless falls under Article 85 (1), the Commission will not impose fines. Where undertakings have failed to notify an agreement falling under Article 85 (1) because they wrongly assumed, owing to a mistake in calculating their market share or aggregate turnover, that the agreement was covered by the present Notice, the Commission will not consider imposing fines unless the mistake was due to negligence.

6. This Notice is without prejudice to the competence of national courts to apply Article 85 (1) on the basis of their own jurisdiction, although it constitutes a factor which such courts may take into account when deciding a pending case. It is also without prejudice to any interpretation which may be given by the Court of Justice of the European Communities.

## II

7. The Commission holds the view that agreements between undertakings engaged in the production or distribution of goods or in the provision of services generally do not fall under the prohibition of Article 81 (1) if:

- the goods or services which are the subject of the agreement (hereinafter referred to as 'the contract products') together with the participating undertakings' other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use, do not represent more than 5% of the total market for such goods or services (hereinafter referred to as 'products') in the area of the common market affected by the agreement, and
- the aggregate annual turnover of the participating undertakings does not exceed ECU 200 million.

8. The Commission also holds the view that the said agreements do not fall under the prohibition of Article 85 (1) if the abovementioned market share or turnover is exceeded by not more than one tenth during two successive financial years.

9. For the purposes of this Notice, participating undertakings are:

- (a) undertakings party to the agreement;
- (b) undertakings in which a party to the agreement, directly or indirectly,
  - owns more than half the capital or business assets, or
  - has the power to exercise more than half the voting rights, or
  - has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertakings, or



— has the right to manage the affairs;

(c) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (b);

(d) undertakings in or over which an undertaking referred to in (c) directly or indirectly has the rights or powers listed in (b).

Undertakings in which several undertakings as referred to in (a) to (d) jointly have, directly or indirectly, the rights or powers set out in (b) shall also be considered to be participating undertakings.

10. In order to calculate the market share, it is necessary to determine the relevant market. This implies the definition of the relevant product market and the relevant geographical market.

11. The relevant product market includes besides the contract products any other products which are identical or equivalent to them. This rule applies to the products of the participating undertakings as well as to the market for such products. The products in question must be interchangeable. Whether or not this is the case must be judged from the vantage point of the user, normally taking the characteristics, price and intended use of the goods together. In certain cases, however, products can form a separate market on the basis of their characteristics, their price or their intended use alone. This is true especially where consumer preferences have developed.

12. Where the contract products are components which are incorporated into another product by the participating undertakings, reference should be made to the market for the latter product, provided that the components represent a significant part of it. Where the contract products are components which are sold to third undertakings, reference should be made to the market for the components. In cases where both conditions apply, both markets should be considered separately.

13. The relevant geographical market is the area within the Community in which the agreement produces its effects. This area will be the whole common market where the contract products are regularly bought and sold in all Member States. Where the contract products cannot be bought and sold in a part of the common market, or are bought and sold only in limited quantities or at irregular intervals in such a part, that part should be disregarded.

14. The relevant geographical market will be narrower than the whole common market in particular where:

— the nature and characteristics of the contract product, e.g. high transport costs in relation to the value of the product, restrict its mobility; or

— movement of the contract product within the common market is hindered by barriers to entry to national markets resulting from State intervention, such as quantitative restrictions, severe taxation differentials and non-tariff barriers, e.g. type approvals or safety standard certifications. In such cases the national territory may have to be

considered as the relevant geographical market. However, this will only be justified if the existing barriers to entry cannot be overcome by reasonable effort and at an acceptable cost.

15. Aggregate turnover includes the turnover in all goods and services, excluding tax, achieved during the last financial year by the participating undertaking. In cases where an undertaking has concluded similar agreements with various other undertakings in the relevant market, the turnover of all participating undertakings should be taken together. The aggregate turnover shall not include dealings between participating undertakings.

16. The present Notice shall not apply where in a relevant market competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers.

17. The present Notice is likewise applicable to decisions by associations of undertakings and to concerted practices.

Notice concerning its assessment of certain subcontracting agreements  
in relation to Article 85 (1) of the EEC Treaty<sup>1</sup>

1. In this Notice the Commission of the European Communities gives its view as to subcontracting agreements in relation to Article 85 (1) of the Treaty establishing the European Economic Community. This class of agreement is at the present time a form of work distribution which concerns firms of all sizes, but which offers opportunities for development in particular to small and medium-sized firms.

The Commission considers that agreements under which one firm, called 'the contractor', whether or not in consequence of a prior order from a third party, entrusts to another, called 'the subcontractor', the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf, are not of themselves caught by the prohibition in Article 85 (1).

To carry out certain subcontracting agreements in accordance with the contractor's instructions, the subcontractor may have to make use of particular technology or equipment which the contractor will have to provide. In order to protect the economic value of such technology or equipment, the contractor may wish to restrict their use by the subcontractor to whatever is necessary for the purpose of the agreement. The question arises whether such restrictions are caught by Article 85 (1). They are assessed in this Notice with due regard to the purpose of such agreements, which distinguishes them from ordinary patent and know-how licensing agreements.

2. In the Commission's view, Article 85 (1) does not apply to clauses whereby:

- technology or equipment provided by the contractor may not be used except for the purposes of the subcontracting agreement,
- technology or equipment provided by the contractor may not be made available to third parties,
- the goods, services or work resulting from the use of such technology or equipment may be supplied only to the contractor or performed on his behalf

provided that and in so far as this technology or equipment is necessary to enable the subcontractor, under reasonable conditions to manufacture the goods, to supply the services or to carry out the work in accordance with the contractor's instructions. To that extent the subcontractor is providing goods, services or work in respect of which he is not an independent supplier in the market.

The above proviso is satisfied where performance of the subcontracting agreement makes necessary the use by the subcontractor of:

- industrial property rights of the contractor or at his disposal, in the form of patents, utility models, designs protected by copyright, registered designs or other rights, or

---

<sup>1</sup> OJ C 1, 3.1.1979, p. 2.

- secret knowledge or manufacturing processes (know-how) of the contractor or at his disposal, or
- studies, plans or documents accompanying the information given which have been prepared by or for the contractor, or
- dies, patterns or tools, and accessory equipment that are distinctively the contractor's,

which, even though not covered by industrial property rights nor containing any element of secrecy, permit the manufacture of goods which differ in form, function or composition from other goods manufactured or supplied on the market.

However, the restrictions mentioned above are not justifiable where the subcontractor has at his disposal or could under reasonable conditions obtain access to the technology and equipment needed to produce the goods, provide the services or carry out the work. Generally, this is the case when the contractor provides no more than general information which merely describes the work to be done. In such circumstances the restrictions could deprive the subcontractor of the possibility of developing his own business in the fields covered by the agreement.

3. The following restrictions in connection with the provision of technology by the contractor may in the Commission's view also be imposed by subcontracting agreements without giving grounds for objection under Article 85 (1):

- an undertaking by either of the parties not to reveal manufacturing processes or other know-how of a secret character, or confidential information given by the other party during the negotiation and performance of the agreement, as long as the know-how or information in question has not become public knowledge,
- an undertaking by the subcontractor not to make use, even after expiry of the agreement, of manufacturing processes or other know-how of a secret character received by him during the currency of the agreement, as long as they have not become public knowledge,
- an undertaking by the subcontractor to pass on to the contractor on a non-exclusive basis any technical improvements which he has made during the currency of the agreement, or, where a patentable invention has been discovered by the subcontractor, to grant non-exclusive licences in respect of inventions relating to improvements and new applications of the original invention to the contractor for the term of the patent held by the latter.

This undertaking by the subcontractor may be exclusive in favour of the contractor in so far as improvements and intentions made by the subcontractor during the currency of the agreement are incapable of being used independently of the contractor's secret know-how or patent, since this does not constitute an appreciable restriction of competition.

However, any undertaking by the subcontractor regarding the right to dispose of the results of his own research and development work may restrain competition, where such results are capable of being used independently. In such circumstances, the subcontracting relationship

is not sufficient to displace the ordinary competition rules on the disposal of industrial property rights or secret know-how.

4. Where the subcontractor is authorized by a subcontracting agreement to use a specified trade mark, trade name or get-up, the contractor may at the same time forbid such use by the subcontractor in the case of goods, services or work which are not to be supplied to the contractor.

5. Although this Notice should in general obviate the need for firms to obtain a ruling on the legal position by an individual Commission Decision, it does not affect the right of the firms concerned to apply for negative clearance as defined by Article 2 of Regulation No 17 or to notify the agreement to the Commission under Article 4 (1) of that Regulation.<sup>1</sup>

The 1968 notice on cooperation between enterprises,<sup>2</sup> which lists a number of agreements that by their nature are not to be regarded as anti-competitive, is thus supplemented in the subcontracting field. The Commission also reminds firms that, in order to promote cooperation between small and medium-sized businesses, it has published a Notice concerning agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community.<sup>3</sup>

This Notice is without prejudice to the view that may be taken of subcontracting agreements by the Court of Justice of the European Communities.

---

<sup>1</sup> First Regulation implementing Articles 85 and 86 of the EEC Treaty (OJ 13, 21.2.1962, p. 204/62).

<sup>2</sup> Notice concerning agreements, decisions and concerted practices relating to cooperation between enterprises.  
(OJ C 75, 29.7.1968, p. 3).

<sup>3</sup> OJ C 313, 29.12.1977, p. 3.

Notice concerning imports into the Community of Japanese goods  
falling within the scope of the Rome Treaty<sup>1</sup>

There has recently been an increasing number of instances of Japanese industries preparing, sometimes independently and sometimes after consultation with their European counterparts, measures to restrict imports of Japanese goods into the Community or otherwise regulate quantities, prices, quality or the like.

The Commission considers that it should point out to those concerned that Article 85 (1) of the Treaty establishing the European Economic Community prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

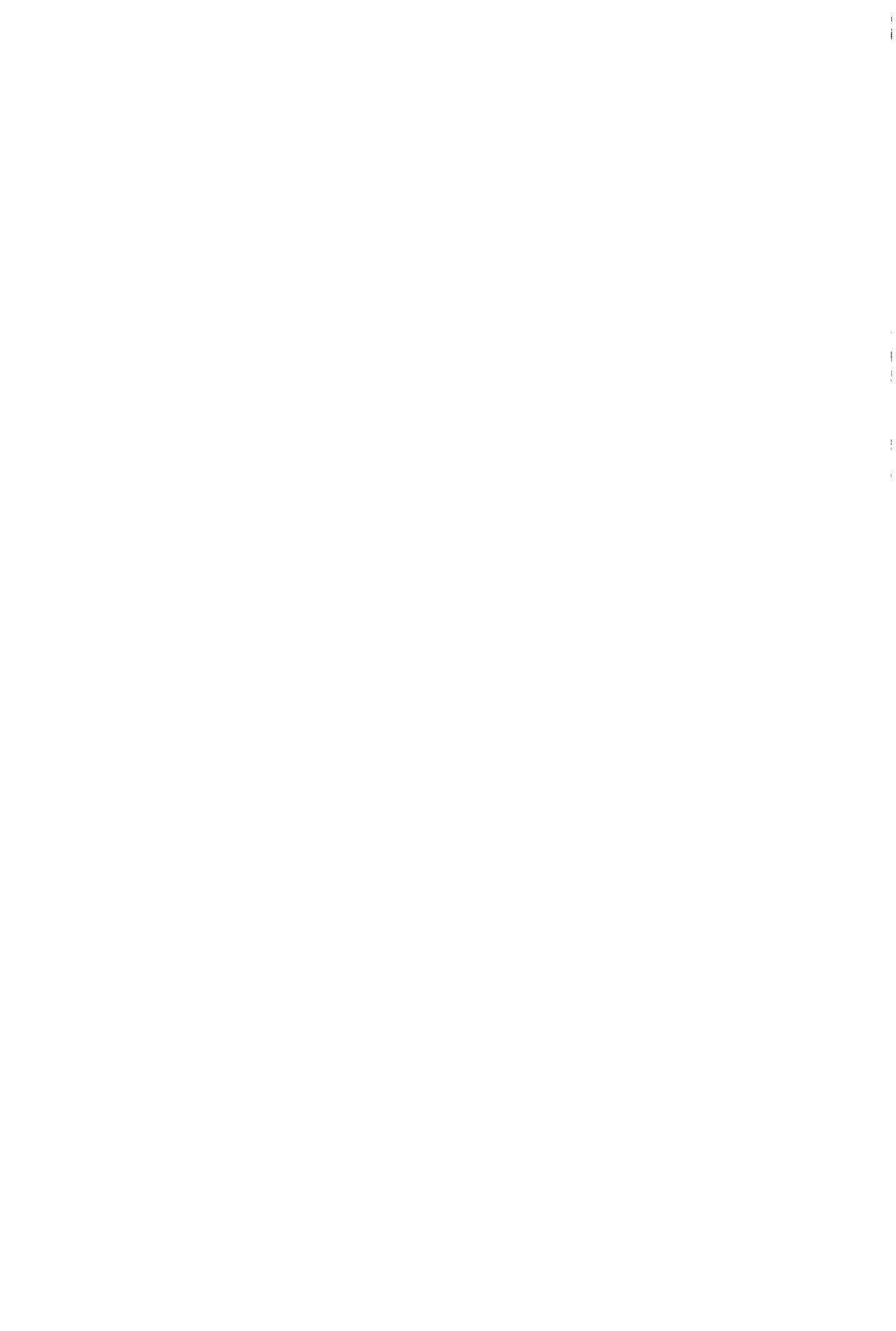
The fact that the headquarters of some or all of the firms involved are located outside the Community does not vitiate this provision if the effects of such agreements, decisions or concerted practices are felt within the common market.

The Commission recommends those concerned to notify such agreements, decisions and practices in good time, as required by Council Regulation No 17 implementing Articles 85 and 86 of the Treaty.<sup>2</sup> The Commission will scrutinize these agreements, decisions and practices to determine whether they are compatible with the Community competition rules. At the same time the Commission will keep a close watch on developments in the industries concerned and propose such appropriate trade policy measures as may be required to resolve this type of problem.

---

<sup>1</sup> OJ C 111, 21.10.1972, p. 13.

<sup>2</sup> OJ 13, 21.2.1962, p. 204/62.



## IV — Regulations in the field of transport

### COUNCIL REGULATION (EEC) No 2988/74 OF 26 NOVEMBER 1974

**concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition<sup>1</sup>**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75, 79 and 87 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,<sup>2</sup>

Having regard to the Opinion of the Economic and Social Committee,<sup>3</sup>

Whereas under the rules of the European Economic Community relating to transport and competition the Commission has the power to impose fines, penalties and periodic penalty payments on undertakings or associations of undertakings which infringe Community law relating to information or investigation, or to the prohibition on discrimination, restrictive practices and abuse of dominant position; whereas those rules make no provision for any limitation period;

Whereas it is necessary in the interests of legal certainty that the principle of limitation be introduced and that implementing rules be laid down; whereas, for the matter to be covered fully, it is necessary that provision for limitation be made not only as regards the power to impose fines or penalties, but also as regards the power to enforce decisions, imposing fines, penalties or periodic penalty payments; whereas such provisions should specify the length of limitation periods, the date on which time starts to run and the events which have the effect of interrupting or suspending the limitation period; whereas in this respect the interests of undertakings and associations of undertakings on the one hand, and the requirements imposed by administrative practice, on the other hand, should be taken into account;

---

<sup>1</sup> OJ L 319, 29.11.1974, p. 1.

<sup>2</sup> OJ C 129, 11.12.1972, p. 10.

<sup>3</sup> OJ C 89, 23.8.1972, p. 21.



Whereas this Regulation must apply to the relevant provisions of Regulation No 11 concerning the abolition of discrimination in transport rates and conditions, in implementation of Article 79<sup>1</sup> of the Treaty<sup>2</sup> establishing the European Economic Community, of Regulation No 17<sup>3</sup>: first Regulation implementing Articles 85 and 86 of the Treaty and of Council Regulation (EEC) No 1017/68<sup>4</sup> of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway; whereas it must also apply to the relevant provisions of future regulations in the fields of European Economic Community law relating to transport and competition,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

##### **Limitation periods in proceedings**

1. The power of the Commission to impose fines or penalties for infringements of the rules of the European Economic Community relating to transport or competition shall be subject to the following limitation periods:

- (a) three years in the case of infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations;
- (b) five years in the case of all other infringements.

2. Time shall begin to run upon the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run the day on which the infringement ceases.

#### *Article 2*

##### **Interruption of the limitation period in proceedings**

1. Any action taken by the Commission, or by any Member State, acting at the request of the Commission, for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period in proceedings. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which have participated in the infringement.

Actions which interrupt the running of the period shall include in particular the following:

<sup>1</sup> OJ C 89, 23.8.1972, p. 21.

<sup>2</sup> OJ 52, 16.8.1960, p. 1121/60.

<sup>3</sup> OJ 13, 21.2.1962, p. 204/62.

<sup>4</sup> OJ L 175, 23.7.1968, p. 1.

- (a) written requests for information by the Commission, or by the competent authority of a Member State acting at the request of the Commission; or a Commission decision requiring the requested information;
  - (b) written authorizations to carry out investigations issued to their officials by the Commission or by the competent authority of any Member State at the request of the Commission; or a Commission decision ordering an investigation;
  - (c) the commencement of proceedings by the Commission;
  - (d) notification of the Commission's statement of objections.
2. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.
3. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty; that period shall be extended by the time during which limitation is suspended pursuant to Article 3.

#### *Article 3*

##### **Suspension of the limitation period in proceedings**

The limitation period in proceedings shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

#### *Article 4*

##### **Limitation period for the enforcement of sanctions**

1. The power of the Commission to enforce decisions imposing fines, penalties, or periodic payments for infringements of the rules of the European Economic Community relating to transport or competition shall be subject to a limitation period of five years.
2. Time shall begin to run on the day on which the decisions becomes final.

#### *Article 5*

##### **Interruption of the limitation period for the enforcement of sanctions**

1. The limitation period for the enforcement of sanctions shall be interrupted:
- (a) by notification of a decision varying the original amount of the fine, penalty or periodic penalty payments or refusing an application for variation;

(b) by any action of the Commission, or of a Member State at the request of the Commission, for the purpose of enforcing payments, of a fine, penalty or periodic penalty payment.

2. Each interruption shall start time running afresh.

#### *Article 6*

##### **Suspension of the limitation period for the enforcement of sanctions**

The limitation period for the enforcement of sanctions shall be suspended for so long as:

(a) time to pay is allowed; or

(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice of the European Communities.

#### *Article 7*

##### **Application to transitional cases**

This Regulation shall also apply in respect of infringements committed before it enters into force.

#### *Article 8*

##### **Entry into force**

This Regulation shall enter into force on 1 January 1975.

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

**COUNCIL REGULATION No 141/62<sup>1</sup> OF 26 NOVEMBER 1962**

**exempting transport from the application of Council Regulation No 17  
amended by Regulations Nos 165/65/EEC<sup>2</sup> and 1002/67/EEC<sup>3</sup>**

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 67 thereof,

Having regard to the first Regulation made in implementation of Articles 85 and 86 of the Treaty (Regulation No 17) of 6 February 1962, as amended by Regulation No 59 of 3 July 1962,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the Economic and Social Committee,

Having regard to the Opinion of the European Parliament,

Whereas, in pursuance of the common transport policy, account being taken of the distinctive features of the transport sector, it may prove necessary to lay down rules governing competition different from those laid down or to be laid down for other sectors of the economy, and whereas Regulation No 17 should not therefore apply to transport;

Whereas, in the light of work in hand on the formulation of a common transport policy, it is possible, as regards transport by rail, road and inland waterway, to envisage the introduction within a foreseeable period of rules on competition; whereas, on the other hand, as regards sea and air transport it is impossible to foresee whether and at what date the Council will adopt appropriate provisions; whereas accordingly a limit to the period during which Regulation No 17 shall not apply can be set only for transport by rail, road and inland waterway;

Whereas the distinctive features of transport make it justifiable to exempt from the application of Regulation No 17 only agreements, decisions and concerted practices directly relating to the provision of transport services,

HAS ADOPTED THIS REGULATION :

*Article 1*

Regulation No 17 shall not apply to agreements, decisions or concerted practices in the transport sector which have as their object or effect the fixing of transport rates and

<sup>1</sup> OJ 124, 28.11.1962, p. 2753 (Special Edition 1959-62, p. 291).

<sup>2</sup> OJ 210, 11.12.1965, p. 314.

<sup>3</sup> OJ 306, 16.12.1967, p. 1.

conditions, the limitation or control of the supply of transport or the sharing of transport markets; nor shall it apply to the abuse of a dominant position, within the meaning of Article 86 of the Treaty, within the transport market.

#### *Article 2*

The Council, taking account of any measures that may be taken in pursuance of the common transport policy, shall adopt appropriate provisions in order to apply rules on competition to transport by rail, road and inland waterway. To this end, the Commission shall, before 30 June 1964, submit proposals to the Council.

#### *Article 3*

Article 1 of this Regulation shall remain in force, as regards transport by rail, road and inland waterway, until 30 June 1968.

#### *Article 4*

This Regulation shall enter into force on 13 March 1962. This provision shall not be invoked against undertakings or associations of undertakings which, before the day following the date of publication of this Regulation in the *Official Journal of the European Communities*, shall have terminated any agreement, decision or concerted practice covered by Article 1.

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

# COUNCIL REGULATION (EEC) No 1017/68<sup>1</sup> OF 19 JULY 1968

## applying rules of competition to transport by rail, road and inland waterway

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75 and 87 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,<sup>2</sup>

Having regard to the Opinion of the Economic and Social Committee,<sup>3</sup>

Whereas Council Regulation No 141<sup>4</sup> exempting transport from the application of Regulation No 17<sup>5</sup> provides that the said Regulation No 17 shall not apply to agreements, decisions and concerted practices in the transport sector the effect of which is to fix transport rates and conditions, to limit or control the supply of transport or to share transport markets, nor to dominant positions, within the meaning of Article 86 of the Treaty, on the transport market;

Whereas, for transport by rail, road and inland waterway, Regulation No 1002/67/EEC<sup>6</sup> provides that such exemption shall not extend beyond 30 June 1968;

Whereas the establishing of rules of competition for transport by rail, road and inland waterway is part of the common transport policy and of general economic policy;

Whereas, when rules of competition for these sectors are being settled, account must be taken of the distinctive features of transport;

Whereas, since the rules of competition for transport derogate from the general rules of competition, it must be made possible for undertakings to ascertain what rules apply in any particular case;

Whereas, with the introduction of a system of rules on competition for transport, it is desirable that such rules should apply equally to the joint financing or acquisition of transport equipment for the joint operation of services by certain groupings of undertakings, and also to certain operations in connection with transport by rail, road or inland waterway of providers of services ancillary to transport;

<sup>1</sup> OJ L 175, 23.7.1968, p. 1 (Special Edition 1968 I, p. 302).

<sup>2</sup> OJ 205, 11.12.1964, p. 3505/64.

<sup>3</sup> OJ 103, 12.6.1965, p. 1792/62.

<sup>4</sup> OJ 124, 28.11.1962, p. 2751/62 (Special Edition 1959-62, p. 291).

<sup>5</sup> OJ 13, 21.2.1962, p. 204/62 (Special Edition 1959-62, p. 87).

<sup>6</sup> OJ 306, 16.12.1967, p. 1.

Whereas, in order to ensure that trade between Member States is not affected or competition within the common market distorted, it is necessary to prohibit in principle for the three modes of transport specified above all agreements between undertakings, decisions of associations of undertakings and concerted practices between undertakings and all instances of abuse of a dominant position within the common market which could have such effects;

Whereas certain types of agreement, decision and concerted practice in the transport sector the object and effect of which is merely to apply technical improvements or to achieve technical cooperation may be exempted from the prohibition on restrictive agreements since they contribute to improving productivity; whereas, in the light of experience following application of this Regulation, the Council may, on a proposal from the Commission, amend the list of such types of agreement;

Whereas, in order that an improvement may be fostered in the sometimes too dispersed structure of the industry in the road and inland waterway sectors there should also be exempted from the prohibition on restrictive agreements those agreements, decisions and concerted practices providing for the creation and operation of groupings of undertakings in these two transport sectors whose object is the carrying on of transport operations, including the joint financing or acquisition of transport equipment for the joint operation of services; whereas such overall exemption can be granted only on condition that the total carrying capacity of a grouping does not exceed a fixed maximum, and that the individual capacity of undertakings belonging to the grouping does not exceed certain limits so fixed as to ensure that no one undertaking can hold a dominant position within the grouping; whereas the Commission must, however, have power to intervene if, in specific cases, such agreements should have effects incompatible with the conditions under which a restrictive agreement may be recognized as lawful, and should constitute an abuse of the exemption; whereas, nevertheless the fact that a grouping has a total carrying capacity greater than the fixed maximum, or cannot claim the overall exemption because of the individual capacity of the undertakings belonging to the grouping, does not in itself prevent such a grouping from constituting a lawful agreement, decision or concerted practice if it satisfies the conditions therefor laid down in this Regulation;

Whereas, where an agreement, decision or concerted practice contributes towards improving the quality of transport services, or towards promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand may be subject to considerable temporal fluctuation, or towards increasing the productivity of undertakings, or towards furthering technical or economic progress, it must be made possible for the prohibition to be declared not to apply, always provided, however, that the agreement, decision or concerted practice takes fair account of the interests of transport users, and neither imposes on the undertakings concerned any restriction not indispensable to the attainment of the above objectives nor makes it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned, having regard to competition from alternative modes of transport;

Whereas it is desirable until such time as the Council, acting in pursuance of the common transport policy, introduces appropriate measures to ensure a stable transport market, and

subject to the condition that the Council shall have found that a state of crisis exists, to authorize, for the market in question, such agreements as are needed in order to reduce disturbance resulting from the structure of the transport market;

Whereas, in respect of transport by rail, road and inland waterway, it is desirable that Member States should neither enact nor maintain in force measures contrary to this Regulation concerning public undertakings or undertakings to which they grant special or exclusive rights; whereas it is also desirable that undertakings entrusted with the operation of services of general economic importance should be subject to the provisions of this Regulation in so far as the application thereof does not obstruct, in law or in fact, the accomplishment of the particular tasks assigned to them, always provided that the development of trade is not thereby affected to such an extent as would be contrary to the interests of the Community; whereas the Commission must have power to see that these principles are applied and to address the appropriate directives or decisions for this purpose to Member States;

Whereas the detailed rules for application of the basic principles of this Regulation must be so drawn that they not only ensure effective supervision while simplifying administration as far as possible but also meet the needs of undertakings for certainty in the law;

Whereas it is for the undertakings themselves, in the first instance, to judge whether the predominant effects of their agreements, decisions or concerted practices are the restriction of competition or the economic benefits acceptable as justification for such restriction and to decide accordingly, on their own responsibility, as to the illegality or legality of such agreements, decisions or concerted practices;

Whereas, therefore, undertakings should be allowed to conclude or operate agreements without declaring them; whereas this exposes such agreements to the risk of being declared void with retroactive effect should they be examined following a complaint or on the Commission's own initiative, but does not prevent their being retroactively declared lawful in the event of such subsequent examination;

Whereas, however, undertakings may, in certain cases, desire the assistance of the competent authorities to ensure that their agreements, decisions or concerted practices are in conformity with the rules applicable; whereas for this purpose there should be made available to undertakings a procedure whereby they may submit applications to the Commission and a summary of each such application is published in the *Official Journal of the European Communities*, enabling any interested third parties to submit their comments on the agreement in question; whereas, in the absence of any complaint from Member States or interested third parties and unless the Commission notifies applicants, within a fixed time limit, that there are serious doubts as to the legality of the agreement in question, that agreement should be deemed exempt from the prohibition for the time already elapsed and for a further period of three years;

Whereas, in view of the exceptional nature of agreements needed in order to reduce disturbances resulting from the structure of the transport market, once the Council has found that a state of crisis exists, undertakings wishing to obtain authorization for such an



agreement should be required to notify it to the Commission; whereas authorization by the Commission should have effect only from the date when it is decided to grant it; whereas the period of validity of such authorization should not exceed three years from the finding of a state of crisis by the Council; whereas renewal of the decision should depend upon renewal of the finding of a state of crisis by the Council; whereas, in any event, the authorization should cease to be valid not later than six months from the bringing into operation by the Council of appropriate measures to ensure the stability of the transport market to which the agreement relates;

Whereas, in order to secure uniform application within the common market of the rules of competition for transport, rules must be made under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the measures required for the application of such rules of competition;

Whereas for this purpose the Commission must have the cooperation of the competent authorities of the Member States and be empowered throughout the common market to request such information and to carry out such investigations as are necessary to bring to light any agreement, decision or concerted practice prohibited under this Regulation, or any abuse of a dominant position prohibited under this Regulation;

Whereas, if, on the application of the Regulation to a specific case, a Member State is of the opinion that a question of principle concerning the common transport policy is involved, it should be possible for such questions of principle to be examined by the Council; whereas it should be possible for any general questions raised by the implementation of the competition policy in the transport sector to be referred to the Council; whereas a procedure must be provided for which ensures that any decision to apply the Regulation in a specific case will be taken by the Commission only after the questions of principle have been examined by the Council, and in the light of the policy guidelines that emerge from that examination;

Whereas, in order to carry out its duty of ensuring that the provisions of this Regulation are applied, the Commission must be empowered to address to undertakings or associations of undertakings recommendations and decisions for the purpose of bringing to an end infringements of the provisions of this Regulation prohibiting certain agreements, decisions or practices;

Whereas compliance with the prohibitions laid down in this Regulation and the fulfilment of obligations imposed on undertakings and associations of undertakings under this Regulation must be enforceable by means of fines and periodic penalty payments;

Whereas undertakings concerned must be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision must be given the opportunity of submitting their comments beforehand, and it must be ensured that wide publicity is given to decisions taken;

Whereas it is desirable to confer upon the Court of Justice, pursuant to Article 172, unlimited jurisdiction in respect of decisions under which the Commission imposes fines or periodic penalty payments;

Whereas it is expedient to postpone for six months, as regards agreements, decisions and concerted practices in existence at the date of publication of this Regulation in the *Official Journal of the European Communities*, the entry into force of the prohibition laid down in the Regulation, in order to make it easier for undertakings to adjust their operations so as to conform to its provisions;

Whereas, following discussions with the third countries signatories to the Revised Convention for the Navigation of the Rhine, and within an appropriate period of time from the conclusion of those discussions, this Regulation as a whole should be amended as necessary in the light of the obligations arising out of the Revised Convention for the Navigation of the Rhine;

Whereas the Regulation should be amended as necessary in the light of the experience gained over a three-year period; whereas it will in particular be desirable to consider whether, in the light of the development of the common transport policy over that period, the scope of the Regulation should be extended to agreements, decisions and concerted practices, and to instances of abuse of a dominant position, not affecting trade between Member States,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

##### **Basic provision**

The provisions of this Regulation shall, in the field of transport by rail, road and inland waterway, apply both to all agreements, decisions and concerted practices which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets, the application of technical improvements or technical cooperation, or the joint financing or acquisition of transport equipment or supplies where such operations are directly related to the provision of transport services and are necessary for the joint operation of services by grouping within the meaning of Article 4 of road or inland waterway transport undertakings, and to the abuse of a dominant position on the transport market. These provisions shall apply also to operations of providers of services ancillary to transport which have any of the objects or effects listed above.

#### *Article 2<sup>1</sup>*

##### **Prohibition of restrictive practices**

Subject to the provisions of Articles 3 to 6, the following shall be prohibited as incompatible with the common market, no prior decision to that effect being required: all agreements

---

<sup>1</sup> Documents concerning the accession 'with regard to the UK the prohibition imposed by Art. 2 of this Regulation shall apply from 1 July 1973 to agreements, decisions and concerted practices in existence at the date of accession which come within the field of application of this prohibition as a result of accession'.

between undertakings, decisions by associations of undertakings and concerted practices liable to affect trade between Member States which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which :

- (a) directly or indirectly fix transport rates and conditions or any other trading conditions;
- (b) limit or control the supply of transport, markets, technical development or investment;
- (c) share transport markets;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of additional obligations which, by their nature or according to commercial usage, have no connection with the provision of transport services.

### *Article 3*

#### **Exception for technical agreements**

1. The prohibition laid down in Article 2 shall not apply to agreements, decisions or concerted practices the object and effect of which is to apply technical improvements or to achieve technical cooperation by means of:

- (a) the standardization of equipment, transport supplies, vehicles or fixed installations;
- (b) the exchange or pooling, for the purpose of operating transport services, of staff, equipment, vehicles or fixed installations;
- (c) the organization and execution of successive, complementary, substitute or combined transport operations, and the fixing and application of inclusive rates and conditions for such operations, including special competitive rates;
- (d) the use, for journeys by a single mode of transport, of the routes which are most rational from the operational point of view;
- (e) the coordination of transport timetables for connecting routes;
- (f) the grouping of single consignments;
- (g) the establishment of uniform rules as to the structure of tariffs and their conditions of application, provided such rules do not lay down transport rates and conditions.

2. The Commission shall, where appropriate, submit proposals to the Council with a view to extending or reducing the list in paragraph 1.

#### *Article 4*

##### **Exemption for groups of small and medium-sized undertakings**

1. The agreements, decisions and concerted practices referred to in Article 2 shall be exempt from the prohibition in that Article where their purpose is:

- the constitution and operation of groupings of road or inland waterway transport undertakings with a view to carrying on transport activities;
- the joint financing or acquisition of transport equipment or supplies, where these operations are directly related to the provision of transport services and are necessary for the joint operations of the aforesaid groupings;

always provided that the total carrying capacity of any grouping does not exceed:

- 10 000 tonnes in the case of road transport,
- 500 000 tonnes in the case of transport by inland waterway.

The individual capacity of each undertaking belonging to a grouping shall not exceed 1 000 tonnes in the case of road transport or 50 000 tonnes in the case of transport by inland waterway.

2. If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 5 and which constitute an abuse of the exemption from the provisions of Article 2, undertakings or associations of undertakings may be required to make such effects cease.

#### *Article 5*

##### **Non-applicability of the prohibition**

The prohibition in Article 2 may be declared inapplicable with retroactive effect to:

- any agreement or category of agreement between undertakings,
- any decision or category of decision of an association of undertakings, or
- any concerted practice or category of concerted practice which contributes towards:
  - improving the quality of transport services; or
  - promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation; or
  - increasing the productivity of undertakings; or
  - furthering technical or economic progress;

and at the same time takes fair account of the interests of transport users and neither:

- (a) imposes on the transport undertakings concerned any restriction not essential to the attainment of the above objectives; nor
- (b) makes it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned.

### *Article 6*

#### **Agreements intended to reduce disturbances resulting from the structure of the transport market**

1. Until such time as the Council, acting in pursuance of the common transport policy, introduces appropriate measures to ensure a stable transport market, the prohibition laid down in Article 2 may be declared inapplicable to any agreement, decision or concerted practice which tends to reduce disturbances on the market in question.
2. A decision not to apply the prohibition laid down in Article 2, made in accordance with the procedure laid down in Article 14, may not be taken until the Council, either acting by a qualified majority or, where any Member State considers that the conditions set out in Article 75 (3) of the Treaty are satisfied, acting unanimously, has found on the basis of a report by the Commission, that a state of crisis exists in all or part of a transport market.
3. Without prejudice to the provisions of paragraph 2, the prohibition in Article 2 may be declared inapplicable only where:
  - (a) the agreement, decision or concerted practice in question does not impose upon the undertakings concerned any restriction not indispensable to the reduction of disturbances; and
  - (b) does not make it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned.

### *Article 7*

#### **Invalidity of agreements and decisions**

Any agreement or decision prohibited under the foregoing provisions shall be automatically void.

### *Article 8*

#### **Prohibition of abuse of dominant positions**

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as trade between Member States may be affected thereby.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair transport rates or conditions;
- (b) limiting the supply of transport, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the provision of transport services.

#### *Article 9*

##### **Public undertakings**

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the provisions of the foregoing Articles.
2. Undertakings entrusted with the operation of services of general economic importance shall be subject to the provisions of the foregoing Articles, in so far as the application thereof does not obstruct, in law or in fact, the accomplishment of the particular task assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
3. The Commission shall see that the provisions of this Article are applied and shall, where necessary, address appropriate directives or decisions to Member States.

#### *Article 10*

##### **Procedures on complaint or on the Commission's own initiative**

Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate any infringement of the provisions of Article 2 or Article 8 or to enforce Article 4 (2).

Complaints may be submitted by :

- (a) Member States;
- (b) natural or legal persons who claim a legitimate interest.

#### *Article 11*

##### **Result of procedures on complaint or on the Commission's own initiative**

1. Where the Commission finds that there has been an infringement of Article 2 or Article 8, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under the preceding subparagraph, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

2. Paragraph 1 shall apply also to cases falling within Article 4 (2).

3. If the Commission, acting on a complaint received, concludes that on the evidence before it there are no grounds for intervention under Article 2, Article 4 (2) or Article 8 in respect of any agreement, decision or concerted practice, it shall issue a decision rejecting the complaint as unfounded.

4. If the Commission, whether acting on a complaint received or on its own initiative, concludes that an agreement, decision or concerted practice satisfies the provisions both of Article 2 and of Article 5, it shall issue a decision applying Article 5. Such decision shall indicate the date from which it is to take effect. This date may be prior to that of the decision.

#### *Article 12*

#### **Application of Article 5 — objections**

1. Undertakings and associations of undertakings which seek application of Article 5 in respect of agreements, decisions and concerted practices falling within the provisions of Article 2 to which they are parties may submit applications to the Commission.

2. If the Commission judges an application admissible and is in possession of all the available evidence, and no action under Article 10 has been taken against the agreement, decision or concerted practice in question, then it shall publish as soon as possible in the *Official Journal of the European Communities* a summary of the application and invite all interested third parties to submit their comments to the Commission within 30 days. Such publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

3. Unless the Commission notifies applicants, within 90 days from the date of such publication in the *Official Journal of the European Communities*, that there are serious doubts as to the applicability of Article 5, the agreement, decision or concerted practice shall be deemed exempt, in so far as it conforms with the description given in the application, from the prohibition for the time already elapsed and for a maximum of three years from the date of publication in the *Official Journal of the European Communities*.

If the Commission finds, after expiry of the 90-day time limit, but before expiry of the three-year period, that the conditions for applying Article 5 are not satisfied, it shall issue a decision declaring that the prohibition in Article 2 is applicable. Such decision may be retroactive where the parties concerned have given inaccurate information or where they abuse the exemption from the provisions of Article 2.

4. If, within the 90-day time limit, the Commission notifies applicants as referred to in the first subparagraph of paragraph 3, it shall examine whether the provisions of Article 2 and of Article 5 are satisfied.

If it finds that the provisions of Article 2 and of Article 5 are satisfied it shall issue a decision applying Article 5. The decision shall indicate the date from which it is to take effect. This date may be prior to that of the application.

### *Article 13*

#### **Duration and revocation of decisions applying Article 5**

1. Any decision applying Article 5 taken under Article 11 (4) or under the second subparagraph of Article 12 (4) shall indicate the period for which it is to be valid; normally such period shall not be less than six years. Conditions and obligations may be attached to the decision.
2. The decision may be renewed if the conditions for applying Article 5 continue to be satisfied.
3. The Commission may revoke or amend its decision or prohibit specified acts by the parties:
  - (a) where there has been a change in any of the facts which were basic to the making of the decision;
  - (b) where the parties commit a breach of any obligation attached to the decision;
  - (c) where the decision is based on incorrect information or was induced by deceit;
  - (d) where the parties abuse the exemption from the provisions of Article 2 granted to them by the decision.

In cases falling within (b), (c) or (d), the decision may be revoked with retroactive effect.

### *Article 14*

#### **Decisions applying Article 6**

1. Any agreement, decision or concerted practice covered by Article 2 in respect of which the parties seek application of Article 6 shall be notified to the Commission.
2. Any decision by the Commission to apply Article 5 shall have effect only from the date of its adoption. It shall state the period for which it is to be valid. Such period shall not exceed three years from the finding of a state of crisis by the Council provided for in Article 6 (2).
3. Such decision may be renewed by the Commission if the Council again finds, acting under the procedure provided for in Article 6 (2), that there is a state of crisis and if the other conditions laid down in Article 6 continue to be satisfied.
4. Conditions and obligations may be attached to the decision.



5. The decision of the Commission shall cease to have effect not later than six months from the coming into operation of the measures referred to in Article 6 (1).
6. The provisions of Article 13 (3) shall apply.

#### *Article 15*

##### **Powers**

Subject to review of its decision by the Court of Justice, the Commission shall have sole power:

- to impose obligations pursuant to Article 4 (2);
- to issue decisions pursuant to Articles 5 and 6.

The authorities of the Member States shall retain the power to decide whether any case falls within the provisions of Article 2 or Article 8, until such time as the Commission has initiated a procedure with a view to formulating a decision in the case in question or has sent notification as provided for in the first subparagraph of Article 12 (3).

#### *Article 16*

##### **Liaison with the authorities of the Member States**

1. The Commission shall carry out the procedures provided for in this Regulation in close and constant liaison with the competent authorities of the Member States; these authorities shall have the right to express their views on such procedures.
2. The Commission shall immediately forward to the competent authorities of the Member States copies of the complaints and applications, and of the most important documents sent to it or which it sends out in the course of such procedures.
3. An Advisory Committee on Restrictive Practices and Monopolies in the Transport Industry shall be consulted prior to the taking of any decision following upon a procedure under Article 10 or of any decision under the second subparagraph of Article 12 (3), or under the second subparagraph of paragraph 4 of the same Article, or under paragraph 2 or paragraph 3 of Article 14. The Advisory Committee shall also be consulted prior to adoption of the implementing provisions provided for in Article 29.
4. The Advisory Committee shall be composed of officials competent in the matter of restrictive practices and monopolies in transport. Each Member State shall appoint two officials to represent it, each of whom, if prevented from attending, may be replaced by some other official.
5. Consultation shall take place at a joint meeting convened by the Commission; such meeting shall be held not earlier than 14 days after dispatch of the notice convening it. This

notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

#### *Article 17*

##### **Consideration by the Council of questions of principle concerning the common transport policy raised in connection with specific cases**

1. The Commission shall not give a decision in respect of which consultation as laid down in Article 16 is compulsory until after the expiry of 20 days from the date on which the Advisory Committee has delivered its Opinion.

2. Before the expiry of the period specified in paragraph 1, any Member State may request that the Council be convened to examine with the Commission any question of principle concerning the common transport policy which such Member State considers to be involved in the particular case for decision.

The Council shall meet within 30 days from the request by the Member State concerned for the sole purpose of considering such questions of principle.

The Commission shall not give its decision until after the Council meeting.

3. Further, the Council may at any time, at the request of a Member State or of the Commission, consider general questions raised by the implementation of the competition policy in the transport sector.

4. In all cases where the Council is asked to meet to consider under paragraph 2 questions of principle or under paragraph 3 general questions, the Commission shall, for the purposes of this Regulation, take into account the policy guidelines which emerge from that meeting.

#### *Article 18*

##### **Inquiries into transport sectors**

1. If trends in transport, fluctuations in or inflexibility of transport rates, or other circumstances, suggest that competition in transport is being restricted or distorted within the common market in a specific geographical area, or over one or more transport links, or in respect of the carriage of passengers or goods belonging to one or more specific categories, the Commission may decide to conduct a general inquiry into the sector concerned, in the course of which it may request transport undertakings in that sector to

supply the information and documentation necessary for giving effect to the principles formulated in Articles 2 to 8.

2. When making inquiries pursuant to paragraph 1, the Commission shall also request undertakings or groups of undertakings whose size suggests that they occupy a dominant position within the common market or a substantial part thereof to supply such particulars of the structure of the undertakings and of their behaviour as are requisite to an appraisal of their position in the light of the provisions of Article 8.

3. Article 16 (2) to (6) and Articles 17, 19, 20 and 21 shall apply.

#### *Article 19*

#### **Requests for information**

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertakings is situated.

3. In its request, the Commission shall state the legal basis and the purpose of the request, and also the penalties provided for in Article 22 (1) (b) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the person authorized to represent them by law or by their constitution, shall be bound to supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 22 (1) (b) and Article 23 (1) (c), and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

## Article 20

### Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 21 (1), or which it has ordered by decision pursuant to Article 21 (3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such authorization shall specify the subject matter and purpose of the investigation.
2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, the officials of the Commission may assist the officials of such authority in carrying out their duties.

## Article 21<sup>1,2</sup>

### Investigating powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To this end the officials authorized by the Commission are empowered:
  - (a) to examine the books and other business records;
  - (b) to take copies of or extracts from the books and business records;
  - (c) to ask for oral explanations on the spot;
  - (d) to enter any premises, land and vehicles of undertakings.
2. The officials of the Commission authorized for the purpose of these investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 22 (1) (c) in cases where production of the required books or other business records is incomplete.

In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorized officials.

---

<sup>1</sup> **Documents concerning the accession** (OJ L 73, 27.3.1972, p. 138)

The following is inserted at the end of the second sentence of Article 21 (6):

'New Member States shall take the measures referred to in Art. 21 (6) within six months from the date of accession after consulting the Commission.'

<sup>2</sup> **Documents concerning the accession of the Hellenic Republic**

OJ L 291, 19.11.1979, p. 92.

The following sentence is added to Article 21 (6):

'The Hellenic Republic shall, after consultation with the Commission, take the necessary measures to this end within a period of six months following accession.'

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject-matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 22 (1) (c) and Article 23 (1) (d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made, may at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end before 1 January 1970.

## *Article 22*

### **Fines**

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 units of account where, intentionally or negligently:

(a) they supply incorrect or misleading information in an application pursuant to Article 12 or in a notification pursuant to Article 14; or

(b) they supply incorrect information in response to a request made pursuant to Article 18 or to Article 19 (3) or (5), or do not supply information within the time limit fixed by a decision taken under Article 19 (5); or

(c) they produce the required books or other business records in incomplete form during investigations under Article 20 or Article 21, or refuse to submit to an investigation ordered by decision issued in implementation of Article 21 (3).

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 10 to 1 million units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently:

(a) they infringe Article 2 or Article 8; or

(b) they commit a breach of any obligation imposed pursuant to Article 13 (1) or Article 14 (4).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

3. Article 16 (3) to (6) and Article 17 shall apply.
4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal-law nature.

#### *Article 23*

##### **Periodic penalty payments**

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1 000 units of account per day, calculated from the date appointed by the decision, in order to compel them:

- (a) to put end to an infringement of Article 2 or Article 8 of this Regulation, the termination of which it has ordered pursuant to Article 11 or to comply with an obligation imposed pursuant to Article 4 (2);
- (b) to refrain from any act prohibited under Article 13 (3);
- (c) to supply complete and correct information which it has requested by decision taken pursuant to Article 19 (5);
- (d) to submit to an investigation which it has ordered by decision taken pursuant to Article 21 (3).

2. Where the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision.

3. Article 16 (3) to (6) and Article 17 shall apply.

#### *Article 24*

##### **Review by the Court of Justice**

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

#### *Article 25*

##### **Unit of account**

For the purpose of applying Articles 23 to 24 the unit of account shall be that adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

*Article 26*

**Hearing of the parties and of third persons**

1. Before taking decisions as provided for in Articles 11, 12 (3), second subparagraph, and 12 (4), 13 (3), 14 (2) and (3), 22 and 23, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.
2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons where they show a sufficient interest shall be granted.
3. Where the Commission intends to give negative clearance pursuant to Article 5 or Article 6, it shall publish a summary of the relevant agreement, decision or concerted practice and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

*Article 27*

**Professional secrecy**

1. Information acquired as a result of the application of Articles 18, 19, 20 and 21 shall be used only for the purpose of the relevant request or investigation.
2. Without prejudice to the provisions of Articles 26 and 28, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.
3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

*Article 28*

**Publication of decisions**

1. The Commission shall publish the decisions which it takes pursuant to Articles 11, 12 (3), second subparagraph, 12 (4), 13 (3) and 14 (2) and (3).
2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

#### Article 29

##### **Implementing provisions**

The Commission shall have power to adopt implementing provisions concerning the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12, notifications pursuant to Article 14 (1) and the hearings provided for in Article 26 (1) and (2).

#### Article 30

##### **Entry into force, existing agreements**

1. This Regulation shall enter into force on 1 July 1968.
2. Notwithstanding the provisions of paragraph 1, Article 8 shall enter into force on the day following the publication of this Regulation in the *Official Journal of the European Communities*.
3. The prohibition in Article 2 shall apply from 1 January 1969 to all agreements, decisions and concerted practices falling within Article 2 which were in existence at the date of entry into force of this Regulation or which came into being between that date and the date of publication of this Regulation in the *Official Journal of the European Communities*.
4. Paragraph 3 shall not be invoked against undertakings or associations of undertakings which, before the day following publication of this Regulation in the *Official Journal of the European Communities*, shall have terminated any agreements, decisions or concerted practices to which they are party.

#### Article 31

##### **Review of the Regulation**

1. Within six months of the conclusion of discussions with the third countries signatories to the Revised Convention for the Navigation of the Rhine, the Council, on a proposal from the Commission, shall make any amendments to this Regulation which may prove necessary in the light of the obligations arising out of the Revised Convention for the Navigation of the Rhine.
2. The Commission shall submit to the Council, before 1 January 1971, a general report on the operation of this Regulation and, before 1 July 1971, a proposal for a Regulation to make the necessary amendments to this Regulation.

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



**COMMISSION REGULATION (EEC) No 1629/69<sup>1</sup> OF 8 AUGUST 1969**

**on the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and notifications pursuant to Article 14 (1) of Council Regulation (EEC) No 1017/68 of 19 July 1968**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75, 87 and 155 thereof,

Having regard to Article 29 of Regulation (EEC) No 1017/68<sup>2</sup> of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway,

Having regard to the Opinion of the Advisory Committee on Restrictive Practices and Monopolies in the field of transport,

Whereas, pursuant to Article 29 of Regulation (EEC) No 1017/68, the Commission is authorized to adopt implementing provisions concerning the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and notifications pursuant to Article 14 (1) of that Regulation;

Whereas the complaints may make it easier for the Commission to take action for infringement of the provisions of Regulation (EEC) No 1017/68; whereas it would consequently seem appropriate to make the procedure for submitting complaints as simple as possible; whereas it is appropriate, therefore, to provide for complaints to be submitted in one written copy, the use of forms being left to the discretion of the complainants;

Whereas the submission of the applications and notifications may have important legal consequences for each undertaking which is a party to an agreement, decision or concerted practice; whereas each undertaking should, therefore, have the right to submit such applications or notifications to the Commission; whereas, on the other hand, if an undertaking makes use of that right, it must so inform the other undertakings which are parties to the agreement, decision or concerted practice, in order that they may protect their interests;

Whereas it is for the undertakings and associations of undertakings to inform the Commission of the facts and circumstances in support of the applications submitted in accordance with Article 12 and the notifications provided for in Article 14 (1);

Whereas it is desirable to prescribe that forms be used for applications and notifications in order, in the interest of all concerned, to simplify and speed up examination thereof by the competent departments,

---

<sup>1</sup> OJ L 209, 21.8.1969, p. 1 (with Forms I-III); (Special Edition 1962 II, p. 371).

<sup>2</sup> OJ L 175, 23.7.1968, p. 1; (Special Edition 1968 I, p. 302).

HAS ADOPTED THIS REGULATION :

*Article 1*

**Complaints**

1. Complaints pursuant to Article 10 of Regulation (EEC) No 1017/68 shall be submitted in writing in one of the official languages of the Community; they may be submitted on Form I shown in the Annex.
2. When representatives of undertakings, of associations of undertakings, or of natural or legal persons sign such complaints, they shall produce written proof that they are authorized to act.

*Article 2*

**Persons entitled to submit applications and notifications**

1. Any undertaking which is party to agreements, decisions or practices of the kind described in Article 2 of Regulation (EEC) No 1017/68 may submit an application under Article 12 or a notification under Article 14 (1) of Regulation (EEC) No 1017/68. Where the application or notification is submitted by some, but not all, of the undertakings concerned, they shall give notice to the others.
2. Where applications or notifications under Articles 12 and 14 (1) of Regulation (EEC) No 1017/68 are signed by representatives of undertakings, of associations of undertakings, or of natural or legal persons, such representatives shall produce written proof that they are authorized to act.
3. Where a joint application or notification is submitted, a joint representative shall be appointed.

*Article 3*

**Submission of applications and notifications**

1. Applications pursuant to Article 12 of Regulation (EEC) No 1017/68 shall be submitted on Form II shown in the Annex.
2. Notifications pursuant to Article 14 (1) of Regulation (EEC) No 1017/68 shall be submitted on Form II shown in the Annex.
3. Several participating undertakings may submit an application or notification on a single form.

4. Applications and notifications shall contain the information requested in the forms.
5. Eight copies of each application or notification and of the supporting documents shall be submitted to the Commission.
6. The supporting documents shall be either originals or copies. Copies must be certified as true copies of the original.
7. Applications and notifications shall be in one of the official languages of the Community. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages, a translation in one of the official languages shall be attached.

*Article 4*

**Entry into force**

This Regulation shall enter into force on the day following 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.

**COMMISSION REGULATION (EEC) No 1630/69<sup>1</sup> OF 8 AUGUST 1969**

**on the hearings provided for in Article 26 (1) and (2) of Council Regulation (EEC)  
No 1017/68 of 19 July 1968**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75, 87 and 155 thereof,

Having regard to Article 29 of Council Regulation (EEC) No 1017/68<sup>2</sup> of 19 July 1968 applying rules of competition to transport by rail, road and inland waterways,

Having regard to the Opinion of the Advisory Committee on Restrictive Practices and Monopolies in the field of transport,

Whereas, pursuant to Article 29 of Regulation (EEC) No 1017/68, the Commission is empowered to adopt implementing provisions concerning the hearings provided for in Article 26 (1) and (2) of that Regulation;

Whereas in most cases the Commission will in the course of the procedure already be in close touch with the participating undertakings or associations of undertakings and they will accordingly have the opportunity of making known their views regarding the objections raised against them;

Whereas, however, in accordance with Article 26 (1) of Regulation No 1017/68 and with the rights of defence, the undertakings and associations of undertakings concerned must have the right on conclusion of the procedure to submit their comments on the whole of the objections raised against them which the Commission proposes to deal with in its decisions;

Whereas persons other than the undertakings or associations of undertakings which are involved in the procedure may have an interest in being heard; whereas, by the second sentence of Article 26 (2) of Regulation No 1017/68, such persons must have the opportunity of being heard if they apply and show that they have a sufficient interest;

Whereas it is desirable to enable persons who pursuant to Article 10 (2) of Regulation No 1017/68 have lodged a complaint to submit their comments where the Commission considers that on the basis of the information in its possession there are insufficient grounds for action;

Whereas the various persons entitled to submit comments must do so in writing, both in their own interest and in the interests of good administration, without prejudice to oral procedure where appropriate to supplement the written procedure;

<sup>1</sup> OJ L 209, 21.8.1969, p. II (Special Edition 1979 II, p. 381).

<sup>2</sup> OJ L 175, 23.7.1968, p. 1 (Special Edition 1968 I, p. 302).

Whereas it is necessary to define the rights of persons who are to be heard, and in particular the conditions upon which they may be represented or assisted and the setting and calculation of time limits;

Whereas the Advisory Committee on Restrictive Practices and Monopolies delivers its Opinion on the basis of a preliminary draft decision; whereas it must therefore be consulted concerning a case after the inquiry in respect thereof has been completed; whereas such consultation does not prevent the Commission from re-opening an inquiry if need be,

HAS ADOPTED THIS REGULATION:

*Article 1*

Before consulting the Advisory Committee on Restrictive Practices and Monopolies, the Commission shall hold a hearing pursuant to Article 26 (1) of Regulation No 1017/68.

*Article 2*

1. The Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them. The communication shall be addressed to each of them or to a joint agent appointed by them.
2. The Commission may inform the parties by giving notice in the *Official Journal of the European Communities*, if from the circumstances of the case this appears appropriate, in particular where notice is to be given to a number of undertakings but no joint agent has been appointed. The notice shall have regard to the legitimate interest of the undertakings in the protection of their business secrets.
3. A fine or a periodic penalty payment may be imposed on an undertaking or association of undertakings only if the obligations were notified in the manner provided for in paragraph 1.
4. The Commission shall, when giving notice of objections, fix a time limit up to which the undertakings and associations of undertakings may inform the Commission of their views.

*Article 3*

1. Undertakings and associations of undertakings shall, within the appointed time limit, make known in writing their views concerning the objections raised against them.
2. They may in their written comments set out all matters relevant to their defence.
3. They may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts.

#### *Article 4*

The Commission shall in its decision deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views.

#### *Article 5*

If natural or legal persons showing a sufficient interest apply to be heard pursuant to Article 26 (2) of Regulation No 1017/68, the Commission shall afford them the opportunity of making known their views in writing within such time limits as it shall fix.

#### *Article 6*

Where the Commission, having received an application pursuant to Article 10 (2) of Regulation No 1017/68, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time limit for them to submit any further comments in writing.

#### *Article 7*

1. The Commission shall afford to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment.

2. The Commission may likewise afford to any other person the opportunity of orally expressing his views.

#### *Article 8*

1. The Commission shall summon the persons to be heard to attend on such date as it shall appoint.

2. It shall forthwith transmit a copy of the summons to the competent authorities of the Member States, who may appoint an official to take part in the hearing.

#### *Article 9*

1. Hearings shall be conducted by the persons appointed by the Commission for that purpose.

2. Persons summoned to attend shall appear either in person or be represented by legal representatives or by representatives authorized by their constitution. Undertakings and associations of undertakings may moreover be represented by a duly authorized agent appointed from among their permanent staff.

Persons heard by the Commission may be assisted by lawyers or university teachers who are entitled to plead before the Court of Justice of the European Communities in accordance with Article 17 of the protocol on the Statute of the Court, or by other qualified persons.

3. Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend. In the latter case, regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets.

4. The essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him.

#### *Article 10*

Without prejudice to Article 2 (2), information and summonses from the Commission shall be sent to the addressees by registered letter with acknowledgement of receipt, or shall be delivered by hand against receipt.

#### *Article 11*

1. In fixing the time limits provided for in Articles 2, 5 and 6, the Commission shall have regard both to the time required for preparation of comments and to the urgency of the case. The time limit shall be not less than two weeks; it may be extended.

2. Time limits shall run from the day following receipt of a communication or delivery thereof by hand.

3. Written comments must reach the Commission or be dispatched by registered letter before expiry of the time limit. Where the time limit would expire on a Sunday or public holiday, it shall be extended up to the end of the next following working day. For the purpose of calculating the extension, public holidays shall, in cases where the relevant date is the date of receipt of written comments, be those set out in the Annex to this Regulation, and in cases where the relevant date is the date of dispatch, those appointed by law in the country of dispatch.

This Regulation shall enter into force on the day following 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.

**COUNCIL REGULATION (EEC) No 4056/86<sup>1</sup> OF 22 DECEMBER 1986**

**laying down detailed rules for the application of Articles 85 and 86 of the Treaty  
to maritime transport**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 84 (2) and 87 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,<sup>2</sup>

Having regard to the opinion of the Economic and Social Committee,<sup>3</sup>

Whereas the rules on competition form part of the Treaty's general provisions which also apply to maritime transport; whereas detailed rules for applying those provisions are set out in the Chapter of the Treaty dealing with the rules on competition or are to be determined by the procedures laid down therein;

Whereas according to Council Regulation No 141,<sup>4</sup> Council Regulation NO 17<sup>5</sup> does not apply to transport; whereas Council Regulation (EEC) No 1017/68<sup>6</sup> applies to inland transport only; whereas, consequently, the Commission has no means at present of investigating directly cases of suspected infringement of Articles 85 and 86 in maritime transport; whereas, moreover, the Commission lacks such powers of its own to take decisions or impose penalties as are necessary for it to bring to an end infringements established by it;

Whereas this situation necessitates the adoption of a Regulation applying the rules of competition to maritime transport; whereas Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conference<sup>7</sup> will result in the application of the Code of Conduct to a considerable number of conferences serving the Community; whereas the Regulation applying the rules of competition to maritime transport foreseen in the last recital of Regulation (EEC) No 954/79 should take account of the adoption of the Code; whereas, as far as conferences subject to the Code of Conduct are concerned, the Regulation should supplement the Code or make it more precise;

<sup>1</sup> OJ L 378, 31.12.1986, p. 4.

<sup>2</sup> OJ C 172, 2.7.1984, p. 178; OJ C 255, 13.10.1986, p. 169.

<sup>3</sup> OJ C 77, 21.3.1983, p. 13; OJ C 344, 31.12.1985, p. 31.

<sup>4</sup> OJ 124, 28.11.1962, p. 2751/62.

<sup>5</sup> OJ 13, 21.2.1962, p. 204/62.

<sup>6</sup> OJ L 175, 23.7.1968, p. 1.

<sup>7</sup> OJ L 121, 17.5.1979, p. 1.



Whereas it appears preferable to exclude tramp vessel services from the scope of this Regulation, rates for these services being freely negotiated on a case-by-case basis in accordance with supply and demand conditions;

Whereas this Regulation should take account of the necessity, on the one hand to provide for implementing rules that enable the Commission to ensure that competition is not unduly distorted within the common market, and on the other hand to avoid excessive regulation of the sector;

Whereas this Regulation should define the scope of the provisions of Articles 85 and 86 of the Treaty, taking into account the distinctive characteristics of maritime transport; whereas trade between Member States may be affected where restrictive practices or abuses concern international maritime transport, including intra-Community transport, from or to Community ports; whereas such restrictive practices or abuses may influence competition, firstly, between ports in different Member States by altering their respective catchment areas, and secondly, between activities in those catchment areas, and disturb trade patterns within the common market;

Whereas certain types of technical agreement, decisions and concerted practices may be excluded from the prohibition on restrictive practices on the ground that they do not, as a general rule, restrict competition;

Whereas provision should be made for block exemption of liner conferences; whereas liner conferences have a stabilizing effect, assuring shippers of reliable services; whereas they contribute generally to providing adequate efficient scheduled maritime transport services and give fair consideration to the interests of users; whereas such results cannot be obtained without the cooperation that shipping companies promote within conferences in relation to rates and, where appropriate, availability of capacity or allocation of cargo for shipment, and income; whereas in most cases conferences continue to be subject to effective competition from both non-conference scheduled services and, in certain circumstances, from tramp services and from other modes of transport; whereas the mobility of fleets, which is a characteristic feature of the structure of availability in the shipping field, subjects conferences to constant competition which they are unable as a rule to eliminate as far as a substantial proportion of the shipping services in question is concerned;

Whereas, however, in order to prevent conferences from engaging in practices which are incompatible with Article 85 (3) of the Treaty, certain conditions and obligations should be attached to the exemption;

Whereas the aim of the conditions should be to prevent conferences from imposing restrictions on competition which are not indispensable to the attainment of the objectives on the basis of which exemption is granted; whereas, to this end, conferences should not, in respect of a given route, apply rates and conditions of carriage which are differentiated solely by reference to the country of origin or destination of the goods carried and thus cause within the Community deflections of trade that are harmful to certain ports, shippers, carriers or providers of services ancillary to transport; whereas, furthermore, loyalty arrangements should be permitted only in accordance with rules which do not restrict

unilaterally the freedom of users and consequently competition in the shipping industry, without prejudice, however, to the right of a conference to impose penalties on users who seek by improper means to evade the obligation of loyalty required in exchange for the rebates, reduced freight rates or commission granted to them by the conference; whereas users must be free to determine the undertakings to which they have recourse in respect of inland transport or quayside services not covered by the freight charge or by other charges agreed with the shipping line;

Whereas certain obligations should also be attached to the exemption; whereas in this respect users must at all times be in a position to acquaint themselves with the rates and conditions of carriage applied by members of the conference, since in the case of inland transports organized by shippers, the latter continue to be subject to Regulation (EEC) No 1017/68; whereas provision should be made that awards given at arbitration and recommendations made by conciliators and accepted by the parties be notified forthwith to the Commission in order to enable it to verify that conferences are not thereby exempted from the conditions provided for in the Regulation and thus do not infringe the provisions of Articles 85 and 86;

Whereas consultations between users or associations of users and conferences are liable to secure a more efficient operation of maritime transport services which takes better account of users' requirements; whereas, consequently, certain restrictive practices which could ensue from such consultations should be exempted;

Whereas there can be no exemption if the conditions set out in Article 85 (3) are not satisfied; whereas the Commission must therefore have power to take the appropriate measures where an agreement or concerted practice owing to special circumstances proves to have certain effects incompatible with Article 85 (3); whereas, in view of the specific role fulfilled by the conferences in the sector of the liner services, the reaction of the Commission should be progressive and proportionate; whereas the Commission should consequently have the power first to address recommendations, then to take decisions;

Whereas the automatic nullity provided for in Article 85 (3) in respect of agreements or decisions which have not been granted exemption pursuant to Article 85 (3) owing to their discriminatory or other features applies only to the elements of the agreement covered by the prohibition of Article 85 (1) and applies to the agreement in its entirety only if those elements do not appear to be severable from the whole of the agreement whereas the Commission should therefore, if it finds an infringement of the block exemption, either specify what elements of the agreement are by the prohibition and consequently automatically void, or indicate the reasons why those elements are not severable from the rest of the agreement and why the agreement is therefore void in its entirety;

Whereas, in view of the characteristics of international maritime transport, account should be taken of the fact that the application of this Regulation to certain restrictive practices or abuses may result in conflicts with the laws and rules of certain third countries and prove harmful to important Community trading and shipping interests; whereas consultations and, where appropriate, negotiations authorized by the Council should be undertaken by

the Commission with those countries in pursuance of the maritime transport policy of the Community;

Whereas this Regulation should make provision for the procedures, decision-making powers and penalties that are necessary to ensure compliance with the prohibitions laid down in Article 85 (1) and Article 86, as well as the conditions governing the application of Article 85 (3);

Whereas account should be taken in this respect of the procedural provisions of Regulation (EEC) No 1017/68 applicable to inland transport operations which takes account of certain distinctive features of transport operations viewed as a whole;

Whereas, in particular, in view of the special characteristics of maritime transport, it is primarily the responsibility of undertakings to see to it that their agreements, decisions and concerted practices conform to the rules on competition, and consequently their notification to the Commission need not be made compulsory;

Whereas in certain circumstances undertakings may, however, wish to apply to the Commission for confirmation that their agreements, decisions and concerted practices are in conformity with the provisions in force; whereas a simplified procedure should be laid down for such cases,

HAS ADOPTED THIS REGULATION:

## SECTION I

### *Article 1*

#### **Subject-matter and scope of the Regulation**

1. This Regulation lays down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport services.
2. It shall apply only to international maritime transport services or to one or more Community ports, other than tramp vessel services.
3. For the purposes of this Regulation:
  - (a) 'tramp vessel services' means the transport of goods in bulk or in break-bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand;
  - (b) 'liner conference' means a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes

within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freights rates and any other agreed conditions with respect to the provision of liner services;

(c) 'transport user' means an undertaking (e.g. shippers, consignees, forwarders, etc.) provided it has entered into, or demonstrates an intention to enter into, a contractual or other arrangement with a conference of shipping line for the shipment of goods, or any association of shippers.

## *Article 2*

### **Technical agreements**

1. The prohibition laid down in Article 85 (1) of the Treaty shall not apply to agreements, decisions and concerted practices whose sole object and effect is to achieve technical improvements or cooperation by means of:

(a) the introduction or uniform application of standards or types in respect of vessels and other means of transport, equipment, supplies or fixed installations;

(b) the exchange or pooling for the purpose of operating transport services, of vessels, space on vessels or slots and other means of transport, staff, equipment or fixed installations;

(c) the organization and execution of successive or supplementary maritime transport operations and the establishment or application of inclusive rates and conditions for such operations;

(d) the coordination of transport timetables for connecting routes;

(e) the consolidation of individual consignments;

(f) the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs.

2. The Commission shall, if necessary, submit to the Council proposals for the amendment of the list contained in paragraph 1.

## *Article 3*

### **Exemption for agreements between carriers concerning the operation of scheduled maritime transport services**

Agreements, decisions and concerted practices of all or part of the members of one or more liner conferences are hereby exempted from the prohibition in Article 85 (1) of the Treaty, subject to the condition imposed by Article 4 of this Regulation, when they have as their objective the fixing of rates and conditions of carriage, and, as the case may be, one or more of the following objectives:

(a) the coordination of shipping timetables, sailing dates or dates of calls;

- (b) the determination of the frequency of sailings or calls;
- (c) the coordination or allocation of sailings or calls among members of the conference;
- (d) the regulation of the carrying capacity offered by each member;
- (e) the allocation of cargo or revenue among members.

#### *Article 4*

#### **Condition attaching to exemption**

The exemption provided for in Articles 3 and 6 shall be granted subject to the condition that the agreement, decision or concerted practice shall not, within the common market, cause detriment to certain ports, transport users or carriers by applying for the carriage of the same goods and in the area covered by the agreement, decision or concerted practice, rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge, unless such rates or conditions can be economically justified.

Any agreement or decision or, if it is severable, any part of such an agreement or decision not complying with the preceding paragraph shall automatically be void pursuant to Article 85 (2) of the Treaty.

#### *Article 5*

#### **Obligations attaching to exemption**

The following obligations shall be attached to the exemption provided for in Article 3:

##### *1. Consultations*

There shall be consultations for the purpose of seeking solutions on general issues of principle between transport users on the one hand and conferences on the other concerning the rates, conditions and quality of scheduled maritime transport services.

These consultations shall take place whenever requested by any of the abovementioned parties.

##### *2. Loyalty arrangements*

The shipping lines' members of a conference shall be entitled to institute and maintain loyalty arrangements with transport users, the form and terms of which shall be matters for consultation between the conference and transport users' organizations. These loyalty arrangements shall provide safeguards making explicit the rights of transport users and conference members. These arrangements shall be based on the contract system or any other system which is also lawful.

Loyalty arrangements must comply with the following conditions :

(a) Each conference shall offer transport users a system of immediate rebates or the choice between such a system and a system of deferred rebates :

- under the system of immediate rebates each of the parties shall be entitled to terminate the loyalty arrangement at any time without penalty and subject to a period of notice of not more than six months; this period shall be reduced to three months when the conference rate is the subject of a dispute;
- under the system of deferred rebates neither the loyalty period on the basis of which the rebate is calculated nor the subsequent loyalty period required before payment of the rebate may exceed six months; this period shall be reduced to three months where the conference rate is the subject of a dispute.

(b) The conference shall, after consulting the transport users concerned, set out :

(i) a list of cargo and any portion of cargo agreed with transport users which is specifically excluded from the scope of the loyalty arrangement; 100% loyalty arrangements may be offered but may not be unilaterally imposed;

(ii) a list of circumstances in which transport users are released from their obligation of loyalty; these shall include :

- circumstances in which consignments are dispatched from or to a port in the area covered by the conference but not advertised and where the request for a waiver can be justified, and
- those in which waiting time at a port exceeds a period to be determined for each port and for each commodity or class of commodities following consultation of the transport users directly concerned with the proper servicing of the port.

The conference must, however, be informed in advance by the transport user, within a specified period, of his intention to dispatch the consignment from a port not advertised by the conference or to make use of a non-conference vessel at a port served by the conference as soon as he has been able to establish from the published schedule of sailings that the maximum waiting period will be exceeded.

### 3. *Services not covered by the freight charges*

Transport users shall be entitled to approach the undertakings of their choice in respect of inland transport operations and quayside services not covered by the freight charge or charges on which the shipping line and the transport user have agreed.

### 4. *Availability of tariffs*

Tariffs, related conditions, regulations and any amendments thereto shall be made available on request to transport users at reasonable cost, or they shall be available for examination at offices of shipping lines and their agents. They shall set out all the conditions concerning loading and discharge, the exact extent of the services covered by the freight charge in proportion to the sea transport and the land transport or by any other charge levied by the shipping line and customary practice in such matters.

5. *Notification to the Commission of awards at arbitration and recommendations*

Awards given at arbitration and recommendations made by conciliators that are accepted by the parties shall be notified forthwith to the Commission when they resolve disputes relating to the practices of conferences referred to in Article 4 and in points 2 and 3 above.

*Article 6*

**Exemption for agreements between transport users and conferences concerning the use of scheduled maritime transport services**

Agreements, decisions and concerned practices between transport users, on the one hand, and conferences, on the other hand, and agreements between transport users which may be necessary to that end, concerning the rates, conditions and quality of liner services, as long as they are provided for in Article 5 (1) and (2) are hereby exempted from the prohibition laid down in Article 85 (1) of the Treaty.

*Article 7*

**Monitoring of exempted agreements**

1. *Breach of an obligation*

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Section II:

- address recommendations to the persons concerned;
- in the event of failure by such persons to observe those recommendations and depending upon the gravity of the breach concerned, adopt a decision that either prohibits them from carrying out or requires them to perform specific acts or, while withdrawing the benefit of the block exemption which they enjoyed, grants them an individual exemption according to Article 11 (4) or withdraws the benefit of the block exemption which they enjoyed.

2. *Effects incompatible with Article 85 (3)*

(a) Where, owing to special circumstances as described below, agreements, decisions and concerted practices which qualify for the exemption provided for in Articles 3 and 6 have nevertheless effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, the Commission, on receipt of a complaint or on its own initiative, under the conditions laid down in Section II, shall take the measures described in (c) below. The severity of these measures must be in proportion to the gravity of the situation.

(b) Special circumstances are, *inter alia*, created by :

(i) acts of conferences or a change of market conditions in a given trade resulting in the absence or elimination of actual or potential competition such as restrictive practices whereby the trade is not available to competition; or

(ii) acts of conference which may prevent technical or economic progress or user participation in the benefits;

(iii) acts of third countries which :

- prevent the operation of outsiders in a trade,
- impose unfair tariffs on conference members,
- impose arrangements which otherwise impede technical or economic progress (cargo-sharing, limitations on type of vessels).

(c) (i) If actual or potential competition is absent or may be eliminated as a result of action by a third country, the Commission shall enter into consultations with the competent authorities of the third country concerned, followed if necessary by negotiations under directives to be given by the Council, in order to remedy the situation.

If the special circumstances result in the absence or elimination of actual or potential competition contrary to Article 85 (3) (b) of the Treaty the Commission shall withdraw the benefit of the block exemption. At the same time it shall rule on whether and, if so, under what additional conditions and obligations an individual exemption should be granted to the relevant conference agreement with a view, *inter alia*, to obtaining access to the market for non-conference lines;

(ii) If, as a result of special circumstances as set out in (b), there are effects other than those referred to in (i) hereof, the Commission shall take one or more of the measures described in paragraph 1.

#### *Article 8*

#### **Effects incompatible with Article 86 of the Treaty**

1. The abuse of a dominant position within the meaning of Article 86 of the Treaty shall be prohibited, no prior decision to that effect being required.

2. Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case the conduct of conferences benefiting from the exemption laid down in Article 3 nevertheless has effects which are incompatible with Article 86 of the Treaty, it may withdraw the benefit of the block exemption and take, pursuant to Article 10, all appropriate measures for the purpose of bringing to an end infringements of Article 86 of the Treaty.

3. Before taking a decision under paragraph 2, the Commission may address to the conference concerned recommendations for termination of the infringement.



*Article 9*

**Conflicts of international law**

1. Where the application of this Regulation to certain restrictive practices or clauses is liable to enter into conflict with the provisions laid down by law, regulation or administrative action of certain third countries which would compromise important Community trading and shipping interests, the Commission shall, at the earliest opportunity, undertake with the competent authorities of the third countries concerned, consultations aimed at reconciling as far as possible the abovementioned interest with the respect of Community law. The Commission shall inform the Advisory Committee referred to in Article 15 of the outcome of these consultations.

2. Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with an Advisory Committee as referred to in Article 15 and within the framework of such directives as the Council may issue to it.

3. In exercising the powers conferred on it by this Article, the Council shall act in accordance with the decision-making procedure laid down in Article 84 (2) of the Treaty.

**SECTION II**

**RULES OF PROCEDURE**

*Article 10*

**Procedures on complaint or on the Commission's own initiative**

Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate any infringement of the provisions of Articles 85 (1) or 86 of the Treaty or to enforce Article 7 of this Regulation.

Complaints may be submitted by:

- (a) Member States;
- (b) natural or legal persons who claim a legitimate interest.

## Article 11

### Result of procedures on complaint or on the Commission's own initiative

1. Where the Commission finds that there has been an infringement of Articles 85 (1) or 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under the preceding subparagraph, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

2. Paragraph 1 shall apply also to cases falling within Article 7 of this Regulation.

3. If the Commission, acting on a complaint received, concludes that on the evidence before it there are no grounds for intervention under Articles 85 (1) or 86 of the Treaty or Article 7 of this Regulation, in respect of any agreement, decision or practice, it shall issue a decision rejecting the complaint as unfounded.

4. If the Commission, whether acting on a complaint received or on its own initiative, concludes that an agreement, decision or concerted practice satisfies the provisions both of Article 85 (1) and of Article 85 (3) of the Treaty, it shall issue a decision applying Article 85 (3). Such decision shall indicate the date from which it is to take effect. This date may be prior to that of the decision.

## Article 12

### Application of Article 85 (3) — objections

1. Undertakings and associations of undertakings which seek application of Article 85 (3) of the Treaty in respect of agreements, decisions and concerted practices falling within the provisions of Article 85 (1) to which they are parties shall submit applications to the Commission.

2. If the Commission judges an application admissible and is in possession of all the available evidence, and no action under Article 10 has been taken against the agreement, decision or concerted practice in question, then it shall publish as soon as possible in the *Official Journal of the European Communities* a summary of the application and invite all interested third parties and the Member States to submit their comments to the Commission within 30 days. Such publications shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

3. Unless the Commission notifies applicants, within 90 days from the date of such publication in the *Official Journal of the European Communities*, that there are serious doubts as to the applicability of Article 85 (3), the agreement, decision or concerted practice shall be deemed exempt, insofar as it conforms with the description given in the application,

from the prohibition for the time already elapsed and for a maximum of six years from the date of publication in the *Official Journal of the European Communities*.

If the Commission finds, after expiry of the 90-day time limit, but before expiry of the six year period, that the conditions for applying Article 85 (3) are not satisfied, it shall issue a decision declaring that the prohibition in Article 85 (1) is applicable. Such decision may be retroactive where the parties concerned have given inaccurate information or where they abuse the exemption from the provisions of Article 85 (1).

4. The Commission may notify applicants as referred to in the first subparagraph of paragraph 3 and shall do so if requested by a Member State within 45 days of the forwarding to the Member State of the application in accordance with Article 15 (2). This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

If it finds that the conditions of Article 85 (1) and of Article 85 (3) are satisfied, the Commission shall issue a decision applying Article 85 (3). The decision shall indicate the date from which it is to take effect. This date may be prior to that of the application.

### *Article 13*

#### **Duration and revocation of decisions applying Article 85 (3)**

1. Any decision applying Article 85 (3) taken under Article 11 (4) or under the second subparagraph of Article 12 (4) shall indicate the period for which it is to be valid; normally such period shall not be less than six years. Conditions and obligations may be attached to the decision.

2. The decision may be renewed if the conditions for applying Article 85 (3) continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specified acts by the parties:

(a) where there has been a change in any of the facts which were basic to the making of the decision;

(b) where the parties commit a breach of any obligation attached to the decision;

(c) where the decision is based on incorrect information or was induced by deceit, or

(d) where the parties abuse the exemption from the provisions of Article 85 (1) granted to them by the decision.

In cases falling within (b), (c) or (d), the decision may be revoked with retroactive effect.

## *Article 14*

### **Powers**

Subject to review of its decision by the Court of Justice, the Commission shall have sole power:

- to impose obligations pursuant to Article 7;
- to issue decisions pursuant to Article 85 (3).

The authorities of the Member States shall retain the power to decide whether any case falls within the provisions of Article 85 (1) or Article 86, until such time as the Commission has initiated a procedure with a view to formulating a decision in the case in question or has sent notification as provided for in the first subparagraph of Article 12 (3).

## *Article 15*

### **Liaison with the authorities of the Member States**

1. The Commission shall carry out the procedures provided for in this Regulation in close and constant liaison with the competent authorities of the Member States; these authorities shall have the right to express their views on such procedures.
2. The Commission shall immediately forward to the competent authorities of the Member States copies of the complaints and applications, and of the most important documents sent to it or which it sends out in the course of such procedures.
3. An Advisory Committee on agreements and dominant positions in maritime transport shall be consulted prior to the taking of any decision following upon a procedure under Article 10 or of any decision issued under the second subparagraph of Article 12 (3), or under the second subparagraph of paragraph 4 of the same Article. The Advisory Committee shall also be consulted prior to the adoption of the implementing provisions provided for in Article 26.
4. The Advisory Committee shall be composed of officials competent in the sphere of maritime transport and agreements and dominant positions. Each Member State shall nominate two officials to represent it, each of whom may be replaced, in the event of his being prevented from attending, by another official.
5. Consultation shall take place at a joint meeting convened by the Commission; such meeting shall be held not earlier than fourteen days after dispatch of the notice convening it. This notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

#### *Article 16*

##### **Requests for information**

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings.
2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.
3. In its request, the Commission shall state the legal basis and the purpose of the request, and also the penalties provided for in Article 19 (1) (b) for supplying incorrect information.
4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the person authorized to represent them by law or by their constitution, shall be bound to supply the information requested.
5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 19 (1) (b) and Article 20 (1) (c) and the right to have the decision reviewed by the Court of Justice.
6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

#### *Article 17*

##### **Investigations by the authorities of the Member States**

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 18 (1), or which it has ordered by decision pursuant to Article 18 (3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorization in writing issued by

the competent authority of the Member State in whose territory the investigation is to be made. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, Commission officials may assist the officials of such authority in carrying out their duties.

#### *Article 18*

#### **Investigating powers of the Commission**

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To this end the officials authorized by the Commission are empowered:

- (a) to examine the books and other business records;
- (b) to take copies of or extracts from the books and business records;
- (c) to ask for oral explanations on the spot;
- (d) to enter any premises, land and vehicles of undertakings.

2. The officials of the Commission authorized for the purpose of these investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 19 (1) (c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 19 (1) (c) and Article 20 (1) (d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made, may at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized

by the Commission to enable them to make their investigation. To this end, Member States shall take the necessary measures, after consulting the Commission, before 1 January 1989.

## *Article 19*

### **Fines**

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from ECU 100 to 5 000 where, intentionally or negligently:

(a) they supply incorrect or misleading information, either in a communication pursuant to Article 5 (5) or in an application pursuant to Article 12; or

(b) they supply incorrect information in response to a request made pursuant to Article 16 (3) or (5), or do not supply information within the time limit fixed by a decision taken under Article 16 (5); or

(c) they produce the required books or other business records in incomplete form during investigations under Article 17 or Article 18, or refuse to submit to an investigation ordered by decision issued in implementation of Article 18 (3).

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from ECU 1 000 to one million, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently:

(a) they infringe Article 85 (1) or Article 86 of the Treaty, or do not comply with an obligation imposed under Article 7 of this Regulation;

(b) they commit a breach of any obligation imposed pursuant to Article 5 or to Article 13 (1).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

3. Article 15 (3) and (4) shall apply.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of criminal law nature.

The fines provided for in paragraph 2 (a) shall not be imposed in respect of acts taking place after notification to the Commission and before its Decision in application of Article 85 (3) of the Treaty, provided they fall within the limits of the activity described in the notification.

However, this provision shall not have effect where the Commission has informed the undertakings concerned that after preliminary examination it is of the opinion that Article 85 (1) of the Treaty applies and that application of Article 85 (3) is not justified.

## *Article 20*

### **Periodic penalty payments**

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from ECU 50 to 1 000 per day, calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 85 (1) or Article 86 of the Treaty the termination of which it has ordered pursuant to Article 11, or to comply with an obligation imposed pursuant to Article 7;

(b) to refrain from any act prohibited under Article 13 (3);

(c) to supply complete and correct information which it has requested by decision taken pursuant to Article 16 (5);

(d) to submit to an investigation which it has ordered by decision taken pursuant to Article 18 (3).

2. Where the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision.

3. Article 15 (3) and (4) shall apply.

## *Article 21*

### **Review by the Court of Justice**

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

## *Article 22*

### **Unit of account**

For the purpose of applying Articles 19 to 21 the ecu shall be that adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

## *Article 23*

### **Hearing of the parties and of third persons**

1. Before taking decisions as provided for in Articles 11, 12 (3) second subparagraph, and 12 (4), 13 (3), 19 and 20, the Commission shall give the undertakings or associations of



undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons where they show a sufficient interest shall be granted.

3. Where the Commission intends to give negative clearance pursuant to Article 85 (3) of the Treaty, it shall publish a summary of the relevant agreement, decision or concerted practice and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

#### *Article 24*

##### **Professional secrecy**

1. Information acquired as a result of the application of Articles 17 and 18 shall be used only for the purpose of the relevant request or investigation.

2. Without prejudice to the provisions of Articles 23 and 25, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.

3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

#### *Article 25*

##### **Publication of decisions**

1. The Commission shall publish the decisions which it takes pursuant to Articles 11, 12 (3), second paragraph, 12 (4) and 13 (3).

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

#### *Article 26*

##### **Implementing provisions**

The Commission shall have power to adopt implementing provisions concerning the scope of the obligation of communication pursuant to Article 5 (5), the form, content and other

details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23 (1) and (2).

*Article 27*

**Entry into force**

This Regulation shall enter into force on 1 July 1987.

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

**COMMISSION REGULATION (EEC) No 4260/88<sup>1</sup> OF 16 DECEMBER 1988**

**on the communications, complaints and applications and the hearings provided for in Council Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport<sup>2</sup> and in particular Article 26 thereof,

Having regard to the opinion of the Advisory Committee on Agreements and Dominant Positions in the field of Maritime Transport.

Whereas, pursuant to Article 26 of Regulation (EEC) No 4056/86, the Commission is empowered to adopt implementing provisions concerning the scope of the obligation of communication pursuant to Article 5 (5), the form, content and other details of complaints pursuant to Article 10 and of applications pursuant to Article 12 and the hearings provided for in Article 23 (1) and (2) of that Regulation;

Whereas the obligation of communication to the Commission of awards at arbitration and recommendations by conciliators provided for in Article 5 (5) of Regulation (EEC) No 4056/86 concerns the settlement of disputes relating to the practices of conferences referred to in Articles 4 and 5 (2) and (3) of that Regulation; whereas it seems appropriate to make the procedure for this notification as simple as possible; whereas it is appropriate, therefore, to provide for notifications to be made in writing, attaching the documents containing the text of the awards and recommendations concerned;

Whereas complaints pursuant to Article 10 of Regulation (EEC) No 4045/86 may make it easier for the Commission to take action for infringement of Articles 85 and 86 of the EEC Treaty in the field of maritime transport; whereas it would consequently seem appropriate to make the procedure for submitting complaints as simple as possible; whereas it is appropriate, therefore, to provide for complaints to be submitted in one written copy, the form, content and details being left to the discretion of the complainants;

Whereas the submission of the applications pursuant to Article 12 of Regulation (EEC) No 4056/86 may have important legal consequences for each undertaking which is a party to an agreement, decision or concerted practice; whereas each undertaking should, therefore, have the right to submit such applications to the Commission; whereas, on the other hand, if an undertaking makes use of that right, it must so inform the other

---

<sup>1</sup> OJ L 376, 31.12.1988, p. 1.

<sup>2</sup> OJ L 378, 31.12.1986, p. 4.

undertakings which are parties to the agreement, decision or concerted practice, in order that they may protect their interests;

Whereas it is for the undertakings and associations of undertakings to inform the Commission of the facts and circumstances in support of the applications submitted in accordance with Article 12 of Regulation (EEC) No 4056/86;

Whereas it is desirable to prescribe that forms be used for applications in order, in the interest of all concerned, to simplify and expedite examination thereof by the competent departments;

Whereas in most cases the Commission will in the course of the procedure for the hearings provided for in Article 23 (1) and (2) of Regulation (EEC) No 4056/86 already be in close touch with the participating undertakings or associations of undertakings and they will accordingly have the opportunity of making known their views regarding the objections raised against them;

Whereas in accordance with Article 23 (1) and (2) of Regulation (EEC) No 4056/86 and with the rights of the defence, the undertakings and associations of undertakings concerned must have the right on conclusion of the procedure to submit their comments on the whole of the objections raised against them which the Commission proposes to deal with in its decisions;

Whereas persons other than the undertakings or associations of undertakings which are involved in the procedure may have an interest in being heard; whereas, pursuant to the second sentence of Article 23 (2) of Regulation (EEC) No 4056/86, such persons should have the opportunity of being heard if they apply and show that they have a sufficient interest;

Whereas it is desirable to enable persons who pursuant to Article 10 of Regulation (EEC) No 4056/86 have lodged a complaint to submit their comments where the Commission considers that on the basis of the information in its possession there are insufficient grounds for action;

Whereas the various persons entitled to submit comments must do so in writing, both in their own interest and in the interests of good administration, without prejudice to an oral procedure where appropriate to supplement the written procedure;

Whereas it is necessary to define the rights of persons who are to be heard, and in particular the conditions upon which they may be represented or assisted and the setting and calculation of time limits;

Whereas the Advisory Committee on Restrictive Practices and Dominant Positions in Maritime Transport delivers its opinion on the basis of a preliminary draft Decision; whereas it must therefore be consulted concerning a case after the inquiry in that case has been completed; whereas such consultation does not prevent the Commission from re-opening an inquiry if need be,

HAS ADOPTED THIS REGULATION:

## SECTION I

### NOTIFICATIONS, COMPLAINTS AND APPLICATIONS

#### *Article 1*

##### **Notifications**

1. Awards at arbitration and recommendations by conciliators accepted by the parties shall be notified to the Commission when they concern the settlement of disputes relating to the practices of conferences referred to in Articles 4 and 5 (2) and (3) of Regulation (EEC) No 4056/86.
2. The obligation of notification applies to any party to the dispute resolved by the award or recommendation.
3. Notifications shall be submitted forthwith by registered letter with an acknowledgement of receipt or shall be delivered by hand against receipt. They shall be written in one of the official languages of the Community.

Supporting documents shall be either originals or copies. Copies must be certified as true copies of the original. They shall be submitted in their original language. Where the original language is not one of the official languages of the Community, a translation in one of the official languages shall be attached.

4. When representatives of undertakings, of associations of undertakings, or of natural or legal persons sign such notifications, they shall produce written proof that they are authorized to act.

#### *Article 2*

##### **Complaints**

1. Complaints pursuant to Article 10 of Regulation (EEC) No 4056/86 shall be submitted in writing in one of the official languages of the Community, their form, content and other details being left to the discretion of complainants.
2. Complaints may be submitted by:
  - (a) Member States;
  - (b) natural or legal persons who claim a legitimate interest.

3. When representatives of undertakings, of associations of undertakings, or of natural or legal persons sign such complaints, they shall produce written proof that they are authorized to act.

#### *Article 3*

##### **Persons entitled to submit applications**

1. Any undertaking which is party to agreements, decisions or practices of the kind described in Article 85 (1) of the Treaty may submit an application under Article 12 of Regulation (EEC) No 4056/86. Where the application is submitted by some but not all of the undertakings concerned, they shall give notice to the others.

2. Where applications under Article 12 of Regulation (EEC) No 4056/86 are signed by representatives of undertakings, of associations of undertakings, or of natural or legal persons, such representatives shall produce written proof that they are authorized to act.

3. Where a joint application is submitted, a joint representative shall be appointed.

#### *Article 4*

##### **Submission of applications**

1. Applications pursuant to Article 12 of Regulation (EEC) No 4056/86 shall be submitted on Form MAR shown in Annex I.

2. Several participating undertakings may submit an application on a single form.

3. Applications shall contain the information requested in the form.

4. Fourteen copies of each application and of the supporting documents shall be submitted to the Commission.

5. The supporting documents shall be either originals or copies. Copies must be certified as true copies of the original.

6. Applications shall be in one of the official languages of the Community. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages, a translation in one of the official languages shall be attached.

7. The date of submission of an application shall be the date on which it is received by the Commission. Where, however, the application is sent by registered post, it shall be deemed to have been received on the date shown on the postmark of the place of posting.

8. Where an application submitted pursuant to Article 12 of Regulation (EEC) No 4056/86 falls outside the scope of that Regulation, the Commission shall without delay

inform the applicant that it intends to examine the application under the provisions of such other Regulation as is applicable to the case; however, the date of submission of the application shall be the date resulting from paragraph 7. The Commission shall inform the applicant of its reasons and fix a period for him to submit any comments in writing before it conducts its appraisal pursuant to the provisions of that other Regulation.

## SECTION II

### HEARINGS

#### *Article 5*

Before consulting the Advisory Committee on Agreements and Dominant Positions in the field of Maritime Transport, the Commission shall hold a hearing pursuant to Article 23 (1) of Regulation (EEC) No 4056/86.

#### *Article 6*

1. The Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them. The communication shall be addressed to each of them or to a joint agent appointed by them.
2. The Commission may inform the parties by giving notice in the *Official Journal of the European Communities*, if from the circumstances of the case this appears appropriate, in particular where notice is to be given to a number of undertakings but no joint agent has been appointed. The notice shall have regard to the legitimate interest of the undertakings in the protection of their business secrets.
3. A fine or a periodic penalty payment may be imposed on an undertaking or association of undertakings only if the objections were notified in the manner provided for in paragraph 1.
4. The Commission shall, when giving notice of objections, fix a period within which the undertakings and associations of undertakings may inform the Commission of their views.

#### *Article 7*

1. Undertakings and associations of undertakings shall, within the appointed period, make known in writing their views concerning the objections raised against them.
2. They may in their written comments set out all matters relevant to their defence.

3. They may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts.

*Article 8*

The Commission shall in its Decision deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views.

*Article 9*

If natural or legal persons showing a sufficient interest apply to be heard pursuant to Article 23 (2) of Regulation (EEC) No 4056/86 the Commission shall afford them the opportunity of making known their views in writing within such period as it shall fix.

*Article 10*

Where the Commission, having received a complaint pursuant to Article 10 of Regulation (EEC) No 4056/86, considers that on the basis of the information in its possession there are insufficient grounds for acting on the complaint, it shall inform the persons who submitted the complaint of its reasons and fix a period for them to submit any further comments in writing.

*Article 11*

1. The Commission shall afford to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment.
2. The Commission may likewise afford to any other person the opportunity of orally expressing his views.

*Article 12*

1. The Commission shall summon the persons to be heard to attend on such date as it shall appoint.
2. It shall forthwith transmit a copy of the summons to the competent authorities of the Member States, who may appoint an official to take part in the hearing.



### *Article 13*

1. Hearings shall be conducted by the persons appointed by the Commission for that purpose.
2. Persons summoned to attend shall either appear in person or be represented by legal representatives or by representatives authorized by their constitution. Undertakings and associations of undertakings may moreover be represented by a duly authorized agent appointed from among their permanent staff.

Persons heard by the Commission may be assisted by lawyers or university teachers who are entitled to plead before the Court of Justice of the European Communities in accordance with Article 17 of the Protocol on the Statute of the Court, or by other qualified persons.

3. Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend. In the latter case, regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets.
4. The essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him.

### *Article 14*

Without prejudice to Article 6 (2), information and summonses from the Commission shall be sent to the addressees by registered letter with acknowledgement of receipt, or shall be delivered by and against receipt.

### *Article 15*

1. In fixing the periods provided for in Articles 4 (8), 6, 9 and 10, the Commission shall have regard both to the time required for preparation of comments and to the urgency of the case. A period shall be not less than two weeks; it may be extended.
2. Periods shall run from the day following receipt of a communication or delivery thereof by hand.
3. Written comments must reach the Commission or be dispatched by registered letter before expiry of the period. Where the period would expire on a Sunday or a public holiday, it shall be extended up to the end of the next following working day. For the purpose of calculating the extension, public holidays shall, in cases where the relevant date is the date of receipt of written comments, be those set out in Annex II to this Regulation, and in cases where the relevant date is the date of dispatch, those appointed by law in the country of dispatch.

*Article 16*

This Regulation shall enter into force on the day following 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.

---

## ANNEX I

This form must be accompanied by an annex containing the information specified in the attached Complementary Note.

The form and annex must be supplied in 14 copies (two for the Commission and one for each Member State). Supply three copies of any relevant agreement and one copy of other supporting documents.

Please do not forget to complete the Acknowledgement of Receipt annexed.

If space is insufficient, please use extra pages, specifying to which item on the form they relate.

FORM MAR

## TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

Directorate-General for Competition  
200, rue de la Loi  
B-1049 Brussels

Application under Article 12 of Council Regulation No 4056/86 of 22 December 1986 with a view to obtaining a decision under Article 85 (3) of the Treaty establishing the European Economic Community.

### **Identity of the parties**

#### *1. Identity of applicant*

Full name and address, telephone, telex and facsimile numbers, and brief description of the undertaking(s) or association(s) of undertakings submitting the application.

For partnerships, sole traders or any other unincorporated body trading under a business name, give, also, the name, forename(s) and address of the proprietor(s) or partner(s).

Where an application is submitted on behalf of some other person (or is submitted by more than one person) the name, address and position of the representative (or joint representative) must be given, together with proof of his authority to act. Where an application or notification is submitted by or on behalf of more than one person they should appoint a joint representative (Article 3 (2) and (3) of Commission Regulation No 4260).

2. Identity of any other parties

Full name and address and brief description of any other parties to the agreement, decision or concerted practice (hereinafter referred to as the 'arrangements').

State what steps have been taken to inform these other parties of this application.

(This information is not necessary in respect of standard contracts which an undertaking submitting the application has concluded or intends to conclude with a number of parties.)

**Purpose of this application**  
(see Complementary Note)

*(Please answer yes or  
no to the question)*

Would you be satisfied with a comfort letter? (See the end of Section VII of the Complementary Note)

The undersigned declare that the information given above and in the ... pages annexed hereto is correct to the best of their knowledge and belief, that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere. They are aware of the provisions of Article 19 (1) (a) of Regulation (EEC) No 4056/86 (see attached Complementary Note).

Place and date: .....

Signatures: .....  
.....  
.....

COMMISSION  
OF THE  
EUROPEAN COMMUNITIES

Brussels .....

Directorate-General for Competition

To

**ACKNOWLEDGEMENT OF RECEIPT**

(This form will be returned to the address inserted above if the top half is completed in a single copy by the person lodging it)

Your application dated:

concerning: .....

Your reference: .....

Parties:

1. ....

2. ....

and others.

(There is no need to name the other undertakings party to the arrangement)

---

(To be completed by the Commission)

was received on: .....

and registered under No IV/MAR/: .....

**Please quote the above number in all correspondence**

---

*Provisional address: Telephone:*

200, rue de la Loi Direct line: 235....

B-1049 Brussels

*Telex:*

COMEU B 21877

*Telegraphic address:*

COMEUR Brussels

Telephone exchange: 235 11 11

**COUNCIL REGULATION (EEC) No 3975/87<sup>1</sup> OF 14 DECEMBER 1987**

**laying down the procedure for the application of the rules on competition to undertakings in the air transport sector**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal from the Commission,<sup>2</sup>

Having regard to the opinions of the European Parliament,<sup>3</sup>

Having regard to the opinion of the Economic and Social Committee,<sup>4</sup>

Whereas the rules on competition form part of the Treaty's general provisions which also apply to air transport; whereas the rules for applying these provisions are either specified in the Chapter on competition or fall to be determined by the procedures laid down therein;

Whereas, according to Council Regulation No 141,<sup>5</sup> Council Regulation No 17<sup>6</sup> does not apply to transport services; whereas Council Regulation (EEC) No 1017/68<sup>7</sup> applies only to inland transport; whereas Council Regulation (EEC) No 4056/86<sup>8</sup> applies only to maritime transport; whereas consequently the Commission has no means at present of investigating directly cases of suspected infringement of Articles 85 and 86 of the Treaty in air transport; whereas moreover the Commission lacks such powers of its own to take decisions or impose penalties as are necessary for it to bring to an end infringements established by it;

Whereas air transport is characterized by features which are specific to this sector; whereas, furthermore, international air transport is regulated by a network of bilateral agreements between States which define the conditions under which air carriers designated by the parties to the agreements may operate routes between their territories;

Whereas practices which affect competition relating to air transport between Member States may have a substantial effect on trade between Member States; whereas it is therefore desirable that rules should be laid down under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the

<sup>1</sup> OJ L 374, 374, 31.12.1987, p. 1.

<sup>2</sup> OJ C 182, 9.7.1984, p. 2.

<sup>3</sup> OJ C 182, 19.7.1982, p. 120 and OJ C 345, 21.12.1987.

<sup>4</sup> OJ C 77, 21.3.1983, p. 20.

<sup>5</sup> OJ 124, 28.11.1962, p. 2751/62.

<sup>6</sup> OJ 13, 21.2.1962, p. 204/62.

<sup>7</sup> OJ L 175, 23.7.1968, p. 1.

<sup>8</sup> OJ L 378, 31.12.1986, p. 4.

requisite measures for the application of Articles 85 and 86 of the Treaty to international air transport between Community airports;

Whereas such a regulation should provide for appropriate procedures, decision-making powers and penalties to ensure compliance with the prohibitions laid down in Articles 85 (1) and 86 of the Treaty; whereas account should be taken in this respect of the procedural provisions of Regulation (EEC) No 1017/68 applicable to inland transport operations, which takes account of certain distinctive features of transport operations viewed as a whole;

Whereas undertakings concerned must be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision must be given the opportunity of submitting their comments beforehand and it must be ensured that wide publicity is given to decisions taken;

Whereas all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice under the conditions specified in the Treaty; whereas it is moreover desirable, pursuant to Article 172 of the Treaty, to confer upon the Court Justice unlimited jurisdiction in respect of decisions under which the Commission imposes fines or periodic penalty payments;

Whereas it is appropriate to except certain agreements, decisions and concerted practices from the prohibition laid down in Article 85 (1) of the Treaty, in so far as their sole object and effect is to achieve technical improvements or cooperation;

Whereas, given the specific features of air transport, it will in the first instance be for undertakings themselves to see that their agreements, decisions and concerted practices conform to the competition rules, and notification to the Commission need not be compulsory;

Whereas undertakings may wish to apply to the Commission in certain cases for confirmation that their agreements, decisions and concerted practices conform to the law, and a simplified procedure should be laid down for such cases;

Whereas this Regulation does not prejudge the application of Article 90 of the Treaty,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

##### **Scope**

1. This Regulation lays down detailed rules for the application of Articles 85 and 86 of the Treaty to air transport services.

2. This Regulation shall apply only to international air transport between Community airports.

*Article 2*

**Exceptions for certain technical agreements**

1. The prohibition laid down in Article 85 (1) of the Treaty shall not apply to the agreements, decisions and concerted practices listed in the Annex, in so far as their sole object and effect is to achieve technical improvements or cooperation. This list is not exhaustive.

2. If necessary, the Commission shall submit proposals to the Council for the amendment of the list in the Annex.

*Article 3*

**Procedures on complaint or on the Commission's own initiative**

1. Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate any infringement of the provisions of Articles 85 (1) or 86 of the Treaty.

Complaints may be submitted by:

- (a) Member States;
- (b) natural or legal persons who claim a legitimate interest.

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

*Article 4*

**Result of procedures on complaint or on the Commission's own initiative**

1. Where the Commission finds that there has been an infringement of Articles 85 (1) or 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such an infringement to an end.

Without prejudice to the other provisions of this Regulation, the Commission may address recommendations for termination of the infringement to the undertakings or associations of undertakings concerned before taking a decision under the preceding subparagraph.



2. If the Commission, acting on a complaint received, concludes that, on the evidence before it, there are no grounds for intervention under Articles 85 (1) or 86 of the Treaty in respect of any agreement, decision or concerted practice, it shall take a decision rejecting the complaint as unfounded.

3. If the Commission, whether acting on a complaint received or on its own initiative, concludes that an agreement, decision or concerted practice satisfies the provisions of both Article 85 (1) and 85 (3) of the Treaty, it shall take a decision applying paragraph 3 of the said Article. Such a decision shall indicate the date from which it is to take effect. This date may be prior to that of the decision.

#### *Article 5*

#### **Application of Article 85 (3) of the Treaty — objections**

1. Undertakings and associations of undertakings which wish to seek application of Article 85 (3) of the Treaty in respect of agreements, decisions and concerted practices falling within the provisions of paragraph 1 of the said Article to which they are parties shall submit applications to the Commission.

2. If the Commission judges an application admissible and is in possession of all the available evidence and no action under Article 3 has been taken against the agreement, decision or concerted practice in question, then it shall publish as soon as possible in the *Official Journal of the European Communities* a summary of the application and invite all interested third parties and the Member States to submit their comments to the Commission within 30 days. Such publications shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

3. Unless the Commission notifies applicants, within 90 days of the date of such publication in the *Official Journal of the European Communities*, that there are serious doubts as to the applicability of Article 85 (3) of the Treaty, the agreement, decision or concerted practice shall be deemed exempt, in so far as it conforms with the description given in the application, from the prohibition for the time already elapsed and for a maximum of six years from the date of publication in the *Official Journal of the European Communities*.

If the Commission finds, after expiry of the 90-day time limit, but before expiry of the six-year period, that the conditions for applying Article 85 (3) of the Treaty are not satisfied, it shall issue a decision declaring that the prohibition in Article 85 (1) applies. Such decision may be retroactive where the parties concerned have given inaccurate information or where they abuse an exemption from the provisions of Article 85 (1) or have contravened Article 86.

4. The Commission may notify applicants as referred to in the first subparagraph of paragraph 3; it shall do so if requested by a Member State within 45 days of the forwarding

to the Member State of the application in accordance with Article 8 (2). This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

If it finds that the conditions of Article 85 (1) and (3) of the Treaty are satisfied, the Commission shall issue a decision applying Article 85 (3). The decision shall indicate the date from which it is to take effect. This date may be prior to that of the application.

#### *Article 6*

##### **Duration and revocation of decisions applying Article 85 (3)**

1. Any decision applying Article 85 (3) of the Treaty adopted under Articles 4 or 5 of this Regulation shall indicate the period for which it is to be valid; normally such period shall not be less than six years. Conditions and obligations may be attached to the decision.

2. The decision may be renewed if the conditions for applying Article 85 (3) of the Treaty continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specific acts by the parties:

(a) where there has been a change in any of the facts which were basic to the making of the decision; or

(b) where the parties commit a breach of any obligation attached to the decision; or

(c) where the decision is based on incorrect information or was induced by deceit; or

(d) where the parties abuse the exemption from the provisions of Article 85 (1) of the Treaty granted to them by the decision.

In cases falling under subparagraphs (b), (c) or (d), the decision may be revoked with retroactive effect.

#### *Article 7*

##### **Powers**

Subject to review of its decision by the Court of Justice, the Commission shall have sole power to issue decisions pursuant to Article 85 (3) of the Treaty.

The authorities of the Member States shall retain the power to decide whether any case falls under the provisions of Article 85 (1) or Article 66 of the Treaty, until such time as the Commission has initiated a procedure with a view to formulating a decision on the case in question or has sent notification as provided by the first subparagraph of Article 5 (3) of this Regulation.

## *Article 8*

### **Liaison with the authorities of the Member States**

1. The Commission shall carry out the procedures provided for in this Regulation in close and constant liaison with the competent authorities of the Member States; these authorities shall have the right to express their views on such procedures.
2. The Commission shall immediately forward to the competent authorities of the Member States copies of the complaints and applications and of the most important documents sent to it or which it sends out in the course of such procedures.
3. An Advisory Committee on Agreements and Dominant Positions in Air Transport shall be consulted prior to the taking of any decision following upon a procedure under Article 3 or of any decision under the second subparagraph of Article 5 (3), or under the second subparagraph of paragraph 4 of the same Article or under Article 6. The Advisory Committee shall also be consulted prior to adoption of the implementing provisions provided for in Article 19.
4. The Advisory Committee shall be composed of officials competent in the sphere of air transport and agreements and dominant positions. Each Member State shall nominate two officials to represent it, each of whom may be replaced, in the event of his being prevented from attending, by another official.
5. Consultation shall take place at a joint meeting convened by the Commission; such a meeting shall be held not earlier than 14 days after dispatch of the notice convening it. In respect of each case to be examined, this notice shall be accompanied by a summary of the case, together with an indication of the most important documents, and a preliminary draft decision.
6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

## *Article 9*

### **Requests for information**

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings.
2. When sending a request for information to an undertaking or association of undertakings, the Commission shall forward a copy of the request at the same time to the competent authority of the Member State in whose territory the head office of the undertaking or association of undertakings is situated.

3. In its request, the Commission shall state the legal basis and purpose of the request and also the penalties for supplying incorrect information provided for in Article 12 (1) (b).

4. The owners of the undertakings or their representatives and, in the case of legal persons or of companies, firms or associations having no legal personality, the person authorized to represent them by law or by their rules shall be bound to supply the information requested.

5. When an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 12 (1) (b) and Article 13 (1) (c), as well as the right to have the decision reviewed by the Court of Justice.

6. At the same time the Commission shall send a copy of its decision to the competent authority of the Member State in whose territory the head office of the undertaking or association of undertakings is situated.

#### *Article 10*

##### **Investigations by the authorities of the Member States**

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 11 (1) or which it has ordered by decision adopted pursuant to Article 11 (3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such an authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, Commission officials may assist the officials of the competent authority in carrying out their duties.

#### *Article 11*

##### **Investigating powers of the Commission**

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To this end the officials authorized by the Commission shall be empowered:

- (a) to examine the books and other business records;
- (b) to take copies of, or extracts from, the books and business records;
- (c) to ask for oral explanations on the spot;

(d) to enter any premises, land and vehicles used by undertakings or associations of undertakings.

2. The authorized officials of the Commission shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 12 (1) (c) in cases where production of the required books or other business records is incomplete. In good time, before the investigation, the Commission shall inform the competent authority of the Member State, in whose territory the same is to be made, of the investigation and the identity of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Articles 12 (1) (c) and 13 (1) (d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take the decisions mentioned in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made may assist the Commission officials in carrying out their duties, at the request of such authority or of the Commission.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation. To this end, Member States shall take the necessary measures after consultation of the Commission by 31 July 1989.

#### *Article 12*

##### **Fines**

1. The Commission may, by decision, impose fines on undertakings or associations of undertakings of from ECU 100 to 5 000 where, intentionally or negligently:

(a) they supply incorrect or misleading information in connection with an application pursuant to Article 3 (2) or Article 5; or

(b) they supply incorrect information in response to a request made pursuant to Article 9 (3) or (5), or do not supply information within the time limit fixed by a decision adopted under Article 9 (5); or

(c) they produce the required books or other business records in incomplete form during investigations under Article 10 or Article 11, or refuse to submit to an investigation ordered by decision taken pursuant to Article 11 (3).

2. The Commission may, by decision, impose fines on undertakings or associations of undertakings of from ECU 1 000 to 1 000 000, or a sum in excess thereof but not exceeding

10% of the turnover in the preceding business year of the undertakings participating in the infringement, where either intentionally or negligently they :

- (a) infringe Article 85 (1) or Article 86 of the Treaty; or
- (b) commit a breach of any obligation imposed pursuant to Article 6 (1) of this Regulation.

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

- 3. Article 8 shall apply.
- 4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a penal nature.
- 5. The fines provided for in paragraph 2 (a) shall not be imposed in respect of acts taking place after notification to the Commission and before its decision in application of Article 85 (3) of the Treaty, provided they fall within the limits of the activity described in the notification.

However, this provision shall not have effect where the Commission has informed the undertakings or associations of undertakings concerned that, after preliminary examination, it is of the opinion that Article 85 (1) of the Treaty applies and that application of Article 85 (3) is not justified.

### *Article 13*

#### **Periodic penalty payments**

- 1. By decision, the Commission may impose periodic penalty payments on undertakings or associations of undertakings of from ECU 50 to ECU 1 000 per day, calculated from the date appointed by the decision, in order to compel them :
  - (a) to put an end to an infringement of Article 85 (1) or Article 86 of the Treaty, the termination of which has been ordered pursuant to Article 4 of this Regulation;
  - (b) to refrain from any act prohibited under Article 6 (3);
  - (c) to supply complete and correct information which has been requested by decision, taken pursuant to Article 9 (5);
  - (d) to submit to an investigation which has been ordered by decision taken pursuant to Article 11 (3).
- 2. When the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would result from the original decision.

- 3. Article 8 shall apply.

*Article 14*

**Review by the Court of Justice**

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

*Article 15*

**Unit of account**

For the purpose of applying Articles 12 to 14, the ecu shall be adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

*Article 16*

**Hearing of the parties and of third persons**

1. Before refusing the certificate mentioned in Article 3 (2), or taking decisions as provided for in Articles 4, 5 (3) second subparagraph and 5 (4), 6 (3), 12 and 13, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission takes, or has taken, objection.
2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications by such persons to be heard shall be granted when they show a sufficient interest.
3. When the Commission intends to take a decision pursuant to Article 85 (3) of the Treaty, it shall publish a summary of the relevant agreement, decision or concerted practice in the *Official Journal of the European Communities* and invite all interested third parties to submit their observations within a period, not being less than one month, which it shall fix. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

*Article 17*

**Professional secrecy**

1. Information acquired as a result of the application of Articles 9 to 11 shall be used only for the purpose of the relevant request or investigation.
2. Without prejudice to the provisions of Articles 16 and 18, the Commission and the competent authorities of the Member States, their officials and other servants shall not

disclose information of a kind covered by the obligation of professional secrecy and which has been acquired by them as a result of the application of this Regulation.

3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

*Article 18*

**Publication of decisions**

1. The Commission shall publish the decisions which it adopts pursuant to Articles 3 (2), 4, 5 (3) second subparagraph, 5 (4) and 6 (3).

2. The publication shall state the names of the parties and the main contents of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

*Article 19*

**Implementing provisions**

The Commission shall have the power to adopt implementing provisions concerning the form, content and other details of complaints pursuant to Article 3, applications pursuant to Articles 3 (2) and 5 and the hearings provided for in Article 16 (1) and (2).

*Article 20*

**Entry into force**

This Regulation shall enter into force on 1 January 1988.

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



*ANNEX*

**List referred to in Article 2**

- (a) The introduction or uniform application of mandatory or recommended technical standards for aircraft, aircraft parts, equipment and aircraft supplies, where such standards are set by an organization normally accorded international recognition, or by an aircraft or equipment manufacturer;
- (b) the introduction or uniform application of technical standards for fixed installations for aircraft, where such standards are set by an organization normally accorded international recognition;
- (c) the exchange, leasing, pooling, or maintenance of aircraft, aircraft parts, equipment or fixed installations for the purpose of operating air services and the joint purchase of aircraft parts, provided that such arrangements are made on a non-discriminatory basis;
- (d) the introduction, operation and maintenance of technical communication networks, provided that such arrangements are made on a non-discriminatory basis;
- (e) the exchange, pooling or training of personnel for technical or operational purposes;
- (f) the organization and execution of substitute transport operations for passengers, mail and baggage, in the event of breakdown/delay of aircraft, either under charter or by provision of substitute aircraft under contractual arrangements;
- (g) the organization and execution of successive or supplementary air transport operations, and the fixing and application of inclusive rates and conditions for such operations;
- (h) the consolidation of individual consignments;
- (i) the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs, provided that such rules do not directly or indirectly fix transport fares and conditions;
- (j) arrangements as to the sale, endorsement and acceptance of tickets between air carriers (interlining) as well as the refund, pro-rating and accounting schemes established for such purposes;
- (k) the clearing and settling of accounts between air carriers by means of a clearing house, including such services as may be necessary or incidental thereto; the clearing and settling of accounts between air carriers and their appointed agents by means of a centralised and automated settlement plan or system, including such services as may be necessary or incidental thereto.

**COMMISSION REGULATION (EEC) No 4261/88<sup>1</sup> OF 16 DECEMBER 1988**

**on the complaints, applications and hearings provided for in Council Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector,<sup>2</sup> and in particular Article 19 thereof,

Having regard to the opinion of the Advisory Committee on Agreements and Dominant Positions in Air Transport,

Whereas, pursuant to Article 19 of Regulation (EEC) No 3975/87, the Commission is empowered to adopt implementing provisions concerning the form, content and other details of complaints pursuant to Article 3 (1) and of applications pursuant to Articles 3 (2) and 5 and the hearings provided for in Article 16 (1) and (2) of that Regulation;

Whereas complaints pursuant to Article 3 (1) of Regulation (EEC) No 3975/87 may make it easier for the Commission to take action for infringement of Articles 85 and 86 of the EEC Treaty in the field of air transport; whereas it would consequently seem appropriate to make the procedure for submitting complaints as simple as possible; whereas it is appropriate, therefore, to provide for complaints to be submitted in one written copy, the form, content and details being left to the discretion of the complainants;

Whereas the submission of the applications pursuant to Articles 3 (2) and 4 of Regulation (EEC) No 3975/87 may have important legal consequences for each undertaking which is a party to an agreement, decision or concerted practice; whereas each undertaking should, therefore, have the right to submit such applications to the Commission; whereas, on the other hand, if an undertaking makes use of that right, it must so inform the other undertakings which are parties to the agreement, decision or concerted practice, in order that they may protect their interests;

Whereas it is for the undertakings and associations of undertakings to inform the Commission of the facts and circumstances in support of the applications submitted in accordance with Articles 3 (2) and 5 of Regulation (EEC) No 3975/87;

Whereas it is desirable to prescribe that forms be used for applications in order, in the interest of all concerned, to simplify and expedite examination thereof by the competent departments;

Whereas in most cases the Commission will in the course of the procedure for the hearings provided for in Article 16 (1) and (2) of Council Regulation (EEC) No 3975/87 already be

<sup>1</sup> OJ L 376, 31.12.1988, p. 10.

<sup>2</sup> OJ L 374, 31.12.1987, p. 1.

in close touch with the participating undertakings or associations of undertakings and they will accordingly have the opportunity of making known their views regarding the objections raised against them;

Whereas in accordance with Article 16 (1) and (2) of Regulation (EEC) No 3975/87 and with the rights of the defence, the undertakings and associations of undertakings concerned must have the right on conclusion of the procedure to submit their comments on the whole of the objections raised against them which the Commission proposes to deal with in its decisions;

Whereas persons other than the undertakings or associations of undertakings which are involved in the procedure may have an interest in being heard; whereas, by the second sentence of Article 16 (2) of Regulation (EEC) No 3975/87, such persons must have the opportunity of being heard if they apply and show that they have a sufficient interest;

Whereas it is desirable to enable persons who pursuant to Article 3 (1) of Regulation (EEC) No 3975/87 have lodged a complaint to submit their comments where the Commission considers that on the basis of the information in its possession there are insufficient grounds for action;

Whereas the various persons entitled to submit comments must do so in writing, both in their own interest and in the interests of good administration, without prejudice to an oral procedure where appropriate to supplement the written procedure;

Whereas it is necessary to define the rights of persons who are to be heard, and in particular the conditions upon which they may be represented or assisted and the setting and calculation of time limits;

Whereas the Advisory Committee on Restrictive Practices and Dominant Positions in Air Transport delivers its opinion on the basis of a preliminary draft decision; whereas it must therefore be consulted concerning a case after the inquiry in that case has been completed; whereas such consultation does not prevent the Commission from re-opening an inquiry if need be,

HAS ADOPTED THIS REGULATION:

## SECTION I

### COMPLAINTS AND APPLICATIONS

#### *Article 1*

#### **Complaints**

1. Complaints pursuant to Article 3(1) of Regulation (EEC) No 3975/87 shall be submitted in writing in one of the official languages of the Community, their form, content and other details being left to the discretion of complainants.

2. Complaints may be submitted by:

- (a) Member States;
- (b) natural or legal persons who claim a legitimate interest.

3. When representatives of undertakings, of associations of undertakings, or of natural or legal persons sign such complaints, they shall produce written proof that they are authorized to act.

#### *Article 2*

##### **Persons entitled to submit applications**

1. Any undertaking which is party to agreements, decisions or practices of the kind described in Articles 85(1) and 86 of the Treaty may submit an application under Articles 3(2) and 5 of Regulation (EEC) No 3975/87. Where the application is submitted by some but not all of the undertakings concerned, they shall give notice to the others.

2. Where applications under Articles 3(2) and 5 of Regulation (EEC) No 3975/87 are signed by representatives of undertakings, of associations of undertakings, or of natural or legal persons, such representatives shall produce written proof that they are authorized to act.

3. Where a joint application is submitted, a joint representative shall be appointed.

#### *Article 3*

##### **Submission of applications**

1. Applications pursuant to Articles 3(2) and 5 of Regulation (EEC) No 3975/87 shall be submitted on Form AER shown in Annex I.

2. Several participating undertakings may submit an application on a single form.

3. Applications shall contain the information requested in the form.

4. Fourteen copies of each application and of the supporting documents shall be submitted to the Commission.

5. The supporting documents shall be either originals or copies. Copies must be certified as true copies of the original.

6. Applications shall be in one of the official languages of the Community. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages, a translation in one of the official languages shall be attached.

7. The date of submission of an application shall be the date on which it is received by the Commission. Where, however, the application is sent by registered post, it shall be deemed to have been received on the date shown on the postmark of the place of posting.

8. Where an application submitted pursuant to Articles 3 (2) and 5 of Regulation (EEC) No 3975/87 falls outside the scope of that Regulation, the Commission shall without delay inform the applicant that it intends to examine the application under the provisions of such other Regulation as is applicable to the case; however, the date of submission of the application shall be the date resulting from paragraph 7. The Commission shall inform the applicant of its reasons and fix a period for him to submit any comments in writing before it conducts its appraisal pursuant to the provisions of that other Regulation.

## SECTION II

### HEARINGS

#### *Article 4*

Before consulting the Advisory Committee on Agreements and Dominant Positions in Air Transport, the Commission shall hold a hearing pursuant to Article 16 (1) of Regulation (EEC) No 3975/87.

#### *Article 5*

1. The Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them. The communication shall be addressed to each of them or to a joint agent appointed by them.

2. The Commission may inform the parties by giving notice in the *Official Journal of the European Communities*, if from the circumstances of the case this appears appropriate, in particular where notice is to be given to a number of undertakings but no joint agent has been appointed. The notice shall have regard to the legitimate interest of the undertakings in the protection of their business secrets.

3. A fine or a periodic penalty payment may be imposed on an undertaking or association of undertakings only if the objections were notified in the manner provided for in paragraph 1.

4. The Commission shall, when giving notice of objections, fix a period within which the undertakings and associations of undertakings may inform the Commission of their view.

#### *Article 6*

1. Undertakings and associations of undertakings shall, within the appointed period, make known in writing their views concerning the objections raised against them.
2. They may in their written comments set out all matters relevant to their defence.
3. They may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts.

#### *Article 7*

The Commission shall in its decision deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views.

#### *Article 8*

If natural or legal persons showing a sufficient interest apply to be heard pursuant to Article 16 (2) of Regulation (EEC) No 3975/87 the Commission shall afford them the opportunity of making known their views in writing within such period as it shall fix.

#### *Article 9*

Where the Commission, having received a complaint pursuant to Article 3 (1) of Regulation (EEC) No 3975/87 considers that on the basis of the information in its possession there are insufficient grounds for acting on the complaint, it shall inform the persons who submitted the complaint of its reasons and fix a period for them to submit any further comments in writing.

#### *Article 10*

1. The Commission shall afford to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment.
2. The Commission may likewise afford to any other person the opportunity of orally expressing his views.

#### *Article 11*

1. The Commission shall summon the persons to be heard to attend on such date as it shall appoint.

2. It shall forthwith transmit a copy of the summons to the competent authorities of the Member States, who may appoint an official to take part in the hearing.

#### *Article 12*

1. Hearings shall be conducted by the persons appointed by the Commission for that purpose.

2. Persons summoned to attend shall either appear in person or be represented by legal representatives or by representatives authorized by their constitution. Undertakings and associations of undertakings may moreover be represented by a duly authorized agent appointed from among their permanent staff.

Persons heard by the Commission may be assisted by lawyers or university teachers who are entitled to plead before the Court of Justice of the European Communities in accordance with Article 17 of the Protocol on the Statute of the Court, or by other qualified persons.

3. Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend. In the latter case, regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets.

4. The essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him.

#### *Article 13*

Without prejudice to Article 5 (2), information and summonses from the Commission shall be sent to the addressees by registered letter with acknowledgement of receipt, or shall be delivered by hand against receipt.

#### *Article 14*

1. In fixing the periods provided for in Articles 3 (8), 5, 8 and 9, the Commission shall have regard both to the time required for preparation of comments and to the urgency of the case. A period shall be not less than two weeks; it may be extended.

2. Periods shall run from the day following receipt of a communication or delivery thereof by hand.

3. Written comments must reach the Commission or be dispatched by registered letter before expiry of the period. Where the period would expire on a Sunday or a public holiday, it shall be extended up to the end of the next following working day. For the purpose of calculating the extension, public holidays shall, in cases where the relevant date

is the date of receipt of written comments, be those set out in Annex II to this Regulation, and in cases where the relevant date is the date of dispatch, those appointed by law in the country of dispatch.

*Article 15*

This Regulation shall enter into force on the day following 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.



*ANNEX I*

This form must be accompanied by an annex containing the information specified in the attached Complementary Note.

The form and annex must be supplied in 14 copies (two for the Commission and one for each Member State). Supply three copies of any relevant agreement and one copy of other supporting documents.

Please do not forget to complete the Acknowledgement of Receipt annexed.

If space is insufficient, please use extra pages, specifying to which item on the form they relate.

**FORM AER**

**TO THE COMMISSION OF THE EUROPEAN COMMUNITIES**

Directorate-General for Competition  
200, rue de la Loi  
B-1049 Brussels

- A. Application for negative clearance pursuant to Article 3 (2) of Council Regulation No 3975/87 of 14 December 1987 relating to implementation of Article 85 (1) or of Article 86 of the Treaty establishing the European Economic Community.
- B. Application under Article 5 of Council Regulation No 3975/87 of 14 December 1987 with a view to obtaining a decision under Article 85 (3) of the Treaty establishing the European Economic Community.

**Identity of the parties**

*1. Identity of applicant*

Full name and address, telephone, telex and facsimile numbers, and brief description of the undertaking(s) or association(s) of undertakings submitting the application.

For partnerships, sole traders or any other unincorporated body trading under a business name, give, also, the name, forename(s) and address of the proprietor(s) or partner(s).

Where an application is submitted on behalf of some other person (or is submitted by more than one person) the name, address and position of the representative (or joint representative) must be given, together with proof of his authority to act. Where an application or notification is submitted by or on behalf of more than one person they

should appoint a joint representative. (Article 2 (2) and (3) of Commission Regulation No 4261/88).

*2. Identity of any other parties*

Full name and address and brief description of any other parties to the agreement, decision or concerted practice (hereinafter referred to as 'the arrangements').

State what steps have been taken to inform these other parties of this application.

(This information is not necessary in respect of standard contracts which an undertaking submitting the application has concluded or intends to conclude with a number of parties.)

**Purpose of this application**

*(Please answer yes or no to the questions)*

(see Complementary Note)

Are you asking for negative clearance alone? (See Complementary Note—Section IV, end of first paragraph—for the consequence of such a request)

Are you applying for negative clearance, and also applying for a decision under Article 85 (3) in case the Commission does not grant negative clearance?

Are you only applying for a decision under Article 85 (3)

Would you be satisfied with a comfort letter? (See the end of Section VII of the Complementary Note)

The undersigned declare that the information given above and in the ... pages annexed hereto is correct to the best of their knowledge and belief, that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere. They are aware of the provisions of Article 12 (1) (a) of Regulation (EEC) No 3975/87 (see attached Complementary Note).

Place and date: .....

Signatures: .....

.....

.....

COMMISSION  
OF THE  
EUROPEAN COMMUNITIES

Brussels ...

Directorate-General for Competition

To

**ACKNOWLEDGEMENT OF RECEIPT**

(This form will be returned to the address inserted above if the top half is completed in a single copy by the person lodging it)

Your application dated: .....

concerning: .....

Your reference: .....

Parties:

1. ....

2. ....

and others.

(There is no need to name the other undertakings party to the arrangement)

---

(To be completed by the Commission)

was received on: .....

and registered under No IV/AER/: .....

**Please quote the above number in all correspondence**

---

*Provisional address:* Telephone: 200, rue de la Loi B-1049 Brussels  
Direct line: 235.... Telephone exchange: 235 11 11  
*Telex:* COMEU B 21877  
*Telegraphic address:* COMEUR Brussels

COMPLEMENTARY NOTE  
*CONTENTS*

- I. Purpose of Community rules on competition
- II. Negative clearance
- III. Decisions applying Article 85 (3)
- IV. Purpose of the forms
- V. Nature of the forms
- VI. The need for complete and accurate information
- VII. Subsequent procedure
- VIII. Secrecy
- IX. Further information and headings to be used in Annex to forms

*NB:* Any undertaking uncertain about how to complete an application or wishing further explanation may contact the Directorate-General for Competition (DG IV) in Brussels. Alternatively, any Commission Information Office will be able to obtain guidance or indicate an official in Brussels who speaks the preferred official Community language.

**I. Purpose of Community rules on competition**

The purpose of these rules is to prevent the distortion of competition in the common market by monopolies or restrictive practices; they apply to any enterprise trading directly or indirectly in the common market wherever established. Article 85 (1) of the Treaty establishing the European Economic Community (the next of Articles 85 and 86 is reproduced in Annex 1 to this note) prohibits restrictive agreements or concerted practices which may affect trade between Member States, and Article 85 (2) declares contracts or other otherwise legally binding arrangements containing such restrictions void (although the European Court of Justice has held that if restrictive terms of contracts are severable, only those terms are void); Article 85 (3), however, gives the Commission power to exempt practices with beneficial effects. Article 86 prohibits the abuse of a dominant position. The original procedures for implementing these Articles, which provide for 'negative clearance' and a declaration applying Article 85 (3), were laid down for the maritime transport sector in Regulation (EEC) No 4056/86 and for the air transport sector in Regulation (EEC) No 3975/87 (the references to these and all other acts mentioned in this note or relevant to applications made on the Forms are listed in Annex II to this note).

## II. Negative clearance

The negative clearance procedure has been provided only for the air transport sector. Its purpose is to allow businesses ('undertakings') to ascertain whether or not the Commission considers that any of their arrangements or behaviour are prohibited under Articles 85 (1) or 86 of the Treaty. (It is governed by Article 3 of Regulation (EEC) No 3975/87.) Clearance takes the form of a decision by the Commission certifying that, *on the basis of the facts in its possession*, there are no grounds under Articles 85 (1) or 86 of the Treaty for action on its part in respect of the arrangements or behaviour.

Any party may apply for negative clearance, even without the consent (but not without the knowledge) of other parties to arrangements. There would be little point in applying, however, where arrangements or behaviour clearly do not fall within the scope of Article 85 (1) or Article 86. Nor is the Commission obliged to give negative clearance — Article 3 (2) of Regulation (EEC) No 3975/87 states that '...the Commission may certify...'. The Commission does not usually issue negative clearance decisions in cases which, in its opinion, so clearly do not fall within the scope of the prohibition of Article 85 (1) that there is no reasonable doubt for it to resolve by such a decision.

## III. Decision applying Article 85 (3)

The application for a decision applying Article 85 (3) allows undertakings to enter into arrangements which, in fact, offer economic advantages even though they restrict competition. (It is governed by Articles 12 and 13 of Regulation (EEC) No 4056/86 and 4, 5 and 6 of Regulation (EEC) No 3975/87). Upon such application the Commission may take a decision declaring Article 85 (1) to be inapplicable to the arrangements described in the decision. The Commission is required to specify the period of validity of any such decision, it can attach conditions and obligations and it can amend or revoke decisions or prohibit specified acts by the parties in certain circumstances notably if the decisions were based on incorrect information or if there is any material change in the facts.

Any party may submit an application even without the consent (but not without the knowledge) of other parties.

Regulation (EEC) No 4056/86 and (EEC) No 3975/87 provide for an 'opposition procedure' under which applications can be handled expeditiously. If an application is admissible under the relevant Regulation, if it is complete and if the arrangement which is the subject of the application has not given rise to a complaint or to an own-initiation proceeding, the Commission publishes a summary of the request in the *Official Journal of the European Communities* and invites comments from interested third parties and from Member States. Unless the Commission notifies applicants within 90 days of the date of such publication that there are serious doubts as to the applicability of Article 85 (3) the arrangement will be deemed exempt for the time already elapsed and for a maximum of six years from the date of publication. Where the Commission does notify applicants that there are serious doubts, the applicable procedure is outlined in point VII of this Complementary Note.

In the air transport sector, the Commission intends to adopt a number of Regulations declaring that Article 85 (1) does not apply to categories of agreements.

A decision applying Article 85 (3) may have retroactive effect. Should the Commission find that arrangements in respect of which the application was submitted are indeed prohibited by Article 85 (1) and cannot benefit from the application of Article 85 (3) and, therefore, take a decision condemning them, the parties are nevertheless protected, from the date of application, against fines for any infringement described in the application (Articles 19 (4) of Regulation (EEC) No 4056/86 and 12 (5) of Regulation (EEC) No 3975/87.

#### **IV. Purpose of the forms**

The purpose of Form AER is to allow undertakings, or associations of undertakings, wherever situated, to apply to the Commission for negative clearance for arrangements or behaviour, or to apply to have them exempted from the prohibition of Article 85 (1) of the Treaty by virtue of Article 85 (3). The form allows undertakings applying for negative clearance to apply, at the same time, in order to obtain a decision applying Article 85 (3). It should be noted that only an application in order to obtain a decision applying Article 85 (3) affords immunity from fines. Form MAR only provides for an application for a decision under Article 85 (3).

To be valid, applications in respect of maritime transport must be made on Form MAR (by virtue of Article 4 of Regulation No 4260/88 and in respect of air transport on Form AER (by virtue of Article 3 of Regulation No 4261/88).

#### **V. Nature of the forms**

The forms consist of a single sheet calling for the identity of the applicant(s) and of any other parties. This must be supplemented by further information given under the headings and references detailed below (see IX). For preference the paper used should be A4 (21 × 29.7 cm — the same size as the form) but must not be bigger. Leave a margin of at least 23 mm or one inch on the left hand side of the page and, if you use both sides, on the right hand side of the reverse.

#### **VI. The need for complete and accurate information**

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

Complete information is of particular importance in order to benefit from the application of Article 85 (3) by means of the opposition procedure. This procedure can only apply where the Commission 'is in possession of all the available evidence'.

Moreover, you should be aware that Articles 19 (1) (a) of Regulation (EEC) No 4056/86 and 12 (1) (a) of Regulation (EEC) No 3975/87 enable the Commission to impose fines of from ECU 100 to ECU 5 000<sup>1</sup> on undertakings or associations of undertakings where, intentionally or negligently, they supply incorrect or misleading information in connection with an application.

The key words here are 'incorrect or misleading information'. However, it often remains a matter of judgement how much detail is relevant; the Commission accepts estimates where accurate information is not readily available in order to facilitate applications; and the Commission calls for opinions as well as facts.

You should therefore note that the Commission will use these powers only where applicants have, intentionally or negligently, provided false information or grossly inaccurate estimates or suppressed readily available information or estimates, or have deliberately expressed false opinions in order to obtain negative clearance or a declaration applying Article 85 (3).

## VII. Subsequent procedure

The application is registered in the Registry of the Directorate-General for Competition (DG IV). The date of receipt by the Commission (or the date of posting if sent by registered post) is the effective date of the submission. The application might be considered invalid if obviously incomplete or not on the obligatory form.

Further information might be sought from the applicants or from third parties, and suggestions might be made as to amendments to the arrangements that might make them acceptable.

An application for a decision under Article 85 (3) may be opposed by the Commission either because the Commission does not agree that the arrangements should benefit from Article 85 (3) or to allow for more information to be sought.

If, after examination, the Commission intends to issue a decision applying Article 85 (3), it is obliged to publish a summary of the application in the *Official Journal of the European Communities* and invite comments from third parties. Subsequently, a preliminary draft Decision has to be submitted to and discussed with the Advisory Committee on Restrictive Practices and Dominant Positions in Air Transport or in Maritime Transport — they will already have received a copy of the application. Only then, and providing nothing has happened to change the Commission's intention, can it adopt a decision.

---

<sup>1</sup> The value of the European currency unit (ecu) is published daily in the C series of the *Official Journal of the European Communities*.

Sometimes files are closed without any formal decision being taken, for example because it is found that the arrangements are already covered by a block exemption, or because the applicants are satisfied by a less formal letter from the Commission's departments (sometimes called a 'comfort letter') indicating that the arrangements do not call for any action by the Commission, at least in present circumstances. Although not a Commission decision, a comfort letter indicates how the Commission's departments view the case on the facts currently in their possession which means that the Commission could if necessary—if, for example, it were to be asserted that a contract was void under Article 85 (2)—take an appropriate decision.

### **VIII. Secrecy**

The Commission and Member States are under a duty not to disclose information of the kind covered by the obligation of professional secrecy. On the other hand the Commission has to publish a summary of your application, should it intend to grant it, before taking the relevant decision. In this publication, the Commission '... shall have regard to the legitimate interest of undertakings in the protection of their business secrets'. In this connection, if you believe that your interests would be harmed if any of the information you are asked to supply were to be published or otherwise divulged to other parties, please put all such information in a second annex, with each page clearly marked 'Business Secrets'; in the principal annex, under any affected heading state 'see second annex' or 'also see second annex'; in the second annex repeat the affected heading(s) and reference(s) and give the information you do not wish to have published, together with your reasons for this. Do not overlook the fact that the Commission may have to publish a summary of your application.

Before publishing a summary of your application, the Commission will show the undertakings concerned a copy of the proposed text.

### **IX. Further information and headings to be used in the Annex to the forms**

The further information is to be given under the following headings and reference numbers. Wherever possible, give exact information. If this is not readily available, give your best estimate, and identify what you give as an estimate. If you believe any detail asked for to be unavailable or irrelevant, please explain why. This may, in particular, be the case if one party is notifying arrangements alone without the cooperation of other parties. Do not overlook the fact that Commission officials are ready to discuss what detail is relevant (see the *nota bene* at the beginning of this complementary note).

#### **1. Brief description**

Give a brief description of the arrangements or behaviour (nature, purpose, date(s) and duration) — (full details are requested below).



## 2. *Market*

The nature of the transport services affected by the arrangements or behaviour. A brief description of the structure of the market (or markets) for these services, e.g. who sells in it, who buys in it, its geographical extent, the turnover in it, how competitive it is, whether it is easy for new suppliers to enter the market, whether there are substitute services. If you are submitting a standard contract, say how many you expect to conclude. If you know of any studies of the market, it would be helpful to refer to them.

### 3. *Fuller details of the party or parties*

3.1. Do any of the parties form part of a group of companies? A group relationship is deemed to exist where a firm:

- owns more than half the capital or business assets, or
- has the power to exercise more than half the voting rights, or
- has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or
- has the right to manage the affairs of another.

If the answer is yes, give:

- the name and address of the ultimate parent company;
- a brief description of the business of the group (and, if possible, one copy of the last set of group accounts);
- the name and address of any other company in the group competing in a market affected by the arrangements or in any related market, that is to say any other company competing directly or indirectly with the parties ('relevant associated company').

3.2. The most recently available total turnover of each of the parties, and, as the case may be, of the group of which it forms part (it could be helpful also if you could provide one copy of the last set of accounts).

3.3. The sales or turnover of each party in the services affected by the arrangements in the Community and worldwide. If the turnover in the Community is material (say more than a 5% market share), please also give figures for each Member State and for previous years (in order to show any significant trends), and give each party's sales targets for the future. Provide the same figures for any relevant associated company. (Under this heading, in particular, your best estimate might be all that you can readily supply.)

3.4. In relation to the market (or markets) for the services described at 2 above, give, for each of the sales or turnover figures in 3.3, your estimate of the market share it represents.

3.5. If you have a substantial interest falling short of control (more than 25% but less than 50%) in some other company competing in a market affected by the arrangements, or

if some other such company has a substantial interest in yours, give its name and address and brief details.

#### 4. *Full details of the arrangements*

4.1. If the contents are reduced to writing give a brief description of the purpose of the arrangements and attach three copies of the text (except that purely technical descriptions may be omitted; in such cases, however, indicate parts omitted.)

If the contents are not, or are only partially, reduced to writing, give a full description.

4.2. Detail any provisions contained in the arrangements which may restrict the parties in their freedom to take independent commercial decisions, for example regarding:

- buying or selling prices, discounts or other trading conditions
- the nature, frequency of capacity of services to be offered
- technical development or investment
- the choice of markets or sources of supply
- purchases from or sales to third parties
- whether to apply similar terms for the supply of equivalent services
- whether to offer different services separately or together.

4.3. State between which Member States trade may be affected by the arrangements, and whether trade between the Community and any third countries is affected.

#### 5. *Reasons for negative clearance*

If you are applying for negative clearance state, under the reference:

5.1. why, i.e. state which provision or effects of the arrangements or behaviour might, in your view, raise questions of compatibility with the Community's rules of competition. The object of this subheading is to give the Commission the clearest possible idea of the doubts you have about your arrangements or behaviour that you wish to have resolved by a negative clearance decision.

Then, under the following two references, give a statement of the relevant facts and reasons as to why you consider Articles 85 (1) or 86 to be inapplicable. i.e.

5.2. why the arrangements do not have the object or effect of preventing, restricting or distorting competition within the common market to any appreciable extent, or why your undertaking does not have or its behaviour does not abuse a dominant position;

and/or

5.3. why the arrangements or behaviour are not such as may affect trade between Member States to any appreciable extent.

6. *Reasons for a decision applying Article 85 (3)*

If you are requesting a decision applying Article 85 (3), even if only as a precaution, explain how:

- 6.1. the arrangements contribute to improving production or distribution, and/or promoting technical or economic progress;
- 6.2. a proper share of the benefits arising from such improvement or progress accrues to consumers;
- 6.3. all restrictive provisions of the arrangements are indispensable to the attainment of the aims set out under 6.1 above;
- 6.4. the arrangements do not eliminate competition in respect of a substantial part of the services concerned.

7. *Other information*

- 7.1. Mention any earlier proceedings or informal contacts, of which you are aware, with the Commission and any earlier proceedings with any national authorities or courts even indirectly concerning these arrangements or this behaviour.
- 7.2. Give any other information presently available that you think might be helpful in allowing the Commission to appreciate whether there are any restrictions contained in the agreement, or any benefits that might justify them.
- 7.3. State whether you intend to produce further supporting facts or arguments not yet available and, if so, on which points.
- 7.4. State, with reasons, the urgency of your application.

**COUNCIL REGULATION (EEC) No 3976/87<sup>1</sup> OF 14 DECEMBER 1987**

**on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal from the Commission,<sup>2</sup>

Having regard to the opinions of the European Parliament,<sup>3</sup>

Having regard to the opinions of the Economic and Social Committee,<sup>4</sup>

Whereas Council Regulation (EEC) No 3975/87 lays down the procedure for the application of the rules on competition to undertakings in the air transport sector; whereas Regulation No 17 of the Council<sup>5</sup> lays down the procedure for the application of these rules to agreements, decisions and concerted practices other than those directly relating to the provision of air transport services;

Whereas Article 85 (1) of the Treaty may be declared inapplicable to certain categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 85 (3);

Whereas common provisions for the application of Article 85 (3) should be adopted by way of Regulation pursuant to Article 87; whereas, according to Article 87 (2) (b), such a Regulation must 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; whereas, according to Article 87 (2) (d), such a Regulation is required to define the respective functions of the Commission and of the Court of Justice;

Whereas the air transport sector has to date been governed by a network of international agreements, bilateral agreement between States and bilateral and multilateral agreements between air carriers; whereas the changes required to this international regulatory system to ensure increased competition should be effected gradually so as to provide time for the air-transport sector to adapt;

---

<sup>1</sup> OJ 379, 31.12.1987, p. 9.

<sup>2</sup> OJ C 182, 9.7.1984, p. 3.

<sup>3</sup> OJ C 262, 14.10.1985, p. 44; OJ C 190, 20.7.1987, p. 182 and OJ C 345, 21.12.1987.

<sup>4</sup> OJ C 303, 25.11.1985, p. 31 and OJ C 333, 29.12.1986, p. 27.

<sup>5</sup> OJ 13, 21.2.1962, p. 204/62.

Whereas the Commission should be enabled for this reason to declare by way of Regulation that the provisions of Article 85 (1) do not apply to certain categories of agreements between undertakings, decisions by associations of undertakings and concerted practices;

Whereas it should be laid down under what specific conditions and in what circumstances the Commission may exercise such powers in close and constant liaison with the competent authorities of the Member States;

Whereas it is desirable, in particular, that block exemptions be granted for certain categories of agreements, decisions and concerted practices; whereas these exemptions should be granted for a limited period during which air carriers can adapt to a more competitive environment; whereas the Commission, in close liaison with the Member States, should be able to define precisely the scope of these exemptions and the conditions attached to them;

Whereas there can be no exemption if the conditions set out in Article 85 (3) are not satisfied; whereas the Commission should therefore have power to take the appropriate measures where an agreement proves to have effects incompatible with Article 85 (3); whereas the Commission should consequently be able first to address recommendations to the parties and then to take decisions;

Whereas this Regulation does not prejudice the application of Article 90 of the Treaty;

Whereas the Heads of State or Government, at their meeting in June 1986, agreed that the internal market in air transport should be completed by 1992 in pursuance of Community actions leading to the strengthening of its economic and social cohesion; whereas the provisions of this Regulation, together with those of Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States and those of Council Decision 87/602/EEC of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air service routes between Member States, are a first step in this direction and the Council will therefore, in order to meet the objective set by the Heads of State or Government, adopt further measures of liberalization at the end of a three year initial period,

HAS ADOPTED THIS REGULATION:

*Article 1*

This Regulation shall apply to international air transport between Community airports.

*Article 2*

1. Without prejudice to the application of Regulation (EEC) No 3975/87 and in accordance with Article 85 (3) of the Treaty, the Commission may by regulation declare

that Article 85 (1) shall not apply to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices.

2. The Commission may, in particular adopt such regulations in respect of agreements, decisions or concerted practices which have as their object any of the following:

- joint planning and coordination of the capacity to be provided on scheduled air services, insofar as it helps to ensure a spread of services at the less busy times of the day or during less busy periods or on less busy routes, so long as any partner may withdraw without penalty from such agreements, decisions or concerted practices, and is not required to give more than three months' notice of its intention not to participate in such joint planning and coordination for future seasons,
- sharing of revenue from scheduled air services, so long as the transfer does not exceed 1 % of the poolable revenue earned on a particular route by the transferring partner, no cost are shared or accepted by the transferring partner and the transfer is made in compensation for the loss incurred by the receiving partner in scheduling flights at less busy times of the day or during less busy periods,
- consultations for common preparation of proposals on tariffs, fares and conditions for the carriage of passengers and baggage on scheduled services, on condition that consultations on this matter are voluntary, that air carriers will not be bound by their results and that the Commission and the Member States whose air carriers are concerned may participate as observers in any such consultations,
- slot allocation at airports and airport scheduling, on condition that the air carriers concerned shall be entitled to participate in such arrangements, that the national and multilateral procedures for such arrangements are transparent and that they take into account any constraints and distribution rules defined by national or international authorities and any rights which air carriers may have historically acquired,
- common purchase, development and operation of computer reservation systems relating to timetabling, reservations and ticketing by air transport undertakings, on condition that air carriers of Member States have access to such systems on equal terms, that participating carriers have their services listed on a non-discriminatory basis and also that any participant may withdraw from the system on giving reasonable notice,
- technical and operational ground handling at airports, such as aircraft push back, refuelling, cleaning and security,
- handling of passengers, mail, freight and baggage at airports,
- services for the provision of in-flight catering.

3. Without prejudice to paragraph 2, such Commission regulations shall define the categories of agreements, decisions or concerted practices to which they apply and shall specify in particular:

- (a) the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices;
- (b) the clauses which must be contained in the agreements, decisions and concerted practices, or any other conditions which must be satisfied.

### *Article 3*

Any regulation adopted by the Commission pursuant to Article 2 shall expire on 31 January 1991.

### *Article 4*

Regulations adopted pursuant to Article 2 shall include a provision that they apply with retroactive effect to agreements, decisions and concerted practices which were in existence at the date of the entry into force of such Regulations.

### *Article 5*

Before adopting a regulation, the Commission shall publish a draft thereof and invite all persons and organizations concerned to submit their comments within such reasonable time limit, being not less than one month, as the Commission shall fix.

### *Article 6*

The Commission shall consult the Advisory Committee on Agreements and Dominant Positions in Air Transport established by Article 8 (3) of Regulation (EEC) No 3975/87 before publishing a draft Regulation and before adopting a Regulation.

### *Article 7*

1. Where the persons concerned are in breach of a condition or obligation which attaches to an exemption granted by a Regulation adopted pursuant to Article 2, the Commission may, in order to put an end to such a breach:

- address recommendations to the persons concerned, and
- in the event of failure by such persons to observe those recommendations, and depending on the gravity of the breach concerned, adopt a decision that either prohibits them from carrying out, or requires them to perform specific acts or, while withdrawing the benefit of the block exemption which they enjoyed, grants them an individual exemption in accordance with Article 4 (2) of Regulation (EEC) No 3975/87 or withdraws the benefit of the block exemption which they enjoyed.

2. Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case an agreement, decision or concerted practice to which a block exemption granted by a regulation adopted pursuant to Article 2 (2) applies, nevertheless has effects which are incompatible with Article 85 (3) or are prohibited by Article 86, it may withdraw the benefit of the block exemption from those agreements, decisions or concerted practices and take,

pursuant to Article 13 of Regulation (EEC) No 3975/87, all appropriate measures for the purpose of bringing these infringements to an end.

3. Before taking a decision under paragraph 2, the Commission may address recommendations for termination of the infringement to the persons concerned.

*Article 8*

The Council shall decide on the revision of this Regulation by 30 June 1990 on the basis of a Commission proposal to be submitted by 1 November 1989.

*Article 9*

This Regulation shall enter into force on 1 January 1988.

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



**COMMISSION REGULATION (EEC) No 2671/88<sup>1</sup> OF 26 JULY 1988**

**on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning joint planning and coordination of capacity, sharing of revenue and consultations on tariffs on scheduled air services and slot allocation at airports**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector,<sup>2</sup> and in particular Article 2 thereof,

Having published a draft of this Regulation,<sup>3</sup>

Having consulted the Advisory Committee on Agreements and Dominant Positions in Air Transport,

Whereas:

- (1) Regulation (EEC) No 3976/87 empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements, decisions or concerted practices relating directly or indirectly to the provision of air transport services.
- (2) Agreements, decisions or concerted practices concerning joint planning and coordination of capacity, sharing of revenue, consultations on tariffs and slot allocation at airports are liable to restrict competition and affect trade between Member States.
- (3) Agreements concerning joint planning and coordination of capacity can help ensure the maintenance of services at less busy times of the day, during less busy periods or on less busy routes, thus benefiting air transport users. However, no air carrier should be bound by each agreement or concerted practices but must be free to change its planned services unilaterally. Nor must they prevent carriers deploying extra capacity. Any clauses concerning extra flights must not require prior approval in the event of deviation or involve financial penalties. Agreements must also allow parties to withdraw from them at reasonably short notice.
- (4) Agreements on the sharing of revenue may encourage airlines to provide a service on a route during less busy periods, thereby improving the service to air transport users. To be eligible for exemption under Article 85 (3), however, revenue sharing must be kept within limits such that it does not affect the competitiveness of more efficient carriers. It must also

---

<sup>1</sup> OJ L 239, 30.8.1988, p. 9.

<sup>2</sup> OJ L 374, 31.12.1987, p. 9.

<sup>3</sup> OJ C 138, 28.5.1988, p. 3.

be clearly related—route by route, and not merely in aggregate, because each route has its specific features—to improvements in the services covered by the agreement.

(5) Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States<sup>1</sup> has laid down a new procedure for the establishment of air fares, which is a step towards an increase in price competition in air transport. The procedure restricts the possibility of innovative and competitive fare proposals by air carriers being blocked. Hence, competition may not be eliminated under these arrangements and consumers will benefit from them. Consultations on tariffs between air carriers may therefore be permitted, provided that participation in such consultations is optional, that they do not lead to an agreement in respect of tariffs or related conditions and that in the interests of transparency the Commission and the Member States concerned can send observers to them.

(6) Agreements on slot allocation at airports and airport scheduling can improve the utilization of airport capacity and airspace, facilitate air traffic control and help spread out the supply of air transport services from the airport. However, to provide a satisfactory degree of security and transparency, such arrangements can only be accepted if all the air carriers concerned can participate in the negotiations, and if the allocation is made on a non-discriminatory and transparent basis.

(7) In accordance with Article 4 of Regulation (EEC) No 3976/87, this Regulation should apply with retroactive effect to agreements, decisions and concerted practices in existence on the date of entry into force of this Regulation, provided that they meet the conditions for exemption set out in this Regulation.

(8) Under Article 7 of Regulation (EEC) No 3976/87, this Regulation should also specify the circumstances in which the Commission may withdraw the block exemption in individual cases.

(9) No applications under Articles 3 or 5 of Council Regulation (EEC) No 3975/87<sup>2</sup> need be made in respect of agreements automatically exempted by this Regulation. However, when real doubt exists, undertakings may request the Commission to declare whether their agreements comply with this Regulation.

(10) The Regulation is without prejudice to the application of Article 86 of the Treaty,

**HAS ADOPTED THIS REGULATION:**

---

<sup>1</sup> OJ L 374, 31.12.1987, p. 12.

<sup>2</sup> OJ L 374, 31.12.1987, p. 1.

TITLE I  
EXEMPTIONS

*Article 1*

Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements between undertakings in the air transport sector, decisions by associations of such undertakings and concerted practices between such undertakings which have as their purpose one or more of the following:

- joint planning and coordination of the capacity to be provided on scheduled international air services between Community airports,
- sharing of revenue from scheduled international air services between Community airports,
- the holding of consultations for the joint preparation of proposals on tariffs for the carriage of passengers and baggage on scheduled international air services between Community airports,
- slot allocation and airport scheduling in so far as they concern international air services between airports in the Community.

TITLE II  
SPECIAL PROVISIONS

*Article 2*

**Special provisions for agreements on joint planning and coordination of capacity**

The exemption concerning joint planning and coordination of the capacity to be provided on scheduled air services shall apply only if:

- (a) the agreements, decisions and concerted practices do not bind air carriers to the results of the planning and coordination;
- (b) the planning and coordination are intended to ensure a satisfactory supply of services at less busy times of the day, during less busy periods or on less busy routes;
- (c) the agreements, decisions and concerted practices do not include arrangements such as to limit in advance, directly or indirectly, the capacity to be provided by the participants or to share capacity;
- (d) the agreements, decisions and concerted practices do not prevent carriers taking part in the planning and coordination from changing their planned services, both with respect to

capacity and schedules, without incurring penalties and without being required to obtain the prior approval of the other participants;

(e) the arrangements, decisions and concerted practices do not prevent carriers from withdrawing from the planning and coordination for future seasons without penalty, on giving notice of not more than three months to that effect;

(f) the agreements, decisions and concerted practices do not seek to influence the capacity provided or schedules adopted by carriers not participating in them.

### *Article 3*

#### **Special provisions for agreements for the sharing of revenue from scheduled air services**

1. The exemption concerning the sharing of revenue from scheduled air services shall apply only if:

(a) the transfer of revenue is made in compensation for the loss incurred by the receiving partner in scheduling flights at less busy times of the day, or during less busy periods in a particular traffic season;

(b) the transfer can be made in only one direction, which is to be determined in advance when the agreement is concluded for the season in question;

(c) the transfer does not exceed 1% of the revenue earned by the transferring partner on the route concerned, after deducting 20% of that revenue as a contribution to costs;

(d) neither partner bears any of the costs incurred by the other partner;

(e) the agreement contains no provision which would impede either carrier from providing additional capacity, whether such impediment is financial or through a procedure for allocating such capacity.

2. Where the agreement covers several routes, the transfer of revenue shall be determined route by route and all the conditions referred to in paragraph 1 shall be satisfied individually for each route (city pair or, where points are combined, group of cities).

Airports serving the same city shall be considered as the same point.

### *Article 4*

#### **Special provisions for agreements on consultations on tariffs**

1. The exemption concerning the holding of consultations on tariffs shall apply only if:

(a) the consultations are solely intended to prepare jointly tariff proposals covering scheduled air fares to be paid by members of the public directly to a participating air carrier or to its authorized agents for carriage as passengers with their accompanying baggage on a scheduled service and the conditions under which those fares apply, in application of Article 4 of Directive 87/601/EEC;

- (b) the consultations only concern tariffs subject to approval by the aeronautical authorities of the Member States concerned, and do not extend to the capacity for which such tariffs are to be available;
- (c) the tariffs which are the subject of the consultations are applied by participating air carriers without discrimination on grounds of passengers' nationality or place of residence within the Community;
- (d) participation in the consultations is voluntary and open to any air carrier who operates or has applied to operate on the route concerned;
- (e) any draft tariff proposals which may result from the consultations are not binding on participants, that is to say, following the consultations the participants retain the right to act independently, both in putting forward tariff proposals for approval independently of the other participants and in freely applying such tariffs after they have been approved;
- (f) the consultations do not entail agreement on agents' remuneration or other elements of the tariffs discussed;
- (g) in respect of each tariff which was the subject of the consultations, each participant informs the Commission without delay of its submission to the aeronautical authorities of the Member States concerned.

2. (a) The Commission and the Member States concerned shall be entitled to send observers to tariff consultations, whether bilateral or multilateral. For this purpose, air carriers shall give the Member States concerned and the Commission the same notice as is given to participants, but not less than 10 days' notice, of the date, venue and subject-matter of the consultations.

(b) Such notice shall be given:

(i) to the Member States concerned according to procedures to be established by the competent authorities of those Member States;

(ii) to the Commission according to procedures to be published from time to time in the *Official Journal of the European Communities*.

(c) A full report on the consultations shall be submitted to the Commission by or on behalf of the air carriers involved at the same time as it is submitted to participants, but not later than six weeks after the consultation were held.

#### *Article 5*

#### **Special provisions for agreements on slot allocation and airport scheduling**

1. The exemption concerning slot allocation and airport scheduling shall apply only if:

(a) The consultations on slot allocation and airport scheduling are open to all air carriers having expressed an interest in the slots which are the subject of the consultations;

(b) Any rules of priority established are neither directly nor indirectly related to carrier identity or nationality or category of service and take into account constraints or air traffic distribution rules laid down by competent national or international authorities. Such rules of

priority may take account of rights acquired by air carriers through the use of particular slots in the previous corresponding season;

(c) The rules of priority established shall be made available on request to any interested party;

(d) The rules of priority shall be applied without discrimination, that is to say that the rules shall not prevent each carrier having an equal right to slots for its services.

2. (a) The Commission and the Member States concerned shall be entitled to send observers to consultations on slot allocation and airport scheduling held in the context of a multilateral meeting in advance of each season. For this purpose, air carriers shall give the Member States concerned and the Commission the same notice as is given to participants, but not less than 10 days' notice, of the date, venue and subject-matter of the consultations.

(b) Such notice shall be given:

(i) to the Member States concerned according to procedures to be established by the competent authorities of those Member States;

(ii) to the Commission according to procedures to be published from time to time in the *Official Journal of the European Communities*.

#### *Article 6*

Any air carrier claiming the benefit of this Regulation must be able at all times to demonstrate to the Commission, on request, that the conditions of Articles 2 to 5 are fulfilled.

### TITLE III

#### MISCELLANEOUS PROVISIONS

#### *Article 7*

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 3976/87, where it finds in a particular case that an agreement, decision or concerted practice exempted under this Regulation nevertheless has certain effects which are incompatible with the conditions laid down by Article 85 (3) or are prohibited by Article 86 of the Treaty.

#### *Article 8*

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

It shall apply with retroactive effect to agreements, decisions and concerted practices which were in existence at the date of its entry into force, from the time when the conditions of application of this Regulation were fulfilled.

It shall expire on 31 January 1991.

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

Commission Notice<sup>1</sup> concerning procedures for communications to the Commission pursuant to Articles 4 and 5 of Commission Regulation (EEC) No 2671/88 of 26 July 1988 on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning joint planning and coordination of capacity, sharing of revenue and consultations on tariffs on scheduled air services and slot allocation at airports<sup>2</sup>

The Commission hereby informs undertakings in the air transport sector that the procedures to be observed by them for communications to the Commission are as follows:

- Air carriers interested in holding consultations on tariffs, on slot allocation or on airport scheduling are requested to address all communications to the Commission in one of the following manners:
  - by telex to 21877 COMEU B,  
or
  - by telefax to 32 2 235 01 28. Mark all messages 'for the attention of DG IV/D-2'.  
Indicate the name and telephone number of a contact person with the air carrier.
- Communications on the submission of tariffs and reports on tariff consultations should be sent by ordinary mail to:

Commission of the European Communities,  
DG IV/D-2,  
200, rue de la Loi,  
B-1049 Brussels.

---

<sup>1</sup> OJ C 257, 4.10.1988, p. 6.

<sup>2</sup> OJ L 239, 30.8.1988, p. 9.



Commission Notice<sup>1</sup> concerning the application of Article 4 (1) (a) of Commission Regulation (EEC) No 2671/88 of 26 July 1988 on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning joint planning and coordination of capacity, sharing of revenue and consultations on tariffs on scheduled air services and slot allocation at airports<sup>2</sup>

At the TC2-Europe Conference of IATA in Geneva which started on 7 September, the Commission's observer made a statement explaining the terms and conditions of the block exemption granted by the Commission for agreements on consultations on tariffs. Following that statement a question arose as to whether Article 4 (1) (a) of the block exemption applies to inclusive tour (IT) and group inclusive tour (GIT) fares.

As a result of the explanation given on this point, the IATA secretariat developed a proposal under which consultations on IT and GIT fares within IATA would respect the following rules:

- (i) fares will only be discussed where the inventory risk is with the carrier (i.e. there will be no discussion of part-charter fares);
- (ii) there will be no discussion of minimum tour prices or any aspects of tour arrangements;
- (iii) IATA resolutions on IT and GIT fares would be modified to provide that:
  - the fare is to appear on the ticket, or (where no ticket is issued) is to be available to the passenger on request,
  - the fare is interlinable,
  - the fare is available for sale so the public with inclusive tour arrangements to be approved by the sponsoring carrier.

These arrangements would, in the Commission's view, be sufficient to bring consultations on IT and GIT fares within the scope of the block exemption, provided that the conditions set out in Article 4 (1) (b) to 4 (2) are respected and subject to the proviso that carriers participating in the consultations must, after the consultations, observe all the requirements listed. In particular a carrier may not, even on a unilateral basis, introduce a minimum tour price condition or refuse to interline if so requested by the tour operator or travel agent or by the passenger where the latter is dealing directly with the airline. In applying Article 4 of Regulation (EEC) No 2671/88 to consultations on IT and GIT fares the Commission will, accordingly, base any action on the above guidelines.

---

<sup>1</sup> OJ C 119, 13.5.1989, p. 6.

<sup>2</sup> OJ L 239, 30.8.1988, p. 9.

This statement is based on the information currently available to the Commission and cannot be binding on national courts. It may be reviewed if new information comes to the Commission's attention.

While the Commission has at this stage taken no view on the terms of any block exemptions to be proposed in the context of the next stage in the liberalization of air transport within the Community, it would appear unlikely in any event that such an exemption would be granted for consultations on IT and GIT fares.

**COMMISSION REGULATION (EEC) No 2672/88<sup>1</sup> OF 26 JULY 1988**

**on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings relating to computer reservation systems for air transport services**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector,<sup>2</sup> and in particular to Article 2 thereof,

Having published a draft of this Regulation,<sup>3</sup>

Having consulted the Advisory Committee on Agreements and Dominant Position in Air Transport,

Whereas:

(1) Regulation (EEC) No 3976/87 empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices relating directly or indirectly to the provision of air transport services.

(2) Agreements for the common purchase, development and operation of computer reservation systems relating to time-tabling, reservations and ticketing are liable to restrict competition and affect trade between Member States.

(3) Computer reservation systems can render useful services to air carriers, travel agents and air travellers alike by giving ready access to up-to-date and detailed information in particular about flight possibilities, fare options and seat availability. They can also be used to make reservations and in some cases to print tickets and issue boarding passes. They thus help the air traveller to exercise choice on the basis of fuller information in order to meet his travel needs in the optimal manner. However, in order for these benefits to be obtained, flight schedules and fare displays must be as complete and unbiased as possible.

(4) The CRS market is such that few individual European undertakings could on their own make the investment and achieve the economies of scale required to compete with the more advanced existing systems. Cooperation in this field should therefore be permitted. A block exemption should therefore be granted for such cooperation.

(5) The cooperation should not allow the parent carriers to create undue advantages for themselves and thereby distort competition. It is therefore necessary to ensure that no

---

<sup>1</sup> OJ L 239, 30.8.1988, p. 13.

<sup>2</sup> OJ L 374, 31.12.1987, p. 9.

<sup>3</sup> OJ C 138, 28.5.1988, p. 6.

discrimination exists between parent carriers and participating carriers with regard in particular to access and neutrality of display. The block exemption should be subject to conditions which will ensure that all air carriers can participate in the systems on a non-discriminatory basis as regards access, display, information loading and fees. Moreover, in order to maintain competition in an oligopolistic market subscribers must be able to switch from one system to another at short notice and without penalty, and system vendors and air carriers must not act in ways which would restrict competition between systems.

(6) In accordance with Article 4 of Regulation (EEC) No 3976/87 this Regulation should apply with retroactive effect to agreements in existence on the date of entry into force of this Regulation provided that they meet the conditions for exemption set out in this Regulation.

(7) Under Article 7 of Regulation (EEC) No 3976/87, this Regulation should also specify the circumstances in which the Commission may withdraw the block exemption in individual cases.

(8) Agreements which are exempted automatically by this Regulation need not be notified under Council Regulation No 17.<sup>1</sup> However, when real doubt exists, undertakings may request the Commission to declare whether their agreements comply with this Regulation.

(9) This Regulation is without prejudice to the application of Article 86 of the Treaty,

HAS ADOPTED THIS REGULATION :

#### *Article 1*

#### **Exemptions**

Pursuant to Article 85 (3) of the Treaty and subject to the conditions set out in Articles 3 to 10 of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements between undertakings the purpose of which is one or more of the following:

- (a) to purchase or develop a CRS in common;
- (b) to create a system vendor to market and operate the CRS;
- (c) to regulate the provision of distribution facilities by the system vendor or by distributors.

The exemption shall apply only to the following obligations:

- (i) an obligation not to engage directly or indirectly in the development, marketing or operation of another CRS;

---

<sup>1</sup> OJ 13, 21.2.1962, p. 204/62.

- (ii) an obligation on the system vendor to appoint parent carriers or participating carriers as distributors in respect of all or certain subscribers in a defined area of the common market;
- (iii) an obligation on the system vendor to grant a distributor exclusive rights to solicit all or certain subscribers in a defined area of the common market; or
- (iv) an obligation on the system vendor not to allow distributors to sell distribution facilities provided by other system vendors.

## *Article 2*

### **Definitions**

For the purposes of this Regulation :

- ‘Computer reservation system’ or ‘CRS’ means a computerized system containing information about air carrier schedules, fares, seat availability and related services, through which reservations can be made or tickets issued or both.
- ‘Distribution facilities’ means facilities provided by a system vendor for the display of information to subscribers about air carrier schedules, fares, seat availability, for making reservations or issuing tickets or both, and for providing any other related services.
- ‘Distributor’ means an undertaking which is authorized by the system vendor to provide distribution facilities to subscribers.
- ‘Parent carrier’ means an air carrier which is a system vendor or which directly or indirectly, alone or jointly with others owns or controls a system vendor.
- ‘Participating carrier’ means an air carrier which has an agreement with a system vendor for the display of its flight schedules, fares or seat availability or for reservations to be made or tickets to be issued through the CRS for the sale of air transport services to members of the public. To the extent that a parent carrier uses its own CRS distribution facilities it is considered a participating carrier.
- ‘Subscriber’ means an undertaking other than a participating carrier, using a CRS within the Community under contract or other arrangement with a system vendor or a distributor for the sale of air transport services to members of the public.
- ‘System vendor’ means an undertaking which operates a CRS.

## *Article 3*

### **Access**

1. The system vendor shall, within the available capacity, offer any air carrier the opportunity to become a participating carrier. The system vendor shall not require acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with participation in the CRS.

2. Distribution facilities provided by the system vendor shall be offered to all participating carriers without discrimination.
3. A participating carrier shall have the right to terminate his contract with the system vendor without penalty on giving notice which shall not exceed six months to expire no earlier than the end of the first year.

*Article 4*

**Display**

1. Participating carriers shall be entitled to have their schedules, fares and availability displayed in a neutral display identified as such. This display shall be without discrimination, in particular as regards the order in which information is presented, which shall not be based on any factor directly or indirectly relating to carrier identity.
2. The system vendor shall not intentionally or negligently display inaccurate or misleading information.
3. The methodologies used for the ranking and presentation of information displayed by the CRS shall be made available to interested parties on request.

*Article 5*

**Information loading**

The system vendor shall not discriminate between participating carriers in the care and timeliness of information loading.

*Article 6*

**Fees**

Any fee charged by the system vendor shall be non-discriminatory and reasonably related to the cost of the service provided and shall in particular be the same for the same level of service.

*Article 7*

**Reciprocity**

1. The conditions laid down in Articles 3 to 6 shall not apply to a system vendor in respect of an air carrier that is a parent carrier owning or controlling another CRS, to the extent that such other CRS does not offer equivalent treatment to parent carriers owning or controlling the CRS subject to this Regulation.

2. The system vendor proposing to avail itself of the provisions of paragraph 1 must notify the Commission of its intentions and the reasons therefore at least 14 days in advance of such action.

#### *Article 8*

##### **Contracts with subscribers**

1. A subscriber shall have a right to terminate his contract with the system vendor or distributor without penalty on giving notice which shall not exceed three months to expire no earlier than the end of the first year.

2. The system vendor or distributor shall not require a subscriber to sign an exclusive contract, nor directly or indirectly prevent a subscriber from subscribing to or using another CRS.

#### *Article 9*

##### **Obligations of parent carriers**

A parent carrier shall not link commissions or other incentives to subscribers for the sale of tickets on its air transport services to the utilization by the subscribers of the CRS of which it is a parent carrier.

#### *Article 10*

##### **Competition between system vendors**

The system vendor shall not enter into any agreement or engage in a concerted practice with other system vendor with the object or effect of partitioning the market.

#### *Article 11*

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 3976/87, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down by Article 85 (3) or which are prohibited by Article 86 of the Treaty, and in particular where;

- (i) the agreement hinders the maintenance of effective competition in the market for computer reservation systems;
- (ii) the agreement has the effect of restricting competition in the air transport or travel-related markets;

(iii) the system vendor directly or indirectly imposes unfair prices, fees or changes on subscribers or on participating carriers;

(iv) the system vendor or distributor refuses to enter into a contract with a subscriber for the use of a CRS without an objective and legitimate reason of a technical or commercial nature;

(v) a parent carrier who holds a dominant position within the common market or in a substantial part of it refuses to participate in the distribution facilities provided by a competing CRS without an objective and legitimate reason of a technical or commercial nature.

#### *Article 12*

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

It shall apply with retroactive effect to agreements which were in existence at the date of its entry into force, from the time when the conditions of application of this Regulation were fulfilled.

It shall expire on 31 January 1991.

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



**COMMISSION REGULATION (EEC) No 2673/88<sup>1</sup> OF 26 JULY 1988**

**on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings decisions of associations of undertakings and concerted practices concerning ground handling services**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector,<sup>2</sup> and in particular Article 2 thereof,

Having published a draft of this Regulation,<sup>3</sup>

Having consulted the Advisory Committee on Agreements and Dominant Positions in Air Transport,

Whereas:

(1) Regulation (EEC) No 3976/87 empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices relating directly or indirectly to the provision of air transport services.

(2) Agreements, decisions or concerted practices concerning ground handling services provided either by air carriers or specialized undertakings, such as technical and operational ground handling, handling of passengers, mail, freight and baggage, and services for the provision of in-flight catering, are liable in certain circumstances to restrict competition and effect trade between Member States. It is appropriate, in the interests of legal certainty for the undertakings concerned, to define a category of agreements which, although not generally restrictive of competition, may benefit from an exemption in the event that, because of particular economic or legal circumstances, they should fall within the scope of Article 85 (1).

(3) Such agreements, decisions or concerted practices may produce economic benefits, in so far as they help to ensure that services of a high standard are provided with continuity and at reasonable cost, and both air carriers and air transport users share in those benefits.

(4) However, it is necessary to attach conditions to the exemption of such agreements, decisions and concerted practices to ensure that they do not contain restrictions that are not indispensable for the optimal provision of the services, and that they do not lead to the elimination of competition with respect to those services.

---

<sup>1</sup> OJ L 239, 30.8.1988, p. 17.

<sup>2</sup> OJ L 374, 31.12.1987, p. 9.

<sup>3</sup> OJ C 138, 28.5.1988, p. 9.

(5) The exemption granted by the Regulation must therefore be subject to the condition that the agreements do not oblige air carriers to obtain services exclusively from a particular supplier, that the supply of the services is not tied to the conclusion of contracts for other goods or services, that each airline is free to choose from the range of services offered to it those which best meet its needs, that the rates charged are reasonable for the services actually provided and that air carriers are free to withdraw from the agreements without penalty upon simple notice of not more than three months to that effect.

(6) In accordance with Article 4 of Regulation (EEC) No 3976/87, this Regulation should apply with retroactive effect to agreements, decisions and concerted practices in existence on the date of entry into force of this Regulation provided that they meet the conditions for exemption set out in this Regulation.

(7) Under Article 7 of Regulation (EEC) No 3976/87, this Regulation should also specify the circumstances in which the Commission may withdraw the block exemption in individual cases.

(8) Agreements, decisions and concerted practices that are exempted automatically by this Regulation need not be notified under Council Regulation no 17<sup>1</sup>. However, when real doubt exists, undertakings may request the Commission to declare whether their agreements comply with this Regulation.

(9) This Regulation is without prejudice to the application of Article 86 of the Treaty,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

Pursuant to Article 85 (3) of the Treaty and subject to the provisions of Article 3 of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements, decisions or concerted practices to which only two undertakings are party and which deal only with the supply by one party of services referred to in Article 2 to an air carrier at an airport in the Community open to international air traffic.

#### *Article 2*

The exemption granted under Article 85 (3) of the Treaty shall apply to the following services:

1. all technical and operational services generally provided on the ground at airports, such as the provision of the necessary flight documents and information to crews, apron services, including loading and unloading, safety, aircraft servicing and refuelling, and operations before take-off;

---

<sup>1</sup> OJ 13, 21.2.1962, p. 204/62.

2. all services connected with the handling of passengers, mail, freight and baggage, such as information to passengers and visitors, the handling of passengers and their baggage before departure and after arrival and the handling and storage of freight and mail in conjunction with the postal services;
3. all services for the provision of in-flight catering, including the preparation, storage and delivery of meals and supplies to aircraft and the maintenance of catering equipment.

#### *Article 3*

The exemption shall apply only if:

1. the agreements, decisions or concerted practices do not oblige an air carrier to obtain any or all of the ground handling services referred to in Article 2 exclusively from a particular supplier;
2. the supply of the ground handling services referred to in Article 2 is not tied to the conclusion of contracts for or acceptance of other goods or services which, by their nature or according to commercial usage, have no connection with the services referred to in Article 2 or to the conclusion of a similar contract for the supply of services at another airport;
3. the agreements, decisions or concerted practices do not prevent an air carrier from choosing from the range of ground handling services offered by a particular supplier those it wants to take from that supplier and do not deny it the right to procure similar or other services from another supplier or to provide them itself;
4. the supplier of the ground handling services does not impose, directly or indirectly, prices or other conditions which are unreasonable and which, in particular, bear no reasonable relation to the cost of the services provided;
5. the supplier of the ground handling services does not apply dissimilar conditions to equivalent transactions with different customers;
6. any air carrier is able to withdraw from the agreement with the supplier without penalty, on giving notice of not more than three months to that effect.

#### *Article 4*

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 3976/87, where it finds in a particular case that an agreement, decision or concerted practice exempted under this Regulation nevertheless has certain effects which are incompatible with the conditions laid down by Article 85 (3) or are prohibited by Article 86 of the Treaty.

#### *Article 5*

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

It shall apply with retroactive effect to agreements, decisions and concerted practices which were in existence at the date of its entry into force, from the time when the conditions of application of this Regulation were fulfilled.

It shall expire on 31 January 1991.

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



## V — Regulation in the field of agriculture

COUNCIL REGULATION No 26/62<sup>1</sup> OF 4 APRIL 1962

**applying certain rules on competition to production of and trade in agricultural products  
amended by the Council Regulation No 49/62<sup>2</sup> of 29 June 1962**

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 42 and 43 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Whereas by virtue of Article 42 of the Treaty one of the matters to be decided under the common agricultural policy is whether the rules on competition laid down in the Treaty are to apply to production of and trade in agricultural products, and accordingly the provisions hereinafter contained will have to be supplemented in the light of developments in that policy.

Whereas the proposals submitted by the Commission for the formulation and implementation of the common agricultural policy show that certain rules on competition must forthwith be made applicable to production of and trade in agricultural products in order to eliminate practices contrary to the principles of the common market and prejudicial to attainment of the objectives set out in Article 39 of the Treaty and in order to provide a basis for the future establishment of a system of competition adapted to the development of the common agricultural policy;

Whereas the rules on competition relating to the agreements, decisions and practices referred to in Article 85 of the Treaty and to the abuse of dominant positions must be applied to production of and trade in agricultural products, in so far as their application does not impede the functioning of national organizations of agricultural markets or jeopardize attainment of the objectives of the common agricultural policy;

---

<sup>1</sup> OJ 30, 20.4.1962, p. 62; (Special Edition 1959-62, p. 129).

<sup>2</sup> OJ 53, 1.7.1962, p. 1571.

Whereas special attention is warranted in the case of farmers' organizations which are particularly concerned with the joint production or marketing of agricultural products or the use of joint facilities, unless such joint action excludes competition or jeopardizes attainment of the objectives of Article 39 of the Treaty;

Whereas, in order both to avoid compromising the development of a common agricultural policy and to ensure certainty in the law and non-discriminatory treatment of the undertakings concerned, the Commission must have sole power, subject to review by the Court of Justice, to determine whether the conditions provided for in the two preceding recitals are fulfilled as regards the agreements, decisions and practices referred to in Article 85 of the Treaty;

Whereas, in order to enable the specific provisions of the Treaty regarding agriculture, and in particular those of Article 39 thereof, to be taken into consideration, the Commission must, in questions of dumping, assess all the causes of the practices complained of and in particular the price level at which products from other sources are imported into the market in question; whereas it must, in the light of its assessment, make recommendations and authorize protective measures as provided in Article 91 (1) of the Treaty;

Whereas, in order to implement, as part of the development of the common agricultural policy, the rules on aids for production of or trade in agricultural products, the Commission should be in a position to draw up a list of existing, new or proposed aids, to make appropriate observations to the Member States and to propose suitable measures to them,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

From the entry into force of this Regulation, Articles 85 to 90 of the Treaty and provisions made in implementation thereof shall, subject to Article 2 below, apply to all agreements, decisions and practices referred to in Articles 85 (1) and 86 of the Treaty which relate to production of or trade in the products listed in Annex II to the Treaty;

#### *Article 2*

1. Article 85 (1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in the preceding Article as form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty. In particular, it shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardized.

2. After consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1.

3. The Commission shall undertake such determination either on its own initiative or at the request of a competent authority of a Member State or of an interested undertaking or association of undertakings.

4. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

#### *Article 3*

1. Without prejudice to Article 46 of the Treaty, Article 91 (1) thereof shall apply to trade in the products listed in Annex II to the Treaty.

2. With due regard for the provisions of the Treaty relating to agriculture, and in particular those of Article 39, the Commission shall assess all the causes of the practices complained of, in particular the price level at which products from other sources are imported into the market in question.

In the light of its assessment, it shall make recommendations and authorize protective measures as provided in Article 91 (1) of the Treaty.

#### *Article 4*

The provisions of Article 93 (1) and of the first sentence of Article 93 (3) of the Treaty shall apply to aids granted for production of or trade in the products listed in Annex II to the Treaty.

#### *Article 5*

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities*, with the exception of Articles 1 to 3, which shall enter into force on 1 July 1962.<sup>1</sup>

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

---

<sup>1</sup> Amended by Regulation No 49 of the Council, 29 June 1962: '30 July 1962'.





## VI — Statutory Decisions in the field of coal and steel

### HIGH AUTHORITY DECISION No 24-54<sup>1</sup> OF 6 MAY 1954

#### laying down in implementation of Article 66 (1) of the Treaty a regulation on what constitutes control of an undertaking

THE HIGH AUTHORITY,

Having regard to Article 66 of the Treaty,

Whereas by virtue of Article 66 (1) the High Authority must by regulation determine what constitutes control of an undertaking;

Whereas control may reside either in persons in whom certain rights are vested or in those who are entitled to exercise such rights with complete freedom,

After consulting the Council of Ministers,

DECIDES:

#### *Article 1*

The rights or contracts specified below shall constitute the elements of control of an undertaking, where either separately or jointly, and having regard to the considerations of fact or law involved, they make it possible to determine how an undertaking shall operate as regards production, prices, investments, supplies, sales and appropriation of profits:

- (1) Ownership or the right to use all or part of the assets of an undertaking;
- (2) Rights or contracts which confer power to influence the composition, voting or decisions of the organs of an undertaking;
- (3) Rights or contracts which enable any person, by himself or in association with others, to manage the business of an undertaking;
- (4) Contracts made with an undertaking concerning the computation or appropriation of its profits;

---

<sup>1</sup> OJ of the High Authority No 9, 11.5.1954, p. 345; (Special Edition 1952-58, p. 16).

(5) Contracts made with an undertaking concerning the whole or an important part of its supplies or outlets, where the duration of these contracts or the quantities to which they relate exceed what is usual in commercial contracts dealing with those matters.

#### *Article 2*

There shall be no control of an undertaking within the meaning of Article 1 where, upon formation of an undertaking or increase of its capital, banks or financial institutions acquire shares in that undertaking with a view to selling them on the market but do not exercise voting rights in respect of those shares.

#### *Article 3*

1. The elements specified in Article 1 shall constitute control of an undertaking by individuals, undertakings or groups of persons or of undertakings who:

- (1) are holders of the rights or entitled to rights under the contracts concerned;
- (2) while not being holders of such rights or entitled to rights under such contracts, have power to exercise the rights deriving therefrom;
- (3) in a fiduciary capacity own assets of an undertaking or shares in an undertaking, and have power to exercise the rights attaching thereto.

2. If, however, the power to exercise the rights of another person is derived from a legal act, the provisions contained in subparagraphs (2) and (3) of the preceding paragraph shall not apply where the holder of the power proves:

- (1) that his power may be revoked at any time; and
- (2) that he is bound by special instructions from the donor; and
- (3) that he is authorized to communicate to the High Authority, should it so request, the name and address of the donor.

#### *Article 4*

This Decision shall enter into force within the Community on 1 June 1954.

This Decision was considered and adopted by the High Authority at its meeting on 6 May 1954.

**HIGH AUTHORITY DECISION No 26-54<sup>1</sup> OF 6 MAY 1954**

**laying down in implementation of Article 66 (4) of the Treaty a regulation  
concerning information to be furnished**

THE HIGH AUTHORITY,

Having regard to Article 66 of the Treaty,

Whereas transactions bringing about concentrations directly or indirectly involving undertakings in the Community may be carried out by natural or legal persons outside its jurisdiction;

Whereas it is necessary for the implementation of Article 66 that the requisite information should be obtainable from those participating in such transactions;

Whereas a general request for information should be made only in respect of transactions that are substantial both as regards their absolute value and the size of the undertakings involved;

Whereas however application of Article 66 presupposes the possibility that information may be obtained in other cases, subject to the scope of such information being defined in a general decision,

after consulting the Council of Ministers,

DECIDES:

**PART ONE**

**Compulsory notification**

*Article 1*

All natural and legal persons except persons engaged within the Community in the production of coal and steel or in the distribution of those products other than by way of sale to domestic consumers or small craft industries shall, where they effect transactions specified in the following Articles, furnish information as provided for in this Regulation.

*Article 2*

The persons referred to in Article 1 shall notify the High Authority of any acquisition of rights in an undertaking as defined in Article 80 of the Treaty and any acquisition of power

---

<sup>1</sup> OJ of the High Authority No 9, 11.5.1954, p. 350 (Special Edition 1952-58, p. 17).

to exercise on their own behalf or on behalf of third parties rights in any such undertaking, whereby they acquire more than 10% of the voting power at meetings of shareholders or other members of such undertaking and where the total value of the rights held by them exceeds 100 000 EPU units of account. Any rights, or power to exercise rights on behalf of others, held by the persons concerned before the transaction in question shall be included in that calculation.

#### *Article 3*

Article 1 shall also apply to the acquisition of rights in any undertaking which exercises control over an undertaking as defined in Article 80 of the Treaty.

#### *Article 4*

1. Banks and their agents shall be exempt from the obligation to notify the transactions mentioned in Article 2 and 3 where exercise of voting rights attaches:

- to shares belonging to customers of those or other banks; or
- to registered shares or stock in respect of which the bank is entitled to exercise such rights in a fiduciary capacity on behalf of its clients.

2. Paragraph 1 shall not affect:

- the obligation for banks to furnish information on such transactions under Article 7;
- the obligation for their customers to notify such transactions in accordance with Articles 2 and 3 or to furnish information under Article 7.

#### *Article 5*

The High Authority may, by special authorization and subject to certain conditions, grant exemption from the obligation to notify the transactions mentioned in Article 2 and 3 to duly accredited stockbrokers where they do not exercise the voting rights attaching to the stock held by them.

#### *Article 6*

The notification provided for in Article 2 and 3 shall be made within four weeks from the date on which the person required to make notification has knowledge of the transaction in question.

## PART TWO

### Special requests for information

#### *Article 7*

1. The High Authority may, by special request, obtain from the persons mentioned in Article 1 all information necessary for the implementation of Article 66 of the Treaty regarding :

- (1) acquisition of ownership of or of rights to use premises, industrial plant or concessions of any undertaking if, before such acquisition, those premises, plant or concessions were used in the operations of that undertaking;
- (2) acquisition of rights, in an undertaking, conferring voting powers at meetings of shareholders or other members of such undertaking;
- (3) acquisition of the power to exercise on own behalf or on behalf of third parties rights of the kind referred to in subparagraph (2) belonging to third parties;
- (4) acquisition by contract of the power to make decisions as to how the profits of an undertaking are shown in the accounts or applied;
- (5) acquisition of the power to participate in the management of an undertaking, alone or with others, whether as owner, beneficiary, manager or member of the managing organs;
- (6) appointment to the Board of Directors of an undertaking.

2. The persons subject to the obligation to furnish information must likewise declare to the High Authority at the latter's request the name and address of the actual owner of the rights concerned, where they are empowered :

- to exercise the rights referred to in paragraph 1 in a fiduciary capacity on behalf of a third party;
- to exercise on their own behalf or on behalf of third parties the rights referred to in paragraph 1 belonging to third parties.

#### *Article 8*

This Regulation shall enter into force within the Community on 1 June 1954.

This Decision was considered and adopted by the High Authority at its meeting on 6 May 1954.

## HIGH AUTHORITY DECISION No 25-67<sup>1</sup> OF 22 JUNE 1967

**laying down in implementation of Article 66 (3) of the Treaty a regulation concerning exemption from prior authorization, amended by Commission Decision No 2495/78/ECSC<sup>2</sup> of 20 October 1978**

THE HIGH AUTHORITY,

Having regard to Articles 47, 66 and 80 of the Treaty,

Having regard to Decision No 25-54 of 6 May 1954 on rules for the application of Article 66 (3) of the Treaty, relating to exemption from prior authorization (*Official Journal of the European Coal and Steel Community*, 11.5.1954, pp. 346 *et seq.*), as supplemented by Decision No 28-54 of 26 May 1954 (*Official Journal of the European Coal and Steel Community*, 31.5.1954, p. 381),

Whereas under Article 66 (1), and subject to Article 66 (3), any transaction which would in itself have the direct or indirect effect of bringing about a concentration between undertakings at least one of which falls within the scope of application of Article 80, requires the prior authorization of the High Authority; whereas the High Authority grants the authorization referred to in paragraph (1) if it finds that the proposed transaction will not give to the persons of undertakings concerned the power to influence competition within the common market, within the meaning of Article 66 paragraph (2);

Whereas by Decision No 25-54 and with the concurring Opinion of the Council the High Authority in accordance with Article 66 (3) exempted from the requirement of prior authorization certain classes of transaction which would bring about concentration of undertakings and which, in view of the size of the assets or of the undertakings to which they relate, taken in conjunction with the kind of concentration which they effect, and having regard to the totality of the undertakings grouped under the same control, must be deemed to meet the requirements of Article 66 (2);

Whereas experience has shown that Decision No 25-54 should be adapted to take account of the changes which have occurred since that time in the volume of production in the economic structure, in market and competitive conditions; whereas this applies particularly to quantitative limits and to the ties which exist between Community undertakings and undertakings in other sectors and trading undertakings;

Whereas in concentrations between undertakings engaged in the production of coal and steel, the significance of the industrial entity being formed depends on the volume of production of the different types of products; whereas this volume should be limited both in absolute figures and in relation to production within the Community as shown in the official statistics;

---

<sup>1</sup> OJ 154, 14.7.1967, p. 11; (Special Edition 1967, p. 186).

<sup>2</sup> OJ L 300, 27.10.1978, p. 21. The Text of Decision No 25-67, as amended by this Decision, was published in OJ C 255, 27.10.1978, p. 2.

Whereas in the case of concentration between undertakings engaged in production and undertakings which are not within the scope of the Treaty, account must be taken of the privileged position which concentration can secure for Community undertakings by ensuring disposal of their products; whereas the relevant consumption of coal and steel in this respect is either the total consumption of the undertakings concerned or that of the different undertakings which are not within the scope of the Treaty but are involved in the concentration;

Whereas any concentration of undertakings in the wholesale trade which is subject to Article 66 should, in accordance with Article 80, be assessed on the basis of the volume of their sales of coal and turnover of steel, the ties which exist between a wholesale undertaking and an undertaking engaged in production not forming an obstacle to exemption for purposes of concentration with another wholesaler; whereas with regard to steel, repeated concentrations and concentrations which relate to several distribution undertakings at the same time should be limited;

Whereas special limits must be fixed for sales of scrap;

Whereas concentrations between producer undertakings and retailers and between distribution undertakings and undertakings which are not within the scope of the Treaty, may, in general, be exempted from the requirement of prior authorization;

Whereas, as regards concentrations effected by establishing control over groups, it is impossible to define general criteria for exemption; whereas concentrations of this type should accordingly be excluded from the field of application of this Decision, whether involving joint formation of new undertakings or control over groups of existing undertakings;

Whereas the High Authority should be informed of any concentration effected within the common market for coal and steel, even if exempt from prior authorization by virtue of this Decision; whereas the undertakings or the persons who obtained control should accordingly be required to declare any such concentration the size of which is not substantially below the limits fixed for exemption,

With the concurring Opinion of the Council of Ministers,

DECIDES:

### **Concentrations between producers**

#### *Article 1*

Transactions referred to in Article 66 (1) which have the direct or indirect effect of bringing about concentration between undertakings engaged in production in the coal or the steel industry shall be exempted from the requirement of prior authorization where:

(1) The annual output of products specified below, achieved by all the undertakings involved in the concentration, does not exceed the following tonnages:



- (a) Coal (net production screened and washed) 10 000 000 tonnes;
  - (b) Manufactured fuels made from coal 1 000 000 tonnes;
  - (c) Coke 3 000 000 tonnes;
  - (d) Iron ore (gross production) No limit;
  - (e) Agglomerated ore 4 000 000 tonnes;
  - (f) Pre-reduced ore 400 000 tonnes;
  - (g) Steelmaking pig iron 4 000 000 tonnes;
  - (h) Other forms of pig iron, ferro-alloys 250 000 tonnes;
  - (i) Crude steel (ordinary steel: ingots, semi-finished products and liquid steel) 5 000 000 tonnes
  - (j) Alloy and non-alloy special steels (ingots, semi-finished products and liquid steel) 500 000 tonnes;
  - (k) Finished rolled steel products including end products 4 000 000 tonnes.
- (2) The annual output of undertakings involved in the concentration shall not exceed, for any of the types of steel products listed in the Annex to this Decision, 30 % of the overall output of products of this type within the Community. The overall output within the Community shall be determined according to the production statistics published by the Statistical Office of the European Communities.

**Concentrations between coal producers and undertakings  
not falling within the scope of the Treaty**

*Article 2*

Transactions referred to in Article 66 (1) shall be exempted from the requirement of prior authorization where they have the direct or indirect effect of bringing about concentration between:

- (a) undertakings engaged in coal production; and
- (b) undertakings not falling within the scope of Article 80,

if:

- either the annual coal consumption considered as a whole for all the undertakings involved in the concentration does not exceed 5 000 000 tonnes or
- the annual coal consumption of each of the undertakings referred to in (b) is less than 500 000 tonnes.

**Concentrations between steel producers and undertakings  
not falling within the scope of the Treaty**

*Article 3*

1. Transactions referred to in Article 66 (1) shall be exempted from the requirement of prior authorization where they have the direct or indirect effect of bringing about concentration between :

- (a) undertakings engaged in steel production, and
- (b) undertakings not falling within the scope of Article 80,

if:

- the annual production of undertakings referred to in (a) does not exceed 20 % of the tonnages set out for the groups of products referred to in Article 1 (1) (g) to (k) or
- the annual steel consumption of undertakings involved in the concentration does not exceed 50 % of their production of the product categories used by the undertakings referred to in (b). However, in respect of finished rolled steel products and end products only the groups of products listed in the Annex to this Decision shall be taken into account, or
- the undertakings referred to in (b) use no more than 10 000 tonnes of ordinary steel or 1000 tonnes of special steel, and the resulting expansion in outlets by the undertakings referred to in (a) is no more than 20 000 tonnes of ordinary steel or 2 000 tonnes of special steel in any three-year period.

2. Tonnages used in the production of steel and in the upkeep and renewal of installations of the undertakings in question shall not be considered as steel consumption.

**Concentrations between distributors**

**COAL**

*Article 4*

1. Transactions referred to in Article 66 (1) shall be exempted from the requirement of prior authorization where they have the direct or indirect effect of bringing about concentration between undertakings engaged in coal distribution, other than sales to domestic consumers or to small craft industries (hereinafter called 'distribution undertakings') if:

- (a) either the total volume of business dealt with annually by distribution undertakings involved in the concentration does not exceed 2 500 000 tonnes of coal; or
- (b) the increase in the annual volume of business brought about by the concentration does not exceed 100 000 tonnes of coal. However, transactions of this type which are repeated or involve several distribution undertakings at the same time shall be exempted from the

requirement of authorization only if the consequent total increase in the volume of business does not exceed 300 000 tonnes.

2. 'Volume of business' means the quantities sold by the distribution undertakings for their own account and for account of third parties. Sales to domestic consumers and to the small craft industries are not to be taken into account.

## STEEL

### *Article 5*

1. Transactions referred to in Article 66 (1) shall be exempted from the requirement of prior authorization where they have the direct or indirect effect of bringing about concentration between undertakings engaged in steel distribution, other than sales to domestic consumers or to small craft industries (hereinafter called 'distribution undertakings') if:

(a) either the total annual turnover of steel — not including scrap — achieved by the distribution undertakings involved in the concentration, does not exceed 100 million EUA; or

(b) the annual turnover of steel — not including scrap — achieved by the distribution undertaking which represents one of the parties involved in the concentration does not exceed 20 million EUA. However, transactions of this type which are repeated or which involve several distribution undertakings at the same time shall only be exempted from the requirement of authorization if the consequent total increase in turnover does not exceed 40 million EUA.

2. Transactions referred to in Article 66 (1) shall be exempted from the requirement of prior authorization where they have the direct or indirect effect of bringing about concentration between undertakings engaged in scrap distribution, if:

(a) either the total annual volume of business of the distribution undertakings involved in the concentration does not exceed 700 000 tonnes of scrap; or

(b) the annual volume of business of the distribution undertaking which represents one of the parties involved in the concentration does not exceed 100 000 tonnes of scrap. However, transactions of this type which are repeated or which involve several distribution undertakings at the same time shall be exempted from the requirement of authorization only if the consequent total increase in the volume of business does not exceed 200 000 tonnes of scrap in any three-year period.

3. The turnover shall be ascertained by reference to the amount of products sold and invoiced for own account and for account of third parties. 'Volume of business' means the amounts sold by the distribution undertakings for their own account and for account of third parties.

## **Other concentrations exempted from authorization**

### *Article 6*

Transactions referred to in Article 66 (1) shall be exempted from prior authorization to the extent that they have the effect of bringing about concentration :

- between undertakings engaged in production as defined in Article 80, and undertakings which sell coal or steel exclusively to domestic consumers or to small craft industries,
- between distribution undertakings and undertakings not coming within Article 80.

## **Concentrations effected by providing for group control**

### *Article 7*

1. Articles 1 to 6 shall not apply to transactions referred to in Article 66 (1) which have the effect of bringing about concentration between :

(a) on the other hand, a number of undertakings of which at least one is engaged in production or distribution in the coal and steel sector, and which are not concentrated among themselves, but which in fact or in law exercise joint control (group control) over the undertaking or undertakings under (b); and

(b) on the other hand, one or several undertakings which produce, distribute or process coal or steel as a raw material.

2. Paragraph 1 shall apply where concentration results from the joint formation of a new undertaking or the establishment of joint control of an existing undertaking.

## **General provisions**

### *Article 8*

1. The figures to be considered in applying Articles 1 to 5 above shall be the average annual figures for production, consumption, turnover and volume of business attained during the last three financial years preceding the date of concentration.

2. In the case of undertakings which have been in existence for less than three years, the figures to be considered shall be the yearly averages calculated on the basis of production, consumption, turnover and volume of business since those undertakings came into existence.

### *Article 9*

1. In applying Articles 1 to 7 regard shall be had to the whole of the undertakings and activities already grouped under one control or which would, as a result of concentration, be under such control.

2. Transactions within the meaning of Article 66 (1), to which more than one of Articles 1 to 6 above apply, shall only be exempted from the requirement of prior authorization if the conditions of each of the relevant Articles are satisfied.

#### *Article 10*

1. Transactions referred to in Article 66 (1) which in accordance with Articles 1 to 5 are exempted from authorization, shall be notified to the Commission within two months from the time when the concentration was effected.

The notification shall be made by the undertakings or persons who have acquired control.

The notification shall contain the following information :

- a description of the transaction leading to concentration,
- the description of the undertakings which will be directly or indirectly concentrated,
- an estimate of production, sales or consumption of coal or steel of the concentrated undertakings.

2. Paragraph 1 shall not apply to concentrations which achieve less than 50% of the figures required under Articles 1 to 5 of this Decision for exemption from authorization.

#### *Article 11*

This Decision shall be published in the *Official Journal of the European Communities*. It shall enter into force on 15 July 1967.

On the same date, Decisions Nos 25-54 and 28-54 shall cease to be in force.

This Decision was considered and adopted by the High Authority at its meeting on 22 June 1967.

---

*ANNEX*

**to Decision No 25-67**

**(Articles 1 (2) and 3 (1))**

Permanent railway material

Sheet pilings

Wide-flanged beams

Other angles, shapes and sections, 80 mm or more and Omega sections

Tube rounds and squares

Wire rod in coils

Merchant steel

Universal plates

Hoop and strip and hot-rolled tube strip

Hot-rolled plates of 4.76 mm or more

Hot-rolled plates of 3 to 4.75 mm

Hot-rolled sheets under 3 mm

Coils (end products)

Cold-rolled sheets under 3 mm

Hoop and strip, cold-rolled, for making tinplate

Tinplate

Blackplate used as such

Galvanized, lead-coated and other clad sheets

Electrical sheet

**COMMISSION DECISION No 715/78/ECSC<sup>1</sup> OF 6 APRIL 1978**

**concerning limitation periods in proceedings and the enforcement of sanctions  
under the Treaty establishing the European Coal and Steel Community**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 2 to 5 and 95 (1) thereof,

Having regard to the opinion of the Consultative Committee,

Having regard to the unanimous assent of the Council,<sup>2</sup>

Whereas, under Articles 47, 54, 58, 59, 64, 65, 66 and 68 of the Treaty, the Commission has the power to impose fines and periodic penalty payments on undertakings or natural or legal persons who infringe obligations incumbent upon them with regard to information and investigations, investments, production, prices, cartels and concentrations or wages;

Whereas comparable powers are conferred upon the Commission by recommendations and decisions made under Article 95 (1) and (2) for the purpose of regulating cases not provided for in the Treaty;

Whereas neither the above mentioned Articles of the Treaty nor the implementing measures taken pursuant to those Articles provide for any limitation period;

Whereas, in order to attain, pursuant to Article 5, the objectives of the Community set out in Articles 2, 3 and 4 of the Treaty and in the interests of legal certainty, it is necessary that the principle of limitation be introduced and that implementing rules be laid down; whereas, for the matter to be covered fully, it is necessary that provision for limitation be made not only as regards the power to impose fines but also as regards the power to enforce decisions which impose fines or periodic penalty payments; whereas such provisions should specify the length of the limitation periods, the date on which time starts to run and the events which have the effect of interrupting or suspending the limitation period; whereas in this respect the interests of the parties, on the one hand, and administrative requirements, on the other, should be taken into account;

Whereas these rules must apply to all the provisions relating to fines and periodic penalty payments laid down in the Treaty and in implementing measures taken thereunder; whereas they must also apply to the relevant provisions of future implementing measures,

HAS ADOPTED THIS DECISION:

---

<sup>1</sup> OJ L 94/22, 8.4.1978, p. 22.

<sup>2</sup> OJ C 31.12.1977, p. 3.

*Article 1*

**Limitation periods in proceedings**

1. The power of the Commission to impose fines for infringements of the provisions of the Treaty or of provisions made for its implementation shall be subject to a limitation period:

(a) of three years in the case of infringements of provisions concerning applications or communications of the parties, requests for information, or the carrying out of investigations;

(b) of five years in the case of all other infringements.

2. Time shall begin to run upon the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

*Article 2*

**Interruption of the limitation period in proceedings**

1. Any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period in proceedings. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one party which has participated in the infringement.

Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission or Commission decisions requiring the requested information;

(b) written authorizations to carry out investigations issued to their officials by the Commission or a Commission decision ordering an investigation;

(c) the commencement of proceedings by the Commission;

(d) notification by the Commission of a letter giving the party concerned the opportunity to submit its comments, pursuant to Article 36 of the Treaty.

2. The interruption of the limitation period shall apply for all parties which have participated in the infringement.

3. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty; that period shall be extended by the time during which limitation is suspended pursuant to Article 3.



*Article 3*

**Suspension of the limitation period in proceedings**

The limitation period in proceedings shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

*Article 4*

**Limitation period for the enforcement of sanctions**

1. The power of the Commission to enforce decisions imposing fines or periodic payments for infringements of the provisions of the Treaty or of provisions made for its implementation shall be subject to a limitation period of five years.
2. Time shall begin to run on the day on which the decision becomes final.

*Article 5*

**Interruption of the limitation period for the enforcement of sanctions**

1. The limitation period for the enforcement of sanctions shall be interrupted:
  - (a) by notification of a decision varying the original amount of the fine or periodic penalty payments or refusing an application for variation;
  - (b) by any action of the Commission or of a Member State at the request of the Commission, for the purpose of enforcing payments of a fine or periodic penalty payment.
2. Each interruption shall start time running afresh.

*Article 6*

**Suspension of the limitation period for the enforcement of sanctions**

The limitation period for the enforcement of sanctions shall be suspended for so long as:

- (a) time to pay is allowed; or
- (b) enforcement of payment is suspended pursuant to a decision of the Court of Justice of the European Communities.

*Article 7*

**Application to transitional cases**

This Decision shall also apply in respect of infringements committed before it enters into force.

*Article 8*

**Entry into force**

This Decision shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

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

**COMMISSION DECISION No 379/84/ECSC<sup>1</sup> OF 15 FEBRUARY 1984**

**defining the powers of officials and agents of the Commission instructed to carry out the checks provided for in the ECSC Treaty and decisions taken in application thereof**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 47 thereof,

Whereas it is necessary to define the scope of the powers to obtain information and carry out checks provided for in the first paragraph of Article 47 of the Treaty, without prejudice to the rights and powers referred to in the fourth paragraph of Article 86;

Whereas it is the task of the Commission to ensure that the objectives set out in the Treaty are attained, and in particular that undertakings fulfil the obligations imposed on them by the provisions of the Treaty and the decisions taken in application thereof;

Whereas in order to determine whether undertakings are acting in accordance with such obligations, it is necessary to carry out physical inspections and checks on their books;

Whereas such checks and inspections can be effective only if the facts and operations of which the Commission may need to have cognizance can be ascertained from undertakings' business records, including records held in automated systems of any kind; whereas the use of data-processing techniques is likely to facilitate the execution of the inspections for both parties;

Whereas undertakings must not be allowed to evade their obligations with regard to inspections by depositing their business records away from the undertaking; whereas they must therefore also permit access to such records in these cases;

Whereas it is not always possible to evaluate the material inspected whilst on the undertaking's premises and in such cases it is necessary to make copies or photocopies of or take extracts from the books or business records concerned;

Whereas in order for inspections to be rapid and effective, undertakings' managers or representatives should be required to give oral explanations on the spot to the officials or agents of the Commission;

Whereas, to ensure that all required information is collected, the Commission's officials or agents must be allowed to enter any premises, land or means of transport of the undertaking concerned, and of any third party with whom its books or business records have been deposited, and in so doing to have sight of the said books and business records so as to be able to select all those that are relevant and are to be produced for inspection;

---

<sup>1</sup> OJ L 46, 16.2.1984, p. 23.

Whereas, in order that inspections can be conducted efficiently, undertakings must actively assist the Commission's officials or agents in carrying out their duties;

Whereas the information required may be determined only according to the purpose for which the check in question is intended;

Whereas checks should be allowed to proceed rapidly, smoothly and without interruption; whereas they should therefore be possible upon simple production of an authorization in writing from the Commission, without an individual decision being required for this purpose;

Whereas this Decision is without prejudice to the various other Decisions in force concerning inspections,

HAS ADOPTED THIS DECISION:

*Article 1*

1. Officials and agents of the Commission instructed to carry out the checks on undertakings provided for in the first paragraph of Article 47 of the Treaty are hereby empowered:

(a) to examine books and business records to the extent necessary for the purpose of the check, including records held in automated systems of any kind, wherever such books or business records are kept;

(b) to take copies or photocopies of or extracts from the books and business records, including data stored in automated systems of any kind;

(c) to require oral explanations on the spot;

(d) to enter any premises, land or means of transport of undertakings, and of any third party with whom books or business records have been deposited, and in so doing to have sight of the said books and business records so as to be able to select all those that are relevant and are to be produced for inspection.

2. Undertakings shall assist officials and agents of the Commission in carrying out their duties.

*Article 2*

Officials and agents of the Commission instructed to carry out checks shall exercise their powers upon production of an authorization in writing specifying the purpose of the check.

*Article 3*

Undertakings shall comply with the obligations imposed by Article 1 of this Decision without an individual decision being required for that purpose, failure to do so rendering them liable to the fines and penalties provided for in the third paragraph of Article 47 of the Treaty.

*Article 4*

This Decision shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

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

## VII — Public undertakings

### *Directives under Article 90(3) of the EEC Treaty*

#### COMMISSION DIRECTIVE<sup>1</sup> OF 16 MAY 1988

##### **on competition in the markets in telecommunications terminal equipment**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 90 (3) thereof,

Whereas :

1. In all the Member States, telecommunications are, either wholly or partly, a State monopoly generally granted in the form of special or exclusive rights to one or more bodies responsible for providing and operating the network infrastructure and related services. Those rights, however, often go beyond the provision of network utilization services and extend to the supply of user terminal equipment for connection to the network. The last decades have seen considerable technical developments in networks, and the pace of development has been especially striking in the area of terminal equipment.

2. Several Member States have, in response to technical and economic developments, reviewed their grant of special or exclusive rights in the telecommunications sector. The proliferation of types of terminal equipment and the possibility of the multiple use of terminals means that users must be allowed a free choice between the various types of equipment available if they are to benefit fully from the technological advances made in the sector.

3. Article 30 of the Treaty prohibits quantitative restrictions on imports from other Member States and all measures having equivalent effect. The grant of special or exclusive rights to import and market goods to one organization can, and often does, lead to restrictions on imports from other Member States.

---

<sup>1</sup> OJ L 131, 27.5.1988, p. 73.

4. Article 37 of the Treaty states that 'Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.'

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.' Paragraph 2 of Article 37 prohibits Member States from introducing any new measure contrary to the principles laid down in Article 37 (1).

5. The special or exclusive rights relating to terminal equipment enjoyed by national telecommunications monopolies are exercised in such a way as, in practice, to disadvantage equipment from other Member States, notably by preventing users from freely choosing the equipment that best suits their needs in terms of price and quality, regardless of its origin. The exercise of these rights is therefore not compatible with Article 37 in all the Member States except Spain and Portugal, where the national monopolies are to be adjusted progressively before the end of the transitional period provided for by the Act of Accession.

6. The provision of installation and maintenance services is a key factor in the purchasing or rental of terminal equipment. The retention of exclusive rights in this field would be tantamount to retention of exclusive marketing rights. Such rights must therefore also be abolished if the abolition of exclusive importing and marketing rights is to have any practical effect.

7. Article 59 of the Treaty provides that 'restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.' Maintenance of terminals is a service within the meaning of Article 60 of the Treaty. As the transitional period has ended, the service in question, which cannot from a commercial point of view be dissociated from the marketing of the terminals, must be provided freely and in particular when provided by qualified operators.

8. Article 90 (1) of the Treaty provides that 'in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.'

9. The market in terminal equipment is still as a rule governed by a system which allows competition in the common market to be distorted; this situation continues to produce infringements of the competition rules laid down by the Treaty and to affect adversely the development of trade to such an extent as would be contrary to the interests of the Community. Stronger competition in the terminal equipment market requires the introduction of transparent technical specifications and type-approval procedures which meet the

essential requirements mentioned in Council Directive 86/361/EEC<sup>1</sup> and allow the free movement of terminal equipment. In turn, such transparency necessarily entails the publication of technical specifications and type-approval procedures. To ensure that the latter are applied transparently, objectively and without discrimination, the drawing-up and application of such rules should be entrusted to bodies independent of competitors in the market in question. It is essential that the specifications and type-approval procedures are published simultaneously and in an orderly fashion. Simultaneous publication will also ensure that behaviour contrary to the Treaty is avoided. Such simultaneous, orderly publication can be achieved only by means of a legal instrument that is binding on all the Member States. The most appropriate instrument to this end is a directive.

10. The Treaty entrusts the Commission with very clear tasks and gives it specific powers with regard to the monitoring of relations between the Member States and their public undertakings and enterprises to which they have delegated special or exclusive rights, in particular as regards the elimination of quantitative restrictions and measures having equivalent effect, discrimination between nationals of Member States, and competition. The only instrument, therefore, by which the Commission can efficiently carry out the tasks and powers assigned to it, is a Directive based on Article 90 (3).

11. Telecommunications bodies or enterprises are undertakings within the meaning of Article 90 (1) because they carry on an organized business activity involving the production of goods or services. They are either public undertakings or private enterprises to which the Member States have granted special or exclusive rights for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment. The grant and maintenance of special and exclusive rights for terminal equipment constitute measures within the meaning of that Article. The conditions for applying the exception of Article 90 (2) are not fulfilled. Even if the provision of a telecommunications network for the use of the general public is a service of general economic interest entrusted by the State to the telecommunications bodies, the abolition of their special or exclusive rights to import and market terminal equipment would not obstruct, in law or in fact, the performance of that service. This is all the more true given that Member States are entitled to subject terminal equipment to type-approval procedures to ensure that they conform to the essential requirements.

12. Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings that involves an abuse of a dominant position within the common market or a substantial part of it.

13. The telecommunications bodies hold individually or jointly a monopoly on their national telecommunications network. The national networks are markets. Therefore, the bodies each individually or jointly hold a dominant position in a substantial part of the market in question within the meaning of Article 86.

The effect of the special or exclusive rights granted to such bodies by the State to import and market terminal equipment is to:

---

<sup>1</sup> OJ L 217, 5.8.1986, p. 21.



- restrict users to renting such equipment, when it would often be cheaper for them, at least in the long term, to purchase this equipment. This effectively makes contracts for the use of networks subject to acceptance by the user of additional services which have no connection with the subject of the contracts,
- limit outlets and impede technical progress since the range of equipment offered by the telecommunications bodies is necessarily limited and will not be the best available to meet the requirements of a significant proportion of users.

Such conduct is expressly prohibited by Article 86 (d) and (b), and is likely significantly to affect trade between Member States.

At all events, such special or exclusive rights in regard to the terminal equipment market give rise to a situation which is contrary to the objective of Article 3 (f) of the Treaty, which provides for the institution of a system ensuring that competition in the common market is not distorted, and requires *a fortiori* that competition must not be eliminated. Member States have an obligation under Article 5 of the Treaty to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, including Article 3 (f).

The exclusive rights to import and market terminal equipment must therefore be regarded as incompatible with Article 86 in conjunction with Article 3, and the grant or maintenance of such rights by a Member State is prohibited under Article 90 (1).

14. To enable users to have access to the terminal equipment of their choice, it is necessary to know and make transparent the characteristics of the termination points of the network to which the terminal equipment is to be connected. Member States must therefore ensure that the characteristics are published and that users have access to termination points.

15. To be able to market their products, manufacturers of terminal equipment must know what technical specifications they must satisfy. Member States should therefore formalize and publish the specifications and type-approval rules, which they must notify to the Commission in draft form, in accordance with Council Directive 83/189/EEC.<sup>1</sup> The specifications may be extended to products imported from other Member States only insofar as they are necessary to ensure conformity with the essential requirements specified in Article 2 (17) of Directive 86/361/EEC that can legitimately be required under Community law. Member States must, in any event, comply with Articles 30 and 36 of the Treaty, under which an importing Member State must allow terminal equipment legally manufactured and marketed in another Member State to be imported on to its territory, and may only subject it to such type-approval and possibly refuse approval for reasons concerning conformity with the abovementioned essential requirements.

16. The immediate publication of these specifications and procedures cannot be considered in view of their complexity. On the other hand, effective competition is not possible without such publication, since potential competitors of the bodies or enterprises with special or exclusive rights are unaware of the precise specifications with which their terminal

---

<sup>1</sup> OJ L 109, 28.3.1983, p. 8.

equipment must comply and of the terms of the type-approval procedures and hence their cost and duration. A deadline should therefore be set for the publication of specifications and the type-approval procedures. A period of two-and-a-half years will also enable the telecommunications bodies with special or exclusive rights to adjust to the new market conditions and will enable economic operators, especially small and medium-sized enterprises, to adapt to the new competitive environment.

17. Monitoring of type-approval specifications and rules cannot be entrusted to a competitor in the terminal equipment market in view of the obvious conflict of interest. Member States should therefore ensure that the responsibility for drawing up type-approval specifications and rules is assigned to a body independent of the operator of the network and of any other competitor in the market for terminals.

18. The holders of special or exclusive rights in the terminal equipment in question have been able to impose on their customers long-term contracts preventing the introduction of free competition from having a practical effect within a reasonable period. Users must therefore be given the right to obtain a revision of the duration of their contracts,

HAS ADOPTED THIS DIRECTIVE:

#### *Article 1*

For the purposes of this Directive:

— ‘terminal equipment’ means equipment directly or indirectly connected to the termination of a public telecommunications network to send, process or receive information. A connection is indirect if equipment is placed between the terminal and the termination of the network. In either case (direct or indirect), the connection may be made by wire, optical fibre or electromagnetically,

Terminal equipment also means receive-only satellite stations not reconnected to the public network of a Member State,

— ‘undertaking’ means a public or private body, to which a Member State grants special or exclusive rights for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment.

#### *Article 2*

Member States which have granted special or exclusive rights within the meaning of Article 1 to undertakings shall ensure that those rights are withdrawn.

They shall, not later than three months following the notification of this Directive, inform the Commission of the measures taken or draft legislation introduced to that end.

### *Article 3*

Member States shall ensure that economic operators have the right to import, market, connect, bring into service and maintain terminal equipment. However, Member States may:

- in the absence of technical specifications, refuse to allow terminal equipment to be connected and brought into service where such equipment does not, according to a reasoned opinion of the body referred to in Article 6, satisfy the essential requirements laid down in Article 2 (17) of Directive 86/361/EEC,
- require economic operators to possess the technical qualifications needed to connect, bring into service and maintain terminal equipment on the basis of objective, non-discriminatory and publicly available criteria.

### *Article 4*

Member States shall ensure that users have access to new public network termination points and that the physical characteristics of these points are published not later than 31 December 1988.

Access to public network termination points existing at 31 December 1988 shall be given within a reasonable period to any user who so requests.

### *Article 5*

1. Member States shall, not later than the date mentioned in Article 2, communicate to the Commission a list of all technical specifications and type-approval procedures which are used for terminal equipment, and shall provide the publication references.

Where they have not as yet been published in a Member State, the latter shall ensure that they are published not later than the dates referred to in Article 8.

2. Member States shall ensure that all other specifications and type-approval procedures for terminal equipment are formalized and published. Member States shall communicate the technical specifications and type-approval procedures in draft form to the Commission in accordance with Directive 83/189/EEC and according to the timetable set out in Article 8.

### *Article 6*

Member States shall ensure that, from 1 July 1989, responsibility for drawing up the specifications referred to in Article 5, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.

### *Article 7*

Member States shall take the necessary steps to ensure that undertakings within the meaning of Article 1 make it possible for their customers to terminate, with maximum notice of one year, leasing or maintenance contracts which concern terminal equipment subject to exclusive or special rights at the time of the conclusion of the contracts.

For terminal equipment requiring type-approval, Member States shall ensure that this possibility of termination is afforded by the undertakings in question no later than the dates provided for in Article 8. For terminal equipment not requiring type-approval, Member States shall introduce this possibility no later than the date provided for in Article 2.

### *Article 8*

Member States shall inform the Commission of the draft technical specifications and type-approval procedures referred to in Article 5 (2):

- not later than 31 December 1988 in respect of equipment in category A of the list in Annex I,
- not later than 30 September 1989 in respect of equipment in category B of the list in Annex I,
- not later than 30 June 1990 in respect of other terminal equipment in category C of the list in Annex I.

Member States shall bring these specifications and type-approval procedures into force after expiry of the procedure provided for by Directive 83/189/EEC.

### *Article 9*

Member States shall provide the Commission at the end of each year with a report allowing it to monitor compliance with the provisions of Articles 2, 3, 4, 6 and 7.

An outline of the report is attached as Annex II.

### *Article 10*

The provisions of this Directive shall be without prejudice to the provisions of the instruments of accession of Spain and Portugal, and in particular Articles 48 and 208 of the Act of Accession.

### *Article 11*

This Directive is addressed to the Member States.

Done at Brussels, 16 May 1988.

*ANNEX I*

**List of terminal equipment referred to in Article 8**

	<i>Category</i>
Additional telephone set; private automatic branch exchanges (PABXs):	A
Modems:	A
Telex terminals:	B
Data-transmission terminals:	B
Mobile telephones:	B
Receive-only satellite stations not reconnected to the public network of a Member State:	B
First telephone set:	C
Other terminal equipment:	C

*ANNEX II*

**Outline of the report provided for in Article 9**

**Implementation of Article 2**

1. Terminal equipment for which legislation is being or has been modified.

By category of terminal equipment:

- date of adoption of the measure, or
- date of introduction of the bill, or
- date of entry into force of the measure.

2. Terminal equipment still subject to special or exclusive rights:

- type of terminal equipment and rights concerned.

**Implementation of Article 3**

- terminal equipment, the connection and/or commissioning of which has been restricted,
- technical qualifications required, giving reference of their publication.

**Implementation of Article 4**

- references of publications in which the physical characteristics are specified,
- number of existing network termination points,
- number of network termination points now accessible.

**Implementation of Article 6**

- independent body or bodies appointed.

**Implementation of Article 7**

- measures put into force, and
- number of terminated contracts.



## VIII — Intra-Community dumping

**COUNCIL REGULATION (EEC) No 812/86<sup>1</sup> OF 14 MARCH 1986**

**on protection against imports which are the subject of dumping between the Community of Ten and the new Member States or between the new Member States during the period throughout which the transitional measures laid down by the Act of Accession of Spain and Portugal apply**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Act of Accession of Spain and Portugal, and in particular Article 380 thereof,

Having regard to the proposal from the Commission,

Whereas Article 380 of the Act of Accession of Spain and Portugal provides that the procedures for applying the Article shall be adopted by the Council upon accession;

Whereas it is necessary to interpret basic concepts such as dumping, normal value and injury and to lay down the procedures to be followed in the determination of dumping and the imposition of anti-dumping duties;

Whereas it is desirable that the rules for determining normal value should be presented clearly and in sufficient detail; whereas it should be specifically provided that where sales on the domestic market of the country of export or origin do not for any reason form a proper basis for determining the existence of dumping, recourse may be had to a constructed normal value; whereas it is appropriate to give examples of situations which may be considered as not representing the ordinary course of trade, in particular where a product is sold at prices which are less than the costs of production, or where transactions take place between parties which are associated or which have a compensatory arrangements; whereas it is appropriate to list the possible methods of determining normal value in such circumstances;

Whereas it is expedient to define the export price and to enumerate the necessary allowances to be made in those cases where reconstruction of this price from the first open-market price is deemed appropriate;

---

<sup>1</sup> OJ L 78, 24.3.1986, p. 1.



Whereas, for the purpose of ensuring a fair comparison between export price and normal value, it is advisable to establish guidelines for determining the allowances to be made in respect of differences in physical characteristics, in quantities, in conditions and terms of sale and to draw attention to the fact that the burden of proof falls on any person claiming such allowances;

Whereas the term 'dumping margin' should be clearly defined;

Whereas it is necessary to set out certain factors that may be relevant for the determination of injury;

Whereas it is necessary to lay down procedures for the lodging of complaints on behalf of an industry in the Community as constituted before 1 January 1986, hereinafter referred to as the 'Community of Ten', or in Spain or Portugal that considers itself injured or threatened by dumped imports originating from the Community of Ten or Spain and Portugal;

Whereas rules should be laid down for the lodging of complaints;

Whereas there should be cooperation between the Member States and the Commission both as regards information about the existence of dumping and injury resulting therefrom, and as regards the subsequent examination of the matter in these cases; whereas, to this end, consultations should take place with the Member States concerned;

Whereas it is appropriate to lay down clearly the procedure to be followed during investigations;

Whereas it should be made clear that, if information is to be treated as confidential, a request to that effect must be made by the supplier of the information and that the information may be disregarded unless a non-confidential summary is provided, where the information is susceptible of such summary;

Whereas it is necessary to specify the content of the recommendations and authorizations that the Commission may issue;

Whereas it is essential, in order to ensure that anti-dumping duties are levied in a correct and uniform manner, that common rules for the application of such duties be laid down; whereas, by reason of the nature of the said duties, such rules may differ from the rules for the levying of normal import duties;

Whereas it is appropriate to provide for open and fair procedures for the review of measures taken, and for the investigation to be reopened when the circumstances so require;

Whereas it is necessary to provide that, after a certain period of time, anti-dumping measures will lapse unless the need for their continuance can be shown;

Whereas appropriate procedures should be established for examining applications for refunds of anti-dumping duties;

Whereas agricultural products and products derived therefrom might also be dumped; whereas it is, therefore, necessary to supplement the import rules generally applicable to such products by providing for protection against dumping;

Whereas it is appropriate to define more precisely the cost to be taken into consideration for the determination of constructed value and of sales below cost on the domestic market;

Whereas it is also appropriate to ensure consistency of the rules concerning parties which are associated or have a compensatory arrangement with each other;

Whereas it is necessary to clarify the provisions relating to the grant of allowances for differences in conditions and terms of sale, including, in particular, those relating to the level of trade, and for import charges;

Whereas it is desirable to state explicitly that the investigation of dumping or subsidization should normally cover a period of not less than six months immediately prior to the initiation of the proceeding and that final determinations must be based on the facts established in respect of the investigation period;

Whereas it is necessary to lay down explicit rules concerning the procedure to be followed after withdrawal or violation of undertakings,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

##### **Applicability**

This Regulation lays down provisions for protection against dumping in imports between the Community of Ten and the new Member States or between the new Member States during the period of application of the transitional measures defined by the Act of Accession of Spain and Portugal.

#### *Article 2*

##### **Principles and definitions**

##### **A. DUMPING**

1. The products referred to are products originating in the Community of Ten or in Spain or Portugal.

2. An anti-dumping duty may be applied to any dumped product whose clearance for home use in the Community of Ten or in Spain or Portugal causes injury, where the interests of the Community require Community action.

3. A product shall be considered to have been dumped if its export price to the Community of Ten or to Spain or Portugal is less than the normal value of a like product.

## B. NORMAL VALUE

4. For the purposes of this Regulation, normal value means :

(a) the comparable price actually paid or payable in the ordinary course of trade for the like product intended for home use in the exporting country or country of origin, providing that if there is considerable variation in prices within the Community of Ten, the weighted average of the prices prevailing within the Community of Ten may be taken as the comparable price ; or

(b) When there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison :

(i) the comparable price of the like product when exported to any third country, which may be the highest such export price but should be a representative price ; or

(ii) the constructed value, determined by adding cost of production and a reasonable margin of profit. The cost of production shall be computed on the basis of all costs, in the ordinary course of trade, both fixed and variable, in the country of origin, of materials and manufacture, plus a reasonable amount for selling, administrative and other general expenses. As a general rule, and provided that a profit is normally realized on sales of products of the same general category on the domestic market of the country of origin, the addition for profit shall not exceed such normal profit. In other cases, the addition shall be determined on any reasonable basis, using available information.

5. Whenever there are reasonable grounds for believing or suspecting that the price at which a product is actually sold for home use in the country of origin is less than the cost of production as defined in paragraph 4 (b) (ii), sales at such prices may be considered as not having been made in the ordinary course of trade if they :

(a) have been made over an extended period of time and in substantial quantities; and

(b) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade.

In such circumstances, the normal value may be determined on the basis of the remaining sales on the domestic market made at a price which is not less than the cost of production or on the basis of export sales to third countries or on the basis of the constructed value or by adjusting the sub-production-cost price referred to above in order to eliminate loss and provide for a reasonable profit. Such normal-value calculations shall be based on available information.

6. Where a product is not imported directly from the country of origin but is exported to the Community of Ten or to Spain or Portugal from an intermediate country, the normal value shall be the comparable price actually paid or payable for the like product on the domestic market of either the country of export or the country of origin. The latter basis might be appropriate *inter alia* where the product is merely transhipped through the country of export, where such products are not produced in the country of export, or where no comparable price for it exists in the country of export.

7. For the purpose of determining normal value, transactions between parties which appear to be associated or to have a compensatory arrangement with each other may be considered as not being in the ordinary course of trade unless the Community authorities are satisfied that the prices and costs involved are comparable to those involved in transactions between parties which have no such link.

### C. EXPORT PRICE

8. (a) The export price shall be the price actually paid or payable for the product sold for export to the Community of Ten or to Spain or Portugal, as the case may be.

(b) In cases where there is no export price or where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party or there are other reasons for thinking that the price actually paid or payable for the product sold for export to the Community of Ten or to Spain or Portugal is unreliable, the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer, or if the product is not resold to an independent buyer, or not resold in the condition as imported, on any reasonable basis. In such cases, allowance shall be made for all costs incurred between importation and resale, including all duties and taxes, and for a reasonable profit margin.

In particular, allowance shall be made for the following:

- (i) usual transport, insurance, handling, loading and ancillary costs;
- (ii) customs duties, any anti-dumping duties, and other taxes payable in the importing country by reason of the importation or sale of the goods;
- (iii) a reasonable margin for overheads and profit and/or any commission usually paid or agreed.

### D. COMPARISON

9. To ensure a fair comparison, the export price and the normal value compared shall be on a comparable basis as regards the physical characteristics of the product, the quantities involved and the conditions and terms of sale. They shall normally be compared at the same level of trade, preferably at the ex-factory level, and as nearly as possible at the same time.

10. If the export price and the normal value are not on a comparable basis in respect of the factors mentioned in paragraph 9, due allowance shall be made in each case, on its

merits, for differences affecting price comparability. Where adjustment for such differences is claimed by an interested party, the onus shall be on the interested party to prove that its claim is justified.

The following guidelines shall apply in determining such adjustments:

(a) differences in the physical characteristics of the product: adjustment for such differences shall normally be based on their effect on the market value in the exporting country or country of origin; however, where domestic pricing data in that country are not available or do not permit a fair comparison, the calculation shall be based on the production costs accounting for such differences;

(b) differences in quantities: adjustment shall be made when the amount of any price differential is wholly or partly due to either:

(i) quantity discounts that have been freely available in the ordinary course of trade over a representative preceding period of time, usually not less than six months, in respect of a substantial proportion, usually not less than 20%, of the total sales of the product concerned on the domestic market or, where applicable, on a third-country market; deferred rebates may be recognized if they are dependent on consistent performance in prior periods or on an undertaking to comply with the conditions required to qualify for the deferred rebate; or

(ii) savings in production costs for the different quantities.

However, where the export price is based on quantities which are less than the smallest quantity sold on the domestic market or to third countries, as the case may be, an adjustment shall be made to reflect the higher price for which the smaller quantity would be sold on the domestic or third-country market;

(c) differences in conditions and terms of sale: adjustments shall be made only for differences directly relevant to the sales under consideration, including, for example, differences in credit terms, guarantees, warranties, technical assistance, after-sales service, commission or salaries paid to salesmen, packing, transport, insurance, handling, loading and ancillary costs and differences in the level of trade not otherwise allowed for; no adjustment will generally be made for differences in overheads and general expenses, including research development or advertising costs; the size of adjustments shall normally be determined by the cost of such differences to the seller, though consideration may also be given to their effect on the value of the product;

(d) differences in import charges: adjustments shall be made for the exemption of the product exported to the Community of Ten or to Spain or Portugal, as the case may be, from import charges borne by the like product or materials physically incorporated therein when destined for consumption in the exporting country or country of origin, or for the refund of such charges.

## E. ALLOCATION OF COSTS

11. In general, all cost calculations shall be based on available accounting data, normally allocated, where necessary, in proportion to the turnover for each product and market under consideration.

## F. LIKE PRODUCT

12. For the purposes of this Regulation, 'like product' means a product which is identical, i.e. alike in all respects to the product under consideration, or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration.

## G. DUMPING MARGIN

13. (a) 'Dumping margin' means the amount by which the normal value exceeds the export price.

(b) Where prices vary, the dumping margin may be established on a transaction-by-transaction basis or by reference to the most frequently occurring, representative or weighted average, prices.

(c) Where dumping margins vary, weighted averages may be established.

## H. CONSULTATION OF INTERESTED MEMBER STATES

14. For the purposes of this Regulation, consultation of interested Member States in connection with antidumping proceedings means the consultation, in writing and, if necessary, orally, of Member States which have an economic interest in the proceedings and have declared such interest within the period laid down by the Commission when it sent them the information referred to in Article 4 (3) and (6).

### *Article 3*

#### **Injury**

1. A determination of injury shall be made only if the dumped imports cause injury, i.e. are causing or threatening to cause, through the effects of the dumping, material injury to an established industry in the Community of Ten or in Spain or Portugal or are materially retarding the establishment of such an industry. Injuries due to other factors, such as the volume and prices of imports that are not dumped or contraction in demand, which, individually or in combination, also adversely affect the industry in the Community of Ten or in Spain or in Portugal, must not be attributed to the dumped imports.

2. The determination of injury shall involve an examination of the following factors, no one or combination of which shall necessarily be conclusive:

(a) the volume of the dumped imports, and in particular whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the Community of Ten or in Spain or Portugal, as the case may be;

(b) the prices of the dumped imports, and in particular whether there has been significant price undercutting as compared with the prices of a like product in the Community of Ten or in Spain or Portugal, as the case may be;

(c) the consequent impact on the industry concerned as indicated by actual or potential trends in the relevant economic factors such as :

- production,
- utilization of capacity,
- stocks,
- sales,
- market share,
- prices (i.e. depression of prices or prevention of price increases which otherwise would have occurred),
- profits,
- return on investment,
- cash flow,
- employment.

3. A determination of threat of injury may only be made where a particular situation is likely to develop into actual injury. In this regard account may be taken of factors such as :

(a) rate of increase of the dumped exports to the Community of Ten or to Spain or Portugal;

(b) export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be to the Community of Ten or to Spain or Portugal.

4. The effect of the dumped imports shall be assessed in relation to the production in the Community of Ten or Spain or Portugal of the like product when available data permit its separate identification. When the production in the Community of Ten or in Spain or Portugal of the like product has no separate identity, the effect of the dumped imports shall be assessed in relation to the production of the narrowest group or range of production which includes the like product for which the necessary information can be found.

5. The term 'industry in the Community of Ten, in Spain or in Portugal' shall be interpreted as referring to all the producers of the like products in the Community of Ten or in Spain or Portugal, as the case may be, or to those of them whose collective output of the products constitutes a major proportion of the relevant production of those products, except that :

- where some of the producers are related to the exporters or importers or are themselves importers of the allegedly dumped product the term 'industry in the Community of Ten, in Spain or in Portugal' may be interpreted as referring to the rest of the producers,

- in exceptional circumstances the Community of Ten may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as an industry of the Community of Ten, if,
  - (a) the producers within such market sell all or almost all their production of the product in question in that market, and
  - (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community of Ten.

In such circumstances injury may be found to exist even where a major proportion of the total industry in the Community of Ten is not injured, provided that there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production of the product within such markets.

#### *Article 4*

#### **Complaint**

1. Any natural or legal person, or any association not having legal personality, acting on behalf of an industry of the Community of Ten, of Spain or Portugal which considers itself injured or threatened by dumped imports may lodge a written complaint.
2. The complaint shall contain sufficient evidence of the existence of dumping and the injury resulting therefrom.
3. The complaint may be submitted to the Commission, or to a Member State, which shall forward it to the Commission. The Commission shall send Member States a copy of any complaint it receives.
4. The complaint may be withdrawn, in which case proceedings may be terminated unless such termination would not be in the interest of the Community.
5. Where it becomes apparent, after consultation of the Member States concerned, that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.
6. Where, in the absence of any complaint, a Member State is in possession of sufficient evidence both of dumping and of injury resulting therefrom for an industry of the Community of Ten, of Spain or Portugal, it shall immediately communicate such evidence to the Commission, which shall send the other Member States a copy thereof.

#### *Article 5*

#### **Initiation and subsequent conduct of proceedings**

1. Where, after consultation of the interested Member States, there appears to be sufficient evidence to warrant initiating proceedings, the Commission shall immediately:



(a) announce the initiation of proceedings by publishing a notice in the *Official Journal of the European Communities*; such notice shall state the product and Member States concerned, summarize the evidence, and invite interested parties to submit relevant information to the Commission; they shall state the period within which interested parties may make written representations and apply to be heard orally by the Commission in accordance with paragraph 5;

(b) so advise interested Member States, the complainants and the exporters and importers known to the Commission to be concerned;

(c) commence an investigation at Community level, acting in cooperation with the Member States; the investigation shall cover both the alleged dumping and the resultant injury and shall be carried out in accordance with paragraphs 2 to 8; the investigation of dumping shall normally cover a period of not less than six months immediately prior to the initiation of proceedings.

2. The Commission shall seek all information it deems necessary and may, where it considers it appropriate to do so, examine and check the records of importers, exporters, traders, agents, producers, and trade associations and organizations.

3. (a) The Commission may request Member States:

— to supply information,

— to carry out all necessary checks and inspections, particularly on importers, traders and producers,

— to afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation.

(b) Member States shall take whatever steps are necessary to comply with requests from the Commission. They shall supply the Commission with the information requested and with the results of any inspections, checks or investigations carried out.

(c) Where the information is of general interest or where its circulation has been requested by a Member State, the Commission shall circulate the information to the interested Member States, except where it is confidential, in which case a non-confidential summary shall be circulated.

(d) Officials of the Commission shall be authorized, if the Commission or a Member State so requests, to assist the officials of Member States in carrying out their duties under this paragraph.

4. (a) The complainant, the importers and exporters known to be concerned and the representatives of the exporting Member State may inspect all evidence supplied to the Commission by any party to the investigation (as opposed to internal documents prepared by the authorities of the Community or its Member States), provided that it is relevant to the defence of their interests, not confidential as defined in Article 6 and being used by the Commission in the investigation. Requests to see such evidence shall be made in writing to the Commission specifying the evidence concerned.

(b) Exporters and importers of the product under investigation may request to be told the essential facts and grounds on which it is intended to authorize the injured Member State or States to impose anti-dumping duties.

(c) (i) Requests for information pursuant to (b) shall:

(aa) be made to the Commission in writing;

(bb) specify the particular matters on which information is sought;

(cc) be received, in cases where a recommendation has been issued to the party or parties found to be responsible for dumping, not later than one month after publication of the recommendation.

(ii) the information may be given orally or in writing, as the Commission considers appropriate. Its disclosure shall be without prejudice to any subsequent recommendations or authorizations contemplated by the Commission. Confidential information shall be treated in accordance with Article 6.

(iii) The information shall normally be given no later than 15 days before the Commission authorizes the injured Member State or States to impose anti-dumping duties. Representations made after the information is given shall be taken into consideration only if received within a period to be set by the Commission in each case depending on the urgency, but being not less than 10 days.

5. The Commission may hear interested parties orally. It shall do so if they request such a hearing in writing within the period prescribed in the notice published in the *Official Journal of the European Communities*, showing that they are an interested party likely to be affected by the outcome of the proceedings and that there are particular reasons why they should be heard orally.

6. Furthermore the Commission shall, on request, give the parties directly concerned an opportunity to meet, so that opposing views may be presented and rebuttal arguments put forward. In providing this opportunity, the Commission shall take account of the need to preserve confidentiality and of the convenience of the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

7. Anti-dumping proceedings shall not constitute a bar to customs clearance of the product concerned.

8. A proceeding shall be concluded either when it appears at the end of the investigation that it is not necessary to take measures, or when, as a result of a Commission recommendation, the enterprise undertakes to terminate dumping or by the Commission's authorizing the injured Member State or Member States to impose anti-dumping duties as provided for in Article 10.

#### *Article 6*

#### **Confidentiality**

1. Information acquired pursuant to this Regulation shall be used only for the purpose of the relevant investigation.

2. (a) The Commission and the Member States, and their respective officials, shall not disclose any information received pursuant to this Regulation for which confidentiality has been requested by the supplier of the information, without specific permission from the supplier.

(b) Requests for confidentiality shall indicate why the information is confidential and shall be accompanied by a non-confidential summary of the information, unless the supplier furnishes good reasons why the information is not susceptible of such summary.

3. Information will ordinarily be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of the information.

4. However, if it appears that a request for confidentiality is not warranted and if the supplier is unwilling to make the information public or to authorize its disclosure in generalized or summary form, the information in question may be disregarded.

The information may also be disregarded where such request is warranted, but the supplier is unwilling to provide a non-confidential summary although the information is susceptible of such summary.

5. This Article shall not preclude the disclosure by the Commission of general information, and in particular of the grounds on which recommendations or authorizations under Articles 8 and 9 are based, or of such evidence as is necessary to justify its action in court proceedings. Such disclosure must take into account the legitimate interest of the parties in the preservation of their trade secrets.

#### *Article 7*

##### **Closure of proceedings where no protective measures are necessary**

1. If it becomes apparent, after consultations of the interested Member States, that no protective measures are necessary, the proceedings shall be closed.

2. The Commission shall announce the closure of proceedings by publishing a notice in the *Official Journal of the European Communities* summarizing its findings and the grounds on which they are based.

#### *Article 8*

##### **Recommendations and undertakings**

1. Where the facts indicate that there was dumping during the period covered by the investigation, and injury, the Commission may address to the party or parties who were the originators of the dumping recommendations that dumping be terminated, within the period it lays down, by means of a measure which eliminates the dumping margin or puts an end to the injury resulting therefrom.

2. The party or parties who are the originators of the dumping shall communicate, to the Commission, their undertakings to this effect before expiry of the period laid down.
3. Before addressing its recommendations to the enterprises, the Commission shall consult with the Member States concerned.
4. The Commission may require any party from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of the undertaking, and to permit verification of pertinent data. Non-compliance with such requirements shall be construed as a violation of the undertakings.
5. Where an undertaking has been withdrawn or the Commission has reason to believe that it has been violated, the Commission may, where the Community interest calls for such action, after consultations of the interested Member States and after having offered the exporter concerned an opportunity to comment, authorize the imposition of anti-dumping duties on the basis of the facts established before acceptance of the undertaking.

#### *Article 9*

#### **Protective measures**

Where the originator or originators of the dumping fail to comply with the recommendations of the Commission or fail to give an undertaking to this end within the period laid down, or fail to comply with such undertaking, the Commission shall authorize the injured Member State or Member States to introduce anti-dumping duties and shall define the conditions and procedures for such duties after consultation of the interested Member States.

#### *Article 10*

#### **General provisions on duties**

1. Authorizations to impose anti-dumping duties shall state, in particular, the amount and type of duty imposed, the product concerned, the exporting country or country of origin, the name of the supplier, if available, and the grounds on which they are based.
2. The rate of such duties shall not exceed the dumping margin; it should be less if such lesser duty would be adequate to remove the injury.
3. (a) Anti-dumping duties may not be imposed or increased with retroactive effect.  
(b) However, where the Commission finds that an undertaking has been violated, anti-dumping duties may be levied on products which are or would have been liable to import duties under Council Directive No 79/623/EEC of 25 June 1979 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt<sup>1</sup> from up to 90 days before the date of imposition of the

---

<sup>1</sup> OJ L 179, 17.7.1979, p. 31.

duties, except that such retroactive levying of duties shall not apply to imports entered for home use in the Community of Ten before the violation.

4. Where a product is imported into the Community of Ten or into Spain or Portugal from more than one country, duty shall be levied at an appropriate rate on a non-discriminatory basis on all imports of such products found to be dumped and to be causing injury except those from sources in respect of which undertakings have been accepted.

5. Where the producers in only part of the Community of Ten have been taken to represent an industry, the Commission shall give the exporters concerned an opportunity to offer undertakings pursuant to Article 8 in respect of that part. If an adequate undertaking is not given promptly or is not fulfilled, a duty may be imposed in respect of the injured Member State or States.

6. Except where specifically provided otherwise when the anti-dumping duty is imposed, the rules on the common definition of origin and the relevant common implementing provisions shall apply.

7. Anti-dumping duties shall be collected by the injured Member State or States authorized to take protective measures in the form, at the rate and on the other terms laid down when the duties are imposed, and independently of the customs duties, taxes and other charges normally charged on imports.

#### *Article 11*

##### **Review**

1. Measures imposing anti-dumping duties and decisions to accept undertakings pursuant to Article 8 shall be subject to review, in whole or in part, where warranted.

Such review may be held either at the request of a Member State or on the initiative of the Commission. A review shall also be held at the request of an interested party who submits evidence of changed circumstances sufficient to warrant such review. Such requests shall be made to the Commission, which shall inform the interested Member States.

2. Where, after consultations of interested Member States, a review is found to be warranted, the proceedings may be reopened in accordance with Article 5 if the circumstances so require. The reopening of proceedings shall not, by itself, have any effect on measures already in operation.

3. In the light of the review, carried out with or without reopening proceedings, the recommendation, undertakings or anti-dumping duties shall, if necessary, be varied or withdrawn in such manner as the Commission shall determine after consulting the interested Member States.

## Article 12

1. Subject to paragraph 2, anti-dumping duties and undertakings shall lapse five years after the date on which they took effect or were last varied or confirmed.
2. Anti-dumping duties and undertakings shall also lapse on the expiry of the transitional measures applicable to the product in question pursuant to the Treaty of Accession of Spain and Portugal.
3. At least six months before the expiry of the five-year period referred to in paragraph 1, the Commission shall, after consultation of interested Member States, publish a notice in the *Official Journal of the European Communities* of the impending expiry of the measures in question and shall inform the Community producers known to be concerned. The notice shall state the period within which interested parties may make written representations and may apply to be heard orally by the Commission in accordance with Article 5 (5).

Where an interested party shows that the expiry of the measure would lead again to injury or threat of injury, the Commission shall carry out a review of the measure. The measure shall remain in effect pending the outcome of the review.

Where anti-dumping duties and undertakings lapse pursuant to this Article, the Commission shall publish a notice to that effect in the *Official Journal of the European Communities*.

## Article 13

### Refund

1. Where an importer can show that the duty collected exceeds the actual dumping margin, consideration being given to any application of weighted averages, the excess amount shall be refunded.
2. An application for the refund of duties under paragraph 1 shall be submitted by the importer to the Commission via the Member State in whose territory the products were entered for home use, once the amount of the duties to be levied has been duly determined by the competent authorities.

The Member State shall forward the application to the Commission as soon as possible, with or without an opinion as to its merits.

The Commission after consultations of the interested Member States shall determine whether and to what extent it can comply with the application.

*Article 14*

**Final provisions**

This Regulation shall be without prejudice to Community Regulations in the agricultural sector or to Regulations (EEC) No 1059/69,<sup>1</sup> (EEC) No 2730/75<sup>2</sup> and (EEC) No 2783/75,<sup>3</sup> except that it shall be applied so as to supplement those Regulations and override any of their provisions that preclude the imposition of anti-dumping duties.

*Article 15*

**Entry into force**

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

It shall apply to:

- proceedings initiated after 1 January 1986,
- proceedings initiated before accession in Spain, Portugal or the Community of Ten,
- the review of measures adopted before accession pursuant to Regulation (EEC) No 3017/79,<sup>4</sup> as last amended by Regulation (EEC) No 1580/82<sup>5</sup> and (EEC) No 2176/84,<sup>6</sup>
- the review of measures decided before accession pursuant to the anti-dumping legislation of the new Member States with regard to the Community of Ten.

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

---

<sup>1</sup> OJ L 141, 12.6.1969, p. 1.

<sup>2</sup> OJ L 281, 1.11.1975, p. 20.

<sup>3</sup> OJ L 282, 1.11.1975, p. 104.

<sup>4</sup> OJ L 339, 31.12.1979, p. 1.

<sup>5</sup> OJ L 178, 22.6.1982, p. 9.

<sup>6</sup> OJ L 201, 30.7.1984, p. 1.

**COUNCIL DECISION No 813/86/ECSC<sup>1</sup> OF 14 MARCH 1986**

**on protection against imports which are the subject of dumping between the Community of Ten and the new Member States or between the new Member States during the period throughout which the transitional measures laid down by the Act of Accession of Spain and Portugal apply**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Act of Accession of Spain and Portugal, and in particular Article 380 thereof,

Having regard to the proposal from the Commission,

Whereas Article 380 of the Act of Accession of Spain and Portugal provides that the procedures for applying the Article shall be adopted by the Council upon accession;

Whereas it is necessary to interpret basic concepts such as dumping, normal value and injury and to lay down the procedures to be followed in the determination of dumping and the imposition of anti-dumping duties;

Whereas it is desirable that the rules for determining normal value should be presented clearly and in sufficient detail; whereas it should be specifically provided that where sales on the domestic market of the country of export or origin do not for any reason form a proper basis for determining the existence of dumping, recourse may be had to a constructed normal value; whereas it is appropriate to give examples of situations which may be considered as not representing the ordinary course of trade, in particular where a product is sold at prices which are less than the costs of production, or where transactions take place between parties which are associated or which have a compensatory arrangement; whereas it is appropriate to list the possible methods of determining normal value in such circumstances;

Whereas it is expedient to define the export price and to enumerate the necessary allowances to be made in those cases where reconstruction of this price from the first open-market price is deemed appropriate;

Whereas, for the purpose of ensuring a fair comparison between export price and normal value, it is advisable to establish guidelines for determining the allowances to be made in respect of differences in physical characteristics, in quantities, in conditions and terms of sale and to draw attention to the fact that the burden of proof falls on any person claiming such allowances;

Whereas the term 'dumping margin' should be clearly defined;

---

<sup>1</sup> OJ L 78, 24.3.1986, p. 10.



Whereas it is necessary to set out certain factors that may be relevant for the determination of injury;

Whereas it is necessary to lay down procedures for the lodging of complaints on behalf of an industry in the Community as constituted before 1 January 1986, hereinafter referred to as the 'Community of Ten', or in Spain or Portugal that considers itself injured or threatened by dumped imports originating from the Community of Ten or Spain and Portugal;

Whereas rules should be laid down for the lodging of complaints;

Whereas there should be cooperation between the Member States and the Commission both as regards information about the existence of dumping and injury resulting therefrom, and as regards the subsequent examination of the matter in these cases; whereas, to this end, consultations should take place with the Member States concerned;

Whereas it is appropriate to lay down clearly the procedure to be followed during investigations;

Whereas it should be made clear that, if information is to be treated as confidential, a request to that effect must be made by the supplier of the information and that the information will be disregarded unless a non-confidential summary is provided, where the information is susceptible of such summary;

Whereas it is necessary to specify the content of the recommendations and authorizations that the Commission may issue;

Whereas it is essential, in order to ensure that antidumping duties are levied in a correct and uniform manner, that common rules for the application of such duties be laid down; whereas, by reason of the nature of the said duties, such rules may differ from the rules for the levying of normal import duties;

Whereas it is appropriate to provide for open and fair procedures for the review of measures taken, and for the investigation to be reopened when the circumstances so require;

Whereas it is necessary to provide that, after a certain period of time, anti-dumping measures will lapse unless the need for their continuance can be shown;

Whereas appropriate procedures should be established for examining applications for refunds of anti-dumping duties;

Whereas it is appropriate to define more precisely the cost to be taken into consideration for the determination of constructed value and of sales below cost on the domestic market;

Whereas it is also appropriate to ensure consistency of the rules concerning parties which are associated or have a compensatory arrangement with each other;

Whereas it is necessary to clarify the provisions relating to the grant of allowances for differences in conditions and terms of sale, including, in particular, those relating to the level of trade, and for import charges;

Whereas it is desirable to state explicitly that the investigation of dumping or subsidization should normally cover a period of not less than six months immediately prior to the initiation of the proceeding and that final determinations must be based on the facts established in respect of the investigation period;

Whereas it is necessary to lay down explicit rules concerning the procedure to be followed after withdrawal or violation of undertakings,

HAS ADOPTED THIS DECISION :

*Article 1*

**Applicability**

This Decision lays down provisions for protection against dumping in imports between the Community of Ten and the new Member States or between the new Member States during the period of application of the transitional measures defined by the Act of Accession of Spain and Portugal.

*Article 2*

**Principles and definitions**

**A. DUMPING**

1. The products referred to are products originating in the Community of Ten or in Spain or Portugal.
2. An anti-dumping duty may be applied to any dumped product whose clearance for home use in the Community of Ten or in Spain or Portugal causes injury, where the interests of the Community require Community action.
3. A product shall be considered to have been dumped if its export price to the Community of Ten or to Spain or Portugal is less than the normal value of a like product.

## B. NORMAL VALUE

4. For the purposes of this Decision, normal value means:

(a) the comparable price actually paid or payable in the ordinary course of trade for the like product intended for home use in the exporting country or country of origin, providing that if there is considerable variation in prices within the Community of Ten, the weighted average of the prices prevailing within the Community of Ten may be taken as the comparable price; or

(b) when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison:

(i) the comparable price of the like product when exported to any third country, which may be the highest such export price but should be a representative price; or

(ii) the constructed value, determined by adding cost of production and a reasonable margin of profit. The cost of production shall be computed on the basis of all costs, in the ordinary course of trade, both fixed and variable, in the country of origin, of materials and manufacture, plus a reasonable amount for selling, administrative and other general expenses. As a general rule, and provided that a profit is normally realized on sales of products of the same general category on the domestic market of the country of origin, the addition for profit shall not exceed such normal profit. In other cases, the addition shall be determined on any reasonable basis, using available information.

5. Whenever there are reasonable grounds for believing or suspecting that the price at which a product is actually sold for home use in the country of origin is less than the cost of production as defined in paragraph 4 (b) (ii), sales at such prices may be considered as not having been made in the ordinary course of trade if they:

(a) have been made over an extended period of time and in substantial quantities; and

(b) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade.

In such circumstances, the normal value may be determined on the basis of the remaining sales on the domestic market made at a price which is not less than the cost of production or on the basis of export sales to third countries or on the basis of the constructed value or by adjusting the sub-production-cost price referred to above in order to eliminate loss and provide for a reasonable profit. Such normal-value calculations shall be based on available information.

6. Where a product is not imported directly from the country of origin but is exported to the Community of Ten or to Spain or Portugal from an intermediate country, the normal value shall be the comparable price actually paid or payable for the like product on the domestic market of either the country of export or the country of origin. The latter basis might be appropriate *inter alia* where the product is merely transhipped through the country of export, where such products are not produced in the country of export, or where no comparable price for it exists in the country of export.

7. For the purpose of determining normal value, transactions between parties which appear to be associated or to have a compensatory arrangement with each other may be considered as not being in the ordinary course of trade unless the Community authorities are satisfied that the prices and costs involved are comparable to those involved in transactions between parties which have no such link.

### C. EXPORT PRICE

8. (a) The export price shall be the price actually paid or payable for the product sold for export to the Community of Ten or to Spain or Portugal, as the case may be.

(b) In cases where there is no export price or where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party or that for other reasons the price actually paid or payable for the product sold for export to the Community of Ten, Spain or Portugal is unreliable, the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer, or if the product is not resold to an independent buyer, or not resold in the condition imported, on any reasonable basis. In such cases, allowance shall be made for all costs incurred between importation and resale, including all duties and taxes, and for a reasonable profit margin.

Such allowances shall include, in particular, the following:

- (i) usual transport, insurance, handling, loading and ancillary costs;
- (ii) customs duties, any anti-dumping duties, and other taxes payable in the importing country by reason of the importation or sale of the goods;
- (iii) a reasonable margin for overheads and profit and/or any commission usually paid or agreed.

### D. COMPARISON

9. For the purpose of a fair comparison, the export price and the normal value shall be on a comparable basis as regards physical characteristics of the product, quantities and conditions and terms of sale. They shall normally be compared at the same level of trade, preferably at the ex-factory level, and as nearly as possible at the same time.

10. If the export price and the normal value are not on a comparable basis in respect of the factors mentioned in paragraph 9, due allowance shall be made in each case, on its merits, for differences affecting price comparability. Where an interested party claims such an allowance, it must prove that its claim is justified.

The following guidelines shall apply in determining these allowances;

(a) differences in physical characteristics of the product: allowance for such differences shall normally be based on the effect on the market value in the country of origin or export; however, where domestic pricing data in that country are not available or do not permit a

fair comparison, the calculation shall be based on the production costs accounting for such differences;

(b) differences in quantities: allowances shall be made when the amount of any price differential is wholly or partly due to either:

(i) price discounts for quantity sales which have been made freely available in the ordinary course of trade over a representative preceding period of time, usually not less than six months, and in respect of a substantial proportion, usually not less than 20 %, of the total sales of the product under consideration on the domestic market, or where applicable, on a third-country market; deferred discounts may be recognized if they are based on consistent practice in prior periods, or on an undertaking to comply with the conditions required to qualify for the deferred discount, or

(ii) savings in the cost of producing different quantities.

However, when the export price is based on quantities which are less than the smallest quantity sold on the domestic market, or, if applicable to third countries, then the allowance shall be determined in such a manner as to reflect the higher price for which the smaller market quantity would be sold on the domestic, or, if applicable, on a third-country market;

(c) differences in conditions and terms of sale: allowances shall be limited to those differences which bear a direct relationship to the sales under consideration, and include, for example, differences in credit terms, guarantees, warranties, technical assistance, servicing, commissions or salaries paid to salesmen, packing, transport, insurance, handling, loading and ancillary costs and, in so far as no account has been taken of them otherwise, differences in the level of trade; allowances generally will not be made for differences in overheads and general expenses, including research development or advertising costs; the amount of these allowances shall normally be determined by the cost of such differences to the seller, though consideration may also be given to their effect on the value of the product;

(d) differences in import charges: an allowance shall be made by reason of the exemption of a product exported to the Community of Ten, to Spain or Portugal, from any import charges borne by the like product and by materials physically incorporated therein, when destined for consumption in the country of origin or export, or by reason of the refund of such charges.

## E. ALLOCATION OF COSTS

11. In general, all cost calculations shall be based on available accounting data, normally allocated, where necessary, in proportion to the turnover for each product and market under consideration.

## F. LIKE PRODUCT

12. For the purposes of this Decision 'like product' means a product which is identical, i.e. alike in all respects to the product under consideration, or, in the absence of such a

product, another product which has characteristics closely resembling those of the product under consideration.

### G. DUMPING MARGIN

13. (a) 'Dumping margin' means the amount by which the normal value exceeds the export price.

(b) Where prices vary, the dumping margin may be established on a transaction-by-transaction basis or by reference to the most frequently occurring, representative or weighted average, prices.

(c) Where dumping margins vary, weighted averages may be established.

### H. CONSULTATION OF INTERESTED MEMBER STATES

14. For the purposes of this Decision consultation of interested Member States in connection with anti-dumping proceedings means the consultation, in writing and, if necessary, orally, of Member States which have an economic interest in the proceedings and have declared such interest within the period laid down by the Commission when it sent them the information referred to in Article 4 (3) and (6).

#### *Article 3*

#### **Injury**

1. A determination of injury shall be made only if the dumped imports cause injury, i.e. are causing or threatening to cause, through the effects of the dumping, material injury to an established industry in the Community of Ten or in Spain or Portugal or are materially retarding the establishment of such an industry. Injuries due to other factors, such as the volume and prices of imports that are not dumped or contraction in demand, which, individually or in combination, also adversely affect the industry in the Community of Ten or in Spain or in Portugal, must not be attributed to the dumped imports.

2. An examination of injury shall involve the following factors, no one or several of which can necessarily give decisive guidance:

(a) volume of dumped imports, in particular whether there has been a significant increase, either in absolute terms or relative to production or consumption in the Community of Ten, Spain or Portugal;

(b) the prices of the dumped imports, and in particular whether there has been significant price undercutting as compared with the prices of a like product in the Community of Ten or in Spain or Portugal, as the case may be;

(c) the consequent impact on the industry concerned as indicated by actual or potential trends in the relevant economic factors such as:

- production,
- utilization of capacity,
- stocks,
- sales,
- market share,
- prices (i.e. depression of prices or prevention of price increases which otherwise would have occurred),
- profits,
- return on investment,
- cash flow,
- employment.

3. A determination of threat of injury may only be made where a particular situation is likely to develop into actual injury. In this regard account may be taken of factors such as:

- (a) rate of increase of the dumped exports to the Community of Ten or to Spain or Portugal;
- (b) exports capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be to the Community of Ten or to Spain or Portugal.

4. The effect of the dumped imports shall be assessed in relation to the production in the Community of Ten or Spain or Portugal of the like product when available data permit its separate identification. When the production in the Community of Ten or Spain or Portugal of the like product has no separate identity, the effect of the dumped imports shall be assessed in relation to the production of the narrowest group or range of production which includes the like product for which the necessary information can be found.

5. The term 'industry in the Community of Ten, in Spain or in Portugal' shall be interpreted as referring to all the producers of the like products in the Community of Ten or in Spain or Portugal, as the case may be, or to those of them whose collective output of the products constitutes a major proportion of the relevant production of those products, except that:

- where some of the producers are related to the exporters or importers or are themselves importers of the allegedly dumped product the term 'industry in the Community of Ten, in Spain or in Portugal' may be interpreted as referring to the rest of the producers,
- in exceptional circumstances the Community of Ten may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as an industry of the Community of Ten, if,
  - (a) the producers within such market sell all or almost all their production of the product in question in that market, and

- (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community of Ten.

In such circumstances injury may be found to exist even where a major proportion of the total industry in the Community of Ten is not injured, provided that there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production of the product within such markets.

#### *Article 4*

#### **Complaint**

1. Any natural or legal person, or any association not having legal personality, acting on behalf of an industry of the Community of Ten, of Spain or Portugal which considers itself injured or threatened by dumped imports may lodge a written complaint.
2. The complaint shall contain sufficient evidence of the existence of dumping and the injury resulting therefrom.
3. The complaint may be submitted to the Commission, or to a Member State, which shall forward it to the Commission. The Commission shall send Member States a copy of any complaint it receives.
4. The complaint may be withdrawn, in which case proceedings may be terminated unless such termination would not be in the interest of the Community.
5. Where it becomes apparent, after consultation of the Member States concerned, that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.
6. Where, in the absence of any complaint, a Member State is in possession of sufficient evidence both of dumping and of injury resulting therefrom for an industry of the Community of Ten, Spain or Portugal, it shall immediately communicate such evidence to the Commission, which shall send the other Member States a copy thereof.

#### *Article 5*

#### **Initiation and subsequent conduct of proceedings**

1. Where, after consultation of the interested Member States, it is apparent that there is sufficient evidence to justify initiating a proceeding, the Commission shall immediately:
  - (a) announce the initiation of a proceeding in the *Official Journal of the European Communities*; such announcements shall indicate the product and the Member States concerned, give a summary of the information received, and provide that all relevant



information is to be communicated to the Commission; it shall state the period within which interested parties may make known their views in writing and may apply to be heard orally by the Commission in accordance with paragraph 5;

(b) so advise interested Member States, the complainants and the exporters and importers known to the Commission to be concerned;

(c) commence an investigation at Community level, acting in cooperation with the Member States; such investigation shall cover both dumping and the injury resulting therefrom and shall be carried out in accordance with paragraphs 2 to 8; the investigation of dumping shall normally cover a period of not less than six months immediately prior to the initiation of the proceeding.

2. The Commission shall seek all information it deems to be necessary and, where it considers it appropriate, examine and verify the records of importers, exporters, traders, agents, producers, trade associations and organizations.

3. (a) The Commission may request Member States:

- to supply information,
- to carry out all necessary checks and inspections, particularly on importers, traders and producers,
- to afford the necessary assistance to the Commission's duly authorized officials to enable them to carry out their duties of conducting checks.

(b) Member States shall take whatever measures are necessary to give effect to requests from the Commission. They shall send to the Commission the information requested together with the results of all inspections, checks or investigations carried out.

(c) Where this information is of general interest or where its transmission has been requested by a Member State, the Commission shall forward it to the Member States, provided it is not confidential, in which case a non-confidential summary shall be forwarded.

(d) Officials of the Commission shall be authorized, if the Commission or a Member State so requests, to assist the officials of Member States in carrying out their duties.

4. (a) The complainant and the importers and exporters known to be concerned, as well as the representatives of the exporting Member State, may inspect all information made available to the Commission by any party to an investigation, as distinct from internal documents prepared by the authorities of the Community or its Member States, provided that it is relevant to the defence of their interests and not confidential within the meaning of Article 6 and that it is used by the Commission in the investigation. To this end, they shall address a written request to the Commission indicating the information required.

(b) Exporters and importers of the product subject to investigation may request to be informed of the essential facts and considerations on the basis of which it is intended to authorize the injured Member State or States to impose anti-dumping measures.

- (c) (i) Requests for information pursuant to (b) shall:
- (aa) be addressed to the Commission in writing;
  - (bb) specify the particular issues on which information is sought;
  - (cc) be received, in cases where a recommendation has been addressed to the party or parties who have been found to be at the origin of the dumping, not later than one month after publication of the recommendation.
- (ii) the information may be given either orally or in writing, as considered appropriate by the Commission. It shall not prejudice any subsequent recommendation or authorization which may be made or given by the Commission. Confidential information shall be treated in accordance with Article 6.
- (iii) information shall normally be given no later than 15 days before the Commission authorizes the injured Member State or Member States to adopt the anti-dumping measures. Representations made after the information is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.
5. The Commission may hear the interested parties. It shall so hear them if they have, within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are an interested party likely to be affected by the outcome of the proceedings and that there are particular reasons why they should be heard orally.
6. Furthermore the Commission shall, on request, give the parties directly concerned an opportunity to meet, so that opposing views may be presented and any rebuttal argument put forward. In providing this opportunity, the Commission shall take account of the need to preserve confidentiality and of the convenience of the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.
7. Anti-dumping proceedings shall not constitute a bar to customs clearance of the product concerned.
8. A proceeding shall be concluded either when it appears at the end of the investigation that it is not necessary to take measures, or when, as a result of a Commission recommendation, the enterprise undertakes to terminate dumping or by the Commission's authorizing the injured Member State or Member States to impose anti-dumping duties as provided for in Article 10.

#### *Article 6*

#### **Confidentiality**

1. Information received pursuant to this Decision shall be used only for the purpose for which it was requested.

2. (a) Neither the Commission, the Member States, nor the officials of any of these shall reveal any information received pursuant to this Decision for which confidential treatment has been requested by its supplier, without specific permission from the supplier.

(b) Requests for confidential treatment shall indicate why the information is confidential and shall be accompanied by a non-confidential summary of the information, or a statement of the reasons why the information is not susceptible of such summary.

3. Information will ordinarily be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of the information.

4. However, if it appears that a request for confidentiality is not warranted and if the supplier is unwilling to make the information public or to authorize its disclosure in generalized or summary form, the information in question may be disregarded.

The information may also be disregarded where such request is warranted, but the supplier is unwilling to provide a non-confidential summary, provided that the information is susceptible of such summary.

5. This Article shall not preclude the disclosure of general information by the Commission and in particular of the reasons on which the recommendations or authorizations referred to in Articles 8 and 9 are based, or disclosure of the evidence relied on by the Commission in so far as necessary to explain those reasons in court proceedings. Such disclosure must take into account the legitimate interest of the parties concerned that their business secrets should not be divulged.

#### *Article 7*

##### **Termination of proceedings where protective measures are unnecessary**

1. If it becomes apparent, after consultation of the interested Member States, that protective measures are unnecessary, the proceeding shall be terminated.

2. The Commission shall announce the termination in the *Official Journal of the European Communities* setting forth its basic conclusions and a summary of the reasons therefor.

#### *Article 8*

##### **Recommendations and undertakings**

1. Where the facts indicate that there was dumping during the period covered by the investigation, and injury, the Commission may address to the party or parties who were the originators of the dumping recommendations that dumping be terminated, within the period it lays down, by means of a measure which eliminates the dumping margin or puts an end to the injury resulting therefrom.

2. The party or parties who are the originators of the dumping shall communicate, to the Commission, their undertakings to this effect before expiry of the period laid down.
3. Before addressing its recommendations to the enterprises, the Commission shall consult with the Member States concerned.
4. The Commission may require any party from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such undertakings, and to permit verification of pertinent data. Non-compliance with such requirements shall be construed as a violation of the undertaking.
5. Where an undertaking has been withdrawn or where Commission has reason to believe that it has been violated, the Commission may, if Community interests call for such intervention, after consultations with the interested Member States and after having offered the exporter concerned an opportunity to comment, authorize the introduction of anti-dumping duties on the basis of the facts established before the acceptance of the undertaking.

#### *Article 9*

#### **Protective measures**

Where the originator or originators of the dumping fail to comply with the recommendation of the Commission or fail to give an undertaking to this end within the period laid down, or fail to comply with such undertaking, the Commission shall authorize the injured Member State or Member States to introduce anti-dumping duties and shall define the conditions and procedures for such duties after consultation of the interested Member States.

#### *Article 10*

#### **General provisions on duties**

1. Authorizations to impose anti-dumping duties shall state, in particular, the amount and type of duty imposed, the product concerned, the exporting country or country of origin, the name of the supplier, if available, and the grounds on which they are based.
2. The amount of such duties shall not exceed the dumping margin established; it should be less if such lesser duty would be adequate to remove the injury.
3. (a) Anti-dumping duties shall be neither imposed nor increased with retroactive effect.  
(b) However, where the Commission determines for dumped products that an undertaking has been violated, the definitive anti-dumping duties may be imposed on products in relation to which the obligation to pay import duties under Council Directive No 623/EEC of 25 June 1979 on the harmonization of provisions laid down by law, regulation or

administrative action relating to customs debt<sup>1</sup> has been or would have been incurred not more than 90 days prior to the date of application of duties, except that in the case of violation of an undertaking such retroactive assessment shall not apply to imports which were released for home use in the Community of Ten before the violation.

4. Where a product is imported into the Community of Ten or into Spain or Portugal from more than one country, duty shall be levied at an appropriate amount on a non-discriminatory basis on all imports of such product found to be dumped and, causing injury, other than imports from those sources in respect of which undertakings have been accepted.

5. Where industry in the Community of Ten has been interpreted as referring to the producers in a certain region, the Commission shall give exporters an opportunity to offer undertakings pursuant to Article 8 in respect of the region concerned. If an adequate undertaking is not given promptly or is not fulfilled, a duty may be imposed in respect of the injured Member State or States.

6. In the absence of any special provisions to the contrary adopted when an anti-dumping duty was imposed, the rules on the common definition of the concept of origin and the relevant common implementing provisions shall apply.

7. Anti-dumping duties shall be collected by the injured Member State or Member States authorized to take protective measures in the form, at the rate and according to the other criteria laid down when the duties were imposed, and independently of the customs duties, taxes and other charges normally imposed on imports.

#### *Article 11*

##### **Review**

1. The undertakings entered into pursuant to Article 8 and the measures imposing anti-dumping duties shall be subject to review, in whole or in part, where warranted.

Such review may be held either at the request of a Member State or on the initiative of the Commission. A review shall also be held where an interested party so requests and submits evidence of changed circumstances sufficient to the need for such review. Such requests shall be addressed to the Commission, which shall inform the interested Member States.

2. Where, after consultations of the interested Member States, it becomes apparent that review is warranted, the proceedings shall be reopened in accordance with Article 5, where the circumstances so require. Such reopening shall not *per se* affect the measures in operation.

---

<sup>1</sup> OJ L 17.7.1979, p. 31.

3. Where warranted by the review, carried out either with or without reopening of the proceedings, the recommendations, undertakings or anti-dumping duties shall be amended or cancelled according to procedures laid down by the Commission after consulting the interested Member States.

#### *Article 12*

1. Subject to paragraph 2, anti-dumping duties and undertakings shall lapse after five years from the date on which they entered into force or were last modified or confirmed.

2. The duties and undertakings shall also lapse on expiry of the period of application of the transitional measures applicable to the product in question pursuant to the terms of the Treaty of Accession of Spain and Portugal.

3. The Commission shall normally, after consultation of the interested Member States, and within six months prior to the end of the five-year period referred to in paragraph 1, publish in the *Official Journal of the European Communities* a notice of the impending expiry of the measures in question and inform the Community industry known to be concerned. This notice shall state the period within which interested parties may make known their views in writing and may apply to be heard orally by the Commission in accordance with Article 5 (5).

Where an interested party shows that the expiry of the measure would lead again to injury or threat of injury, the Commission shall carry out a review of the measure. The measure shall remain in effect pending the outcome of the review.

Where anti-dumping duties and undertakings lapse pursuant to this Article, the Commission shall publish a notice to that effect in the *Official Journal of the European Communities*.

#### *Article 13*

##### **Refund**

1. Where an importer can show that the duty collected exceeds the actual dumping margin, consideration being given to any application of weighted averages, the excess amount shall be reimbursed.

2. In order to request the reimbursement referred to in paragraph 1, the importer shall submit an application to the Commission. The application shall be submitted via the Member State in the territory of which the products were released for home use and within three months of the date on which the amount of the duties to be levied was duly determined by the competent authorities.

The Member State shall forward the application to the Commission as soon as possible, either with or without an opinion as to its merits.

The Commission shall, after consultation of the interested Member States decide whether, and to what extent, the application should be granted.

#### *Article 14*

#### **Entry into force**

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

It shall apply to :

- proceedings initiated after 1 January 1986,
- proceedings initiated before accession in Spain, Portugal or the Community of Ten,
- the review of measures decided before accession pursuant to Recommendation No 3018/79/ECSC<sup>1</sup> as last amended by Recommendation No 3025/82/ECSC,<sup>2</sup> and Decision No 2177/84/ECSC<sup>3</sup>,
- the review of measures decided before accession pursuant to the anti-dumping legislation of the new Member States with regard to the Community of Ten.

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

---

<sup>1</sup> OJ L 339, 31.12.1979, p. 15.

<sup>2</sup> OJ L 317, 13.11.1982, p. 17.

<sup>3</sup> OJ L 201, 30.7.1984, p. 17.

European Communities — Commission

**Competition law in the European Communities**

**Volume I: Rules applicable to undertakings**

Luxembourg: Office for Official Publications of the European Communities

1990 — 410 pp. — 16.2 × 22.9 cm

ES, DA, DE, GR, EN, FR, IT, NL, PT

Vol. I: ISBN 92-826-1307-0

Vol. I + II: ISBN 92-826-1298-8

Catalogue number: CV-42-90-001-EN-C

Price (excluding VAT) in Luxembourg: ECU 18.50



**Venta y suscripciones • Salg og abonnement • Verkauf und Abonnement • Πωλήσεις και συνδρομές  
Sales and subscriptions • Vente et abonnements • Vendita e abbonamenti  
Verkoop en abonnementen • Venda e assinaturas**

**BELGIQUE / BELGIE**

**Moniteur belge / Belgisch Staatsblad**  
Rue de Louvain 42 / Leuvenseweg 42  
1000 Bruxelles / 1000 Brussel  
Tél. (02) 512 00 26  
Fax 511 01 84  
CCP / Postrekening 000-2005502-27  
Autres distributeurs / Overige verkooppunten

**Librairie européenne /  
Europese Boekhandel**  
Avenue Albert Jonnard 50 /  
Albert Jonnardlaan 50  
1200 Bruxelles / 1200 Brussel  
Tél. (02) 734 02 81  
Fax 735 08 60

**Jean De Lannoy**  
Avenue du Roi 202 / Koningslaan 202  
1050 Bruxelles / 1050 Brussel  
Tél. (02) 538 51 69  
Télex 63220 UNBOOK B

**CREDOC**  
Rue de la Montagne 34 / Bergstraat 34  
Bte 11 / Bus 11  
1000 Bruxelles / 1000 Brussel

**DANMARK**

**J. H. Schultz Information A/S  
EF-Publikationer**  
Ottelavej 18  
2500 Valby  
Tlf. 36 44 22 66  
Fax 36 44 01 41  
Girokonto 6 00 08 86

**BR DEUTSCHLAND**

**Bundesanzeiger Verlag**  
Breite Straße  
Postfach 10 80 06  
5000 Köln 1  
Tel. (0221) 20 29-0  
Fernschreiber  
ANZEIGER BONN 8 882 595  
Fax 20 29 278

**GREECE**

**G.C. Eleftheroudakis SA**  
International Bookstore  
Nikis Street 4  
10563 Athens  
Tel. (01) 322 63 23  
Telex 219410 ELEF  
Fax 323 98 21

**ESPAÑA**

**Boletín Oficial del Estado**  
Trafalgar, 27  
28010 Madrid  
Tel. (91) 446 60 00

**Mundi-Pressa Libros, S.A.**  
Castelló, 37  
28001 Madrid  
Tel. (91) 431 33 99 (Libros)  
431 32 22 (Suscripciones)  
435 36 37 (Dirección)  
Télex 49370-MPLI-E  
Fax (91) 275 39 98

Sucursal:  
**Libreria Internacional AEDOS**  
Consejo de Ciento, 391  
08009 Barcelona  
Tel. (93) 301 86 15  
Fax (93) 317 01 41

Generalitat de Catalunya:  
**Libreria Rambla dels estudis**  
Rambla, 118 (Palau Moja)  
08002 Barcelona  
Tel. (93) 302 86 35  
302 64 62

**FRANCE**

**Journal officiel**  
Service des publications  
des Communautés européennes  
26, rue Desaix  
75727 Paris Cedex 15  
Tél. (1) 40 58 75 00  
Fax (1) 40 58 75 74

**IRELAND**

**Government Publications Sales Office**  
Sun Alliance House  
Molesworth Street  
Dublin 2  
Tel. 71 03 09

or by post

**Government Stationery Office  
EEC Section**  
6th floor  
Bishop Street  
Dublin 8  
Tel. 78 16 66  
Fax 78 06 45

**ITALIA**

**Licosa Spa**  
Via Benedetto Fortini, 120/10  
Casella postale 552  
50125 Firenze  
Tel. (055) 64 54 15  
Fax 64 12 57  
Telex 570466 LICOSA I  
CCP 343 509

Subagent:

**Libreria scientifica Lucio de Bissio - AEIOW**  
Via Meravigli, 16  
20123 Milano  
Tel. (02) 80 76 79

**Herder Editrice e Libreria**  
Piazza Montecitorio, 117-120  
00186 Roma  
Tel. (06) 679 46 28/679 53 04

**Libreria giuridica**  
Via 12 Ottobre, 172/R  
16121 Genova  
Tel. (010) 59 56 93

**GRAND-DUCHÉ DE LUXEMBOURG**

Abonnements seulement  
Subscriptions only  
Nur für Abonnements

**Messageries Paul Kraus**  
11, rue Christophe Plantin  
2339 Luxembourg  
Tél. 499 88 88  
Télex 2515  
CCP 49242-63

**NEREDLAND**

**SDU uitgeverij**  
Christoffel Plantijnstraat 2  
Postbus 20014  
2500 EA 's-Gravenhage  
Tel. (070) 78 98 80 (bestellingen)  
Fax (070) 47 63 51

**PORTUGAL**

**Imprensa Nacional**  
Casa da Moeda, EP  
Rua D. Francisco Manuel de Melo, 5  
1092 Lisboa Codex  
Tel. (01) 89 34 14

**Distribuidora de Livros Bertrand, Ld.º**  
**Grupo Bertrand, SARL**  
Rua das Terras dos Vales, 4-A  
Apartado 37  
2700 Amadora Codex  
Tel. (01) 493 90 50 - 494 87 88  
Telex 15798 BERDIS  
Fax 491 02 55

**UNITED KINGDOM**

**HMSO Books (PC 16)**  
HMSO Publications Centre  
51 Nine Elms Lane  
London SW8 5DR  
Tel. (01) 873 9090  
Fax GP3 873 8463

Sub-agent:

**Alan Armstrong Ltd**  
2 Arkwright Road  
Reading, Berkshire RG2 0SQ  
Tel. (0734) 75 18 55  
Telex 849937 AALTD G  
Fax (0734) 75 51 64

**SCHWEIZ / SUISSE / SVIZZERA**

**OSEC**

Stampfenbachstraße 85  
8035 Zürich  
Tel. (01) 365 51 51  
Fax (01) 365 52 21

**ÖSTERREICH**

**Manz'sche Verlags-  
und Universitätsbuchhandlung**  
Kohlmarkt 16  
1014 Wien  
Tel. (0222) 531 61-0  
Telex 11 25 00 BOX A  
Fax (0222) 531 61-81

**TURKIYE**

**Dünya süper veb ofset A.Ş.**  
Naribahçe Sokak No. 15  
Cağaloğlu  
İstanbul  
Tel. 512 01 90  
Telex 23822 DSVO-TR

**UNITED STATES OF AMERICA**

**UNIPUB**

4611-F Assembly Drive  
Lanham, MD 20706-4391  
Tel. Toll Free (800) 274 4888  
Fax (301) 459 0056  
Telex 7108260418

**CANADA**

**Renouf Publishing Co., Ltd**  
61 Sparks Street  
Ottawa  
Ontario K1P 5R1  
Tel. Toll Free 1 (800) 267 41 64  
Ottawa Region (613) 238 89 85-6  
Telex 053-4936

**JAPAN**

**Kinokuniya Company Ltd**  
17-7 Shinjuku 3-Chome  
Shinjuku-ku  
Tokyo 160-91  
Tel. (03) 354 01 31

**Journal Department**  
PO Box 55 Chitose  
Tokyo 156  
Tel. (03) 439 01 24

**SVERIGE**

**BTJ**

Box 200  
22100 Lund  
Tel. (046) 18 00 00  
Fax (046) 18 01 25

AUTRES PAYS  
OTHER COUNTRIES  
ANDERE LÄNDER

**Office des publications officielles  
des Communautés européennes**  
2, rue Mercier  
L-2985 Luxembourg  
Tel. 49 92 81  
Télex PUBOF LU 1324 b  
Fax 48 85 73  
CC bancaire BIL 8-109/6003/700

---

Price (excluding VAT) in Luxembourg: ECU 18.50

ISBN 92-826-1307-0



OFFICE FOR OFFICIAL PUBLICATIONS  
OF THE EUROPEAN COMMUNITIES

L-2985 Luxembourg



9 789282 613078

---