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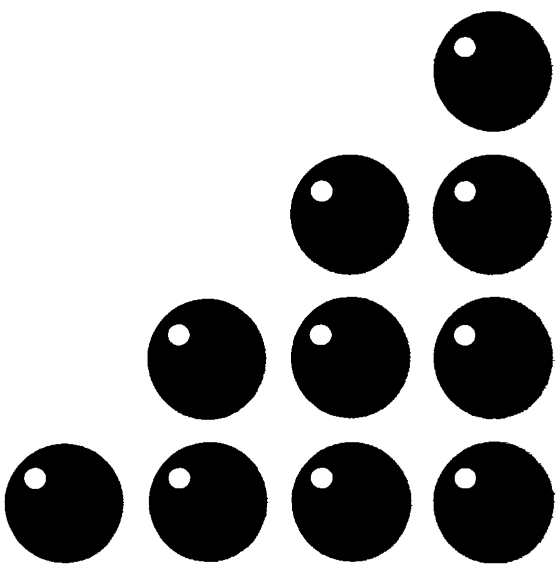
EEC COMPETITION RULES

Guide for small and medium-sized enterprises



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EEC competition rules

Guide for small and medium-sized enterprises

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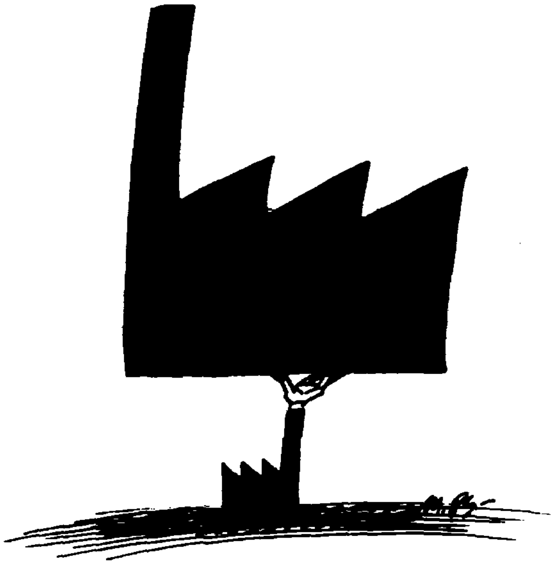


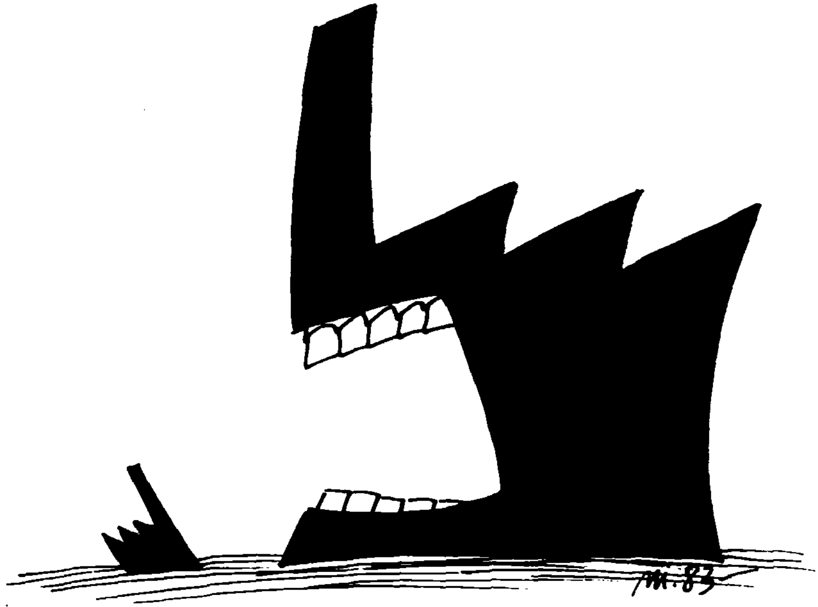
Introduction

It is a generally recognized fact that small and medium-sized enterprises form a cornerstone of the industrial and commercial structure of Europe and a major source of innovation and jobs. Indeed, smaller businesses can and do make a significant contribution towards strengthening the position of the European economy in a world-wide context, thereby helping to improve the competitiveness of European industry and safeguarding employment in Europe.

At the same time, it is clear that because of their very nature, small and medium-sized firms are faced by problems which are less relevant for larger enterprises. For example, smaller firms may have handicaps in the field of financing, and in terms of managment they may suffer from inadequate training or information facilities. Fiscal problems or difficulties relating to technical and administrative requirements and norms may be felt particularly acutely by smaller firms.

In recognition of the important role of small and medium-sized enterprises on the one hand and the special problems they encounter on the other, it was decided to devote particular attention to them at a European level. At the initiative of the European Parliament, promptly and wholeheartedly supported by the European Commission and the Economic and Social Committee, 1983 was declared the year of small and medium-sized enterprises. During the course of the year, numerous conferences, seminars and other forms of discussion were organized in this context throughout the EEC.

It is clear that the all-round position of small and medium-sized enterprises can only be improved through a multi-policy approach. European competition policy is one of the several



instruments that can be used for this purpose and its importance in this respect is two-fold: by helping to maintain or re-establish a genuine competitive structure, competition policy helps create an environment in which smaller firms can compete as successfully as possible with large firms.

Secondly, the special problems of small and medium-sized enterprises have been taken into account whenever possible in the formulation and development of that policy, in an effort to further enhance their competitive position.

Having noted the beneficial repercussions of competition policy for small and medium-sized firms, it must immediately be underlined that such firms are at the same time expected to respect the rules which make up that policy, just like any others involved in business. Because it is difficult to respect a law of which one is not really aware, the question is how generally known the European competition rules are.

If one looks at the United States, where competition or 'antitrust' laws have been in force for a century, one sees a universal awareness of those laws on the part of all businesses, from small to large. This respect of the law is especially understandable in view of the fact that violation of the antitrust laws can involve very serious punishment.

Competition law in the European Community is by comparison very new. The EEC Treaty which contains the basic competition rules has been with us now for a little over 25 years, and the first individual competition cases in which pecuniary sanctions were imposed took place not even 15 years ago. Although this case law has developed steadily, many businessmen may feel the need to be more fully informed, so that they can recognize a potential competition problem when they see one. Large undertakings often have at their service specialized lawyers or other advisers who are trained to spot and deal with such problems. Smaller firms must normally sort out these matters themselves, without any expert advice.

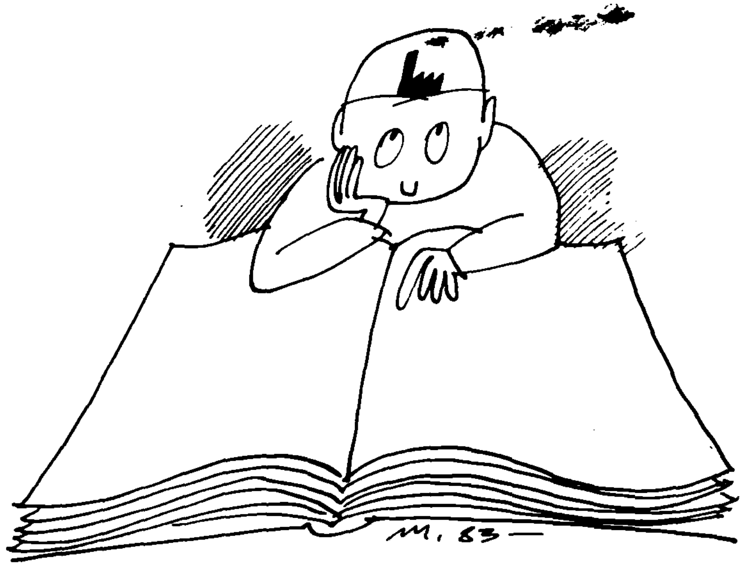
With all these considerations in mind, the European Commission decided that it would be useful to publish a practical guide to the European competition rules, especially tailored to the interests of small and medium-sized enterprises.

Competition policy is a very technical and complex area of European Community law. It would not be possible in the context of a concise practical guide to deal with it in exhaustive detail. Although this guide endeavours to give as complete an overview as possible, its main purpose is to make small and medium-sized firms aware of the scope of the competition rules, helping them develop an automatic 'reflex' to take those rules into account in their business dealings.

Particular attention has been paid in this overview to the rules which are of special importance for small and medium-sized enterprises, notably where exceptions have been provided in their favour.

Enterprises may wonder whether they should consider themselves to be small or medium-sized, in other words whether this guide has been written for them. In the competition field, no attempt has been made to formulate a precise definition of this concept. It derives its meaning from the economic context of each specific field covered by legislative and administrative measures applying the competition rules, so that a variety of enterprises fall under the exceptions devised for the benefit of smaller firms.

As a matter of general principle, however, the competition rules are relevant for all those engaged in economic or commercial activities, regardless of their size. This guide is therefore



destined for any undertaking which feels it is not or not sufficiently familiar with the European competition rules; in practice, it will probably be especially useful for small and medium-sized firms.

Finally, European competition law should by no means be seen as simply yet another set of rules and regulations which make life difficult for undertakings. Dynamic, consistant application of the competition rules is of particular benefit to small and medium-sized enterprises in that it forms a protection against destructive anti-competitive behaviour, enabling them to develop as independently and as vigorously as possible.

Frans Andriessen,
Member of the
European Commission

I. What is the EEC

Definition and aims of the EEC

The European Economic Community ('EEC') was established in 1957 by France, Italy, Germany, Belgium, Luxembourg and the Netherlands, for the purpose of creating a union of European states, bound together by common economic goals. In 1973, Denmark, Ireland and the United Kingdom joined and since 1981 Greece has been a member. Spain and Portugal have also applied for membership.

By creating a single 'common market' the present 10 Member States strive together to achieve the harmonious development of economic activities, continuous economic expansion and a faster rise in the standard of living. With these goals in mind, the activities of the EEC include

— the elimination of customs duties between the Member States,

— the creation of a common commercial policy towards third countries,

— the creation of common policies in a number of specific sectors, such as agriculture and transportation,

— the removal of obstacles to the free movement of persons, services and capital throughout the Community,

— the creation of common funds to promote social and regional development,

— the approximation, or 'harmonization' as it is often referred to, of national laws,

— the establishment of a system which ensures that competition is not distorted.

Although the removal of the various barriers existing between the Member States has by no means been completed, undertakings in the Community can increasingly reap the benefits of operating on one large, unified market reaching more than 250 million citizens.

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Next to this general economic community which exists between the Member States a common market has also been established in the coal and steel sector ('ECSC', the European Coal and Steel Community) and in the field of nuclear energy ('Euratom', the European Atomic Energy Community).

The institutions

The responsibility for achieving the aims of the EEC, the ECSC and Euratom lies with four institutions:

— the *European Parliament*, which has 434 members, is elected directly by the citizens of the Member States. The parliamentarians are not organised in national sections, but in Community-level political groups. The Parliament must be consulted on the more important Commission proposals to the Council and has far-reaching powers in the budgetary field, among others the power to reject the Community budget as a whole. Also, the Parliament can compel the Commission to resign as a body by passing a motion of censure.

— the *Court of Justice*, composed of 11 judges, assisted by 5 advocates-general, ensures that implementation of the Treaties is in accordance with the rule of law. It plays an essential role in the interpretation of European law, frequently at the request of national courts. The Court also deals with disputes on Community matters between Member States, between Member States and the Community institutions, or between the latter and individuals, including firms.

  In the field of competition policy, the Court has issued important decisions which give valuable guidance to undertakings as to the meaning of the competition rules.

— the *Council* consists of representatives of the governments of the 10 Member States. Although the 'main' representative for each is its Foreign Minister, membership of the Council varies with the subjects down for discussion. Meetings are thus often attended by the Ministers for Agriculture, Transport and so forth.

  Under the EEC and Euratom Treaties, any measure of general application or of a certain level of importance must be enacted by the Council, which can, however, only in rare cases proceed without a proposal from the Commission.

— *the Commission* is a collegiate body consisting of 14 Members, appointed by agreement between the member governments. Throughout their four-year term of office, Members must remain independent of the governments and of the Council. The Commission has a wide range of duties:
  - it is the guardian of the Treaties;
  - it is the executive arm of the Communities;
  - it is the initiator of Community policy and exponent of the Community interest in the Council.

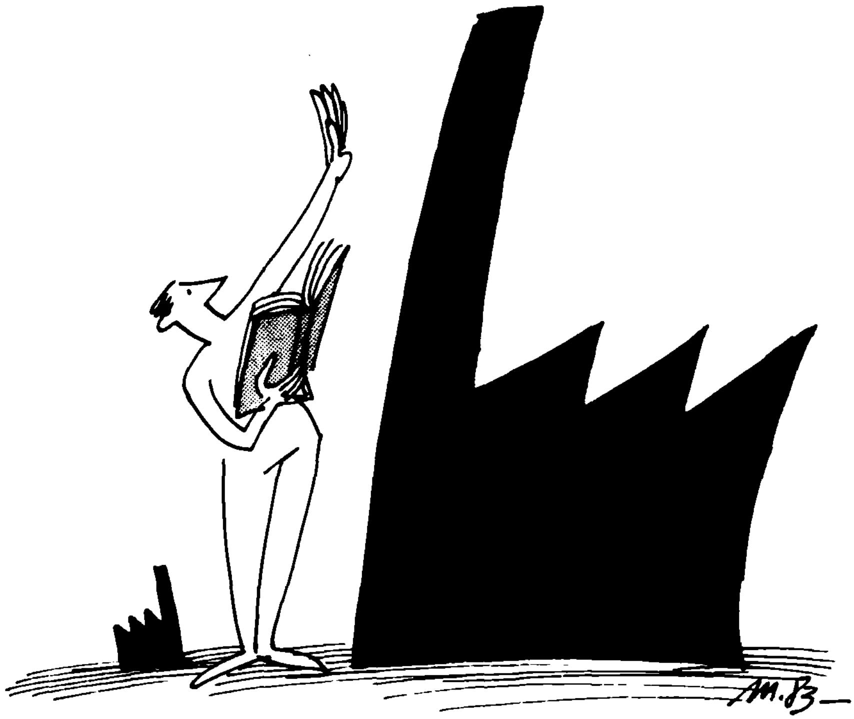
  Other community organs include the Economic and Social Committee, the European Investment Bank and the Court of Auditors.

Legislation in the EEC

The EEC Treaty mentions four instruments which the competent Community institutions can use to establish law or policy:

— *regulations*, which are laws directly applicable and binding in the Member States;

— *directives* are addressed to Member States. They lay down the results to be achieved, but leave the Member States free choose form and methods;



— *decisions*, which are binding on those to whom they are addressed. This can be a Member State, a legal entity or a private person. In the competition field, decisions issued by the Commission can have a far-reaching impact on the behaviour of undertakings;
— *recommendations and opinions*, which have no binding force.

This list of Community acts is not limitative: use is also made, for example, of communications, memoranda, guidelines and general programmes.

In the competition area, the Commission has issued several *notices* which, although not binding, can nonetheless be useful for undertakings as general guidance.

General

Community law is a factor which all those operating in the common market must be aware of and take into account. Not only do the EEC rules — including the rules of competition — apply, often directly, in all the Member States, but in cases of conflict with national laws, Community law prevails.

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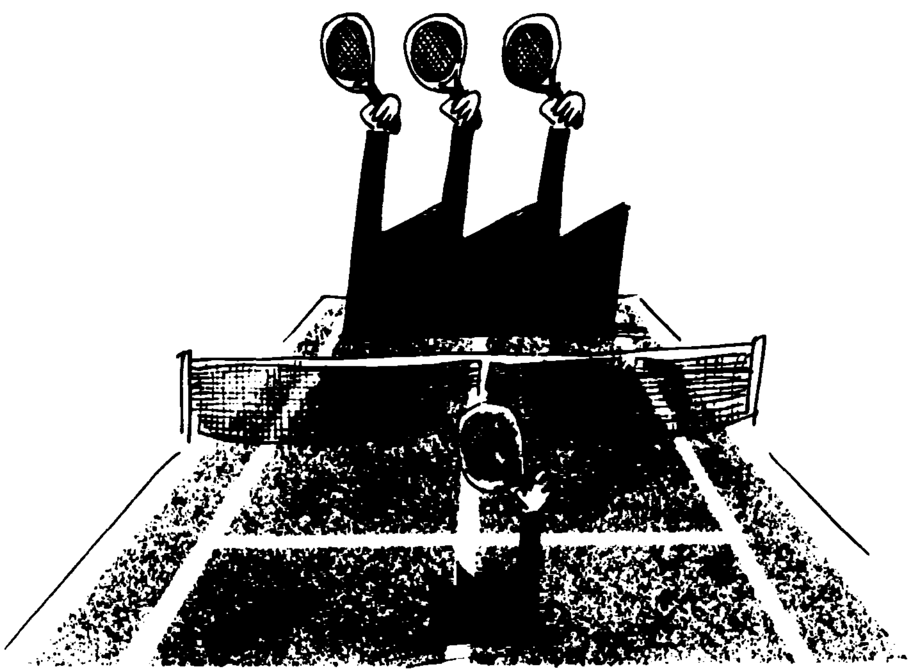
II. The EEC competition rules which apply to undertakings

The creation of one single common market requires the elimination of economic barriers existing between the Member States, such as the removal of customs duties or other quantitative measures having an equivalent effect to such duties. Wherever national legislation impedes the free movement of, for example, goods across the frontiers of the Member States, it is the national authorities who may come under attack for violating the Treaty.

Private arrangements may also interfere with cross-border trade or otherwise create divisions within the European market, for example, agreements between companies to keep out of each other's national markets. Here, it is the companies concerned who may be attacked, under the competition rules.

The EEC Treaty provides for the establishment of a system to ensure that competition in the common market is not distorted. This objective of market integration is as important as the traditional role which competition plays in free market economies, such as ensuring efficient



allocation of resources, stimulating enterprises to make the best use of their know-how and skills and encouraging them to develop new research techniques and products.

The rules of competition are contained in Articles 85 to 94 of the EEC Treaty.

(N.B. The ECSC Treaty imposes special competition rules on undertakings operating in the coal or steel industry. Special rules also apply in the agriculture and transport sectors and in the nuclear energy field. This guide does not deal with these sectors).

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Articles 85 and 86 relate to anticompetitive behaviour by enterprises which has an effect on trade between Member States. These are the rules which undertakings must be aware of and must comply with in all their commercial dealings.

Both Articles are aimed at avoiding abuses of economic power: Article 85 is directed at abuses which occur through the activities of (competing) enterprises, whereas Article 86 is aimed at abusive behaviour by monopolies or firms with very considerable power.

Competition can of course also be distorted when national governments favour certain undertakings, by granting them aids in whatever form, such as outright grants or special tax advantages. This aspect of competition policy, which is dealt with in Articles 92 to 94 of the Treaty, is of indirect importance to enterprises in the sense that if the Commission finds a certain state aid to be illegal, it will intervene against the national government concerned and not against the company to whom the aid is given. However, in view of the fact that companies might be obliged to reimburse any aids illegally received, it is obviously also of direct relevance for them. This topic is dealt with in Chapter V.

Article 85

Basic principle — the prohibition of Article 85(1)

Article 85 of the Treaty relates to anticompetitive behaviour by two or more undertakings and prohibits agreements or other practices which distort competition and which are liable to affect trade between Member States. Examples of such prohibited activities are price fixing between competitors, agreements on market shares or production quotas, or tie-in clauses.

The prohibition of Article 85 applies both to so-called horizontal agreements, meaning agreements between undertakings at the same level of commercial activity, in other words between competitors, and to vertical agreements, such as agreements between manufacturers and the distributors of their goods.

The following checklist can be used in considering whether a particular commercial activity will be caught by the prohibition of Article 85 paragraph 1:

(1) there must be an agreement (in writing or oral), or a decision by an association of undertakings (for example a trade association) or a so-called concerted practice, which covers positive action falling short of an actual agreement to align undertakings' activities (hereinafter, the term 'agreement' will be used to cover all three types of activities).

(2) there must be more than one undertaking involved; the term 'undertaking' must be viewed in the broadest sense, covering any entity engaged in economic or commercial activities such as production, distribution or the supply of services and ranging from small shops run by one individual to large industrial companies.

(3) there must be a noticeable restraint upon competition involved; this applies not only where the actual object, but also where the *effect* is such a restraint.

(4) the agreement must have a perceptible effect, actual or potential, on trade between Member States; agreements which have no effect on trade at all, for example agreements relating to warning labels on dangerous products, and agreements which have an impact only on the internal trade within one Member State or on trade outside the EEC will not be caught. Caveat: the fact that all the parties to an agreement are located in one Member State and operate only on that market does not necessarily mean that there is no effect on interstate trade: if, due to the agreement, that Member State is sealed off from imports coming from other Member States, there *is* an effect on trade.

Consequences — Article 85(2)

If an agreement meets the above criteria, therefore falling within the prohibition of Article 85(1), the following consequences apply:

— it is null and void from the outset.
An agreement can be declared void, and thus unenforceable by a national court, if the parties are involved in a lawsuit about the agreement. Also the Commission can order parties to put an end to such a prohibited agreement.

— the Commission has the power to order the parties to terminate the illegal conduct and it may impose fines of up to 1 million ECU ('European Currency Unit', a fluctuating currency, equal, on 10 October 1983, to BFR/LFR 45.92 (conv.) or 46.79 (fin.), DKR 8.16, DR 80.50, DM 2.25, HFL 2.53, UKL 0.58, FF 6.91, LIT 1 371.91, IRL 0.72) or even more, up to 10% of the annual turnover of the undertakings concerned. Fines are paid into the Commission's budget, not to any parties injured by the anticompetitive behaviour; these may, however, seek damages in national courts.

Exemptions — Article 85(3)

The general rule as described above, is that restrictive practices which affect interstate trade are not allowed, and undertakings engaged in such activities will be ordered to stop doing so and run the risk of being fined by the Commission.

However, an important nuance has been added to this general rule: the prohibition of Article 85 can be declared inapplicable by the Commission (and not by national courts) if the harmful effects of a restrictive agreement or practice are sufficiently counterbalanced by a number of beneficial elements. Paragraph 3 of Article 85 lists four conditions which must all be met before such a so-called 'exemption' can be granted by the Commission:

(1) the agreement must contribute to an improvement in production or distribution, or economic progress. In other words, there must be clear objective advantages involved, such as a reduction of costs or an increase of production capacity;

(2) a fair share of the resulting benefits must be allowed to consumers (and this includes not only ultimate consumers but also trade purchasers), for example in the form of lower prices or an improvement in the quality of the goods or services concerned;

(3) only restrictions of competition which are indispensible in order to achieve the beneficial results will be allowed;

(4) competition in respect of the goods or services in question may never be eliminated substantially altogether.

Where an agreement meets these four requirements, an exemption can be granted, either on an individual basis or by way of a group exemption:

— for the Commission to be able to grant an exemption in an individual case, the parties must normally first have notified their agreement, to the Commission, on a special form. Chapter IV deals with this procedure in greater detail. One important consequence of notification should be noted: as a general rule, no fines may be imposed for the period from the moment of notification until the Commission reaches a decision;

— agreements need not be notified and nonetheless benefit from exemption if they fulfill the requirements contained in so-called 'group exemption' regulations which exist with respect to certain categories of agreements. At present, group exemptions are in force with respect to the following types of agreements:
  - specialization agreements,
  - exclusive distribution agreements,
  - exclusive purchasing agreements.

Furthermore, group exemptions are envisaged for:

— patent licensing agreements,

— research and development agreements,

— distribution agreements in the automobile sector.

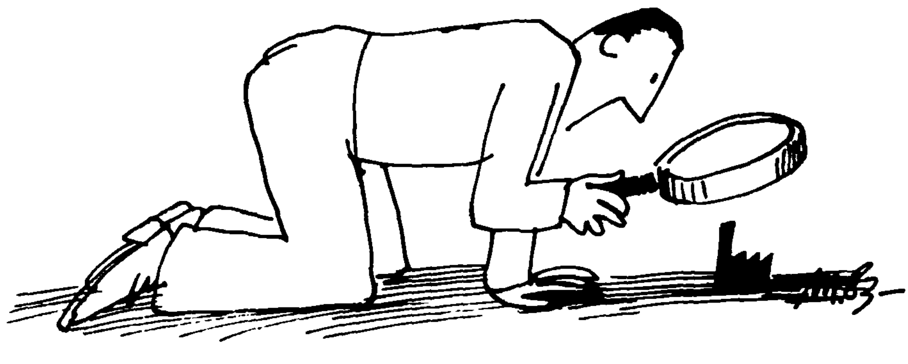
Group exemptions are of particular importance to small and medium-sized firms, because:

(1) no notification to the Commission is required, an advantage for small firms who may not have the necessary manpower or expertise to deal with the notification procedure;

(2) they give absolute legal certainty: by staying in line with the conditions contained in the group exemption, undertakings can be assured that their agreements will not later be declared void, nor will they be liable for fines;

(3) the Commission has taken specific account of small and medium-sized firms in setting up its group exemptions.

These group exemptions are dealt with in more detail in connection with the specific types of agreements concerned.



Article 86

Article 85 relates to restrictive practices between undertakings; as long as there is an appreciable restraint upon competition and an effect on interstate trade, such agreements are prohibited, regardless of the size of the undertakings concerned.

Article 86 is directed at a different problem, namely the behaviour of undertakings which are in a dominant position. Having a dominant position *is not in itself* prohibited. Unlike 85, which is based on a general principle of prohibition, Article 86 only attacks the abuse of a dominant position, when an effect on interstate trade is involved.

The elements necessary for application of Article 86 are:

(1) There must be undertaking in a dominant position. Although *market share* is the major element in assessing dominance, it is by no means the only factor. An undertaking can be deemed to be dominant if, because of various factors, such as ready access to raw materials or capital, it has the power to act independently, without having seriously to take into account its competitors, purchasers or suppliers.

(2) The dominant position must be in the common market or a substantial part of it; whether a particular geographic area — for example a portion of a Member State — can be deemed to be a 'substantial part' depends on a number of factors, including the nature of the product market involved, In one case, the southern part of Germany was held to be 'substantial' in this context; in another case, Belgium.

(3) There must be an *abuse* of the dominant position, in the sense that advantage is taken of the dominant position which causes injury to third parties. Examples are:
- — charging unfair purchase or selling prices: prices which are unfairly high being to the detriment of consumers, unfairly low (below cost) prices being aimed at eliminating weaker competitors who do not have the power to match these low prices for any length of time;
- — discriminatory prices, e.g. charging customer A more than customer B for exactly the same transaction, thereby placing 'A' at a competitive disadvantage;

— refusal to sell to a customer without valid, objective reasons;
— attempts to hold on to customers, for example by granting fidelity rebates.

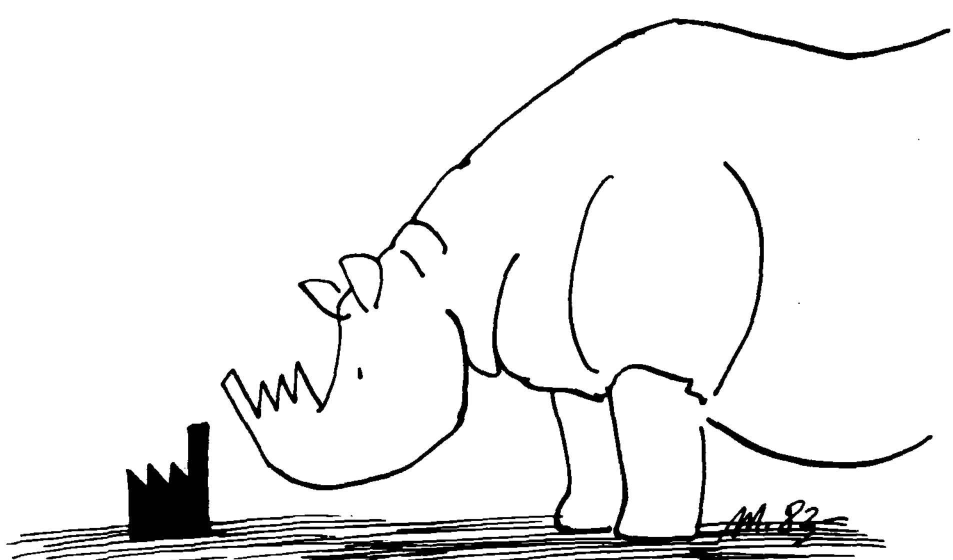
Given the nature of dominance, it is safe to say that it is difficult to envisage Article 86 ever being applied to individual small and medium-sized enterprises; and, although joint dominance by serveral undertakings is not to be excluded, it would take a large number of small and medium-sized firms acting in concert to achieve the necessary economic power.

Article 86 is nevertheless of great indirect and indeed favourable importance to small and medium-sized firms, who may depend for their growth or even their very survival on the behaviour of undertakings in a dominant position. In this sense, small and medium-sized firms can benefit from actions by virtue of Article 86 to prevent abusive practices by dominant firms. As in the case of Article 85, victims can invoke Article 86 directly before national courts in order to put an end to the abusive behaviour. Also, complaints can be made to the Commission; this procedure is described in Chapter IV.

Activities which do not run foul of the competition rules

The administrative practice of the Commission provides for a procedure enabling parties to an agreement to seek a declaration from the Commission that their activities do not come within the scope of the competition rules and are therefore 'safe'.

Such 'negative clearances', as these declarations are called, can be given in individual cases, provided the parties have notified their agreement to the Commission; this procedure is dealt with in Chapter IV.



Furthermore, a number of 'block' negative clearances exist for certain activities which either because of (1) the size of the undertakings involved, (2) the relationship between those undertakings or (3) the nature of the activity are not deemed to be an infringement of the competition rules. For certain of these activities, the Commission has issued a number of notices to provide some guidance to businessmen as to what course of action they can pursue without getting into trouble with the competition rules.

When doubt remains as to whether an agreement falls within one of the following categories, parties can of course apply for individual negative clearance.

Agreements of minor importance (the 'de minimis rule')

Small and medium-sized firms should be aware of the fact that many of the agreements they conclude will not be considered to violate the competition rules because the economic effect involved is not significant enough. This can be measured by market share and turnover.

As a guideline, the Commission has issued a notice ('Notice concerning agreements, decisions and concerted practices of minor importance which do not fall under Article 85(1) of the Treaty establishing the EEC') indicating that normally agreements will not be caught by Article 85(1) if two conditions are met:

(1) *market share:* the products which are the subject of the agreement and other products of the participating undertakings considered by consumers to be similar by reason of their characteristics, price or use (broadly speaking, competing or substitute products), must not represent, in a substantial part of the common market, more than 5% of the total market for such products, and

(2) *turnover:* the aggregate annual turnover of the participating undertakings must not exceed 50 million ECU.

Such so-called 'de minimis' agreements are normally safe, even though they involve certain restrictions. A caveat must be added: the criteria indicated by the Commission are by way of guidance only.

Relations between undertakings which bar application of the competition rules

Commercial agents

The Commission has made it clear ('Notice on exclusive dealing contracts with commercial agents') that a contract made with a commercial agent who transacts business on behalf of the principal does not fall under Article 85(1). A trader will only be considered to be a 'commercial agent' if he does not bear any responsibility for the financial risks involved in the business transactions (except for the normal *del credere* guarantee, by which the agent undertakes to indemnify the principal against failures to pay by customers) and is in fact no more than a mere intermediary of the principal. The name given to the representative is not decisive in determining whether he is a commercial agent or an independent trader, it is a matter of the factual relation between the parties.

For example, where a distributor

— maintains a considerable stock of the goods in question as his own property, or

— provides at his own expense substantial free customer-service, or

— determines the prices at which he sells or other terms of business,

he will be deemed to be an independent trader, and not a commercial agent, and the rules of competition must be taken into account.

Parent companies/subsidiaries

Article 85(1) can only apply where competition exists between undertakings which is capable of being restricted. Agreements between parent companies and their subsidiaries, or between subsidiaries amongst themselves, in other words undertakings forming one economic unit, will not be caught by Article 85(1), where

— the subsidiary does not have any real freedom to determine its course of action on the market; one criterion here is how large the parent company's shareholding is;

— the agreement relates merely to the allocation of tasks within the concern.

Activities which by their nature are not anti-competitive

The Commission has stated, again by way of notices, that certain forms of cooperation between undertakings and certain types of subcontracting agreements do not pose any problem under the competition rules. The size of the undertakings involved is generally not relevant in this context.

Cooperation agreements

In its 'Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises', the Commission indicates that eighteen types of agreements are deemed not to restrict competition where their object is one of the following forms of cooperation:

— an exchange of opinion or experience;

— joint comparative studies of enterprises or industries;

— joint preparation of statistics and calculation models;

— joint market research;

— cooperation in accounting matters;

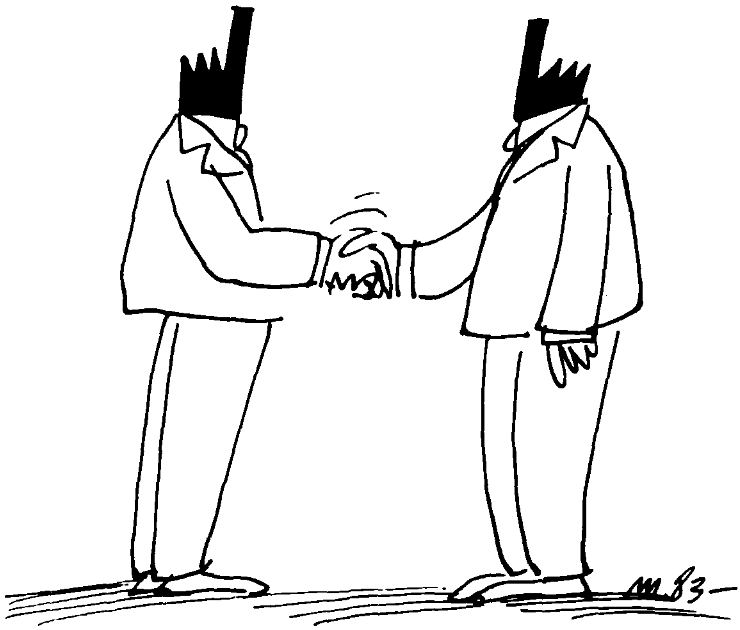
— joint provision of credit guarantees;

— joint debt-collecting associations;

— joint business or tax consultant agencies;

— joint implementation of research and development contracts;

— joint implementation of research and development projects;



— joint placing of research and development contracts;
— sharing out of research and development projects, among participating enterprises;
— joint use of production, storage and transport equipment;
— joint execution of orders (but only when the participants do not compete with each other as regards the work to be done);
— joint selling arrangements by non-competing firms;
— joint after-sales and repairs services when the participants are non-competing firms, or, even if they are competitors, when these services are provided by an undertaking independent of them;
— joint advertising (but no restriction is allowed on the participants *also* to advertise independently);
— joint quality marks (but only where the label is available to all competitors on the same conditions).

Subcontracting

A subcontracting agreement is a form of work distribution whereby one firm — the subcontractor — supplies goods, work or services for another firm — the contractor — in accordance with the latter's specifications; this distinguishes it from an ordinary sale of goods or supply of services.

While subcontracting is done by undertakings of all sizes, small and medium-sized firms account for the major part of it. It is indeed a form of business cooperation which is particularly favourable for the development of such firms: whereas the contractor may have the financial and technical resources enabling him to manufacture a complete product, the subcontractor *in his turn* will be able to improve his facilities, expand his know-how and cut his costs in his particular field of activity.

In the relevant notice ('Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty'), the Commission indicates that subcontracting agreements are not of themselves caught by the prohibition of Article 85(1).

However, in order to carry out the order, the subcontractor may have to make use of particular technology or equipment provided by the contractor. In order to protect the economic value of such equipment or technology, the contractor may wish to restrict their use by the subcontractor to whatever is necessary for the purpose of the agreement. In this way, the subcontractor may become dependent on the contractor, and thereby be limited in his freedom of business action.

This applies particularly to the obligation imposed on the subcontractor to supply the items covered by the subcontract solely to the contractor, an obligation of material importance where the subcontract is for the manufacture of spare parts and of adaptable or compatible components which the subcontractor could also sell otherwise than to the contractor.

The Notice indicates that provision of the contractor's technology or equipment to the subcontractor may justify the obligation to supply solely to the contractor the items manufactured or the work done with the help of the technology or equipment. These conditions are fulfilled not only when the technology or equipment is protected by the contractor's industrial property rights or rights over secret know-how but also when it can be used to manufacture a distinctive product or to supply a service which is not available from other undertakings in the same industry. Otherwise, the subcontractor must remain free to meet orders from other customers.

Other clauses covering the use of facilities provided under subcontracting agreements will likewise be judged by the need to protect the contribution actually made by the contractor to the performance of the order and at the same time to safeguard the subcontractor's freedom to engage in other activities. For instance, by reason of the special nature of these agreements the use of know-how supplied by the contractor to the subcontractor may be justifiably confined to the specific order. On the other hand, the subcontracting relationship does not justify reserving solely for the contractor the results of the subcontractor's research and development work, where they can be applied to other purposes.

III. How the competition rules affect agreements and other business dealings of undertakings

Introduction

In the previous chapter, a general discription was given of the meaning of Article 85 (1) of the EEC Treaty with regard to restrictive agreements, concerted practices or decisions of associations of undertakings.

Having thus established the principles involved in the application of this Article, we now turn to its relevance with respect to specific types of agreements.

Article 85 itself lists by way of example several types of agreements which may prevent, restrict or distort competition.

For the sake of clarity, we will make a distinction between horizontal agreements, that is agreements between competitors or potential competitors, and vertical agreements, that is agreeements between undertakings in different stages of the process through which a product or service passes from the manufacturer to the final consumer.

The 'de minimis rule'

As indicated above in Chapter II, agreements which because of the market share and the turnover of the undertakings involved are deemed to have a negligible effect on competition and interstate trade pose no problems under the competition rules.

This so-called 'de minimis rule' which applies to such agreements is particularly relevant for small and medium-sized enterprises, because the agreements they conclude will often fulfil the criteria as to market share and turnover laid down in the Notice concerning agreements of minor importance.

Whatever the nature of the agreement in question, if the two criteria are applicable, the undertakings concerned normally need not worry about the possible applicability of Article 85(1) and can therefore refrain *from notifying* to the Commission.

In border-line cases, of course, undertakings are well-advised to consider whether their agreement falls under any of the headings indicated below.

Horizontal agreements

Horizontal agreements which pose no problems under the competition rules

When undertakings have established that a particular agreement does not satisfy the 'de minimis rule', the next step is to check whether the agreement is one which by its nature is not deemed to pose a problem under Article 85(1).

For this purpose, the Notices on, respectively, *cooperation agreements* and *subcontracting agreements* offer guidance. These are dealt with above in Chapter II.

Horizontal agreements which benefit from a group exemption

Specialization

Certain horizontal agreements, namely specialization agreements, are exempted as a group under Article 85(3). This means that although Article 85(1) is normally applicable (again, the 'de minimis rule' must first be considered), agreements which fall under the criteria of the group exemption issued by the Commission are deemed to meet the requirements of exemption under Article 85(3) without the need of prior notification.

For the purpose of the group exemption, specialization agreements are agreements by which parties undertake a reciprocal obligation:

— either not to manufacture certain products themselves and leave to the other side the task of manufacturing those products, or

— to only manufacture certain products jointly.

By giving up the manufacture of certain products the participating undertakings can each concentrate — or, in other words, 'specialize in' — the manufacture of those products remaining in their respective production lines. Competition is restricted because the parties give up the possibility of independently manufacturing certain items.

The group exemption was created in order to allow small and medium-sized firms to improve their production processes and thereby strengthen their competitive position *vis-à-vis* larger firms.

In order to fall under the group exemption, specialization agreements must fulfil the following conditions:

(1) The agreement must be between small and medium-sized undertakings, measured on the basis of market share and turnover, in this case:
   - — the market share with respect to the specialized products may not exceed in a substantial part of the common market, 15% of the market for all such products;
   - — the total annual turnover of the participating undertakings must not exceed 300 million ECU.

   The group exemption is basically aimed at *individual* small and medium-sized firms: if a small firm is in fact part of a larger concern, the market share and turnover of the whole concern must be taken into account, with the result that the thresholds would probably be exceeded and the exemption thus inapplicable.

(2) The commitment to specialize must be reciprocal, which means that an obligation on only one of the parties to refrain from production of a certain item would not qualify for group exemption.

(3) The commitment must refer only to the nature of the products, so that any quantitative limitation of production does not fall within the group exemption.

(4) Certain additional clauses may be agreed which are essential to implement the commitment to specialize:
- a non-competition clause;
- exclusive purchasing and distribution commitments with respect to the specialized products, in order to enable the participants to continue dealing in the whole range of products;
- obligations concerning minimum stocks, replacement parts, and customers and after-sales services.

(5) Commitments with regard to *prices* are not allowed in the context of the group exemption.

Research and development

A group exemption is being prepared regarding research and development; provisions which are particularly favourable for small and medium-sized enterprises are envisaged. This legislation will probably go into effect at the end of 1984.

Horizontal agreements which are not allowed

Assuming the 'de minimis rule', the Notices on cooperation and subcontracting and the specialization block exemption are all not applicable in a particular case, (competing) undertakings must refrain from engaging in the following activities:

- *Price fixing (other trading conditions).* — Prohibited are all agreements, directly or indirectly fixing buying and/or selling prices. The term 'indirectly' covers the situation where undertakings agree in general as to their pricing policies. Also prohibited are any agreements by which undertakings restrict themselves as to the trading conditions they apply in their business dealings, such as on what basis discounts are granted, credit terms, etc.

- *Market or production sharing.* — Agreements between (potential) competitors to keep out of each others markets or to allocate certain territories or sources of supply amongst themselves are prohibited. Arrangements to control production itself such as limitations imposed by quotas, as well as long term plans regarding production are normally not allowed.

- *Agreements to discriminate.* — Agreements between undertakings to fix discriminatory terms in their dealings with third parties who are in competition with each other are not allowed. For example when A and B agree to apply more advantageous conditions to buyer C than to buyer D, for transactions which are the same, buyer D will be placed at a competitive disadvantage. It should be noted that this type of behaviour is only prohibited where there is an agreement between A and B to discriminate; in the absence of a dominant position, A, acting individually, is as a general rule free to apply the terms he wants in his various business dealings.

— *Collective boycotts.* — Agreements between undertakings aimed at forcing a (potential) competitor out of the market or preventing market entry by others are not allowed.

— *Tie-ins.* — Agreements are not allowed by which undertakings impose 'tying arrangements', for example obliging a buyer of one product or service to also buy another product or service which is not connected to the first by its nature of commercial usage.

This list of prohibited agreements is not exhaustive, but illustrates the types of agreements which have restrictive effects on competition.

Horizontal agreements which may pose problems

Again, assuming the 'de minimis rule' does not apply, certain agreements *may* possibly violate Article 85(1):

— *Joint purchasing* agreements between competitors and even between non-competing firms may lead to a restriction on competition, for example by making it more difficult for suppliers to make individual sales to the participants in the joint purchasing arrangements. Joint purchasing agreements between small firms can be encouraged so as to place them in a better competitive position *vis-à-vis* powerful purchasing concerns. However, the purchasing power which is created when firms participate in joint purchasing can not be allowed to assume such proportions which would lead to an abuse of that purchasing power *vis-à-vis* suppliers.

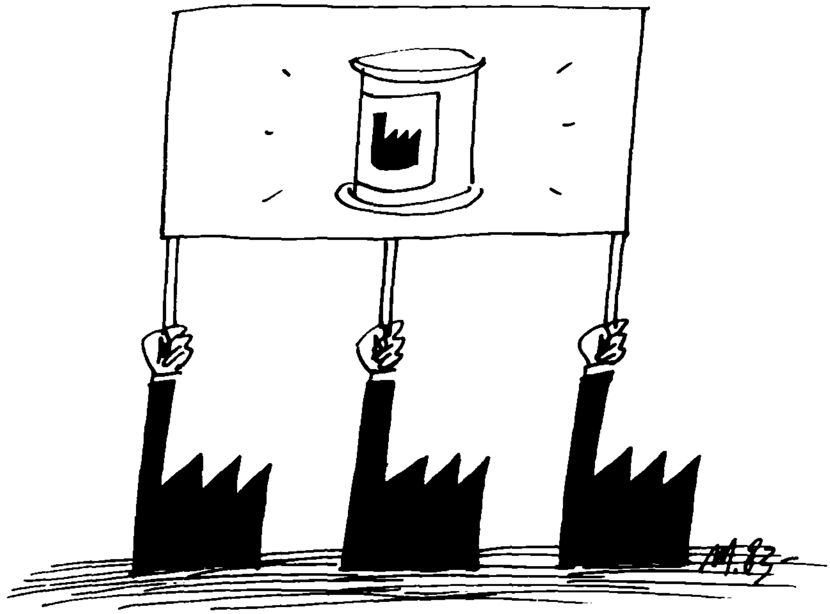
— *Joint selling* agreements which limit the freedom of the parties to fix their selling prices or otherwise to sell as they see fit will normally infringe Article 85(1). Such selling arrangements can for example be organized in the context of a trade association or through jointly owned marketing subsidiaries.

Joint selling arrangements between non-competing firms (actual or potential) will normally not be held to violate Article 85(1), nor is it likely that joint selling to countries outside the EEC will be deemed to be an infringement provided trade between Member States is not affected.

— *Sales promotion.* — Three types of sales promotion may be relevant under the competition rules: trade fairs, joint advertising and the use of a common quality control label.

- Trade associations which organize *trade fairs* may impose certain restrictions on the members as to their participation in other trade fairs than those organized by the association. These restrictions may be anticompetitive at two levels, in that they limit the possibilities of other organizers of trade fairs to acquire participants and furthermore limit the freedom of participating producers to promote their goods elsewhere. Certain restrictions may, however, be exemptable because of the advantages which result from an orderly organization of trade fairs.

- *Joint advertising* may be used to promote the products of a particular industry or a common brand. Such joint publicity normally poses no problems, as long as the participants remain free to also promote their products independently.
- The use of a *common quality label or trademark* in joint promotional activities is allowed when use of the label is open to *all* manufacturers whose products meet the relevant quality standards. If further restrictions are involved, such as an obligation on the participants not to manufacture other products not covered by the common label, the agreement may pose problems under Article 85(1).



— *Exchange of information.* — Undertakings may arrange to exchange information, for example through a central agency, on quantities, prices, discounts and other terms of business, or on suppliers and customers. Such exchange of information can lead to an alignment of the participants' business conduct.

The legality of such information arrangements will depend on, in the first place, the type of information involved: exchange of purely statistical information, for example on production and sales figures for a particular industry, without identifying the individual firms concerned, is not objectionable.

In general, information arrangements become dangerous from the competition point of view where they are likely to lead to collusion: cooperation which jeopardizes the independent determination of business policies by the participants must be avoided.

— *Trade associations/market foreclosure.* — Undertakings in a particular sector may validly pursue common interests by creating a trade association. Among the possible problems which must be considered in this context are:

- activities within the trade association which tend to deprive members of their freedom to determine their individual business policies are dangerous;
- where all or nearly all of the undertakings in a given sector are organized in such an association, market foreclosure *vis-à-vis* potential competitors who want to enter that market may give rise to problems under the competition rules.

— *Non-competition clauses in connection with the sale of an undertaking.* — When the ownership of an undertaking changes hands, the new owner (the purchaser) will normally want to be protected from competition by the previous owner (the seller), who may at least initially be in a stronger competitive position due to his knowledge of the market, etc.

Agreements relating to the sale of undertakings therefore often contain so-called non-competition clauses, obliging the seller to refrain from competing in the market in question.

Whether such a clause is a forbidden restriction of competition depends on a number of factors:

- If the sale involves merely the transfer of material assets, a non-competition clause is normally not necessary and therefore in violation of Article 85(1).
- If the sale involves the *transfer of good-will and know-how,* protection from competition by the seller will normally be acceptable under Article 85(1), under two conditions:
  (1) the *duration* of the clause must not exceed the period required for an active, competitive purchaser to build up his position to equal that of the previous owner's at the time of the transfer. How long this period is depends on the specific facts of each case;
  (2) the *scope* of the clause may not be excessively wide; the obligation not to compete must be limited to the market in which the undertaking was active before its sale.

Vertical agreements

General

The horizontal agreements dealt with in the previous chapter involve situations in which competition is diminished due to arrangements by competitors restricting their independent business behaviour.

Vertical agreements relate to the passage of a product from the factory to the end-user. In the EEC, such agreements are particularly relevant to the concept of the creation of one European market, in that distribution arrangements across the borders can promote market unification.

In this chapter, the problem of distribution will be dealt with in the context of Article 85(1), in other words only situations in which agreements have been concluded relating to distribution will be considered. For the application of Article 86 (abuse of a dominant position) no distinction need be made between horizontal and vertical activities; the same concepts apply regardless of whether a dominant firm abuses its position *vis-à-vis* its competitors (horizontal) or in the distribution of its products (vertical).

Whether or not vertical agreements come under Article 85(1) depends on the extent to which the parties, i.e. the supplier and his intermediary/distributor, agree to restrict their commercial freedom. The following concepts are relevant with respect to distribution agreements:

— *'simple' distribution agreements:* where neither the supplier nor the distributor is bound to any restrictive obligations, such as exclusivity of purchase and/or supply, territorial restrictions, non-competition clauses, or minimum purchase requirements, the agreement will not fall within the scope of Article 85(1);

— *exclusive distribution agreements:* the supplier agrees to supply only one distributor in a determined territory. Here, Article 85(1) is relevant: there is a restriction on competition in that the supplier is no longer free to supply other distributors or, in some cases, even end users directly, in that territory. In return for the exclusivity, the exclusive distributor may in turn accept certain restrictions, for example he may agree not also to act as the distributor for the supplier's competitors;

— *exclusive purchasing agreements:* the distributor agrees to purchase all of his requirements of a particular product only from one supplier. The distributor is thus restricted in his source of supply and other suppliers of the same type of goods have lost a sales outlet;

— *selective distribution:* a supplier may wish to limit the sale of his products to only those sales outlets that meet certain standards. For example, in the case of highly technical products, the supplier may require that all dealers possess a minimum degree of technical knowledge.

In the following sections, the applicability of Article 85(1) and the possibilities of exemption are considered.

Distribution agreements which pose no problems under Article 85(1)

(1) For application of Article 85(1), there must be an agreement between independent undertakings. Thus, the following cases do not fall under the prohibition:

— distribution by the manufacturer himself;

— distribution through a branch office in a given territory; although a position of exclusivity is present, the branch is seen as part of the manufacturer himself;

— likewise, true agency agreements, where the commercial agent is merely an auxiliary of the supplier, do not fall under Article 85(1) — see Chapter II;

— and, where a local subsidiary company is entrusted with the distribution of the supplier's goods, Article 85(1) will not apply if that subsidiary has no autonomous commercial freedom. See Chapter II.

(2) The *de minimis rule* (see Chapter II,) also applies to vertical arrangements.

However, a caveat must be added: the underlying principle of the 'de minimis rule' is, that for Article 85(1) to apply, the restriction on interstate trade and of competition must be appreciable. If a supplier concludes only one distribution agreement with a particular distributor, there will normally be no problem if the criteria as to market share and turnover are fulfilled. However, if that supplier has set up a vast network of agreements with a large number of distributors, the whole effect of that network may be relevant, and not just the individual agreements between the supplier and each distributor.

Exclusive distribution agreements: the 'old' group exemption (Regulation 67/67)

General

Although exclusive distribution agreements as described above have detrimental effects as far as competition as concerned, such agreements may at the same time be beneficial, not only by improving the efficiency of distribution but, in general, by contributing to market unification. For example, contacts with one (exclusive) distributor only in a particular area may make it easier for a supplier entering a new market to deal with linguistic and legal differences.

In practice, many exclusive distribution agreements have been found to fulfill the conditions for exemption under Article 85(3) (see Chapter II). Therefore, to avoid having to deal with all such cases individually, the Commission in 1967 put into effect a group exemption (referred to as Regulation 67/67) for certain distribution agreements.

The underlying principle of the group exemption is, that while certain restrictions will be allowed in the interest of improving distribution, those restrictions may not go too far, and must notably never result in absolute market insulation. In this context, the concept of parallel imports is very important. 'Parallel imports' exist where in addition to the 'official' route by which the goods are imported by the exclusive distributor into a given territory, there is also a second 'parallel' route, by which another trader in the territory imports the goods, which he has obtained from a third party outside the territory. In other words, that 'parallel importer' is a source of competition for the exclusive distributor. Any attempts to hinder such parallel imports render the group exemption inapplicable.

Specific provisions

The exemption may apply (i) where A (the supplier) agrees with B (the reseller or distributor) to supply only to B certain goods for resale within a defined area in the common market, or (ii) B (the reseller) agrees with A (the supplier) to purchase only from A certain goods for resale or (iii) A agrees to supply exclusively to B and at the same time B agrees to purchase exclusively from A.

The main conditions of the group exemption are:

(1) the agreement must involve two parties only, these need not necessarily be established within the common market;

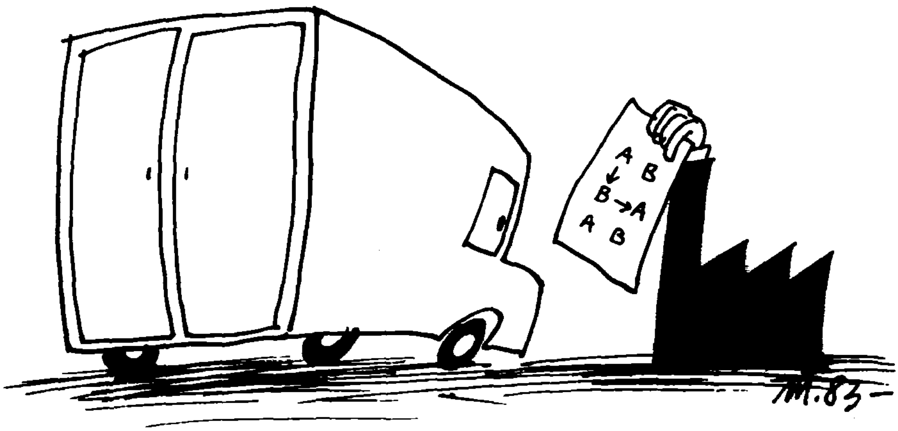
(2) the products must be supplied for resale, thus for example the exemption does not apply when the distributor uses the products to manufacture another end-product;

(3) the sales area must be a defined part of the common market;

(4) the only permitted restriction on the supplier is the obligation not to sell to other resellers in the sales area allocated to the exclusive distributor;

(5) the supplier can definitely not be obliged to guarantee absolute territorial protection for the distributor, for example by barring parallel imports into the sales area;

(6) the supplier can however agree not to make direct sales himself to customers within the distributor's territory;



(7) the distributor may agree to purchase all his requirements from the supplier. Aside from this, the following obligations on the distributor are also permitted under the group exemption:
- — not to manufacture or sell competing goods;
- — to concentrate his sales efforts in his sales territory; this means that he can be obliged to refrain from actively seeking customers elsewhere. He must, however, always remain free to sell outside his sales territory, even in areas allocated by the same supplier to *other* exclusive distributors;
- — to purchase minimum quantities;
- — to sell under the trademark, etc. indicated by the supplier;
- — to carry out after-sales service.

No restrictions may be imposed on the distributor as to his prices and other terms of resale, such as the choice of his customers; where these exist, the benefit of the group exemption is lost;

(8) the agreement must not be one in which competing manufacturers grant each other exclusive selling rights; this could lead to (horizontal) market sharing;

(9) there must be no effort by the parties to create absolute territorial protection for the distributor, including the improper use of a patent or trademark for that purpose. In other words, parallel imports of the contract goods must remain possible.

Agreements which satisfy these conditions are automatically exempted, without the need for the parties to notify the agreement to the Commission; the Commission does, however, retain the right to withdraw the benefit of the group exemption in certain cases, for example if the distributor is abusing the exemption by charging unreasonably high prices.

Agreements which contain restrictions going beyond the conditions of the group exemption can, of course, be notified to the Commission in order to obtain an individual exemption.

The new group exemptions in effect since 1 July 1983 (Regulations 1983/83 and 1984/83)

The group exemption described above expired on 1 July 1983 and was replaced by two new regulations, one covering exclusive distribution agreements and the other exclusive purchasing agreements.

Due to the transitional period provided, the situation as it existed will, however, remain unchanged until 1 January 1987 for agreements which complied with all the terms of the 'old' group exemption and which were in effect before 1 January 1984.

For 'new' agreements, the situation will be as follows:

Exclusive distribution agreements (Regulation 1983/83)

The conditions for group exemption of exclusive distribution agreements, including agreements in which parties enter into exclusive supply and purchasing obligations, will to a large extent remain the same as in the past.

The two most important changes are:

(1) the distributor's sales area may now cover the entire territory of the common market;

(2) the rule on exclusive distribution agreements between competing manufacturers has become stricter: such agreements are now always prohibited between large undertakings.

An exception to this prohibition has, however, been made where one (or both) of the parties is a small or medium-sized enterprise, which for this purpose is defined as having a total annual turnover of less than 100 million ECU. In those cases, non-reciprocal distribution agreements are allowed, that is, one of the parties entrusts the distribution of his goods to the other, but not also vice-versa.

N. B.: The provision has been included for the benefit of 'true' small and medium-sized firms; where such firms are in fact part of a larger group, the turnover of the whole group will be taken into account.

Exclusive purchasing agreements (Regulation 1984/83)

Agreements by which a reseller is obliged to buy his supplies exclusively from a stated manufacturer or other supplier (e.g. wholesaler), without, however, being allotted and exclusive sales territory, present different problems than exclusive distribution agreements. Where a supplier has succeeded in tying the most numerous or the largest sales outlets in a given area to himself, his competitors may find it very difficult to sell their goods in that area. The longer the duration of the exclusive purchasing obligation and the wider the range of products involved, the more serious is this barrier to market entry for competitors.

Also, such arrangements limit the commercial freedom of the resellers, who may often be smaller firms.

With these considerations in mind, the new group exemption, which parties must take into account for all exclusive purchasing agreements entering into force after 1 January 1984, therefore provides:

— the maximum duration of the exclusive purchasing obligation must be limited to five years (renewable);

— the range of products covered by the obligation must be limited to products which either by their nature or by commercial usage are connected to each other.

Aside from these provisions as to the duration and the range of the obligation, the same provisions found in the group exemptions (both old and new) for exclusive distribution agreements apply.

Beer and petrol. — Special provisions are included in the new group exemptions for exclusive purchasing agreements relating to beer (and other drinks) sold for consumption on the spot (in cafés, for example) and to petrol sold in service stations.

Normally, such agreements entail considerable financial involvement on the part of suppliers, which may thus justify binding the reseller for a longer period of time than in other sectors.

The following special provisions were therefore deemed appropriate for such beer supply or service-station agreements:

(1) the maximum duration of an exclusive tie for beer alone or for petrol is 10 years;

(2) in beer-supply agreements, if the obligation relates to beer and other drinks, the maximum duration is 5 years;

(3) for both beer-supply and service-station agreements, if the premises where the products are sold are subject to a tenancy agreement between the reseller and the supplier, the duration of the exclusive purchasing obligation can be as long as the duration of the tenancy (even if it is longer than 10 years);

(4) as to the range of products covered, for beer supply agreements, no other products can be included in the tie except other drinks: no chips, gambling machines, etc; for service-station agreements, the tie can relate only to petroleum-based motor vehicle fuels and, in some cases to lubricants to be used in a lubrication bay: no road maps, balls, car-accessories etc;

(5) special transitional rules apply to such agreements.

Those interested in detailed information on the rules governing beer supply and service-station agreements are advised to consult the relevant 'Guidelines' published in the Official Journal.

Selective distribution

Certain manufacturers may want their products to be sold only by qualified, 'approved' dealers. This is particularly true for technically sophisticated products such as electronic equipment, watches or automobiles.

In such cases, so-called 'selective distribution' systems can be created in which only 'selected' dealers are authorized to distribute the goods concerned.

The selection of the dealers allowed into the system sometimes takes place on the basis of purely qualitative criteria which are entirely justified, given the nature of the product in question. For example, dealers may need a minimum amount of technical knowledge, or skilled personnel, or suitable premises in order to be able to sell the products in an appropriate way. If all dealers who fulfil these justified quality standards are allowed without discrimination into the system, there will be no objections as far as the EEC competition rules are concerned.

It also happens, however, that manufacturers go beyond applying purely qualitative criteria when appointing dealers. They may, for example, accept only dealers who are willing to carry out sales promotion for the manufacturer's products, or to stock his products.

Dealers who are technically qualified to sell the products concerned but who are unwilling to accept these additional obligations, are thus excluded from the system. This is a restriction.

Even more restrictive is a selection system in which the manufacturer applies quantitative criteria, for example limiting the number of dealers in an area to the presumed purchasing power of the population there. In these cases, dealers who are qualified and moreover willing to accept additional obligations may nevertheless be excluded.

Aside from the need to have qualified dealers for certain products, all the above restrictions may seriously harm competition. Such closed distribution systems may be particularly damaging for potential dealers — often small and medium-sized firms — who may be excluded without any objective reasons. Also, the dealers who are a part of such a network may be seriously hampered in their commercial freedom, for example they may be obliged to sell only to other approved dealers.

These distribution systems can in any event not benefit from the group exemption for exclusive distribution agreements (see above), because the restrictions go beyond those allowed.

They may however be exempted on an individual basis if they manifestly improve distribution and fulfil all the other conditions for exemption under Article 85 (3). It must notably be clear that the beneficial results can not be achieved through other, less restrictive means.

Any indication that a selective distribution system is being used to artificially maintain prices, or to exclude in a discriminatory way certain types of retail outlets (for example discount shops or supermarkets who are qualified to sell the products), or any attempts to hinder parallel imports through the system, will make exemption highly unlikely, and such distribution systems thus remain illegal. Action can then be called for by national courts or by the Commission.

Automobile sector. — Selective distribution systems are more common in certain sectors than in others, often depending on the nature of the products concerned.

One example is the motor vehicle sector, where manufacturers tend to set up distribution networks in which, at all stages, access is reserved only for selected dealers.

Such systems can often be exempted because they are indispensable measures of rationalization, and ensure that dealers provide a satisfactory information, maintenance and repair service to their customers.

In order to avoid masses of individual notifications of such motor vehicle distribution systems for exemption, the Commission is preparing a group exemption in this sector, which will probably go into effect at the end of 1984. It would cover cars, buses, commercial vehicles and tractors.

As drafted, the Regulation would grant an exemption, in principle, for the following types of restrictions on the motor dealer:

— not to sell another manufacturer's vehicles or parts,
— not actively to seek customers outside his allotted territory,
— not to sub-contract distribution or servicing and repairs to other dealers or repairers without the consent of the manufacturer or his importer, and
— not to sell new vehicles or replacement parts obtained from the manufacturer to dealers outside the distribution network.

Also exempted would be a restriction on the manufacturer's freedom to appoint other dealers in the allotted territory during the period of the contract.

Several important conditions are included to ensure that:

— Dealers are not made so dependent on the manufacturer or importer that their freedom to compete is seriously diminished.

— Consumers can have servicing or repairs done under the manufacturer's warranty anywhere in the common market.

— Spare parts supplied by third parties matching the quality of those supplied by the motor manufacturer can be sold and used in the official distribution network.

— Consumers can order cars with the specifications required at the place where they are to be registered from official dealers in other Member States who are willing to sell the vehicles to them, if the manufacturer or his importer sells the model concerned through the official distribution network at both places.

Industrial property

Industrial property rights include patents, copyrights, trade marks, performing rights, registered designs and models; 'know-how' is not actually a right, but is sometimes treated analogously.

At present, how these rights can be obtained and used is determined by the national laws of each Member State.

The existence of these national systems is in itself perfectly legitimate, but problems arise where the national rules are used to partition the common market along national boundaries. This is a matter relating to the free movement of goods within the Community.

A second problem relates to how the owner of an industrial property right uses that right or allows others to use it. Here, the competition rules may be relevant.

The following general rules are important to bear in mind when dealing with industrial property rights:

(1) The principle of the free movement of goods: once goods protected by industrial property rights have been legitimately marketed in Member State A, by the owner or someone authorized to do so by him (for example a licensee), the importation of those goods into Member State B can not be prevented on the basis of the parallel property rights existing under the national legislation of Member State B. For example: a manufacturer registers a trade mark for his products in each Member State where the products are sold, for example France and Germany. Once the goods in question have been marketed in Germany, the importation of those goods into France can not be stopped by invoking the same trade mark it is registered under in France.

Of course, where a third party unlawfully uses a registered trade mark, the manufacturer can take the necessary steps; but this is a matter of trade mark infringement, not of efforts to illegally partition the common market.

(2) If an undertaking is in a dominant position in the common market or a substantial part thereof, the improper exploitation of an industrial property right may be in violation of

Article 86 (abuse of a dominant position); there must, of course, be an actual or potential effect on trade between Member States.

(3) The owner of an industrial property right may decide to confer an enterprise the benefit of that right — for example, he may let another firm use his registered trade mark, or if he is the owner of a patent, he may confer a licence to manufacture and sell the goods to another. In return, the other party will normally be asked to pay a royalty. In itself, such authorization of a third party to exploit the patent or any other industrial property right is not caught by Article 85(1). Problems may, however, arise when the authorization is accompanied by clauses which restrict competition without being justified in that they protect the industrial property right.

In general, the tests for application of Article 85(1) or exemption under Article 85(3) are the same in the area of industrial property rights as in other areas.

Patent licensing agreements. — Patent licensing agreements account for a large percentage of the notifications submitted to the Commission for negative clearance or exemption in the area of industrial property right.

Such agreements may present problems in view of the territorial restriction they impose, which can lead to the isolation of national markets, and the exclusivity they confer on the licensee to manufacture and/or sell the products covered by the patent.

On the other hand, patent licensing has a number of beneficial aspects, in particular for small and medium-sized enterprise: such agreements allow firms which might otherwise not be in a position to do so, to obtain access to new technologies. Also, patent licensing encourages the innovative activities of smaller firms which do not have the financial resources to exploit their inventions themselves throughout the whole Community.

In recognition of the beneficial effects which patent licensing agreements can have, the Commission has for some time been working on a group exemption in this area. The draft group exemption as published for comments would establish the following system:

(1) it would generally exempt exclusive rights to manufacture and to use specified products from the prohibition in Article 85(1) of the Treaty;

(2) it goes on to exempt exclusive selling rights and accompanying export restrictions by small and medium-sized firms, for they are the firms who, with their limited financial resources, usually have the greatest difficulty in exploiting their own inventions or having them exploited by companies within their group, and consequently have to issue licences; the same protection is given to small and medium-sized firms who receive licences;

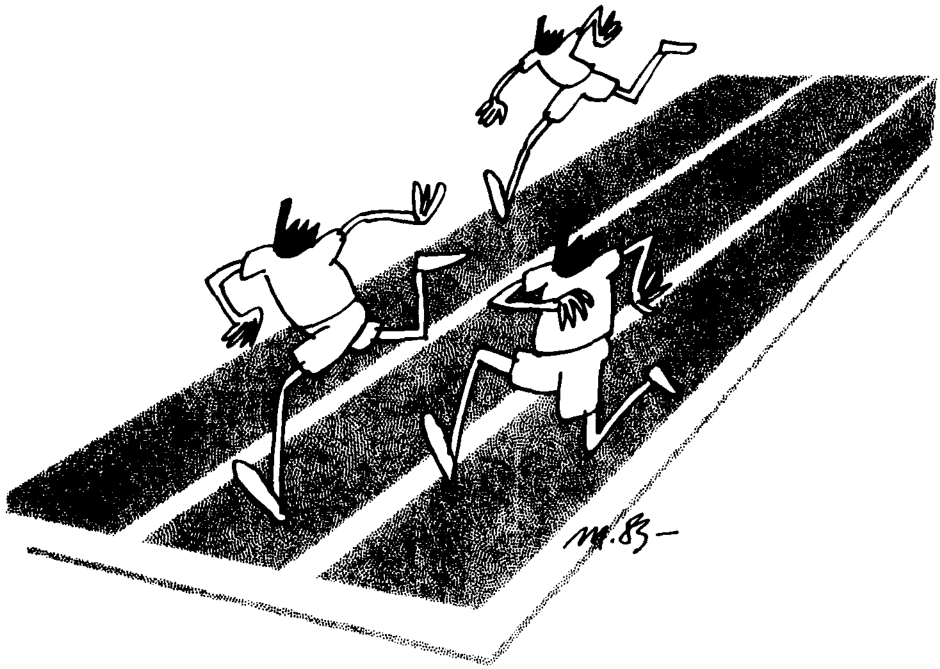
(3) it lists a number of obligations that do not prevent exemption, such as the obligation not to divulge business secrets, the obligation to respect quality standards, grant-back clauses and field-of-use restrictions;

(4) it lists clauses whose presence in a licence precludes the benefit of the block exemption, such as no-challenge clauses, clauses stating that the licence is for an indefinite duration, competing products clauses, quantitative restrictions and resale price fixing. These clauses restrict competition in such a way that they can be exempted only individually, and then only if good reasons are produced;

(5) like the other group exemption regulations, this draft empowers the Commission to withdraw the benefit of the block exemption in specified cases, notably where the patented products are not in competition with similar products in the licensed territory;

(6) certain areas where the Commission has not yet acquired adequate experience are excluded, such as patent pools and cross-licensing.

Following consideration of the many comments received after publication and also the judgment of the Court of Justice in the first case to come before it on exclusive licences, the Commission plans to make a number of amendments to the draft before adoption of the final regulation, probably at the end of 1984.



IV. Enforcement of the competition rules by the Commission — Procedural matters

The competition rules of the EEC Treaty can be applied directly by national courts. For example, a party to an agreement which is the subject of litigation before a national court can argue that the agreement is void — and thus unenforceable by the other side — because it infringes Article 85 of the Treaty. Likewise, a firm may plead before a national court that a dominant enterprise is involved in abusive behaviour — for example, is trying to drive the complainant out of business by severely undercutting his prices. National courts can determine the appropriate remedies in such cases, possibly accompanied by an award of damages to the injured party.

Running parallel to the possibility of such actions before national courts is an elaborate procedure of application of the competition rules by the Commission. In some ways, this procedure has further-reaching consequences for the firms involved than actions at national level, in that, for example:

— the Commission has the power to impose administrative *fines* for infringement of the competition rules;

— the Commission has extensive powers to collect the information it needs in order to determine whether an infringement is taking place;

— only the Commission has the power to grant exemptions on the basis of Article 85(3);
— the Commission can take interim measures to bring to an immediate halt damaging behaviour.

The procedure before the Commission can not, however, culminate in an award of damages to the victim; fines imposed are paid to the Commission, not to the injured party.

There are various ways in which procedures before the Commission can be started. Some are more relevant for small and medium-sized enterprises than others. For example, smaller firms may be more interested in the possibilities of submitting complaints to the Commission against abusive behaviour by dominant firms than in the notification procedure. Nonetheless, for the sake of completeness, small and medium firms should be aware of the various procedures which they may become involved in.

The beginning of a procedure

There are a number of ways in which a procedure before the Commission involving the competition rules can be set in motion:
— notification, for negative clearance or for exemption,
— complaints, formal or informal,
— own-initiative action by the Commission,
— sector investigations by the Commission.

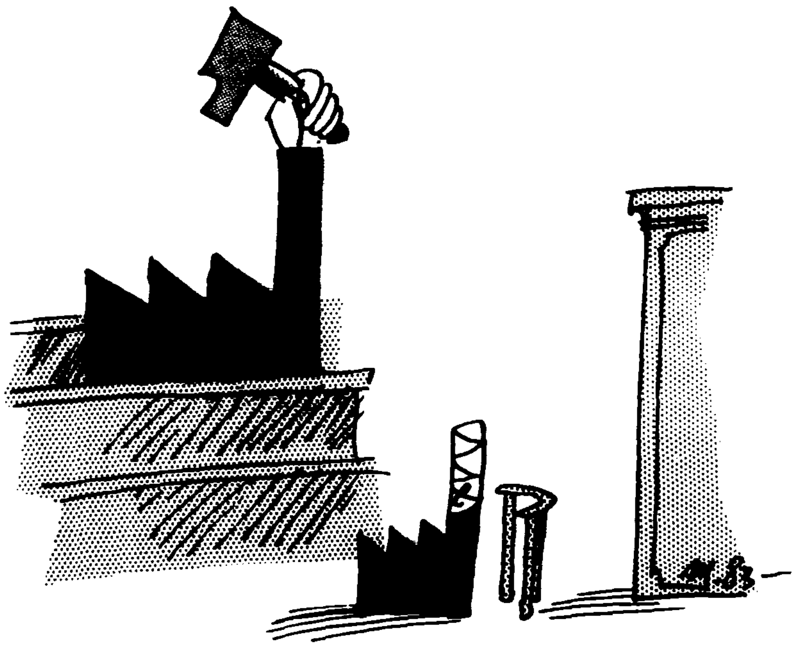
Notification

The mechanism of notification

Agreements between enterprises and decisions by associations (e.g. trade associations) may be submitted to the Commission to seek a decision from the latter that the agreement does not violate Article 85(1) at all (this is a negative clearance) or that the agreement does fall under Article 85(1) but meets the conditions for exemption under Article 85(3). Although the correct terminology is 'application for negative clearance' and 'notification for exemption', the term 'notification' is used for both possibilities. In fact, applicants will normally submit one notification to the Commission seeking negative clearance or, in the alternative, individual exemption.

N. B.: No notification is necessary when an agreement falls under one of the group exemptions.

Notification must be made in writing on an official form issued by the Commission, called 'Form A/B'. This form requires the applicant(s) to give detailed information relating to the parties to the agreement and the essential features and aims of the agreement; to avoid any possible misunderstanding, it is wise to attach a copy of the agreement in its entirety to the form.



Notification need not be made by all those concluding an agreement, but whoever takes it upon himself to notify must in any event be a party to the agreement. Officially authorized representatives are also permitted to submit a notification.

Finally, enterprises should be aware of the importance of submitting accurate, complete and truthful information in their notifications: the Commission has the power to impose fines of up to 5 000 ECU where applicants intentionally or through negligence supply incorrect or misleading information in a notification.

Copies of Form A/B and the accompanying explanatory memorandum prepared by the Commission can be obtained from the Commission's Information Offices in each Member State and also outside the EEC. A list of these addresses can be found at the back of this guide.

The importance of notification

There are two main reasons why notification can be very important to firms:

— as a rule the Commission can not grant negative clearance or an individual exemption with regard to any agreement which has not been notified to it in the proper manner;

— no administrative fines can be imposed by the Commission for activities which take place after notification and until the Commission reaches a decision, final or provisional, as to the applicability of Article 85(1) and/or Article 85(3), provided those activities do not go beyond those described in the notification.

The fines which can be imposed for actual violation of Articles 85(1) and 86 must be distinguished from the (more minor) fines which can be imposed where a notification intentionally or negligently contains misleading or untruthful information.

There are two exceptions to the general rule that to obtain an exemption under article 85(3), the agreement in question must be notified to the Commission:

— agreements which fall under one of the group exemptions are automatically exempted;

— certain types of agreement do not have to be notified, and can nevertheless, if the case arises, be exempted by the Commission retrospectively to the date on which the agreement was concluded. In broad lines, the requirement to notify does not apply to:

  (1) agreements between parties located only in one Member State and not relating to imports or exports, in other words, agreements which are purely domestic or local in scope;

  (2) agreements between two parties only in which the sole restriction is a unilateral restriction on one of the parties as to prices and terms of resale or as to the exercise of industrial property rights or know-how;

  (3) agreements between two parties only which have as their sole object
    - the development or uniform application of certain standards or types, or
    - joint research and development, or
    - specialization in manufacturing, where the market share is not more than 15% and aggregate annual turnover not more than 200 million ECU.

A caveat should be added:

— in case any doubt exists as to whether a particular agreement falls under one of the categories for which notification is not required, the parties should not hesitate to notify;

— the advice 'when in doubt, do notify' is especially important because the benefit of immunity from fines is available only with respect to notified agreements and agreements covered by group exemptions.

Quick checklist in connection with notification

When deciding whether or not an agreement should be notified to the Commission, undertakings should run through the following questions:

(1) Does the agreement have any connection at all with competition? If not — for example if the agreement concerns a simple sale of goods — there is no need to contemplate notification.

(2) If the agreement does feature certain restrictions on competition, are the competition rules nevertheless inapplicable because, e.g. the effects are minimal, or the activity is covered by one of the relevant Commission notices. If so, parties need not notify.

(3) If the agreement seems likely to contain elements which are contrary to Article 85(1), but also appears to the parties to fulfil the requirements for exemption under Article 85(3), parties must determine:

  — whether the agreement falls under one of the group exemptions;
  if so, no need to notify, the agreement is safe and no fines can subsequently be imposed;

— whether the agreement is one of the types of agreements for which notification is not required; if so, no need to notify, exemption can if necessary be obtained later, even in the absence of notification. One risk in not notifying is, however, that immunity from fines is not guaranteed.

If neither of the above applies, parties should make the proper notification on Form A/B as soon as possible after concluding the agreement (or even before): the importance of timely notification lies in the fact that fines may still be imposed for the period preceding notification.

Complaints

General

Anticompetitive behaviour can be brought to the attention of the Commission by way of a complaint.

Potential complainants should first carefully consider a number of questions:

— Is the object of the complaint autonomous behaviour by undertakings, or is the behaviour imposed by national legislation? In the latter case, the competition rules do not apply.

— Is there a transfrontier effect involved in the behaviour? If not, the matter would be one of national, not Community, competence.

— Are all the other elements of either Article 85 or 86 fulfilled? For actions under Article 85, the complainant should check whether the agreement in question is perhaps *de minimis*. In that case, there is no point in complaining. For Article 86 cases, a dominant position is required — not always an easy requirement to prove — and there must be an abuse thereof.

— Would action before a national court be preferable in connection with the question of damages?

In sum, in order to avoid wasting the time of all involved, complaints should only be submitted after due reflection.

Who can complain

Those entitled to submit complaints are Member State authorities, individuals or legal persons, such as companies or trade associations.

One essential requirement is that a complainant must have a legitimate interest in the termination of the objectionable behaviour. Parties to an agreement would in any event be deemed to have a legitimate interest. Furthermore, any third party who can show that the alleged anticompetitive behaviour is damaging — even potentially — to him will normally have a legitimate interest.

Consequences

When a complaint is submitted by a party having a legitimate interest in the matter, the Commission will *examine* whether a violation of the competition rules is in fact taking place. If the complaint turns out to be well-founded, the Commission can then take the necessary measures to put an end to the infringement. If, on the other hand, the Commission, after examining the matter, finds that the *complaint is not* justified, it must inform the complainant of its reasons for not pursuing the matter. The complainant must then be allowed a certain period of time to submit any further comments, after which the Commission will either continue its investigation, if new facts have come to light, or definitely reject the complaint.

Form and contents of a complaint

There are no specific requirements as to the form in which a complaint is made. However, given the fact that the Commission is only obliged to investigate a so-called formal complaint, by a party showing a legitimate interest in the matter, it is in the interest of the complainant to clearly present the facts involved in writing. A special form ('Form C' — available from the Commission's Information Offices listed at the back of this guide) exists which can be used for this purpose, but a simple letter is sufficient. The complaint should in any event include:

- the name and address of the complainant;
- the identity of the undertaking(s) which are the subject of the complaint;
- evidence which supports the complainant's claim to a legitimate interest in the matter;
- a clear description of the substance of the complaint and, if possible, the reasons why the complainant believes the behaviour in question constitutes an infringement of Article 85 and/or 86;
- if the complaint is signed by a representative, evidence of his authority to act on behalf of the complainant.

The party under attack will be informed of the complaint against him and given the opportunity to present his views. In this context, the complainant would be well advised to clearly indicate which parts of his complaint are to be considered as confidential and thus not transmitted to the party under attack.

Informal or anonymous complaints

The Commission also receives oral complaints and sometimes anonymous complaints. The difference with the 'formal' complaints described above is that the Commission is under no obligation to examine such so-called 'informal' complaints, although it may of course do so if it wishes.

Therefore, where there is serious evidence that an infringement of the competition rules is taking place, any undertaking which is being harmed by the behaviour in question should contemplate the advantage of lodging a formal complaint in writing.

Own-initiative intervention by the Commission

There are a variety of ways in which the Commission can become aware of possibly anticompetitive behaviour: questions raised in the European Parliament, articles in newspapers, information received from Member State authorities, or contacts with interest groups, such as consumer organizations. Although the Commission is not obliged to pursue matters which come to its attention in this way, it can decide on its own initiative to examine further such cases and will definitely do so if the information it has received seems to point to a serious infringement of the competition rules.

Furthermore, the Commission has the power to conduct general enquiries into economic sectors where it feels competition is being restricted or distorted. Such enquiries have for example taken place in the brewery industry and the margarine industry.

Fact-finding by the Commission — procedural decisions

Where the Commission decides that commercial activities which have come to its attention seem to pose problems in the context of the competition rules, it will normally need more information to be able to reach a definite opinion on the legality of the behaviour in question.

There are two basic ways in which the Commission can obtain information from undertakings:
- written requests for information,
- investigations.

Requests for information

The Commission can send written requests (including telexes) for information not only to undertakings which are suspected of infringements but also to third parties who may be in a position to clarify certain matters. For example, where the Commission is examining the behaviour of a dominant firm, it may ask smaller firms who have dealings with that firm to indicate whether they have ever been subject to specific abusive treatment by it.

Requests for information involve the following consequences:
- where the undertakings interrogated reply promptly, correctly and completely to the Commission's letter, no further complications need be feared (although the Commission may of course subsequently request additional supplementary information);
- if in their reply the undertakings concerned provide incorrect or incomplete information, the Commission has the right to impose fines of up to 5 000 ECU;
- if the undertakings choose to ignore the initial request for information altogether, or if their reply is incomplete, the Commission may as a second step take a formal decision ordering complete information to be supplied. Failure to respond to this formal decision is not to be recommended, because daily default fines of up to 1 000 ECU can be imposed by the Commission until a complete reply is finally received.

In sum, undertakings who receive a request for information from the Commission must seriously bear in mind:

— that if they decide to reply, that reply must be correct and complete;

— that if they do not reply to the first request for information, they stand the risk of subsequently being forced to reply anyway, if necessary, by means of daily default payments.

Investigations

The Commission has the power to send authorized officials to the premises of undertakings in order to gather the information it needs. The officials who make an inspection visit are entitled to examine the company's business records and documents, take copies or extracts thereof, request explanations and enter all premises, land or vehicles belonging to the company. Again, as in the case of written requests for information, undertakings who submit to such an inspection but produce the material requested in incomplete form run the risk of fines of up to 5 000 ECU.

Undertakings are not obliged to admit Commission officials who come on inspection, but the Commission may then proceed to take a formal decision ordering them to comply, if necessary reinforced by a daily penalty payment of up to 1 000 ECU for each day the undertaking refuses to admit the Commission inspectors.

The Commission is not obliged first to give the undertaking concerned the opportunity to comply with an investigation based on a simple mandate before passing on to the more forceful instrument of ordering the undertaking to comply by a formal decision. Normally, the Commission will resort to an unannounced visit by decision at the outset where a serious risk exists that the undertakings, if forewarned of the inspection, will destroy any incriminating evidence.

Undertakings who receive a visit from Commission inspectors are allowed to ask a legal adviser to be present, but the inspection can not be unduly delayed to await the arrival of such a person.

The procedure leading to a final decision

The three basic types of decisions which the Commission can take in application of Articles 85 and 86 are:

— decisions granting negative clearance;

— exemption decisions pursuant to Article 85(3);

— decisions ordering the termination of an infringement.

The procedural decisions which the Commission can take in connection with its powers of investigation, for example ordering an undertaking to admit Commission inspectors, have been dealt with in the preceeding paragraph.

Other measures which may occur when the Commission deals with a case are:

— interim measures,
— provisional decisions,
— informal settlements.

Negative clearance

When an undertaking has made an application on Form A/B, seeking formal assurance from the Commission that its agreement or other commercial activities are not deemed to infringe the competition rules, the Commission must first give any other interested parties the chance to make their views on the matter known. This is done by publishing the main facts of the case — in the Official Journal. Any interested parties are given a specific period of time to react to this publication and new facts may be brought to light which cause the Commission to reconsider its position.

A second formality which must be observed before negative clearance can be given is consultation of Member State authorities, who meet for this purpose in a body referred to as the 'Advisory Committee on Restrictive Practices and Dominant Positions'.

If after these steps have been observed the Commission maintains the view that negative clearance is justified, a formal decision is taken which states that on the basis of the facts in its possession, there are no grounds for the Commission to take any action under Article 85(1) and/or Article 86 against the agreement or other commercial activity involved.

It is clear that if new facts subsequently arise or if the circumstances involved change substantially, the Commission retains the power to reconsider the matter. Until now, however, no cases have ever occurred in which the Commission has gone back on a decision granting negative clearance.

Exemption

As in the case of negative clearances, a decision granting exemption must be preceded by publication in the Official Journal of the main elements involved, giving interested parties the opportunity to submit any observations, and by consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.

The Commission's decision indicates why the agreement or other activity in question is deemed to violate Article 85(1) and what elements have been found by the Commission which fulfil all the requirements for justifying an exemption under Article 85(3).

Exemption is always granted for a fixed period of time, which can be extended. The decision may impose certain obligations on the undertakings involved and in some cases, the parties may be requested to modify certain aspects of their agreement before exemption can be granted at all.

Normally, exemption can only be granted as of the date of notification; only in the case of certain types of agreements which need not be notified (see above) can exemption be granted as of the date on which the agreement, was concluded.

Decisions attacking an infringement

Procedure

When a matter comes to its attention through a complaint, a notification or in any other way, the Commission may reach the preliminary conclusions that a violation of Article 85(1) or 86 is taking place and, in the case of notifications, that the conditions for granting an exemption under Article 85(3) are not present.

The Commission must give the parties concerned notice of its objections to their behaviour in the form of a written communication known as the 'statement of objections'. Annexed to the statement of objections is a list of the documents which constitutes the Commission's file in a particular case. In order to prepare their response, parties may examine the file on the Commission's premises, although documents of a confidential nature, for example concerning other undertakings' business secrets or internal Commisson notes, are normally not accessible. Parties are given a specific time limit — normally one or two months, depending on the complexity of the case — to respond in writing to the Commission's objections.

After their written response, parties can also request an opportunity to argue their case orally. This 'oral hearing' as it is called, is organized by the Directorate General for Competition and is conducted by the Hearing Officer. This official sees to it that the rights of the defence are respected and has the right to make observations to ensure that in the procedure leading to the Commission's decision, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned.

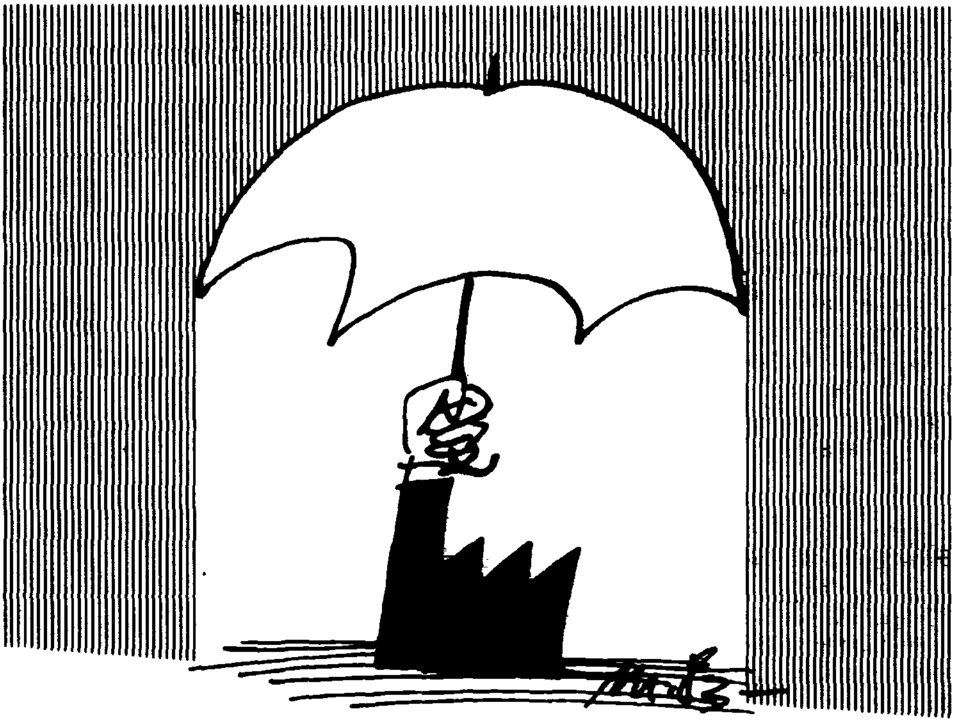
Following the oral hearing, the Commission must consult the Advisory Committee on Restrictive Practices and Dominant Positions.

Only after all these procedural steps have taken place can the Commission come to a final decision.

Contents of the decision

Where an infringement is found to exist, the Commission will order the undertaking involved to put an end to it forthwith, a so-called 'cease and desist' order. Of course where the parties have already terminated the infringement, for example during the course of the procedure before the Commission, the decision may simply consist of a declaration that the behaviour in question constituted an infringement.

If appropriate, the Commission also has the power to order positive action by the undertakings involved. For example, where a dominant undertaking has been found to abuse its position by refusing to supply a customer, the Commission may require that firm to resume supplies within a specified period and ensure appropriate supply arrangements for the future.



Fines

The Commission has the power to impose fines of up 1 million ECU or 10% of the world annual turnover of the undertaking concerned in the previous business year (whichever of the two is greater), where undertakings are found to have infringed Article 85(1) or 86, intentionally or through negligence.

Whether or not a fine will be imposed, and the determination of the amount of the fine, will depend, among other things, on the seriousness of the behaviour, how long it went on, the size of the undertakings involved; a deliberate infringement will normally deserve a heavier fine than where undertakings can only be accused of negligence. Activities which have been frequently attacked by the Commission in the past will also warrant heavier fines, because undertakings should realize, through the case law built up by the Commission, that such behaviour is not allowed.

With respect to notified agreements, fines can not be imposed for the period between the moment of notification and the Commission's decision, provisional or definite (see below).

Fines are, however, possible for the period during which the agreement was in force before notification.

Also, where the Commission refuses to grant an exemption, the result is that the agreement in question, whose illegality is thus confirmed, may give rise to actions in national courts, for example for damages.

Interim measures

Depending on the complexity of any given case, it may take the Commission one or two years or even more to reach a final decision. During that time, the behaviour in question may give rise to serious and irreparable damage to, for example, a complainant, whose very existence is threatened, or it may be totally unacceptable for the general public interest. In such cases of urgency, the Commission has the power to take immediate action in the form of so-called 'interim measures' to stop the objectionable behaviour. Such measures are of a temporary nature aimed at safeguarding the *status quo* and do not determine the final outcome of the matter being dealt with.

Provisional decisions

The general rule is that once an agreement has been notified, no fines can be imposed with respect to the period after notification. This immunity from fines can, however, be lost where the Commission takes a provisional decision informing the parties that after preliminary examination, it is of the opinion that Article 85(1) applies and exemption under Article 85(3) is not justified.

If the parties disregard this warning, they run the serious risk of being fined in the Commission's final decision.

Informal settlements — 'administrative letters'

For the sake of expediency, many cases before the Commission are concluded by way of an informal settlement, notably where the undertakings involved voluntarily eliminate any objectionable practices. In fact, the Commission normally takes a dozen or so formal decisions each year, whereas the number of such informal settlements is usually several hundred.

In some cases, informal settlements take place by way of 'administrative letters' in which the Commission services inform the parties that it sees no reason to take any action under the competition rules and that the relevant file will therefore be closed. Such letters are administrative documents and do not have the legally binding effects of decisions, but may nevertheless be useful as guidance. Also, the Commission's recently instituted practice of publishing a notice of its intention to issue an administrative letter in certain cases, allowing third parties to react before it takes any further steps, enhances the value of such administrative letters.

Publicity

Decisions granting negative clearance, exemption or ordering the termination of an infringement, as well as interim measures and provisional decisions, must be published in the Official Journal. Procedural decisions, such as those formally requesting an undertaking to supply information, need not be published in the Official Journal, but the Commission may nevertheless decide to do so, for example in cases of general interest.

The Commission normally issues press releases regarding the decisions it has taken. Press releases can also be used to make the general public aware of informal settlements which for some reason contain important elements which are of general interest.

Finally, the Commission's monthly Bulletins, as well as the annual Reports on Competition Policy contain information on the decisions and informal settlements that have taken place.

Control over the Commission by the European Court of Justice

The European Court of Justice has the following powers of review over decisions taken by the Commission:

— the Court has the power to confirm, reduce, cancel or increase fines and penalty payments imposed by Commission decisions;

— all formal decisions by the Commission can be reviewed and if necessary annulled by the Court: negative clearances, decisions granting or refusing exemption, orders to terminate infringements, decisions requesting information, orders to submit to an investigation and provisional decisions relating to the immunity from fines (see above).

Furthermore, appeals can be brought before the Court where the Commission has failed to act, for example failure to examine a formal complaint that has been submitted to it or to inform the complainant of its reasons for not pursuing the matter after preliminary examination.

Those entitled to bring actions before the Court are all natural or legal persons against whom a decision has been taken as well as any other parties who are directly and personally affected by a decision.

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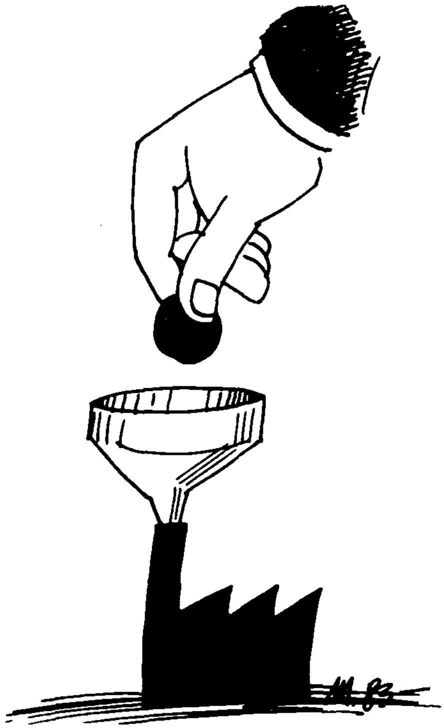


V. State aids

Another aspect of Community competition policy that may interest small and medium-sized businesses is the control of national aids. Under Articles 92 and 93 of the EEC Treaty this control is exercised by the Commission.

Article 92 EEC Treaty

Paragraph 1 of Article 92 provides that, as a general rule, all government aid to business is forbidden: 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

The concept of 'aid' is a good deal wider than just government grants, cheap loans and interest subsidies, where the gratuitous element is immediately obvious. It also covers such forms of support as tax concessions, public guarantees of corporate borrowing from bank or the capital market, provision of goods and services on preferential terms, and, in some circumstances, the acquisition of public shareholdings in businesses. Any other measure having an equivalent effect will also fall within the definition.

Paragraph 2 of Article 92 goes on to provide that certain types of aid are nevertheless compatible with the common market, namely aid having a social character which is granted to individual consumers, provided that it is granted without discrimination related to the origin of the products concerned, aid to make good the damage caused by natural disasters, and aid required to compensate for the economic disadvantages caused to certain areas of the Federal Republic of Germany by the division of Germany.

Paragraph 3 of Article 92 then lists several other categories of aid that may be considered compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; and

(d) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

Article 93 EEC Treaty

Under paragraph 3 of Article 93 the Member States of the Community are required to notify the Commission, well in advance, of any plans to introduce new aid schemes or alter existing ones so that the Commission can determine whether they fall within one or other of the excepted categories and so can be allowed to go ahead. The Member State may not implement the aid scheme until the Commission has taken a final decision.

The Commission has two months in which to define its position on a notified scheme. If it considers the scheme to be compatible with the common market, the Member State is informed that the scheme may go ahead.

If it does not think it will be able to authorize the scheme, however, it opens a special procedure, which is laid down in paragraph 2 of Article 93. Under this procedure, the Commission gives the Member State a certain period, usually a month, in which to defend its scheme against the objections the Commission has raised. Comments are also invited from the other Member States and from other interested parties, the latter being informed by publication of a notice in the Official Journal of the European Communities.

At the end of the procedure, the Commission takes a final decision in which it takes into account the arguments of the Member State concerned and the reactions of the other Member

States and interested parties. It may decide to drop its objections or to order the Member State to abandon the scheme or to alter it in some way.

In any event, the Commission is obliged to follow the Article 93(2) procedure before turning down any notified aid scheme.

If the Member State disagrees with the Commission's decision on its aid scheme, it has two months in which to demand a judicial review by the Court of Justice.

A Member State failing to comply with a decision within the prescribed time, however, can itself be brought before the Court of Justice by the Commission or any other interested Member State.

The Commission has the power to order a Member State to recover from the recipient any aid it has granted unlawfully, that is to say, without prior notification of the scheme or before, or in defiance of, the Commission's decision in the case of a scheme that was notified.

The Commission also has a duty, under paragraph 1 of Article 93, to keep existing aid systems under constant review and to issue appropriate recommendations to Member States where the progressive development or functioning of the common market so requires. Existing schemes include both those in force before the common market was founded and those introduced later with the Commission's approval. If the Commission finds that, for one reason or another, such an aid scheme is no longer compatible with the common market, it issues appropriate recommendations to either amend or abolish it. If the Member State refuses to take the action recommended, the Commission initiates the Article 93(2) procedure; in the case of an existing scheme this does not have the same effect of suspending implementation as it does in the case of a new scheme, that is the Member State can continue to award aid under the scheme until the Commission has taken a formal decision.

Guiding principles of the control of State aid to small and medium-sized enterprises

All Member States dispense aid in one form or another to small and medium-sized firms. As a rule, this aid will fall under article 92(1) of the EEC Treaty. The few instances on record where this was not considered to be the case have involved aid to craft businesses, the retail trade and the professions where it was clear that the aid would have no impact on intra-EEC competition and trade. In these cases the Commission considered that the aid did not fall within the criteria of Article 92(1).

In normal circumstances, however, government aid to small and medium-sized businesses will be liable to distort intra-Community competition and trade, and especially so in industries where the small firms' output is extensively traded between EEC countries.

For a case to be considered to fall within one of the categories of exceptions to the general principle of incompatibility, and in particular the exception in subparagraph (c) of Article 92(3) for 'aid to facilitate the development of certain economic activities', the aided firms must be making some *quid pro quo* for the aid that is not only in the national interest but also in that of the Community, and the aid must not affect trading conditions to an extent contrary to the common interest. The latter criterion to a considerable extent depends on the industry of the recipients, the intensity of the aid and the overall budget for the scheme.

The Commission generally takes a sympathetic attitude towards aid to the small and medium-sized sector and often authorizes such schemes on the basis of the exception in Article 92(3) (c). It is conscious of the handicaps faced by smaller firms. Their legal form and size puts them at a disadvantage in obtaining finance. They may be too small for long production runs, so that their costs of production are high. They may lack the scientific and technical resources for research and development. And very often they will also suffer from handicaps in the field of management, organization and marketing.

In applying the exception in subparagraph (c) of Article 92(3) to national aid to small and medium-sized firms the Commission is also mindful of the important part played by such enterprises in economic growth and employment creation, and of their decisive contribution to maintaining effective competition in both the national and Community markets and to a balanced social and economic development of the regions.

All these wider benefits — which are in the Community's as well as in the national interest — can, in the Commission's opinion, be regarded as a sufficient *quid pro quo* by the small firm sector to justify certain national aid.

This makes it easier for the Commission to condone aid to a small or medium-sized firm than to a large company.

Before giving the go-ahead to a national aid scheme for small businesses with specific references to the size factor, the Commission must be sure that the beneficiaries do fall into the small and medium-sized category. The exact size criterion may vary, however, depending on the industry and the objective of the aid in question.

For aid to be described as facilitating the 'development' of certain economic activities, it must not be just a holding operation, artificially keeping alive businesses that are uncompetitive. This is mostly the case with operating aid, that is aid which is not conditional on new investment or the creation of new jobs. Operating aid, even to small firms, is highly damaging to intra-Community competition and trade, as it shows up directly in the firms' costs and competitiveness and harms competing enterprises that do not receive it. For this reason, the Commission does not normally allow such aid, even if the recipients are small or medium-sized enterprises. It considers that such aid would affect trading conditions to an extent contrary to the common interest.

Nevertheless, some aid to small firms that is not strictly linked to investment may be authorized if it is a temporary measure to offset the specific handicaps small firms have compared with large companies, and to bring them to the point where they can compete normally without public support.

The Commission is thus quite willing to accept state aid, in the form of guarantees or direct finance, to cover expenditure other than that strictly connected with investment. Such eligible forms of expenditure may include, for example, the cost of research and development work contracted out to others or consultancy services to improve the management, internal organization or distribution arrangements of small firms. They may even extend to expenditure to set up joint external services common to several firms or organize structured cooperation between them.

Aid to the small business sector the Commission will authorize

The type of aid Member States choose to extend to small firms will depend on the problems that have to be solved, which will vary at different stages of a business's life: whether it is just starting up or is already an established business, being extended or switching to a new field, or changing hands.

The aid to small and medium-sized firms which the Commission has authorized in the past under Article 92(3) (c) of the EEC Treaty has often taken one of the following forms:

- grants, low-interest loans or loan guarantees to help small businesses get started;
- low-interest loans or loan guarantees for investment by small businesses, which offer them terms matching those which the largest companies are able to obtain on the capital market or from banks;
- public support to encourage the flow of risk capital to the small business sector; the Commission has, for example, authorized a number of aid schemes involving specialized public agencies buying temporary stakes in small firms, the extension of government guarantees for private venture capital companies taking temporary stakes in such firms, or the grant of subordinated government loans enabling the firm to obtain further loans on that basis from the banking sector;
- grants for research and development. As small firms do not always have the staff or facilities to carry out R & D themselves, some Member States have introduced, with the Commission's approval, aid schemes designed to reduce the cost of R & D work contracted out to others;
- grants or low-interest loans to innovation projects undertaken by small or medium-sized businesses (development of new products or manufacturing processes or radical improvement of existing products or processes), which might not proceed without government support because of the high risk they involve in both technological and financing terms;
- grants or low-interest loans to investment projects involving energy or raw material savings or the replacement of oil by alternative fuels;
- grants towards the cost of improving small firms' management or sales policy with the help of outside consultants or computerization.

In line with this general approach to small business, the Commission has cleared a number of proposals for setting up new aid schemes for the small firm sector or for altering existing schemes. In some cases it has insisted on a lowering of the size limits for eligibility to ensure that only small or medium-sized firms can benefit under the scheme.

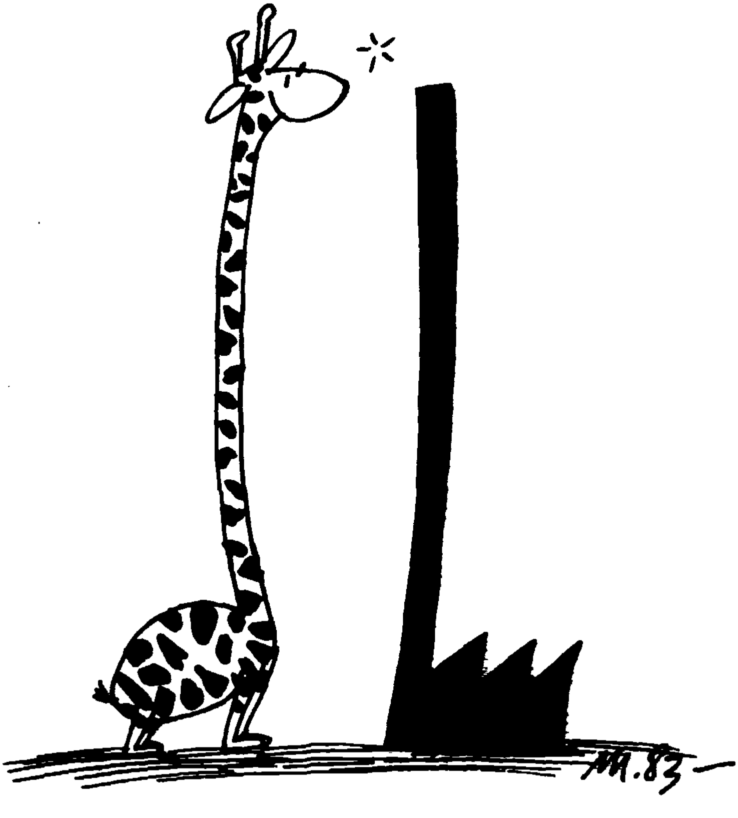
Aid for exports

Any advantages Member States confer on their industry to assist exports are also aid. Support of sales in other Member States always falls under Article 92(1). The position invariably taken by the Commission in such cases is that it is inconsistent with the principles of the common market for a Member State to use aid in order to artificially expand its industry's sales in fellow EEC countries to the detriment of businesses in those countries which do not receive such aid. Whatever its form, intensity, motive or purpose, such aid is ineligible for any of the exceptions from the ban on aid. It is always apt to affect intra-Community trade to an extent contrary to the common interest and this applies equally when the recipients are small or medium-sized firms.

Conclusion

A concise overview of the complicated rules which form EEC competition law can not pretend to give a ready answer to every imaginable question that may arise in practice.

Our hope is that this guide will provide undertakings with a sufficiently complete picture to enable them in the first place to recognize situations in which the competition rules may be relevant and in the second place to deal with potential conflicts by themselves, at any event in a preliminary stage.



Where undertakings are for whatever reason not in a position to reach an acceptable conclusion about the legality of a given matter, expert advice should of course be sought, for example via national or European trade associations, federations of industry, chambers of commerce, European Parliamentarians, and any other organizations serving the interest of European industry, including, last but not least, the competition services of the European Commission.

The legislative texts referred to in this Guide can be found in *Competition Law in the EEC and in the* ECSC — Office for Official Publications of the EC — 1981.

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Maintenance of undistorted competition is one of the fundamental principles of the free market economy on which the European Community is based.

The competition rules which have been established in this context are aimed at ensuring that a healthy competitive environment exists throughout a unified European market, for the benefit of all — producers, traders, consumers and the economy in general.

This guide to the competition rules is aimed at making small and medium-sized enterprises more fully aware of the meaning and scope of this area of Community law. Particular attention is paid to the special possibilities which have been provided in this field for cooperation between small and medium-sized firms.

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