

# INFORMATION

## COMPETITION

### EXCLUSIVE AGENCY AGREEMENTS IN THE COMMUNITY ANTI-CARTEL LEGISLATION

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The sole agency agreement is part of current commercial usage. Customarily the firm concerned gives exclusive selling agreements for its products to a limited number of concession-holders, each for a different region.

The European Community does not deny the advantages accruing in some measure to the consumer from this system. It enables the producer to have a network of preferential selling outlets, comprising specialists in the promotion, sale and maintenance of its products.

If these traders make special efforts, in the form of advertising, market prospecting and after-sales service, it seems natural at first sight that they should be the main beneficiaries. This would mean that they would be protected against the risk that the launching of a product, on which they had spent considerable sums, should accrue to the profit of a competitor who would be able to sell the same goods without the cost of the same promotion.

It seems a good plan, too, especially for highly technical goods, that the stockists should be in a position to give an effective after sales service, and generally capable of maintaining the reputation of the trademark. This result can be obtained most easily by restricting the selling to a small number of middle-men who are technically qualified, and will give consumers the best quality guarantees.

It is nevertheless true, that this system amounts to a sharing of the market, and thus a restriction of competition limiting the free choice of the consumer. There is the risk that it may tempt the concession-holder to take advantage of his exclusive rights to charge excessive profit margins. In this respect, such arrangements may come within the prohibitions of cartel and similar agreements contained in the Community legislation.

This legislation is only aimed at agreements which have the effect of restricting competition on trade between Community countries. In the first instance, therefore, sole agencies which apply only to sales within the territory of a given nation, might be considered as a class as being outside the general prohibition.

A French producer, for example, is within his rights in setting up a network of exclusive agents for different regions on his own national territory, each being assigned his own city or department area; and it may be a condition of each of these that it does not entitle the concession holder to sell in France outside the area assigned to him. Allowance has been made for the fact that both customers and goods circulate easily over the national territory, so that consumers have a certain freedom of choice, and there is a certain degree of competition between the exclusive selling agents.

This does not apply, however, when we consider the Common Market as a whole. In this case the complete territorial protection clause, in which the concession holder is protected against any import from any of the other Community countries results in cutting off the channels of trade between one country and another; and these channels must be left free. Such a clause, indeed, results in eliminating competition between the exclusive agents in the different countries. It gives them an incentive to take advantage of their exclusivity by putting up their selling prices to an abusive extent. It also results in consumers being deprived of their freedom to get their supplies from another Community country.

This practice is forbidden by the Community legislation, which is in its turn confirmed by the regular practice of the Commission and the decisions of the Court of Justice.

Exclusive agencies are, however, permitted, provided they do not interfere with the possibility of imports from other Community countries. In these cases their authorisation is automatic and does not require specific approval by the Commission

In consequence, firms which have entered into exclusive agency agreements by which their concessionaries had full territorial protection, have had to modify the terms of the agreements.

Exclusive distribution agreements which leave open the possibility of parallel imports within the Common Market are subject to an open general licence as a separate category (Regulation 67/67, dated March 22, 1967 published in the Official Journal of the Community No. 57, dated March 25, 1967).

The Rome Treaty leaves with the Commission the power to licence individually, or by category, various types of agreement which otherwise come within the general prohibition contained in Article 85 para 1. The licences may be granted if the agreements concerned result in less obstruction of competition than they bring economic advantages to firms and consumers (Article 85 para 3).

Firms which are linked by exclusive agency agreements embodying the full territorial protection clause, may take their chance by applying for an individual licence under Article 85 para 3, if they consider the surrounding circumstances are such as to justify the issue of such a licence.

For example, the Commission might grant a licence of this type, but subject to a definite time limit, to full territorial exclusivity which would enable a new producer to gain a foothold in any particular markets. The same might apply for the sale of products which enjoy only a weak position in the market for their own special line.

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Another type of exclusive agency agreement exists between producers of different nationalities who are in competition with one another and who exchange exclusive representation agreements for one another's products in one another's national markets.

The Community has not been willing to take a general view about agreements in this class. They often amount to agreements for sharing the Community market, restricting competition and limiting the consumer's choice. Agreements of this type must, in any case, be notified to the Commission.

On the precedents of cases which have come before the Commission, it appears that the probability of a licence being granted for such agreements increases when it is possible to classify them as specialisation agreements, under which each firm takes charge of a specific range of products which do not compete with those of the other parties to the agreement. In such cases the agreements enable the firms which specialise in particular lines of goods, to increase the volume of their production and the quality of their products to the benefit of the final consumer. They are apt to be specially valuable in the case of highly technical goods, and may come within the category of agreements, in which the limitation of competition is offset by the accrual of economic advantages.