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EEC Law of Competition: Distribution Agreements and Their Notification

I. Introduction

To notify or not to notify the Commission of the European Communities (hereinafter "Commission") in Brussels of agreements if and when they pertain to business in the Common Market, has continued as one of the unsolved riddles of EEC competition law practice for many years. The legality, hence enforceability, under EEC competition law of an agreement containing restrictive provisions depends on a system of institutionalized analysis so entirely different from what American practitioners have come to expect regarding their latitude to include certain restrictive, yet reasonable clauses in their agreements in the United States, that some general reflections are in point. The following, therefore, is intended to assist the American practitioner by first explaining the notification system. Second, the EEC law governing distribution agreements is analyzed with special attention given to selective and exclusive distribution agreements. Recent regulations of the EEC governing exclusive distribution and purchasing agreements are then described, and last, some practical comments about how practitioners might best proceed are offered.

A. ROLE OF NOTIFICATION

The system in the EEC is based on a division into, on the one hand, a rather formalistic application by the Commission of the pertinent law, i.e. Article 85(1) of the Treaty of Rome,¹ to all restraints of business conduct

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1. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (entered into force January 1, 1958), also referred to as EEC Treaty. This treaty represents

found in an agreement, and, on the other hand, an economic analysis of pro- and anticompetitive effects of such restraints not until a special administrative procedure has been opened in Brussels, following "notification" of the agreement, i.e., formal application for an approval of the restraints pursuant to Article 85(3). The practical difficulties resulting from this system center on the question of what flexibility exists, if any, for businessmen and their legal advisers to decide whether to file a notification in respect of their agreements.²

At the outset, it should be stated that no legal obligation exists in EEC law to notify any agreement. Notification is only employed, if a company or person desires to obtain an approval from the Commission for its agreements otherwise violative of Article 85(1). Consequently, the omission to notify any specific agreement does not have any automatic legal result, particularly does not lead to the prohibition of the agreement, since the applicable regulations of EEC law governing the process of notification have not added anything to the prohibitions in the underlying substantive law contained in Article 85(1).³ Whether or not a particular contractual arrangement is prohibited in the EEC depends solely on the interpretation of Article 85(1) with respect to such arrangement, not its notification to the Commission.

the charter of the Common Market. Articles without further specification mentioned in the text will be those of the Treaty of Rome, or EEC Treaty. Article 85(1) provides:

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

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

2. The system goes back to basic principles borrowed from French and German administrative law at the time EEC competition law was first created, giving an administrative agency sole control over the permissibility of certain contractual arrangements, subject only to the jurisdiction of the European Court of Justice. The system has been criticized in the literature, particularly by British scholars and practitioners who did not participate in its creation and who, by tradition, are less inclined to entrust administrative agencies with such powers, rather preferring adjudication by the courts; cf., for instance, the criticism voiced by Valentine Korah, *The Rise and Fall of Provisional Validity—The Need for a Rule of Reason in EEC Antitrust*, in *Symposium on the European Economic Community*, 3 NW. J. INT'L L. & BUS. 320, 348 *et seq.* (1981). See also, Van Bael, *A Practitioner's Guide to Due Process in EEC Antitrust and Antidumping Proceedings*, 18 INT'L LAW 841 (1984).

3. *Société Technique Minière v. Maschinenbau Ulm GmbH (LTM v. MBU)* Court of Justice, June 30, 1966, Case 56/65, 12 Rec. 337 [1966], Common Market Reports (CCH) ¶ 8047 (hereinafter "C.M.R."). Pages of Court decisions cited in this article will always be those in C.M.R., not the official Court reports).

B. WHY NOTIFY?

On the other hand, there are advantages resulting from notification and, by the same token, risks attached to not notifying agreements which may be subject to Article 85(1). The most obvious effect of a notification is the immunity from fines pursuant to Article 15(5)(a), Regulation 17/62.⁴ No agreement or contractual provision pertaining to the Common Market that has been notified can attract a fine, provided the notification is comprehensive and truthful. However, since ordinary, business-like arrangements of the kind typically entered into by companies such as distribution or licensing agreements are not likely to result in fines, even if they violate Article 85(1),⁵ a more practical consideration is the following. American manufacturers and/or licensors may wish to protect their trade secrets and other valuable assets, temporarily provided to, or shared with, a European distributor or licensee, and they will want to secure the return of their tangible or intangible property at contract termination and, of course, the punctual payment of any monies agreed upon with the European partner. If the language contained in a contract provision pertaining to any of these arrangements goes beyond the permissible limits under Article 85(1), the whole agreement is in danger of being void, and certainly the particular contract provision would not be enforceable, resulting from the interplay of Article 85(1) and Article 85(2).

In such a situation, to avoid the nullity or partial nullity resulting from an arrangement subject to Article 85(1) the only sensible thing to do (short of changing the agreement) is the notification of the agreement.⁶ Only in this way will companies doing business in Europe be able to avail themselves of the opportunity to obtain an "exemption," or approval, for their arrangement from the Commission, if the particular prerequisites of Article 85(3)

4. Official Journal of the European Communities ("O.J.") (Special ed. 1959-1962), p. 87. For a more detailed discussion of the legal effects of notification, see H. SMIT and P.E. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY, A COMMENTARY ON THE EEC TREATY* (1976) (supplements), points 85.04 and 85.32 to 85.39. See also C. BELLAMY and G. CHILD, *COMMON MARKET LAW OF COMPETITION*, 111 *et seq.* (2nd ed., 1978).

5. An exception are export bans preventing trade between EEC member states on a secondary level of distribution. *Cf.*, as one of many examples Commission Decision of Nov. 25, 1980, in the matter of Johnson & Johnson Inc., O.J. No. L 337, p. 16, Dec. 31, 1980; C.M.R. ¶10,227.

6. Admittedly, notification in and of itself does not provide legal certainty with respect to the enforceability of the notified agreement. It is not until a formal decision granting "exemption" has been taken by the Commission that the agreement can be relied upon. See further discussion of this subject later in the text. When such exemption has been received, the notifying company (companies) can rely upon the agreement as against anyone, including third parties, *L'Oreal v. De Nieuwe A.M.C.K.*, Court of Justice, December 11, 1980, Case 31/80, [1980] E.C.R. 3775, C.M.R. ¶ 8715, at p. 8608. The exemption can be, and frequently is granted retroactively to the date of notification, Article 6(1), Regulation 17/62. This is important since it sometimes takes years before the Commission gets around to granting an exemption. *Cf. infra* note 22.

are fulfilled in the circumstances. The question remains, though, what type of agreement is subject to Article 85(1) and thus a candidate for notification.

Article 85(1) prohibits all agreements or concerted practices that have the object or effect of preventing, restricting, or distorting competition within the Common Market and may affect trade between EEC member states.⁷ Broadly speaking, this embraces all agreements containing any kind of restriction, geographic or substantive, of a party's right to conduct its business freely. If they are capable of affecting trade within the Common Market, such agreements involve the risk of violating Article 85(1), subject only to the *de minimis* exception excluding agreements of minor importance,⁸ or unless specific clearance of the restrictive provision in question has been given by decision of the Commission or the European Court of Justice (hereinafter "CoJ") in a prior case.

As is apparent, the threshold of the prohibition contained in Article 85(1) is extremely low. The prohibition catches many more contractual arrangements than appear sensible from an American businessman's point of view.⁹ Americans are used to the system of self-assessment provided by United States antitrust law and permitting businessmen and their lawyers to decide, albeit at their own risk, whether a restrictive contractual provision, despite its anticompetitive character, is acceptable as a reasonable business arrangement ancillary to an otherwise lawful purpose. In the EEC no such latitude exists, due to the wide-ranging scope of Article 85(1). Instead, a check must

7. The width of this prohibition is not unlike that of the Sherman Antitrust Act, Section 1, 15 U.S.C. 1, and was designed to implement the basic objectives of the Treaty of Rome, i.e., the realization of a single market among sovereign states by removing the existing obstacles to free trade in the Community; cf. *Italy v. EEC Council and EEC Commission*, Court of Justice, July 13, 1966, Case 32/65; 12 Rec. 563 [1966], C.M.R. ¶ 8048, at pp. 7717/8. For more background and the rationale behind the Common Market's competition rules enshrined in the Treaty of Rome, and subsequently promulgated through regulations of the EEC Council and/or the EEC Commission, see U. TOEPKE, *EEC COMPETITION LAW, BUSINESS ISSUES AND LEGAL PRINCIPLES IN COMMON MARKET ANTITRUST CASES*, 19-96 (hereinafter cited as TOEPKE, *EEC COMPETITION LAW*).

8. See Commission Notice of 19 December 1977 Concerning Agreements of Minor Importance Which Do Not Fall Under Article 85(1) Of The Treaty Establishing The European Economic Community; O.J. No. C 313, December 29, 1977, p. 3. Generally speaking, the Commission has taken the view in this Notice that agreements must exert an "appreciable" impact on the market position, i.e., sales outlets and supply possibilities, of third parties and of consumers for Article 85(1) to apply. "Appreciable" is defined quantitatively by using as a threshold a 5% market share with respect to the products in question, or substitutes, and a combined annual sales limit of 50 million European units of account for the contracting parties. However, the Commission has cautioned readers of its Notice that the quantitative definition of the term "appreciable" is not an absolute yardstick.

9. An exception are agreements that benefit from one of the Common Market's so-called "block exemptions," as for instance, the Commission Regulation (EEC) No. 1983/83 regarding exclusive distribution agreements of June 22, 1983, O.J. No. L 173, p. 1, June 30, 1983, and the corresponding Commission Regulation (EEC) No. 1984/83 regarding exclusive purchasing agreements, of the same date, O.J. No. L 173, p. 5. Both regulations are the subject of detailed discussion later in this article.

be made on a case-by-case basis, taking guidance from the jurisprudence of the CoJ and numerous decisions of the Commission, to determine whether a specific restriction contained in a distribution or patent licensing agreement, for example, has been held to fall outside the scope of Article 85(1), i.e., below the threshold of the prohibition;¹⁰ if no such precedent exists, chances are that the broad language in Article 85(1) will be interpreted to apply to the restriction.

The effect of this broad language in Article 85(1) is drastic. Pursuant to its corollary, Article 85(2), all agreements violating Article 85(1), either wholly or in part, are null and void, to the extent of the infringement.¹¹ However, this effect is tempered by Article 85(3) which authorizes, under certain defined conditions, the granting of exemptions from the prohibition contained in Article 85(1).¹² The Commission has sole power to grant such exemptions,¹³ following a formalized notification including the use of a

10. The discussion below will focus on restrictions in distribution agreements and their treatment by the CoJ and the Commission. With respect to patent licensing agreements the following have been held to fall outside the prohibition in Article 85(1), among others: nonexclusive grant-back license, sublicensing prohibition, export prohibitions relating to non-EEC countries, information exchange regarding patent improvements and secret know-how, obligation to keep secret know-how confidential, quality controls by licensor. For more detail, including the decisions that have so held, see TOEPKE, *EEC COMPETITION LAW*, *supra* note 7, at Chapter 53, 349 *et seq.*

11. Article 85(2) states as follows: "Any agreements or decisions prohibited pursuant to this Article shall be automatically void." In *LTM v. MBU*, *supra* note 3, the Court established the rule that Article 85(2) applies only to the prohibited contract provision, not to the whole agreement, unless the particular clause cannot be separated from the agreement without destroying the whole arrangement ("doctrine of severability").

12. There are four conditions for the application of Article 85(3) which can be grouped into two distinct categories, the first requiring certain positive effects of the agreement in issue, the second proscribing certain negative effects. All of them must be fulfilled, that is, the positive effects must be present and the negative ones must be absent, before the Commission may issue an exemption decision. In short, Article 85(1) may be declared inapplicable to an agreement pursuant to Article 85(3), if the agreement (i) contributes to improving the production or distribution of goods or to promoting technical or economic progress, while (ii) allowing consumers a fair share of the resulting benefit, and which does not (iii) impose on the contracting parties restrictions that are not indispensable to the attainment of the agreement's objectives, or (iv) afford the contracting parties the possibility of eliminating competition in respect of a substantial part of the products in question.

13. Article 9(1), Regulation 17/62. It has been suggested that this provision is invalid as contrary to primary EEC law contained in the Treaty, i.e., Article 85, which is directly applicable in member states and hence subject to adjudication in its entirety by member state courts, see *Korah*, *supra* note 2, at p. 353. The argument is not persuasive to this author as it neglects the division of competence between civil and administrative branches of the judiciary, typical in continental Europe, the CoJ in this case representing the administrative court and the Commission deciding the issue of exemption as the authority of the first instance.

Addressing the issue of competence of a member state court under Article 85 in a 1980 judgment the CoJ held: "The jurisdiction of the national courts is restricted to determining whether the agreement, decision or concerted practice which is the subject of the action before them is in accordance with Article 85(1) and, if appropriate, to declaring the agreement, decision or practice in question void under Article 85(2)." *L'Oreal v. De Nieuwe A.M.C.K.*, CoJ of December 11, 1980, Case 31/80 [1980] E.C.R. 3775, C.M.R. ¶8715, at p. 8607.

particular form.¹⁴ Since the Commission can grant an exemption only in response to such a formal notification¹⁵ which leads to an administrative procedure requiring the Commission to engage in a balancing process of positive and negative consequences of the agreement with respect to competition and the competitive structure of the market,¹⁶ the exemption procedure constitutes, so to speak, an institutionalized rule of reason approach in EEC competition law.¹⁷

1. Avoid Unenforceability in National Courts

Thus, under the European system a private contract must be notified to the Commission to avoid its unenforceability in national courts, if it violates

14. Form A/B, see Article 4(1), Regulation 27/62, O.J. (Special Edition 1959—1962), p. 132. This form is presently under review by the Commission, *c.f.* Commission Press Release No. IP (84) 484, of Dec. 21, 1984, C.M.R. § 10,656. At present, the form requires disclosure of significant details of the subject agreement, and it cannot be dispensed with during the notification process, *FEDETAB v. Commission*, CoJ of October 29, 1980, Cases 209 to 215, and 218/78, [1980] E.C.R. 3125, C.M.R. ¶ 8687. However, business secrets may not be divulged by the Commission, *see* Article 20, Regulation 17/62. The form must be filed by the parties to the agreement, either jointly or separately, but it may also be filed by their counsel or other representative provided written proof of authority is attached. For more detail *see* B. CAWTHRA, *RESTRICTIVE AGREEMENTS IN THE E.E.C.: THE NEED TO NOTIFY*, (1972).

15. *Distillers Company Ltd. v. Commission*, CoJ of July 10, 1980, Case 30/78, [1980] E.C.R. 2229, C.M.R. ¶ 8613 held that notification of the agreement is an essential requirement for exemption under Article 85(3) and that the Commission's unofficial knowledge of the agreement or any of its provisions does not suffice, *id.*, at p. 7255. For details *see* TOEPKE, *EEC COMPETITION LAW*, *supra* note 7, at 60 and 709 *et seq.*

16. *See* *Ets. Consten and Grundig Verkaufs-GmbH v. Commission (Grundig, Consten)*, CoJ of July 13, 1966, Cases 56 and 58/64, 12 Rec. 429 [1966], C.M.R. ¶ 8046, where the Court held: "In evaluating the relative importance of the various parts of the agreement, the Commission also had to evaluate their effect in relation to an objectively ascertainable improvement in the production and distribution of the products and to determine whether the resulting advantage was enough to make the restrictions on competition appear essential." *Id.*, at p. 7656. In its judgment in *Perfumes* the Court said: "Before taking a decision of exemption, it is necessary to assess the advantages which are likely to be derived therefrom for consumers, having regard to the scope of the special restrictions which they involve. . . ." *Procureur v. Giry and Guerlain et al.*, CoJ of July 10, 1980, Cases 253/78 and 1 to 3/79, [1980] E.C.R. 2327, C.M.R. ¶ 8712, p. 8528.

17. The "rule of reason" itself, well-known to American practitioners, is not applicable in EEC antitrust law, contrary to what has been written and said by several scholars elsewhere. The European Court of Justice had to deal with this issue as early as 1966 when it decided its first genuine antitrust case, namely *Grundig, Consten*, *supra* note 16. There, the plaintiffs had argued that the Commission decision prohibiting their distribution agreement was a violation of Article 85(1), since the Commission, before declaring that Article 85(1) is applicable, should have considered the economic effects of the contract in question on competition between the various brands, *i.e.*, should have avoided a *per se* prohibition in the interest of a reasonable application of the law (*rule of reason* approach); *cf.* *Grundig, Consten*, C.M.R. ¶ 8046, at pp. 7640 and 7652. The Court rejected this argument in its decision of July, 1966, as follows: "Competition between producers is generally more apparent than competition between distributors of the same brand. This does not, however, mean that an agreement that restricts competition between distributors should escape the prohibition of Article 85, paragraph 1, because it might strengthen competition between producers." *Id.*, at p. 7652.

Article 85(1). While it is true, due to the doctrine of severability, that not the entire agreement would be null and void as a result of a single provision, or even several provisions violating Article 85(1), it is usually the essential provisions of an agreement that are likely to cause concern given the breadth of Article 85(1), such as provisions regarding the scope of a license to sell or produce, the rights and obligations to purchase raw materials and to use know-how, the commitment to refrain from canvassing in certain parts of the Common Market, and the like. If such clauses are in fact beyond the threshold of Article 85(1) and thus require a specific exemption from the Commission pursuant to Article 85(3) before they can be enforced in a national court,¹⁸ the American businessman entering into a contract with a European partner without notifying it to the Commission risks that he may not be paid, that his trade secrets are not protected, or that other provisions of the contract will not be binding as he expects, based on his contract's language.

A recent judgment of the CoJ is a demonstration of the problem.¹⁹ Restrictive clauses contained in a private agreement among companies from two separate member states of the Community were held to be incompatible with Article 85(1), yet had not been notified to the Commission. A German court hearing the case will now have to decide the consequences of partial nullity of the agreement under private German law.²⁰ If in a given case involving an American firm the parties had agreed on a United States forum for the settlement of their disputes, it is entirely possible that a European defendant, under similar circumstances, would raise and ultimately suc-

18. This possibility of exemption exists in all situations described in Article 85(1), at least theoretically. Thus, there is no *per se* violation of this EEC law. Cf. The Commission's statements to this effect in Annual Report on Competition Policy ("Comp. Rep.") 1975 (Fifth), point 10. However, certain violations of Article 85(1) are so blatant that chances of an exemption are close to zero and that they therefore approximate what would be called a *per se* violation in the United States. An example are clauses designed to partition national markets in the EEC, such as export prohibitions leading to absolute territorial protection, cf. Comp. Rep. 1979, point 99; for more detail see TOEPKE, EEC COMPETITION LAW, *supra* note 7, at 445 *et seq.*

19. See *Société de vente de Ciments et Bétons de l'Est v. Kerpen & Kerpen GmbH*, CoJ of December 14, 1983, Case 319/82, [1983] E.C.R.——(not yet published).

20. In a contract for the annual supply of certain amounts of cement the French supplier had agreed with the German buyer that the latter would use the cement mainly for its own purposes and not sell to the Saar region. The buyer breached these obligations and claimed, in the lawsuit following termination of the contract by the French supplier, invalidity of these provisions under Article 85(1) and (2). The argument prevailed since restrictive provisions of this kind violate Article 85(1) and are void, if they appreciably affect intra-EEC trade, according to the CoJ. This is the case where the contract volume reaches close to 10% of a member state's exports of a specific product to another member state. The French cement manufacturer now faces defeat in the National court (the Court of Appeals in Saarbrücken) on the issues of contract termination and enjoining of sales, but it could have protected itself better had it attempted to obtain an exemption for its supply contract from the Commission. The author, however, has no knowledge whether the conditions for an exemption would have been fulfilled in the circumstances.

ceed, even in the United States, on the question of enforceability of any such contract provision incompatible with EEC law.²¹

2. *Drafting Challenge: How to Circumvent Notification*

The challenge for anyone drafting an agreement relating to business activities to which EEC law will apply therefore lies in avoiding contractual restrictions that would, to be enforceable, require an exemption from, and hence a notification to the Commission.²² The task may seem difficult, and in certain situations a notification will be inevitable to make for a particular provision's enforceability. It should be remembered however, that, according to existing case law of the CoJ and the decision practice of the Commission to date, several types of restrictive contract clauses fall outside the prohibition in Article 85(1). They are therefore below the threshold of EEC incompatibility. Others benefit from statutory exemption by way of the regulations existing in EEC law that provide for categories of agreements to escape the prohibition of Article 85(1) (so-called group or block exemptions). Examples are the new regulations of June 1983 covering exclusive distribution and exclusive purchasing.²³ In these situations there is no need to notify the agreement. The trick is to negotiate and write contracts that only contain provisions belonging into these categories of restrictions—provided this is feasible from a business standpoint, given the particular requirements of the companies involved.

21. A question of separate dimension relates to the compensation for possible damages of the United States company that may result from such lack of enforceability. The question is whether an indemnification by the European firm, based on its failure to notify the agreement despite an obligation to do so (which would have to be written into the agreement), might help the American firm, or whether this would raise insurmountable concerns of public (European) policy. This is probably a close question, depending on the circumstances, and can only be decided on an individual basis.

22. This is dictated by simple pragmatism. The Commission may not take action upon a specific notification for a considerable period of time, and sometimes never. Therefore, the uncertainty resulting from implementing an agreement with provisions violative of Article 85(1) will not be avoided just by notifying the agreement for the purpose of obtaining an exemption, cf. *Brasserie de Haecht v. Wilkin and Janssen*, CoJ of Feb. 6, 1973, Case 48/72, [1973] E.C.R. 77; C.M.R. ¶ 8170. There the Court held that so long as the Commission has not decided whether to grant exemption to a notified agreement, the "agreement can be applied only at the parties' risk and peril," *id.*, at 8270—leaving civil liabilities of the contracting parties in limbo until such time.

Recently, the Commission has emphasized, indirectly, the need for the pragmatic approach in drafting EEC-related agreements which this author recommends. In its response to a question put to it by a member of the European Parliament regarding provisional validity of notified agreements the Commission stated, *inter alia*: "One of the unalterable principles of Article 85 is that agreements which have the features described in paragraph 1 are prohibited under that provision and are void pursuant to paragraph 2, unless they are exempted from such prohibition, which in turn is possible only under the conditions set out in paragraph 3." Commission Answer to Written Question No. 291/82, O.J. No. C 221, August 25, 1982, p. 9; C.M.R. ¶ 10,422.

23. See *supra* note 9.

The following attempts to draw the dividing line between agreements raising no concern under applicable EEC law and those which, in order to be enforceable, will have to be submitted to the Commission to pass the balancing test of pro- and anticompetitive effects under Article 85(3). By way of example, the area of distribution will be discussed as the Commission has recently promulgated its two new block exemptions in this field. The dividing line separates permissible contract clauses, gathered empirically from "impermissible" ones, i.e., provisions restricting competition that require specific exemption from the Commission before they can be enforced in a court of law. However, agreements of minor importance, i.e., those that do not exert an appreciable effect on competition, will not be discussed. The *de minimis* exception attaching to those agreements would blanket even the most blatant violations of Article 85(1) otherwise subject to heavy fines, such as absolute territorial protection resulting from outright export prohibitions within the EEC.²⁴

II. Distributing Goods under EEC Law

A. GENERAL

1. *Application of Article 85(1)*

The decision of how to organize the distribution of products in the EEC is left entirely to the manufacturer of the goods in question. In particular, the choice between a fully integrated system of parent and subsidiary companies and/or branch offices and the use of independent wholesalers/distributors selling for the manufacturer in the various member states of the Community is not dictated by any law, but solely by business considerations.²⁵ EEC law, particularly Article 85, does not establish an obligation to supply products to other independent companies that may wish to distribute them,²⁶ save for the somewhat extraordinary situations of remedying an organized boycott among manufacturers or a dominant company's refusal to continue to supply dependent customers.²⁷

24. See *Völck v. Vervaecke*, CoJ of July 9, 1969, Case 5/69, 15 Rec. 295 [1969], C.M.R. ¶ 8074, at p. 8086. Also, *Cadillon v. Höss*, CoJ of May 6, 1971, Case 1/71, 17 Rec. 351 [1971], C.M.R. ¶ 8135. See in addition *supra* note 8.

25. The Common Customs Tariff of the EEC may make it advantageous for a United States manufacturer to set up subsidiaries within the Common Market. Such subsidiaries would be considered "national" companies of the member state of incorporation; cf. Article 58, EEC Treaty. No further customs duties would therefore have to be paid on sales made by these subsidiaries anywhere in the EEC.

26. See *Demo-Studio Schmidt v. Commission*, CoJ of October 11, 1983, Case 210/81, [1983] E.C.R. 3045, 3063, C.M.R. ¶ 14,009. See also *Comp. Rep.* 1981, point 11.

27. See *Groupeement des Fabricants de Papiers Peints de Belgique v. Commission*, CoJ of November 26, 1975, Case 73/74, [1975] E.C.R. 1491, C.M.R. ¶ 8335, re boycott; and *United Brands Co. v. Commission*, CoJ of February 14, 1978, Case 27/76, [1978] E.C.R. 207, C.M.R. ¶ 8429, at p. 7714, re dominant firm.

a. Use of Dealers Distributors

The Common Market's competition rules come into play, however, if a distribution system is set up using dealers/distributors in EEC member states. In legal terms, a dealer/distributor is an independent trader, or enterprise, and therefore acts in his own name and on his own account when entering into a distribution agreement with a manufacturer or someone acting on the manufacturer's behalf. Consequently, one of the basic requirements for applying Article 85(1) is always present in a manufacturer/distributor relationship: the requirement that the agreement be concluded "between undertakings."²⁸

It follows that the application of Article 85 is excluded and problems of EEC competition law can altogether be avoided—leaving aside issues arising out of a possible position of market dominance and the abuse thereof by the dominant firm—if a manufacturer organizes his European distribution without resorting to distributors. In other words, sales in the Common Market through branch offices or subsidiaries are not subject to Article 85(1) irrespective of the conditions of sale agreed upon.²⁹ EEC law does not recognize the theory of intra-corporate conspiracy formerly approved by American courts.³⁰

28. Instead of "enterprise," EEC law uses the awkward English translation "undertaking" for the French and German terms "entreprise" and "Unternehmen," respectively, which are contained in the original Treaty texts. Despite the official term "undertaking" which readers will thus find in the decisions of the Commission and the CoJ, this author has taken the liberty of using the more customary translation "enterprise" throughout this article except, of course, in direct citations.

29. *Centrafarm et al. v. Sterling Drug Inc.*, CoJ of October 31, 1974, Case 15/74, [1974] E.C.R. 1147, C.M.R. ¶ 8246, where the Court held as follows: "In any event, Article 85 is not concerned with agreements or concerted practices between undertakings belonging to the same concern as parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings." *Id.*, at pp. 9151 - 57/58. See also the earlier judgment in *Grundig, Consten* where the CoJ held that "the prohibition of Article 85 . . . does not apply to a situation in which a single undertaking has integrated its distribution network into its own operations". *Id.*, note 16, at p.7651. The Commission, in earlier decisions, has held that parent and subsidiary companies are one economic entity and that the division of markets among them is only a division of labor; allocating separate national markets among various subsidiaries of the same parent company was therefore not caught by Article 85(1), nor was the sale by such subsidiaries on identical terms and conditions or for prices jointly agreed to, cf. Commission Decisions of June 18, 1969, in the matter of Christiani & Nielsen, O.J. No. L 165, p.12, of July 5, 1969, C.M.R. ¶ 9308, and of June 30, 1970, in the matter of Eastman Kodak, O.J. No. L 147, p.24, of July 7, 1970, C.M.R. ¶ 9378. Consequently, a notification to the commission is not necessary in these circumstances.

30. See *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968). See also *Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982), cert. granted, 103 S.Ct. 3109 (1983). However, the theory's validity has come abruptly to an end by the U.S. Supreme Court's decision, *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731 (1984).

b. Affect on Trade Between Member States

The second basic requirement for the application of Article 85(1), and EEC competition law in general, is also present in almost all manufacturer/distributor arrangements relating to the Common Market. This requirement is of a jurisdictional character, making EEC law applicable to those agreements "which may affect trade between member states." Without such effect distortions of competition resulting from distribution agreements could only be subject to national competition law of the member state in question. However, the "effect on member state trade" requirement is easily satisfied and restrictive, anticompetitive provisions in a distribution agreement are thus removed from the Commission's jurisdiction only in exceptional circumstances.³¹ An example is an agreement between a manufacturer from a country outside the Common Market and an exclusive distributor in a single EEC member state, provided that this agreement does not appreciably interfere with the pattern of trade between member states with respect to the specific product subject to the agreement.³²

i. *Non-member State.* On the other hand, the application of EEC law is not precluded where a manufacturer from a non-member state, such as the United States, sells its products directly to its customers in various EEC countries, using one or two common ports of entry into the Community. In *United Brands v. Commission*, the CoJ rejected the argument that such a distribution system has no effect on intra-EEC trade on the basis that the products in question were merely transiting the Common Market countries prior to reaching their final destination. Since the products were not otherwise available to the plaintiff distributor anywhere in the EEC and products

31. As a rule of thumb the requirement will be satisfied whenever trade between member states develops in a different fashion than it would have done without the restriction resulting from the agreement under consideration. Therefore it is no defense, if trade between two EEC countries in the products subject to the restrictive agreement has increased, cf. *Grundig, Consten* (*supra* note 16), at 7652. Equally, a purely domestic arrangement between manufacturer and distributors from the same EEC country can exert the described effect, since the ability of traders from other member states to penetrate the market in the country in question may be restricted by the agreement, cf. *Vereeniging van Cementhandelaren v. Commission*, CoJ of October 17, 1972, Case 8/72, 18 Rec. 997 [1972], C.M.R. ¶ 8179, at pp. 8412/3. Finally, it is not necessary that the effect on member state trade has already occurred. It is sufficient, if the agreement is capable of exerting such influence in the future, cf. *Miller International Schallplatten GmbH v. Commission*, CoJ of February 1, 1978, Case 19/77, [1978] E.C.R. 131, C.M.R. ¶ 8439, at p. 7926.

32. See *Tepea B.V. v. Commission*, CoJ of June 20, 1978, Case 28/77, [1978] E.C.R. 1391, C.M.R. ¶ 8467, at p. 8430. Here the Court ruled as follows: "So long as the United Kingdom was not a Member State, the restrictions on competition arising out of the implementation of the Watts/Theal agreements in fact affected trade only within the Netherlands, and nothing in the Court's file justifies the assertion that the partitioning of this domestic market appreciably interfered with the pattern of trade between Member States in Watts products before January 1, 1973, the date of the United Kingdom's accession to the Common Market."

of a different brand had to be obtained through imports, the Court ruled that intra-Community trade was affected and that EEC competition law applied.³³

ii. *Standard Form Agreements.* Distribution is often accomplished through networks of distributors dealing with the manufacturer on standardized terms. Particularly in larger geographic markets such systems provide manufacturers with the opportunity to streamline the sale and attendant services of their products. The resulting cost savings are usually appreciable, and in a multi-nation market such as the EEC with its divergent market conditions even more significant. One of the key tools employed to maximize the efficiency, hence cost cutting nature of such distribution systems is the use of a standard form agreement which all distributors have to sign, if they want to participate in the distribution network. Strictly speaking, every contract between a manufacturer and a distributor in such a network is, or could be an agreement in restriction of competition and may thus have to be notified to the Commission for an exemption. However, it is not necessary under existing EEC law to notify every single agreement if an underlying standard form agreement has been, or will be notified for exemption, provided the content of the individual agreements with distributors is identical to the standard form contract. The CoJ has held in *Brasserie de Haecht v. Wilkin-Janssen* that a duly made registration of such standard form agreements is equivalent to notification of all agreements of same content, even those concluded prior to the notification of the standard one.³⁴

Networks of distribution agreements typically involve large numbers of dealers, but nevertheless do not always permit everyone willing to sell the products in question to participate. The exclusion of certain dealers from the network is normally based on provisions contained in the standard form agreement or, expressed differently, the selection of those permitted to participate is justified through application of certain criteria laid down by the manufacturer. Such a method of distribution is referred to as *selective* distribution, and it will be discussed following these introductory remarks.

iii. *Selective and Exclusive Mixture.* Often distributors enjoy some protection for a given territory and thus, selective distribution systems may contain elements of *exclusive* distribution, despite the large number of dealers involved. This mixture of selective and exclusive distribution methods is widely used in the Common Market, sometimes separating in that way the retail and wholesale sides of the trade. The Commission has addressed the legal issues relating to such mixed systems in several deci-

33. *United Brands*, *supra* note 27, at p. 7715.

34. *Supra* note 22, at p. 8271.

sions, approving of the concept.³⁵ Jurisdiction under EEC law almost always exists and then, no matter where the individual dealer may be located in the EEC, the competition rules of the Treaty apply directly and equally to all distribution agreements. As a matter of law these rules are valid in all member states *ab initio*, that is from the moment of accession to the Community of the country in question.³⁶

2. Competition- Unrelated

However, EEC law does not regulate the entire relationship between manufacturer and distributors in the Common Market. It is mostly concerned with the competition, or antitrust aspects of this relationship. Other aspects, particularly the contractual obligations of the parties are governed by the national law of the country in which the distributor has its main place of business, unless the parties have changed this by including a choice of law clause in their agreement. Details such as risk of loss, term and termination, good will entitlement, etc. will have to be assessed under national law.

B. SELECTIVE DISTRIBUTION

1. Commission Acceptance

For many years now the Commission has pursued a policy supportive of distribution systems under which dealers are selected on the basis of their specialized skills and certain other factors. Although such systems exclude dealers who do not meet the selection criteria, the Commission consistently allows the restriction of resale resulting from provisions stipulating that "products may normally be resold . . . only by qualified personnel and in premises offering satisfactory facilities for their storage, display, and sale." This contract clause passed muster when the Commission reviewed the distribution agreements in the matter of *Eastman Kodak Corp.* in 1970.³⁷

Since this early decision in EEC competition law practice the Commission's policy of permitting dealer selection on the basis of the dealer's professional qualifications and standing, his staff, and the suitability of his

35. As examples cf. Commission Decisions of December 15, 1975, In the Matter of SABA, O.J. No. L 28, p. 19, of February 3, 1976, C.M.R. ¶ 9802, renewed by decision of December 21, 1983, O.J. No. L 376, p. 41, of December 31, 1983, C.M.R. ¶ 10,568; In the Matter of Junghans, Decision of December 21, 1976, O.J. No. L 30, p. 10, of February 2, 1977, C.M.R. ¶ 9912; In the Matter of Murat, Decision of December 5, 1983, O.J. No. L 348, p. 20, of December 20, 1983, C.M.R. ¶ 10,544; and most recently In the Matter of IBM, Decision of April 18, 1984, O.J. No. L 118, p. 24, of May 4, 1984, C.M.R. ¶ 10,585.

36. *Metallurgiki Halyps AE v. Commission*, CoJ of December 9, 1982, Case 258/81, [1982] E.C.R. 4261, C.M.R. ¶ 8950, with respect to Greece as the Community's newest member state.

37. *Supra* note 29.

premises has continued.³⁸ This policy has been upheld by the CoJ in a number of judgments.³⁹

The justification for permitting only selected dealers to distribute a given product in the EEC can be summarized, using the Commission's own words from a recent public statement: "... such systems, particularly in relation to technically advanced products, can ensure that distribution is carried out by dealers possessing the specialized knowledge required to give advice and perform customer and guarantee services."⁴⁰ Thus, the restriction inherent in these systems is justified by the sales and after-sales services provided by specialty retailers, which in turn is expected to result in benefits for consumers and a better quality distribution system overall.

a. Manufacturer Selection Criteria

Whether or not the restriction that comes with any selective distribution system represents at the same time a violation of Article 85(1) and therefore requires notification of the standard form agreement to the Commission to make for the enforceability of the individual agreements depends upon the criteria established by the manufacturer to admit dealers to, or exclude them from the system. The mere fact that it is a selective distribution system, and not a "free for all" approach chosen by the manufacturer is not sufficient to subject the system to Article 85 and its somewhat cumbersome ramifications explained above. Expressed differently, EEC law does not, despite the breadth of Article 85(1), prohibit a system of selective distribution in and of itself. Rather, the application of Article 85 hinges upon the economic effects of a particular agreement, or network of agreements, but not on its legal nature or specific type.⁴¹

38. See decisions mentioned in *supra* note 35. An overview of the Commission's early decision practice in this field and a useful comparison of EEC and U.S. antitrust rules relating to distribution can be found in Salzman, *Analogies Between United States and Common Market Antitrust Law in the Field of Distribution*, 13 INT'L LAW. 47 (1979).

39. *MetroSB-Grossmärkte v. Commission*, CoJ of October 25, 1977, Case 26/76, [1977] E.C.R. 1875, C.M.R. ¶ 8435; *Lancome v. Etos B.V.*, CoJ of July 10, 1980, case 99/79 [1980] E.C.R. 2511, C.M.R. ¶ 8714; *L'Oreal v. De Nieuwe AMCK*, *supra*, note 13; *Salonia v. Poidomani*, CoJ of June 16, 1981, Case 126/80, [1981] E.C.R. 1563, C.M.R. ¶ 8758; *AEG-Telefunken v. Commission*, CoJ of October 25, 1983, Case 107/82, [1983] E.C.R. 3151.

40. Commission Answer to Written Question No. 669/83, O.J. No. C 335, p.3, of December 12, 1983, C.M.R. ¶ 10,546.

41. *Lancome*, *supra* note 39, at p. 8593/4. For this reason it is equally true that other agreements belonging to a separate, distinguishable category like selective distribution agreements are also not automatically subject to Article 85(1) in all cases, although they may contain inherent exclusionary features. The best example is the category of exclusive licensing agreements. In its now famous *Maize Seed* judgment the CoJ ruled that "the grant of an open exclusive license, that is to say a license that does not affect the position of third parties such as parallel importers and licensees for other territories, is not in itself incompatible with Article 85(1) of the Treaty." *Nungesser et al. v. Commission*, CoJ of June 8, 1982, Case 258/78, [1982] E.C.R. 2015, C.M.R. ¶ 8805 at p. 7544. All depends on the circumstances of each situation,

b. Exclusion of the Unqualified

Implicit in the acceptance of selective distribution and the inherent obligation of all participants in the system to sell for resale only within the network, i.e., only to other appointed dealers, is the recognition that it does not amount to a restriction of competition within the meaning of Article 85(1) where a manufacturer refuses to supply outsiders, i.e., dealers who do not meet the requirements of the selective distribution agreement in question. If a certain standard of professional training, technical knowledge, and appearance of the trading premises can lawfully be required from reselling contract partners as a necessary element of distributing the products concerned, then it is permissible, by the same token, to exclude from the distribution system those traders who do not meet the standards established by the manufacturer. Such exclusion would not violate Article 85(1) and hence, a notification to the Commission of the agreement(s) establishing such standards is unnecessary.⁴² Consequently, the excluded traders cannot, in situations such as these, claim a right to be supplied with the manufacturer's product, even if they are willing and able to purchase. The Commission's decision, in the matter of *Demo-Studio Schmidt* supports this analysis and the CoJ later confirmed that Article 85(1) is not a legal basis for a general supply obligation on the part of manufacturers.⁴³

2. Discrimination Potential

a. Parallel Imports

Notwithstanding the fact that Article 85 compatibility is measured by the economic effects of an agreement, not its legal nature, selective distribution as a method entails opportunities for discrimination in the application of the system. Although perhaps economically neutral in a given case, these opportunities raise concern under EEC competition law. By far the most important concern, of which everyone entering into a distribution agreement for the Common Market should be aware, is the issue of parallel imports from other EEC countries. EEC-specific considerations categorically demand the integrity of the Community-wide trading system, since the Treaty of Rome was designed to bring about economic interpenetration throughout the Community and to prevent the protection of national

i.e., the compatibility of a contract clause with Article 85 can usually be assessed by way of a case-by-case review, only.

42. Nevertheless, a careful examination of the specific requirements demanded of traders in the individual case is inevitable. If these requirements are not commensurate with the sale of goods of the type in question, then it is likely that the restrictions surpass the threshold of Article 85(1) and therefore require an exemption from the Commission in order to be enforceable. Readers are referred to the text below where, on the basis of previous decisions, a number of restrictions are discussed that can be included with impunity in a selective distribution agreement for the Common Market.

43. *Supra* note 26.

markets.⁴⁴ Time and time again this overriding principle of EEC competition law has been confirmed and upheld in the decisions of the Commission and the CoJ,⁴⁵ and it has never been seriously questioned by any informed writer.

As a result, any selective distribution system that permits the manufacturer to refuse admission to qualified traders (wholesalers or retailers) because of their involvement in parallel imports is illegal in the EEC and stands no chance of being exempted. American businessmen and their advisers must know that certain vertical restraints in distribution contracts, namely those that would seal off a geographic market against parallel imports or merely make it difficult, or more expensive, to engage in parallel imports from other EEC countries, are clearly a "no-no" in Europe, although such restraints may well be acceptable under prevailing U.S. antitrust law. The economic analysis of the effects of such restraints must (and will) be subjected to the superior objectives of market integration and free movement of goods enshrined in the Treaty.⁴⁶ To avoid any problems with its anticipated distribution of products in the Common Market, a manufacturer should therefore eliminate from his agreements any provision that impinges on the unalterable rights of qualified resellers to engage in parallel trade. This does not mean, however, that he cannot assign territorially limited areas of responsibility to his resellers on the first level of distribution. As will be shown later, such restrictions have been approved by the Commission and the CoJ in the past.

3. Group Exemption

As of January 1985, a group exemption regulation exists in the Common Market that specifically deals with the area of selective distribution. This is Regulation No. 123/85 concerning the distribution of automobiles and spare parts, including service therefor, within a defined territory of the Common Market.⁴⁷ The regulation constitutes a *sui generis* approach to an area of

44. *Salonia v. Poidomani*, *supra* note 39, at p. 9100.

45. It is not possible to list all these decisions in a single footnote. One of the earliest pronouncements of the principle is found in *Italy v. EEC Council and Commission*, *supra* note 7. A representative example for all CoJ judgments confirming this early ruling is the Court's definition of the essential goal of the Treaty of Rome in 1971, as follows: "... the essential goal of the Treaty ... is to merge the national markets into a single market." *Deutsche Grammophon GmbH v. MetroSB-Grossmärkte*, CoJ of June 8, 1971, Case 78/70, 17 Rec. 487 [1971], C.M.R. ¶8106, at p. 7192. For further examples, including pertinent Commission decisions, see the analysis of the entire EEC competition case law existing as of 1982, in TOEPKE, *EEC COMPETITION LAW*, *supra* note 7, at chapters 41 through 75.

46. See Articles 2, 3(f), 30 and 36 in conjunction with Articles 85 and 86. In light of the current disintegration of the Community over financial disputes among leading European politicians, one could come to the conclusion that these articles of law are the only thing that works in today's Community. They can be seen as the remaining linch-pin of the Common Market's unity.

47. Regulation On The Application Of Article 85(3) Of The Treaty To Certain Categories

specialized distribution, typically organized through a network of dealers who have been selected according to a mixture of technical and economic, not just qualitative criteria, thus creating so-called *closed* selective distribution systems. Admission depends on additional criteria/obligations, resulting in the exclusion of otherwise qualified distributors meeting the professional requirements for distributing the product in question. Such agreements always represent a violation of Article 85(1) and therefore must be notified and exempted.⁴⁸ Inevitably, this leads to bureaucratic delay and legal uncertainty regarding the enforceability of the agreements.

The Commission has decided to solve this problem by issuing the block exemption to all agreements falling into this category, thus recognizing, in principle, that selective distribution in the automobile industry is compatible with Article 85(3). Regulation 123/85 follows the familiar format known since Regulation 67/67 concerning exclusive distribution, *infra*, except it contains the unusual feature of a blanket permission for use restrictions of a certain kind.⁴⁹ The regulation will become effective on July 1, 1985, and remains in force pursuant to its own terms for a period of ten years.

4. Commission Decisions

a. Defining the Threshold

The Commission decisions of the past and the confirming judgments of the CoJ previously mentioned⁵⁰ have established that, in short, the threshold of Article 85(1) will not be reached and thus, a notification of a selective distribution agreement (system) can be dispensed with, if distributors/dealers are selected based only on objective criteria of a qualitative nature relating to their skills, education, or technical experience (or that of their staff), and the suitability of their trading premises, all in proportion to the specific requirements for distributing the product(s) in question, and provided that these selection criteria are uniformly applicable to all potential traders and are not in fact applied in a discriminatory fashion (so-called *open* or "simple" selective distribution systems). Admission to such a system merely depends on the individual dealer's fulfillment of qualitative criteria objectively required to ensure an adequate distribution of the goods.

Of Motor Vehicle Distribution And Servicing Agreements, O.J. No. C 17, p. 4, of Jan. 18, 1985, C.M.R. 2751.

48. A good example is the case of SABA, *supra*, note 35. If in order to be admitted to the network dealers must not only satisfy certain professional criteria but must also agree to sales promotion, order and performance commitments, or if quantitative selection criteria are used, the agreements constitute a restriction of competition in the meaning of Article 85(1). In appropriate cases they can then be exempted pursuant to Article 85(3), as has now happened twice in SABA; see *supra* note 35.

49. Article 3(4), Regulation 123/85 allows prohibiting the use of competitive spare parts by the dealer in servicing the contract cars, provided such spare parts "do not match the quality of contract goods."

50. *Supra* notes 35, 37 and 39.

As an example, a manufacturer of watches or jewelry could therefore insist, without having to notify his agreements to obtain an exemption, that dealers who want to be admitted to his distribution system conduct a business as a retail jeweler/watchmaker, either from a specialty shop or within a self-contained specialist department in a larger department store, where they sell exclusively jewelry, clocks and watches, and other luxury articles related to this trade; he can further require that dealers possess the necessary professional knowledge, evidenced by appropriate means such as a certificate from a relevant educational institution, and that they employ appropriately qualified full-time staff.⁵¹

In addition, other obligations may be imposed on retailers under certain circumstances without crossing the threshold of Article 85(1), thus avoiding the need to notify the agreement. An example are stocking and sales promotion requirements. The agreement, however, must not contain any further obligations on the dealer in these cases, such as minimum sales or specified delivery quantities.⁵²

b. Sample Non-restrictive Provisions

An analysis of previously decided cases involving the distribution of products in the EEC reveals several such contract provisions that have been held to fall outside the prohibition contained in Article 85(1). A list of the more typical and frequent of these non-restrictive provisions is assembled below, to show the difference between a selective distribution agreement that is compatible with currently existing EEC law, and one that has to be exempted in order to be enforceable, thus requiring a notification of such agreement. Readers will be able to evaluate their own distribution agreements by checking them against this list. Any contract containing only provisions of the kind listed below, and devoid of further obligations on the reselling dealers, is in all likelihood a valid agreement under EEC competition law and does not have to be notified to the Commission.⁵³

51. These requirements were all held to fall outside the prohibition of Article 85(1) by the Commission in its *Junghans* and *Murat* decisions, *supra* note 35.

52. A manufacturer complying with these prerequisites can require that his dealers maintain adequate stocks in all current products covered by the contract and that they provide adequate customer advice and service. Cf. Commission Decision of April 17, 1980, O.J. No. L 120, p. 26, of May 13, 1980, C.M.R. ¶ 10,223, In the Matter of *Krups*.

53. Problems may arise where a combination of factors usually not present at the same time results in a different conclusion as to the restriction of competition in the individual case. See the remarks in text relating to the *Krups* decision, *supra*. Also, increased use of the method of selective distribution in a given sector of the economy may change results; cf. *MetroSB-Grossmärkte v. Commission*, *supra* note 39, where the Court cautioned that alteration of competitive market conditions as a result of an increase in selective distribution networks may necessitate a different assessment of an agreement's exemptability. While this comment obviously relates to the assessment of an agreement by the Commission under Article 85(3) it is conceivable that certain contract provisions, normally outside Article 85(1), may have to be assessed differently, as well, in such circumstances.

Professional Competence

Traders at all levels of distribution can be required to satisfy a standard of professional training and technical knowledge reasonably necessary for an adequate, competent distribution of the contract goods. Dealers can be asked to employ equally qualified staff on a full-time basis. The measure for a dealer's qualification is his ability to provide sufficient customer advice in selling the product in question and his after-sales service capability, measured by the technical complexity of the product.⁵⁴

Status of Trading Premises

The internal fitting and external appearance of the dealer's shop must be suitable for the sale of the contract goods. This permits manufacturers to require their retailers to maintain premises used exclusively for trading in the subject goods,⁵⁵ or, in the case of large department stores, to maintain specialty departments, with no adjacent departments selling products that would detrimentally affect the sale of the contract goods. Manufacturers can also insist that retailers do not mix the contract goods with other products of similar appearance, but different quality. Retailers can be required to keep their shop open to the public during normal business hours, which excludes dealers who operate only on a part-time basis.⁵⁶

Exclusive Sales Territory

Provided that it does not affect the opportunities for sale of third parties, such as distributors for other territories and parallel importers, manufacturers may undertake to restrict their sales in a particular geographic area to one dealer.⁵⁷ The reverse obligation imposed on retailers and/or wholesalers to refrain from buying and selling competing products is, however, a violation of Article 85(1) and stands little chance of being exempted by the Commission in a selective distribution system.⁵⁸ It is, however, automatically exempt under Regulation 1983/83 provided an exclusive sales area is carefully defined. In this case, the selective distribution network changes to a system of many parallel exclusive distributorships.

Outside the contract territory a prohibition of advertising, or canvassing in other ways for customers, a prohibition of establishing branch offices and of maintaining sales depots, all with respect to the contract goods, can be imposed on dealers with defined, exclusive sales areas. Any of these clauses may be included in

54. *IBM, supra* 35, provides a good example of this.

55. In *Murat supra* note 35, the Commission allowed this requirement of exclusivity with respect to the trading premises, but in *SABA, supra* note 35, retailers were only required to run a specialist retail business which achieves over 50% of its turnover from sales of consumer electronic equipment (the contract goods in question in that case). The author does not know whether the difference in volume percentage is the result of the Commission's intervention, or merely a difference in sales policy of the manufacturers involved in these two cases.

56. This was the issue decided in *Demo-Studio Schmidt, supra* note 26.

57. *Nungesser et al. v. Commission, supra* note 41.

58. Cf. Commission Decision of December 21, 1977, In the Matter of *Liebig*, O.J. No. L 53, p. 20, of February 24, 1978, C.M.R. ¶10,017. In *Liebig* the Commission declared the non-competition clause contained in the spice manufacturer's distribution contracts illegal under EEC competition law, and refused an exemption. No particular sales area had been defined as the exclusive territory for the distributors. In contrast see Commission Decision of December 13, 1974, In the Matter of *B.M.W.*, O.J. No. L 29, p. 1, of February 3, 1975, C.M.R. ¶9701. Of course, if the specific requirements of Regulation 1984/83 are observed, a block exemption may exist for exclusive purchasing obligations.

distribution agreements without creating a need to notify, since they benefit from the group exemption in Regulation 1983/83. However, dealers may not be prevented from selling outside their contract territory, except for sales to dealers who do not meet the criteria of professional competence applicable in the particular case.

Manufacturers may reserve the right to alter the dealer's exclusive territory unilaterally, and the agreement may also provide for manufacturers to install further dealers in the contract territory at their discretion.⁵⁹ The permissibility of both these provisions depends, however, on manufacturers refraining from recommending against selling competitive products or maintaining/recommending resale prices. The alteration of the dealer's contract territory may not be a reprisal for competitive behavior by the distributor.⁶⁰

Sales Promotion and Marketing

Dealers may be required to avail themselves of the promotional aids and advertising material supplied by the manufacturer, to display the contract goods to their advantage, to keep all stocks in good condition, and to maintain a favorable and reputable appearance of their shop in accordance with the prestige and brand image of the products in question. Dealers can be asked to undertake intensive sales promotion for the contract goods, if this does not prevent them from taking advantage of competition between different brands and if they are not obliged to achieve a specified turnover or to take delivery of specified quantities at specified times.⁶¹

Dealers may further be required to use the manufacturer's trademarks, to follow instructions issued by the manufacturer regarding their advertising, except as to prices, and to supply contract goods only in their original packaging.⁶² They may also be asked to serve and advise customers in a competent manner with respect to the contract goods, except that Article 85(1) will be violated where the sales and/or promotional efforts required of dealers restrict their competitive behavior by eliminating too much of their freedom to pursue sales of competing brands. Then, the agreement requires an exemption.

Provisions dealing with the administration of the distribution system, such as the method of order placing and price quotations, the conditions of payment, customer complaints etc., are normally without problem, do not require an exemption, and hence no notification.⁶³

Stocking Requirements

A requirement to keep adequate stocks of all current products of the manufacturer is in accordance with the natural function of wholesalers to supply the retail trade and raises no problems under Article 85(1). As long as the manufacturer's product line is not exceptionally broad, the products are small and cheap, and do

59. These provisions were held to fall outside the prohibition of Article 85(1) in the *B.M.W.* decision, *supra*.

60. This comment addresses the actual operation of a selective distribution system and has little to do with the way in which the agreement between manufacturer and distributor is written. Readers should be warned that Article 85(1) cannot only be infringed by drafting a contract, but also by implementing an otherwise legal contract in a discriminatory, repressive fashion. The *AEG-Telefunken* case, *supra* note 39, is a perfect illustration.

61. *Krups*, *supra* note 52. However, the obligation to undertake intensive sales promotion usually is beyond the threshold of Article 85(1).

62. *B.M.W.*, *supra* note 58; Commission Decision of June 14, 1973, In the Matter of *DuPont de Nemours*, O.J. No. L 194, p. 27, of July 16, 1973, C.M.R. ¶ 9578.

63. *DuPont de Nemours*, *supra* note 62.

not tie up substantial finances or storage space, such an obligation is also acceptable in agreements with retailers.⁶⁴ Otherwise retailers can be required to keep sufficient stocks at least of a representative range of the manufacturer's products, to be able to supply customers promptly. An obligation imposed on retailers to take at least 3 month's supplies each time they order is permissible, if this minimum order quantity represents less than the customary average order quantity in the trade.⁶⁵

After-Sales Services

It is a permissible obligation that dealers provide the customer with the usual service of the branch. Distribution agreements may require retailers to give competent after-sales service, either themselves or through qualified third parties whose workmanship they can control. Where this is not possible, they can be asked to return the products to the manufacturer for service.

The agreement can impose an obligation upon dealers to provide a six month warranty with respect to the contract goods and dealers can be required to perform the warranty repair services. A refusal to provide such free-of-charge warranty services may be based upon the following three reasons: (i) the product is defective by reason of faulty installation and/or use inconsistent with national safety standards; (ii) the product has been used in violation of the manufacturer's instructions and has therefore been damaged; (iii) adjustments or changes have been made to the product other than properly executed adjustments required to make the product conform to technical/safety standards in the country of use.⁶⁶ The distribution agreement may contain these provisions and dealers may be authorized by the agreement to include these refusal-of-warranty provisions in their conditions of sale, without a need to notify the distribution agreement.

Resale Restrictions

The contract may contain a requirement that products shall be resold at all subsequent stages of trade only by qualified personnel and in premises offering satisfactory facilities for their storage, display, and sale. Dealers can be prohibited from selling for resale to dealers who are not appointed to the distribution system or who do not meet the criteria for appointment.⁶⁷ Equally, the agreement may impose an obligation on the manufacturer to supply only appointed dealers or dealers who meet the requirements for adequate distribution of the products in question. However, for these obligations to be below the threshold of Article 85(1), it is necessary for the distribution system to be an *open* system, meaning that all dealers who fulfill the qualitative criteria of admission will be admitted without a need to undertake further obligations.

64. *Krups*, *supra* note 52.

65. *Murat*, *supra* note 35. However, an agreement by retailers to order and sell regularly, to carry the full range of the manufacturer's products, as well as stipulations to annual sales targets by wholesalers or retailers (general or product-specific) are not outside Article 85(1) but require an exemption from the Commission; *cf.* *SABA*, *supra* note 35.

66. Commission Decision of October 23, 1978, In the Matter of Zanussi, O.J. No. L 322, p. 36, of November 16, 1978, C.M.R. ¶ 10,090.

67. *Cf.* *IBM* and *Murat*, *supra* note 35. In *Murat* the Commission insisted upon the change of language in the agreement reflected in the phrase "who do not meet the criteria for appointment." Prior approval of a dealer by the manufacturer as condition of selling to this other dealer is thus no longer required. In older decisions of previous years the flat denial of supplies to unauthorized dealers had been tolerated, *cf.* the first *SABA* decision of 1975, *supra* note 35. This change signals a tougher attitude on the Commission's part to prevent abuses of the system in day-to-day implementation.

Wholesalers may be prohibited from supplying the contract goods to private consumers.⁶⁸ This follows from the separation of functions of the wholesale and retail trade. The inherent differences in the cost of doing business would, if not taken into account by allowing a prohibition on wholesalers to sell to end-users, result in an unfair competitive advantage for wholesalers over retailers.

Export Prohibitions Outside EEC

All dealers may be prohibited from exporting to countries outside the Common Market, in principle.⁶⁹ However, where the EEC has concluded a free-trade agreement with a specific non-member state, such an export restriction would appreciably affect competition and would thus no longer be permissible with respect to such country. The reason is the absence of any customs duties as a result of the free-trade agreement and therefore, the possibility of reimport of the contract goods into the EEC, thus making them part of the normal competitive process.

Sales Information and Verification

Obligations to supply information on their trading position, available stocks and expected demand can be imposed on dealers. Also, dealers may be required to inform the manufacturer about sales trends and the economic situation in their market, to exchange opinions, offer suggestions and make critical reports, all in relation to the contract goods. Further, dealers with exclusive sales territories allotted to them can be required to inform their principal of their gross income from the sale of the contract goods, as well as any discounts granted to customers.⁷⁰ This is not considered a restriction of competition, and does not require notification of the agreement, as long as the principal refrains from recommending against selling outside the exclusive territory, selling at certain prices or as long as no advantages are offered or disadvantages threatened in respect of any business conduct by the dealers.

Since every selective distribution system entails, by definition, to sell for resale only to appointed dealers, manufacturers have the right to discover when and to whom the contract goods have been sold by the dealer. They also have the right to verify this information and the corresponding obligation for dealers to permit verification of their compliance is below the threshold of Article 85(1).⁷¹ Such verification rights of suppliers can be included in distribution agreements with impunity.

Term and Termination

Agreements can be concluded for a fixed period, such as a one-year term, and they may be made renewable by a tacit agreement. Termination rights for the manufacturer for breaches of the retailer's obligations do not constitute a restriction of competition in the sense of Article 85(1).⁷²

Miscellaneous Provisions

Contract clauses which deal with the retention of legal title to the contract goods until full payment, with consignments, settlement of disputes by arbitration, with choice of law or with forum selection are all acceptable without any need to notify such a provision.

68. *SABA*, *supra* note 35. However, this prohibition may never be imposed on retailers.

69. *Junghans*, *supra* note 35.

70. *SABA* and *Junghans*, *id.*

71. *Junghans*, *id.*

72. *B.M.W.*, *supra* note 58.

5. *Specialist Trade Agreements*

Although recognized as the cause for potential price rigidities and thus as being partially detrimental to consumers in the limited sense that it may result in a decrease of price competition for certain brand image consumer goods, selective distribution has been confirmed and reconfirmed as a legitimate method of distribution in the Common Market. Price competition is not regarded as the only form of competition worthy of protection under EEC law and certainly does not have absolute priority in all cases. The specialist trade made possible through selective distribution networks is a preferred European approach to distribution, and manufacturers from the United States can organize the sale of their products in the Common Market accordingly. This includes a multi-level distribution system separating the functions of wholesaler and retailer, and preventing competition between the two. Article 85(1) does not stand in the way of agreements written to achieve such specialist trade. Such agreements do not require an exemption and hence, do not have to be notified as long as the individual contract provisions stay within the limits outlined in the above list. The April 1984 decision re *IBM* may serve as the latest precedent for a selective distribution system compatible with Article 85(1).⁷³

In every case the specific product characteristics of the contract goods must be considered, and the obligations imposed on dealers must be necessitated by such product characteristics to preserve the image and/or quality and to ensure proper and safe use of the products by consumers.^{73a} In case of a dispute the ultimate question whether or not Article 85(1) applies to a specific provision in the agreement, must be decided by the national court hearing the case.

Readers should be alerted once again, however, that EEC compatibility of a selective distribution system depends not only on the drafting of the standard form agreement used by the manufacturer, but also on the way such system is operated in day-to-day business. The *AEG-Telefunken* decisions by the Commission and the CoJ, respectively, prove the point. A \$1 million fine imposed by the Commission on the German hi-fi and consumer electronics manufacturer in its 1982 decision was upheld by the Court, since the abusive manner in which the system was implemented by the company caused appreciable restrictions of competition.⁷⁴ Distribution agreements, although inoffensive to start with, may nevertheless run afoul of Article

73. *Supra*, note 35.

73a. See Commission Decision of Dec. 10, 1984, in the Matter of Grohe, O.J. No. L 19, p. 17, of Jan. 23, 1985, C.M.R. § 10,661.

74. See *AEG-Telefunken v. Commission*, *supra* note 39. Similarly, the CoJ has recently ruled again that "the existence of a concerted practice aimed at restricting parallel imports . . . is sufficient to exclude block exemption under Regulation No. 67/67/EEC." *Hasselblad (GB) Ltd. v. Commission*, CoJ of February 21, 1984, Case 86/82, [1984] E.C.R. —, C.M.R. ¶ 14, 014, at 14,187.

85(1) and attract fines, if appropriate surveillance is lacking and admission to the distribution network is refused, rendered difficult, or made subject to additional conditions for those dealers whose selling practices, particularly pricing practices, threaten the manufacturer's own pricing policy, as was the case in *AEG-Telefunken*. This confirms that the criteria for selecting dealers must not only be restricted to qualitative, objective aspects in order to conform with Article 85(1), but must also be applied consistently and in a non-discriminatory fashion.

6. Summary

In summary, dealers in a selective distribution system must be free to sell throughout the Common Market—with limited restrictions permitted on wholesalers and their sales to end-users, and on retailers in an *open* system with respect to their sales to other authorized dealers. Dealers must also be free to establish their own prices, resulting in an absolute ban on resale price maintenance by manufacturers.⁷⁵ Recommended prices appear to be less of a problem nowadays, at least where they lack any binding effect,⁷⁶ but they have been held by the CoJ in at least one judgment to amount to illegal price fixing.⁷⁷ Finally, dealers in a selective distribution system must always be free to sell competing products. The use of noncompetition clauses in a distribution agreement, which the manufacturer does not want to notify to the Commission for exemption, is reserved for exclusive dealing arrangements. These will be discussed next.

C. EXCLUSIVE DISTRIBUTION

1. Favorable Treatment

For the past seventeen years, exclusive distribution agreements have received preferential treatment in the Common Market. Since 1967 a group exemption regulation has existed whereby agreements are exempted as a category from the competition rules of the EEC Treaty, provided only two companies are party to the agreement and one party agrees with the other to supply certain goods for resale within the EEC only to that other party.⁷⁸

As a result it has not been necessary to notify exclusive dealing arrangements in the Common Market for a long time, provided the agreement did not exceed the scope of Regulation 67/67 in the individual case. In contrast

75. Commission Decision of December 22, 1976, in the matter of Gerofabriek, O.J. No. L 16, p. 8, of January 19, 1977, C.M.R. ¶ 9914. See also, *DuPont de Nemours*, *supra* note 62.

76. Cf. *Murat* *supra* note 35, where the Commission tolerated some recommended prices contained in the manufacturer's annual catalogues, pointing at the same time, however, to the fact that these prices were "not in any way binding and quite large differences can in fact be found in the prices charged even by retailers quite close together." *Id.*, at 11,260.

77. *Vereeniging van Cementhandelaren v. Commission*, *supra* note 31.

78. Regulation 67/67, O.J. No. L 57, p. 849, of March 25, 1967, C.M.R. ¶ 2727.

to many other agreements relating to business in the Common Market, notably certain selective distribution agreements, the contracts concluded by manufacturers with their exclusive distributors in the EEC have benefited from a blanket approval, without bureaucratic delay, and the companies involved have enjoyed legal certainty as to the enforceability of their contracts. Recently, this policy of favorable treatment of exclusive dealing was reconfirmed when the Commission issued two new regulations replacing the 1967 regulation, thus continuing the group or block exemption of exclusive distribution and exclusive purchasing under certain defined conditions.⁷⁹

2. *Reasons*

There are a number of valid reasons for this administrative favoritism towards exclusive dealing. First and foremost is the recognition that exclusivity arrangements between manufacturers and their dealers, as a category, result in economic and social benefits that almost always outweigh the restriction of competition inherent in agreements that oblige a manufacturer to sell only to one dealer per defined territory. The redeeming features of exclusive dealing usually compensate for the limitation of sales outlets, i.e., the threat to intrabrand competition that consumers have to put up with following the institution of a single, exclusive dealer for the given product in their respective territory.

In such a system, manufacturers have the ability to streamline their sales activities and to overcome more easily distribution difficulties in international trade, such as linguistic, legal, and other barriers. In addition, a multitude of rationalization effects result from exclusive dealing both on the part of manufacturers and distributors. As an example, exclusive dealers will concentrate their sales efforts on the contract goods within their territory, thus boosting sales and cutting cost per unit sold. This leads to lower prices and therefore, interbrand competition will become stiffer, offering consumers better choices. Also, the availability of the product in question will be improved in exclusive dealing situations, again benefiting consumers, since the continuity of supplies is usually guaranteed in such a system by the manufacturer.

3. *Categorical Exemption*

Consequently, these agreements often satisfy the conditions of Article 85(3) making them eligible for exemption.⁸⁰ The Commission has seen fit, understandably, to grant them exemption by category, since this relieves

79. Regulation 1983/83, O.J. No. L 173, p. 1, of June 30, 1983; and Regulation 1984/83, O.J. No. L 173, p. 5, of June 30, 1983; C.M.R. ¶ 2730 and ¶ 2733, respectively.

80. See *supra* note 12. The Commission itself has stated that its "approach to exclusive dealing agreements is largely favourable." See, Comp. Rep. 1980, point 2.

tremendously the administrative burden of single case exemptions. During the first years of applying the EEC competition rules and after the adoption of Regulation 17/62, which introduced the requirement of, and the administrative rules for notification of agreements in 1962, the Commission was swamped with thousands of applications for exemption by companies seeking to escape the rigidity of Article 85(1).

As a result of adopting Regulation 67/67, the Commission's workload with respect to exclusive distribution agreements decreased dramatically. Of 29,500 such agreements notified to the Commission during the early years of application of Article 85, approximately 25,000 notifications were resolved automatically on the basis of the group exemption regulation.⁸¹

There is no doubt that the Commission will continue to pursue its policy of support for exclusive distribution agreements in the Common Market, at the same time, however, watching over attempts to partition national markets through the use of such agreements.⁸² The EEC competition rules in favor of exclusive dealing have maintained their validity since they were placed on the books of EEC law in 1967. These rules, in their renewed and amended form of 1983 will remain in force for a period of at least 15 years, pursuant to specific provisions in the new Regulations 1983/83 and 1984/83.

The conditions under which Regulation 67/67 was applicable are widely known, as are the exceptions to its applicability.⁸³ It is therefore of greater

81. Comp. Rep. 1979, point 2.

82. Neither Regulation 67/67 nor the new regulations of 1983 tolerate such attempts as they would stifle the indisputable improvements otherwise gained from exclusive dealing in intra-EEC trade. Cf. Recital No. 11 ("Whereas" clause) to Regulation 1983/83, and Commission Information Memo No. P-60 of June 1983, C.M.R. ¶ 10.496, issued when the new regulation was adopted. The Commission announced in the Press Statement that the regulation "reflects the increased concern on the part of the Commission to give consumers and intermediaries or agents a real guarantee that they can obtain goods sold in the Community wherever they are offered on the best terms, or, in other words, to guarantee the possibility of parallel imports, which is an indispensable condition of any absolute territorial concession." See also the recent case *Wooden Racing Kayaks*, Comp. Rep. 1982, point 80.

83. Generally speaking, Article 1 of the regulation, as amended, declared Article 85(1) inapplicable to bilateral agreements that stipulate, for purposes of resale, exclusive supply and/or purchase obligations. Article 2, Regulation 67/67, listed additional obligations that could be imposed in such agreements without losing the benefit of the block exemption granted by Article 1, such as non-compete clauses, obligations to refrain from pursuing sales activities outside the allotted territory, minimum purchase requirements, and complete product line obligations. Article 3, Regulation 67/67 contained certain exceptions to the applicability of Article 1, i.e., removed the benefit of the block exemption, where competing manufacturers had entered into a reciprocal exclusive dealing arrangement or where the parties took measures to obstruct parallel imports of the contract goods from other EEC countries.

Further limitations of the regulation's applicability resulted from interpretations of its provisions by the Commission and the CoJ in pertinent decisions. The most noteworthy of these limitations is probably the Commission's ruling in its Decision of December 19, 1974, in the matter of *Duro-Dyne/Europair*, O.J. No. L 29, p. 11, of February 3, 1975, C.M.R. ¶ 9708A. Here, the Commission held that Regulation 67/67 did not apply to an agreement granting exclusivity for the whole of the Common Market as this was beyond the language contained in Article 1: agreements "for resale within a *defined area* of the Common Market" (emphasis added).

interest to analyze the new state of the law in the area of exclusive dealing introduced with the block exemption regulations of 1983, in order to compare the situation today with that which existed in the EEC prior to adoption of these new regulations. The following comments are designed to accomplish this comparison, by highlighting any differences in applicability of the regulations in their new form. This will provide readers with the means to assess for themselves whether their exclusive distribution contracts are covered by the new regulations and thus exempt from notification, or whether they have to be notified to the Commission to obtain an exemption from Article 85(1) in order to be enforceable.⁸⁴

III. The New Regulations: Exemptions

A. GENERAL

Generally speaking, Regulation 1983/83 (the exclusive distribution exemption) contains the old rules of the 1967 regulation, while Regulation 1984/83 introduces new, special provisions aimed at the particular situation existing for a manufacturer who does not allocate an area of sales responsibility to his dealer, notwithstanding the dealer's obligation to take all his supplies from that manufacturer (the exclusive purchasing exemption).⁸⁵

Both regulations became effective on July 1, 1983, and they shall expire at year-end 1997. In view of the changes introduced with the 1983 law, companies are given a period of three and one-half years to adjust their exclusivity contracts, if required. This applies to all agreements that existed on July 1 or were entered into until December 31, 1983, and which benefit from the old block exemption under Regulation 67/67.⁸⁶ If the parties desire to continue with such agreements beyond January 1, 1987, they will have to make sure that the agreements comply with the provisions of the new regulations, or they will have to notify them to the Commission.⁸⁷

84. Agreements satisfying the conditions of either Regulation 1983/83 or 1984/83 "need not be notified," Recital Nos. 14 and 22, respectively (the "Whereas" clauses in the preamble to each regulation). See also *Cadillon v. Höss*, *supra* note 24, where the CoJ held that agreements "could qualify for the group exemption, even though they were not registered with the Commission, provided that they fulfilled the special conditions set forth in Articles 1 to 3 of that regulation." *Id.* at 7543.

85. As to further details of the similarities and differences between the two new regulations see Commission Notice Concerning Regulations No. 1983/83 and No. 1984/83 On The Application Of Article 85(3) Of The Treaty To Categories Of Exclusive Distribution and Exclusive Purchasing Agreements, O.J. C 101, p. 2, of April 13, 1984, C.M.R. ¶ 10,583 (hereinafter the "Commission Explanation"). This Notice replaced an earlier Commission Notice on the same subject of December 30, 1983. It "sets out the main considerations which will determine the Commission's view of whether or not an exclusive distribution or purchasing agreement is covered by the block exemption." Commission Explanation, at para. 3.

86. Article 7, Regulation 1983/83, and Article 15, Regulation 1984/83, respectively.

87. Special provisions have now been introduced with respect to beer supply and service station agreements, cf. Titles II and III, Regulation 1984/83. These will not be discussed further in this article.

The scope of the two new regulations has been defined in Article 16, Regulation 1984/83 so as to avoid any overlap. Agreements by which the supplier undertakes with the dealer to supply only him with certain goods for resale, and the dealer undertakes to purchase these goods only from the supplier, are outside the scope of Regulation 1984/83. They are exclusively covered by Regulation 1983/83.

B. EEC-WIDE DISTRIBUTION AGREEMENTS AND "RESALE" AGREEMENTS

As under Regulation 67/67, the block exemption under both new regulations applies only to agreements "for resale." However, the exclusive distribution exemption today permits the parties to stipulate resale within the whole *or* a defined area of the Common Market. Thus, EEC-wide distribution agreements are covered by Article 1, Regulation 1983/83 and benefit from the block exemption regulation. This represents a remarkable extension of the regulation as compared with the old rule under Regulation 67/67, and it expressly overrules the decision in *Duro-Dyne/Europair*.⁸⁸

Similarly, the applicability of the new block exemption regulation has been extended by eliminating the restriction contained in Article 1(2), Regulation 67/67, pursuant to which purely national agreements, i.e., agreements between companies from one member state only, did not benefit from the block exemption. On the other hand, the restrictions resulting from the notion that the agreement must be concluded "for resale" remain the same today as they were under the old regulation. If the contract goods are purchased and later transformed or processed into other goods, or used or consumed in the production of different goods, the agreement is not one for resale and the exemption under Article 1, Regulation 1983/83 will not apply.⁸⁹ However, such contracts are obviously not prohibited in the EEC notwithstanding the fact they may be subject to Article 85 (1). The lack of availability of the block exemption simply means that a single-case exemption has to be obtained and that the agreement must be notified to the Commission.

Where the dealer merely improves the quality, durability, appearance, or taste of the contract goods,⁹⁰ the block exemption remains in effect with respect to such exclusive distribution contract, if the value added to the contract goods by such operation does not change the economic identity of the goods. A slight addition in value will not be considered a change of the economic identity of the contract goods.⁹¹ Although it is nowhere explained

88. See *supra* note 83.

89. Cf., Commission Explanation, *supra* note 85, at para. 9.

90. Examples would be rust-proofing of metals, sterilization of food, or the addition of coloring matter or flavorings to drugs; cf. Commission Explanation, *supra* note 85, at para. 10.

91. Commission Explanation, at para 10.

what constitutes, and what exceeds "slight addition in value," it is suggested, in keeping with the general interpretation of *de minimis* situations in EEC law, that 5 percent added value in respect to the dealer's purchase price will not remove the benefit of block exemption from an exclusive distribution agreement.⁹²

The agreement is "for resale" if the dealer merely breaks up and packs the goods into other packages prior to reselling them. Repackaging does not change the economic identity of the contract goods. This applies also to situations where the reseller is supplied with a concentrated extract for a drink which he bottles after diluting it with water, pure alcohol, or another liquid.⁹³

Exclusive distribution agreements under which the dealer not only resells the contract goods, but leases them to third parties, are covered by Regulation 1983/83. This is a welcome clarification of the law as compared with the situation that existed prior to adoption of the new regulation.⁹⁵

C. SUPPLY OF SERVICES AGREEMENTS

Since Article 1, Regulation 1983/83 specifies that the agreement for resale must be concluded with respect to "certain goods" (as did Article 1(1)(a), Regulation 67/67), a contract for the supply of services is not covered by the regulation. Nevertheless, an obligation imposed on the reseller to provide after-sales services that can be considered incidental to the sale of the contract goods, does not change the character of the agreement from one "for resale" to an agreement for the supply of services. As in the case of determining the economic identity of the contract goods, the decisive criterion is the money value added to the contract by the rendition of these after-sales services. If the charge for the service is higher than the price of the goods, the block exemption will not apply to the agreement. Presumably, trade usage will play an important role in individual case-by-case determinations, as it does, according to the Commission's own announcement, in cases of defining the economic identity of the contract goods.⁹⁴

D. NON-COMPETE CLAUSE

Like the old regulation, both new block exemption regulations contain an *exhaustive* list of restrictions of competition that may be imposed on the

92. *Cf.*, *supra* note 8. Note also the 10% "grace" range provided for in Article 5(2), Regulation 1983/83, with respect to the financial limits established as a criterion for the regulation's applicability. If such limits may be exceeded by up to 10%, it could perhaps be argued that such greater latitude should also apply to the added value percentage used in defining the economic identity of the contract goods.

93. Commission Explanation, at paras. 9 and 10.

94. *Cf.*, Commission Explanation, at para. 12.

95. *Id.*, at para. 10.

exclusive distributor/purchaser. These restrictions are enumerated in Article 2, subparagraph (2) of the two new regulations and their inclusion into a contract does not result in an obligation for the companies involved to notify their contract to the Commission. These provisions contain the familiar non-compete clause that can be included in exclusive distribution or purchasing agreements. However, different from the situation prior to 1983, dealers can be restricted in their freedom to compete only for the duration of the agreement. Under Article 2(1)(a), Regulation 67/67, it was permissible to prohibit the exclusive dealer from manufacturing or distributing competing goods until one year after expiration of the exclusive distribution contract. This is no longer possible without having to notify the agreement for an exemption.

Manufacturers can also be restricted from competing with their exclusive dealers. Article 2(1), Regulation 1983/83 permits, as did its predecessor, a prohibition imposed on the manufacturer to supply the contract goods to users, including end-users, in the dealer's territory. This restriction of competition does not require notification. However, the restriction must not be absolute. The Commission has made it clear in a recent case that the benefit of block exemption will be removed from an exclusive distribution agreement, if the manufacturer refuses to enter into a contract with a consumer resident in the dealer's territory, who approaches the manufacturer at its place of business. If in such a case the manufacturer does not sell and deliver the contract goods to the consumer, the block exemption under Regulation 1983/83 will no longer apply to the manufacturer's relationship with the exclusive dealer.⁹⁶ The only protection remaining for the dealer in this situation is the requirement that the contract goods must be delivered to the consumer outside the dealer's territory.

On the other hand, the manufacturer may retain a contractual right to supply certain customers in the dealer's territory himself. Provided the customers in question are not resellers, such contractual right may be included in the distribution agreement and this would not remove the agreement from Regulation 1983/83, irrespective of whether this contractual right of direct supply of end-users is granted in consideration of a compensation/commission payment to the exclusive dealer or not.

E. MINIMUM PURCHASE OBLIGATION

Article 2(3) of both new regulations contains other obligations that may be undertaken by the exclusive dealer/purchaser without prejudicing the block exemption under Article 1, Regulations 1983/83 and 1984/83, respec-

96. Cf., Commission Press Release No. IP(84) 16, in the matter of *ATP*, a French furniture trading company, Bulletin EC 1-1984, point 2.1.33.

tively. This list in Article 2(3) is a *non-exhaustive* enumeration of examples, only. A familiar feature known since the days of Regulation 67/67 is the obligation to purchase complete ranges of goods, or minimum quantities. However, an interesting difference between the two new regulations emerges with respect to the minimum purchase obligation imposed upon an exclusive dealer as compared with such obligation undertaken by an exclusive purchaser. While Article 2(3)(a), Regulation 1983/83 continues the old, unlimited language of Regulation 67/67, the provision dealing with the purchase of minimum quantities in the new exclusive purchasing regulation, namely Article 2(3)(b), Regulation 1984/83, contains the limitation that such obligation may only be imposed with respect to goods "which are subject to the exclusive purchasing obligation."

The question is whether this limitation also applies to the exclusive distribution agreements covered by Regulation 1983/83. The text of that regulation's Article 2(3)(a) suggests that this is not the case. Nevertheless, the Commission's admonition in its recent Notice concerning the new block exemption regulation should be kept in mind.⁹⁷ The Commission warned that, in order to retain the benefit of block exemption, all obligations in exclusive distribution agreements must be formulated in a non-restrictive manner, considering the special relationship that exists between manufacturer and exclusive distributor. Where the parties include obligations restrictive of competition beyond the character of their special contractual relationship, the agreement as a whole is no longer covered by the block exemption and requires an individual exemption. This would mean that the parties would have to notify their agreement. A minimum purchase obligation relating to goods that are not the main subject of an exclusive distribution agreement could trigger this effect if it was too broad, restricting the dealer's commercial conduct in unrelated areas.

F. USE RESTRICTIONS

The non-exhaustive character of the list of obligations falling under Article 2(3) of both new regulations can be demonstrated by pointing to use restrictions as an example of a contractual provision that may, under certain circumstances, be covered although not mentioned in Article 2(3), Regulation 1983/83 or 1984/83. While usually subject to Article 85(1) and thus prohibited in EEC distribution agreements,⁹⁸ unless exempted under Article 85(3), such use restrictions may be imposed as a condition of sale at all levels of distribution without reaching the threshold of Article 85(1), where

97. Cf., Commission Explanation, at para. 19.

98. *Ciments et Betons de l'Est v. Kerpen & Kerpen*, *supra* note 19, at paras. 6 and 7 of the judgment (not yet published).

they are inevitable for the health and safety of humans.⁹⁹ An exclusive dealing agreement with respect to products involving a health safety risk can therefore contain a provision imposing use restrictions on the dealer and all subsequent purchasers, without thereby creating a need to notify the agreement. This shows that it would be a mistake to assume that contract clauses not explicitly exempted under Article 2(3) of both new regulations are automatically prohibited.¹⁰⁰

G. BLOCK EXEMPTION INCOMPATIBILITY

As an example of provisions incompatible with the block exemption regulation, the Commission has mentioned a prohibition imposed on the exclusive distributor to supply certain categories of customers in his contract territory, as for instance department stores which are reserved for other resellers appointed by the manufacturer for that purpose.¹⁰¹ It is, however, possible to restrict resellers from supplying the contract goods to unsuitable dealers who do not qualify for the distribution of the particular product in question. This follows from the provision contained in Article 2(3)(c), Regulation 1983/83,¹⁰² under which the exclusive distributor may be required to "maintain a sales network." This must be read in conjunction with the controlling language of that particular subparagraph, which permits imposing measures on exclusive dealers "for promotion of sales." This results in a combined obligation for exclusive distributors to promote distribution networks established by the manufacturer. These are workable only where the criteria for dealer selection, defined by the manufacturer, have to be observed by appointed dealers. Therefore, such clauses are unobjectionable and the agreement does not have to be notified for exemption, if admission to the network is based on objective criteria of a qualitative nature, as described above in the section on selective distribution.¹⁰³

99. Cf., Commission Notice in the matter of Kathon Biocide, O.J. No. C 59, p. 6, of March 1, 1984, C.M.R. ¶ 10,571. There, the Commission proposed to issue a "negative clearance" to a system of monitoring and limiting all sales of a hazardous product to avoid mishandling, i.e., took the position that Article 85(1) was not applicable. An example of a use restriction violating Article 85(1) and failing to qualify for exemption under Article 85(3) is the Commission's Decision of December 10, 1982, in the matter of Cafeteros de Colombia, O.J. No. L 360, p. 32, of December 21, 1982, C.M.R. ¶ 10,448. Contracts between the Colombian Coffee Federation and distributors in the EEC contained the restriction that the raw coffee sold by the Colombians had to be used by the buyers in their own roasting plants or could only be sold to predetermined roasters approved by the Colombian supplier. This amounted to an illegal ban on the sale of green coffee.

100. The CoJ has ruled in this sense as early as 1966, in *Italy v. EEC Council and EEC Commission*, *supra* note 7, where it held: "This does not mean, however, that everything that is not exempt must be considered to be prohibited." *Id.* at 7717.

101. Commission Explanation, at para. 29.

102. See also corresponding provision Article 2(3)(d), Regulation 1984/83 for exclusive purchasing agreements.

103. Cf., also Commission Explanation, at para. 20.

On the other hand, contract clauses providing for, and actual business conduct of the contract parties leading to absolute territorial protection for the exclusive distributor are incompatible with the block exemption. It is imperative that parallel importers retain the ability, legally and practically, to sell the contract goods inside the distributor's exclusive sales territory, and that consumers residing there remain in a position to buy in other EEC countries. Otherwise, Regulation 1983/83 shall not apply, pursuant to its own terms laid down in Article 3, subparagraphs (c) and (d).

It is safe to assume that in cases of absolute territorial protection not even a single-case exemption would be granted.¹⁰⁴ Notification of the agreement would therefore not make a difference. Manufacturers/suppliers may never seek to prohibit their exclusive dealers from *selling* outside their allotted territory, they may only prohibit them from *canvassing* there, Article 2(2)(c), Regulation 1983/83. Further, a manufacturer/supplier may never commit to his exclusive distributor to prevent his buyers elsewhere from supplying the contract goods to users inside the exclusive sales territory; he may only agree to that supply prohibition for himself, Article 2(1), Regulation 1983/83.

The block exemption under both new regulations is also not applicable to exclusive agreements between competing manufacturers.¹⁰⁵ Different from the situation prevailing prior to 1983, both reciprocal and non-reciprocal exclusive agreements between competitors are excluded from the benefit of block exemption. The only exception to this new rule are non-reciprocal agreements, where one or both of the contract parties are of smaller size. If the total annual sales (aggregate sales, not just sales of the contract goods) of at least one of the parties are less than 100 million ECU, the agreement does not have to be notified and the parties are spared the single-case exemption scrutiny of their contract. Special provisions exist in Articles 4 and 5 of both regulations with respect to calculating aggregate sales among "connected" companies. Generally speaking, a connected enterprise is a company in a parent/subsidiary relationship to the contract party.

A further significant difference to the old law of exclusive distribution exists today with Article 3(d), Regulation 1983/83. The block exemption is

104. Cf., Commission Decision of July 11, 1983, in the matter of Windsurfing International, O.J. No. L 229, p. 1, of August 20, 1983, C.M.R. ¶ 10,515. In this case, exclusive dealing agreements contained a ban preventing the sole distributor not only from pursuing any active sales policy outside his allotted territory, but also from furnishing any supplies of the contract goods whatsoever. The Commission held that this clause removed the agreements from Regulation 67/67 and went on to say that, had the agreements been notified, an exemption would not have been possible: "In any event . . . the complete ban on any supplies to other dealers, including therefore those in the distribution system itself, would have imposed too great a restriction." *Id.* at p. 11,174. The Commission imposed fines on the companies involved for this violation of Article 85(1).

105. Articles 3(a)(b), Regulations 1983/83 and 1984/83, respectively. See also Comp. Rep. 1982, point 81, regarding the matter of *Cansulex*.

inapplicable where the parties "make it difficult for intermediaries or consumers to obtain the contract goods from other dealers." While this limitation used to apply only with respect to dealers within the Common Market, as explicitly stated in Article 3(b), Regulation 67/67, the new law provides that the block exemption shall not be available, if the parties interfere with someone's attempt to obtain the contract goods from outside the Common Market, insofar as no alternative source of supply is available inside the EEC.

This has to be considered a natural extension of the scope of this provision in view of the legality introduced with Regulation 1983/83, to conclude EEC-wide distribution agreements, yet not to lose the benefit of block exemption. Where the contract territory covers the whole of the Common Market, alternative sources of supply could not exist inside the EEC, by definition.

However, this new rule is problematic and may lead to a conflict with the Commission which may have to be litigated, in cases where the contract parties, either the manufacturer or the dealer, exercise an industrial or commercial property right, such as a trademark, to oppose the import from outside the Common Market of products properly marked or otherwise properly marketed there. Article 3(d) in its new form may well be in violation of prior decisions of the CoJ in the *EMI v. CBS* judgments of 1976.¹⁰⁶

There, the Court had ruled that EEC law does not prevent the owner of a trademark from exercising his rights to block importation from outside the Common Market of products bearing the identical mark owned by a third party in a non-EEC country. The "exhaustion of rights" doctrine established by the CoJ with respect to the exercise of industrial or commercial property rights in intra-EEC trade¹⁰⁷ does therefore not apply to the importation of goods from countries outside the Common Market. This unequivocal ruling in *EMI v. CBS* was subsequently confirmed in *Polydor Ltd. v. Harlequin Record Shops*.¹⁰⁸

Thus, it appears that Article 3(d), Regulation 1983/83, goes beyond this Court jurisprudence—at least in cases where the exercise of a trademark right is unilateral, that is an exercise by the trademark owner himself and not by the dealer under an assignment of the trademark right. The dealer's use

106. CoJ, judgments of June 15, 1976; Case 51/75 *EMI Records Ltd. v. CBS United Kingdom Ltd.*, [1976] E.C.R. 811; C.M.R. ¶ 8350; Case 86/75 *EMI Records Ltd. v. CBS Grammofon A/S* [1976] E.C.R. 871; C.M.R. ¶ 8351; and Case 96/75 *EMI Records Ltd. v. CBS Schallplatten GmbH*; [1976] E.C.R. 913; C.M.R. ¶ 8352.

107. Cf. *Centrafarm v. Sterling Drug*, *supra* note 29. For a detailed discussion of this subject see TOEPKE, *EEC COMPETITION LAW*, *supra* note 7, at chapter 71.

108. *Polydor Ltd. and RSO Records Inc. v. Harlequin Record Shops Ltd., et al.*, CoJ of February 9, 1982, Case 270/80, [1982] E.C.R. 329, C.M.R. ¶ 8806.

of a trademark in such situation may constitute the "object, the means, or the result of an agreement which, by prohibiting imports . . . would have the effect of partitioning the market."¹⁰⁹ The trademark owner's use of his right, however, appears legitimate under *EMI v. CBS* and under *Polydor v. Harlequin*. It may well be that the Court, if and when faced with the question, would hold that Article 3(d), Regulation 1983/83, is too broad and does not apply in cases of unilateral exercise of a trademark.

For companies to benefit from the block exemption of the two new regulations it is not necessary that they enter into a legally binding contract. Different from the situation that existed under Regulation 67/67, concerted practices are now also subject to the block exemption.¹¹⁰ If two companies merely operate an exclusive distribution or purchasing arrangement without, however, reducing it to writing, it is still covered by Regulation 1983/83 and 1984/83, respectively, i.e., it does not have to be notified to the Commission.

H. EXCLUSIVE SALES TERRITORY SIZE

Under the old rules of Regulation 67/67 ambiguity persisted for some time as to the permissible size of the exclusive sales territory of the distributor, in both directions. The maximum size was unclear until *Duro-Dyne/Europair* was decided in 1974. This decision clarified that the parties could not agree on the entire Common Market as contract territory. Today, however, this is possible as was already pointed out, pursuant to the explicit language of Article 1, Regulation 1983/83. The minimum size of an exclusive sales territory permissible under Regulation 67/67 remained unclear until the regulation's expiration.

Even today, under Regulation 1983/83, it is not settled how small the "defined area of the Common Market," i.e., the exclusive sales territory, may be drawn without losing the benefit of block exemption. The decision in *Junghans* highlights the importance of this question since the obligations undertaken in this case by the German manufacturer and its three exclusive dealers in Belgium were not automatically exempt from Article 85(1), but

109. *Deutsche Grammophon v. Metro*, *supra* note 45, at 7192. Such exercise of a trademark would, with respect to intra-EEC trade, constitute illegal action violating Article 85(1), *Sirena v. Eda*, CoJ of February 18, 1971, Case 40/70, 17 Rec. 69 [1971], C.M.R. ¶ 8101. The Court held that "Article 85 . . . applies if the importation of products coming from different Member States and carrying the same trademark is prevented by invoking the trademark right, where the owners of the trademark acquired this mark or the right to use it under agreements between them or agreements with third parties." *Id.* at p. 7112. See also the earlier judgment in *Grundig, Consten*, *supra* note 16. Presumably, Article 85(1) would also apply where imports from non-EEC countries are prevented by an agreement, permitting the use of a trademark for such purpose.

110. Article 9, Regulation 1983/83, and Article 18, Regulation 1984/83.

had to be notified to the Commission for a single-case exemption, because "Junghans [did] not supply only one dealer in the contractual territory, as required by Article 1(1)(a) of the Regulation, but three."¹¹¹ The mistake made by the manufacturer in this situation was apparently the choice of the whole of Belgium as the "defined area," or contractual territory in the meaning of Article 1(1)(a), Regulation 67/67. If the company had wanted to appoint three exclusive dealers in Belgium and still benefit from block exemption, the sales area for each dealer should have been defined on a smaller scale, such as a district or province of Belgium, or a large city.

The proper delineation of the exclusive sales territory reserved for one dealer remains as important under Regulation 1983/83 as it was under Regulation 67/67. Unfortunately, the ambiguity as to the smallest permissible size of such territory has not been cleared up by the Commission. The prudent thing to do if one wants to avoid having to notify an agreement, is to draft a detailed description of the allotted sales area. There appears to be no limit to how small a portion of a single member state a manufacturer may choose for the appointment of an exclusive distributor. It is clear that the benefit of block exemption is not lost, if one enters into exclusive distribution or purchasing agreements covering the same goods with several resellers.¹¹² There is no limitation on the number of exclusive distribution or exclusive purchasing agreements that a manufacturer may conclude in the EEC. Therefore, the requirement of both block exemption regulations that the agreement be a bilateral one relates only to the individual agreement.¹¹³

Once an exclusive sales territory has been established, the manufacturer/supplier will normally have to deal within that territory only with his exclusive distributor. However, this does not mean that the benefit of block exemption is lost where the manufacturer/supplier provides the contract goods to other resellers who subsequently sell them in the dealer's exclusive territory, regardless of where these other resellers are located (they may even reside inside the territory). The only conditions are that the contract of sale comes about at the reseller's request, not as a result of the manufactur-

111. *Junghans*, *supra* note 35, at 9963-8.

112. Commission Explanation, at para. 14.

113. A bilateral agreement would still exist, if on one side of the agreement several companies participated which belong to one economic unit, like sister companies of a conglomerate, *cf.* Commission Explanation, at para. 13. However, where one or both of the parties to the agreement are associations with a large membership, such as a trade union association or a manufacturers' association, they cannot be regarded as "undertakings" in the meaning of Article 1, Regulation 1983/83 or 1984/83, respectively. Consequently, the block exemption would be inapplicable in such a case, *Salonia v. Poidomani*, *supra* note 39, at 9102 (with respect to the old, identical phrase in Article 1, Regulation 67/67). For this reason an agreement concluded by an Export Trading Company, as they now exist in the United States, will normally not qualify as a bilateral one, unless care is taken that such company is created as a separate legal entity which holds title to the contract goods for which an exclusive distribution agreement is concluded in the EEC.

er's marketing efforts, and that the contract goods are delivered to the reseller or his agent outside the territory reserved for the exclusive distributor.¹¹⁴

I. DURATION OF EXCLUSIVE CONTRACT

The duration of the exclusivity contract must be carefully reviewed under the new EEC regulations. Exclusive purchasing agreements, for instance, may not be concluded for an indefinite period or for a period of more than five years, or the parties will lose the benefit of block exemption.¹¹⁵ Exclusive distribution agreements, on the other hand, can apparently be concluded for an indefinite period, without creating the need to notify the contract. Agreements specifying a fixed term, but which are automatically renewable unless one of the parties gives notice to terminate, will be considered to have been concluded for an indefinite period.¹¹⁶ Therefore, such a contract would benefit from block exemption only if it was an exclusive distribution agreement, but would fail to qualify under Regulation 1984/83.

J. BLOCK EXEMPTION WITHDRAWAL

In certain situations the Commission may order a withdrawal of the block exemption, Articles 6 and 14, Regulation 1983/83 and 1984/83, respectively. The examples mentioned in these two articles are only illustrations, not an exhaustive list of reasons for which the benefits of block exemption may be withdrawn from an individual agreement.¹¹⁷ Among other cases, that of a dominant manufacturer distributing its goods by means of exclusive distribution agreements deserves attention. Generally speaking, dominant companies may enter into such agreements like any other manufacturer or supplier. However, where the contract goods are not subject to effective competition in the contract territory, as may be the case with products manufactured by a dominant firm, Article 6(a), Regulation 1983/83 empowers the Commission to withdraw from such exclusive distribution agreement the benefit of block exemption. It should also be kept in mind that Article 86, Treaty of Rome, remains applicable at all times to dominant companies, irrespective of whether Regulation 1983/83 applies to an individual agreement concluded by such company.

114. Commission Explanation, at para. 27. In a situation like this the reseller has to pay the transportation cost of the contract goods into the sales territory, otherwise the block exemption is withdrawn, *id.*

115. Article 3(d), Regulation 1984/83.

116. Commission Explanation, at para. 39.

117. *Id.* at para. 24.

The withdrawal of block exemption in individual cases requires a formal decision by the Commission under the rules of Regulation 17/62. The Commission must, therefore, first conduct a regular investigation, applying all the procedural rules applicable in other competition cases, before an agreement otherwise benefitting from the protection of either Regulation 1983/83 or 1984/83 can be declared violative of Article 85(1). Thus, the companies involved have an opportunity to argue their point of view and the ultimate decision, even if negative, cannot have retroactive effect.¹¹⁸

K. EXEMPTION UNDER ARTICLE 85(3)

As a final comment regarding exclusivity agreements and their treatment under the old and new block exemption regulations in the EEC, readers are reminded of the flexibility of the administrative process in the Common Market. Where an individual agreement is excluded from the block exemption of either regulation, as a result of its terms, it may still be eligible for exemption under Article 85(3), depending on the circumstances. Such exclusion from the block exemption does not prejudice an agreement in any way as regards a single-case exemption. However, if falling outside the provisions of Regulation 1983/83 or 1984/83, an agreement must be notified, if an exemption is desired.

Admittedly, certain contract clauses will make such an exemption highly unlikely, such as those providing for absolute territorial protection. The Commission's objective to ensure intrabrand competition at all stages of distribution in intra-EEC trade, documented in its many decisions in this respect, will likely override any potential benefits otherwise derived from such agreement in the particular case. Similarly, provisions interfering with dealers' choices of their customers and their freedom to determine prices and other sales conditions can hardly be considered candidates for a single-case exemption. They certainly do not qualify under the block exemption regulations.

IV. Conclusions

The preceding discussion has hopefully helped clarify the basic questions relating to the need to notify a particular distribution agreement in the Common Market. Of course, details will remain ambiguous in certain situations simply because no decision may as yet exist in the EEC that can provide guidance in the given circumstances, or because the new block exemption regulations of 1983 may not be entirely clear when applied to an individual case.

118. *Id.*

EEC competition law, however, provides a procedure for companies seeking advice from the Commission as to the compatibility of their agreements, or certain provisions in an agreement, with Article 85(1). They may file an application for "negative clearance" pursuant to Article 2, Regulation 17/62, in effect thereby notifying such agreement.¹¹⁹ By making such an application the company concerned can request the Commission to certify that its agreement is not in violation of Article 85(1) or, alternatively, to grant an exemption under Article 85(3). In cases of doubt a company should avail itself of this opportunity and file such a combined application for negative clearance or exemption. It is strongly recommended to notify an agreement with questionable provisions, as the decision not to notify risking a violation of Article 85(1) entails the acceptance of a substantial level of legal uncertainty regarding the enforcement of the contract, or certain of its provisions. Should such enforcement become necessary the danger exists that the other party to the agreement may seek to use Article 85(2) to escape its contractual obligations. The possibility of attracting a fine for violation of Article 85(1) poses another risk. That this risk is real even in case of distribution agreements can be demonstrated by pointing to the Commission's decision of July 1983 regarding *Windsurfing International*.¹²⁰

The fact that the Commission customarily has not moved speedily upon receiving an application for negative clearance and/or exemption under Article 85(3) should not discourage companies from notifying their agreements. First, even if a decision of exemption or negative clearance does not issue from the Commission quickly, the notification of an agreement is still of some practical value. No fine can be imposed with respect to notified agreements or practices, and in case of litigation before a national court raising the issue of enforceability of a particular contract clause or the whole distribution agreement, a pending application for an exemption may be sufficient to convince the court not to rule under Article 85(1) until the Commission has decided whether an exemption can be granted in the individual case or not.¹²¹

119. Such application has to be submitted on Form A/B which is also used for notification of agreements in order to gain exemption under Article 85(3). The filing procedure is laid down in Regulation 27/62 of May 3, 1962, O.J. (Special Edition 1959-1962), p. 132, C.M.R. ¶ 2651.

120. *Supra*, note 104.

121. Whether it is helpful in such a situation to gain a stay from the national court depends, of course, on whether one is the plaintiff or the defendant in the action. If it is in a party's interest to have the question of EEC compatibility of a particular contract resolved quickly, a motion to the national court should be made to refer to the CoJ any question the national court may have about the relevance of applicability of EEC law, including the question whether an exemption under Article 85(3) of the disputed contract clause or agreement may be possible in the particular case. The Commission has taken the position that national courts should be entitled to refer questions regarding Article 85(3) to the CoJ for a preliminary ruling, notwithstanding the fact that national courts do not have jurisdiction to decide this question themselves. *Cf. Procureur v. Giry and Guerlain et al. (the Perfumes decision)*, *supra* note 16, at p. 8524. For more details see TOEPKE, EEC COMPETITION LAW, *supra* note 7, at 685 *et seq.* and 798 *et seq.*

Secondly, there is hope that the Commission may dispose of many cases much more rapidly now than in the past, at least in situations where a "typical," ordinary distribution agreement has been notified. Such an agreement would either be an arrangement containing only provisions of the type previously permitted by the Commission as compatible with Article 85(1)—which were discussed above—or provisions that have been exempted earlier in similar situations by decisions under Article 85(3). The hope for more expeditious treatment of applications involving such agreements is founded on the Commission's announcements of December 1982 and November 1983, respectively, "to open the way for a more flexible administrative practice in assessing applications for negative clearance"¹²² and likewise in "assessing notifications under Article 4 of Regulation No. 17/62."¹²³

These Commission Notices of 1982 and 1983 have established a new administrative procedure for handling both an application for negative clearance and for exemption which, in certain "typical" situations, may result in a considerable acceleration of the notoriously slow Commission proceedings involving notified agreements. In its two cited Notices, the Commission indicated its intention to send companies a so-called comfort letter or provisional letter in lieu of a formal decision in certain cases. Such letter would inform the applicant that no further action is warranted in respect to the notified agreement (or practice) and that the file on the case can be closed. In cases of application for a negative clearance this would establish that the Commission feels, on the basis of information in its possession, that the notified agreement does not violate Article 85(1). In cases where an exemption under Article 85(3) has been applied for, such a letter would mean that the Commission, on a provisional basis, takes the position that the notified agreement, while in violation of Article 85(1), would be eligible for an exemption but that the Commission does not consider it necessary to follow the formal procedure through to the issuance of an exemption decision. Several such comfort letters have meanwhile been sent and a number of cases have thus been terminated without the delay experienced in prior years.¹²⁴

It may be surprising to many observers that a procedure as noncommittal as the mailing of a comfort letter should take the place of a formal decision of

122. Commission Notice On Procedures Concerning Applications For Negative Clearance Pursuant To Article 2 Of Council Regulation No. 17/62, O.J. No. C 343, p. 4, December 31, 1982. Cf. also Comp. Rep. 1981, point 15, and Comp. Rep. 1982, point 30.

123. Commission Notice On Procedures Concerning Notifications Pursuant to Article 4 Of Council Regulation No. 17/62, O.J. No. C 295, p. 6, November 2, 1983. Cf. also Comp. Rep. 1983, point 72.

124. Cf., Notice concerning an application for negative clearance (IV/30477) re: Europages, O.J. No. C 343, p. 4, December 31, 1982, and application for negative clearance (IV/30946) re: *Kathon Biocide*, *supra* note 99. See also, Notice concerning notification pursuant to Article 4, Reg. 17/62 for exemption (IV/30778) re: Rovin, O.J. No. C 295, p. 6, November 2, 1983.

constitutive character, such as an exemption decision under Article 85(3). In the case of applications for negative clearance the change may appear less drastic, but a Commission decision under Article 85(3) transforms an illegal, potentially void agreement into a legal, enforceable contract. To forego such a decision is therefore clearly detrimental to the applicant.¹²⁵ For this reason, the Commission will apply its new accelerated procedure of sending a comfort or provisional letter to applicants for exemption only if the companies involved agree to this procedure and thereby waive their right to receive a formal decision.¹²⁶

The increase in speed and flexibility in the enforcement of EEC competition rules resulting from this new Commission procedure is clearly an improvement, and companies have reacted favorably, despite the criticism voiced by politicians in Europe.¹²⁷ The fact remains, though, that such a provisional letter does not have the status of a decision. It can therefore neither be appealed to the CoJ nor does it provide the protection resulting from decisions in case of attacks by third parties (or even the contract partner) directed at the agreement. However, it seems this is not too high a price to pay for the increase in speed in obtaining an opinion from the Commission concerning a notified agreement.

The alternative is chaos, i.e., legal uncertainty of much greater proportion and duration than experienced before. At year end 1981, there were approximately 4,000 applications for exemption pending at the Commission, increasing at an annual rate of about 200.¹²⁸ The prospect of having an exemption granted to one's agreement faded further and further for the average applicant, i.e., a company that could not claim a test-case character

125. One must remember the CoJ's ruling in *Brasserie de Haecht*, *supra* note 22, according to which companies that have concluded agreements violative of Article 85(1) can implement them only at their own risk and peril, as long as the Commission has not issued an exemption decision.

126. Comp. Rep. 1983, point 72. There, the Commission states as follows: "A provisional letter will only be sent if the undertakings involved agree to the procedure being closed in this manner." This and other announcements of recent time seem to signal a distinction the Commission wants to make with respect to comfort letters mailed in response to an application for a negative clearance and those closing the file on applications for an exemption. This is justified, given the important difference in legal character of both types of Commission decision. Also, the terminology appears to become clearer now, after initial ambiguity using the term "comfort letter" indiscriminately. Lately, the Commission seems to prefer the term "administrative letter" for both categories (*see* Comp. Rep. 1983—§ 10 procedural issues), and uses "provisional letter" for those mailings that are in lieu of a formal exemption. This would leave the expression "comfort letter" as a label for the letters that are sent in response to negative clearance applications. This is a welcome distinction to avoid confusion.

127. *Cf.*, Commission Answer to Written Question No. 813/82 by Mr. Prout, Member Europ. Parliament, O.J. No. C 275, p. 15, October 18, 1982, C.M.R. ¶ 10,427. *See also* Commission Answer to Written Questions No. 874/82 by Mr. Tyrell and No. 291/82 by Mrs. Walz, both Members Europ. Parliament, O.J. No. C 287, p. 22, November 4, 1982, C.M.R. ¶ 10,432, and O.J. No. C 221, p. 9, August 25, 1982, C.M.R. ¶ 10,422, respectively.

128. Comp. Rep. 1981, point 15.

with respect to its agreement (and thus could not expect any particular interest on the Commission's part to take an early decision for creating new case law). The average time for obtaining an exemption stood at five years several years ago, and nobody has a clue today, when applying for an exemption, whether he will live to see his case decided in Brussels.

To receive a comfort or provisional letter from the Commission within a reasonable time is therefore an improvement which appears like the second-best solution to none. In addition, the Commission has taken an important step to enhance the legal certainty attached to administrative letters by adopting its new approach, announced in the 1982 and 1983 Notices,¹²⁹ of publishing the main contents of a notified agreement in the Official Journal. Even if no formal decision issues in the case, the Commission itself appears to accept that, by publishing these administrative letters in the Official Journal, they are of legal value in proceedings before national courts and do not just have simple declaratory character.¹³⁰

This view should be endorsed. Comfort or provisional letters can, given the procedural enhancement of publication, provide a legal basis for the recipient company that should prove determinative in any proceeding before a national court raising the compatibility of a particular agreement with EEC law (provided that the Commission had all the relevant facts when sending its closing letter). In this way, the unsatisfactory situation of the past, resulting from the enormous delays after notification of most agreements, can be resolved. One can, and indeed should, take the position with respect to the civil enforceability of a contract that the effects of an exemption provided for under Article 85(3) are impliedly granted where the Commission has not taken a formal decision to exempt the agreement, or to reject exemption within a reasonable period, but where it has carried out a preliminary examination of the notified agreement, as evidenced by its administrative letter, and has given interested third parties an opportunity to submit their comments under the applicable procedural rules.¹³¹

Without such a rule the present dilemma of legal uncertainty will continue with respect to many notified agreements, and companies that decide to notify will continue to be unjustly penalized by such uncertainty. The alternative route taken by many companies in view of this dilemma too often is the decision not to notify in order to keep a particular agreement undetected, thus sometimes accepting a much greater risk.

129. *Supra* notes 122 and 123.

130. *Cf.*, Commission Answer to Written Question No. 813/82, *supra* note 127.

131. There is precedent in existing EEC law for such an opposition procedure leading to a presumed or automatic exemption in Article 12, Regulation 1017/68. O.J. No. L 175, p. 1, of July 23, 1983, C.M.R. ¶ 2761. This regulation applied the EEC competition rules to transport by rail, road and inland waterway. The Commission has now incorporated equivalent provisions in its proposal for a similar regulation extending the competition rules to air and sea transport, *see* O.J. No. C 282, p. 4, of November 5, 1981, and O.J. No. C 291, p. 4, of November 17, 1981, C.M.R. ¶ 10,339 and ¶ 10,322, respectively.