

Introduction

1 Concept of competition

1.1 Definition of competition

Two or several actors who run for the same goal for survival purpose

1.2 Field of competition

Animal : They run for a prey

Vegetables : they run for resources

Sport : they run from starting line to finishing line

Undertaking : they run for market share

1.3 Natural event or concept ?

competition sows the seeds of its own destruction

Adam Smith mentioned the invisible hand in 1776 : free market economies left to their own devices will produce results more beneficial than in case of intervention of the States ; but sometimes the intervention is necessary

1.4 Competition in economics

a) definition

Structure of the market with a free confrontation between supply and demand for goods and services.

b) Perfect competition (a dream)

Characterization :

Homogeneity of goods and services (all are similar , there is not any distinguishing feature

Atomization of market : many suppliers and customers of small size so that there is no influence between themselves

Perfect transparency so that suppliers have a perfect knowledge on the demand and consumers have a perfect knowledge of supply

Fluidity of supply and demand : free access to the market, quick adaptation of the supply to the offer

c) Workable competition

The structure of competition is imperfect, namely conditions for perfect competition are not met but it is still not a monopoly situation

d) Functions of competition :

to enhance efficiency in order to maximize consumer welfare

to achieve the optimal allocation of resources

to protect consumers and to protect smaller firms against economic power in form of monopolistic dominance by an undertaking or by the coordination of several undertakings

an incentive to improvement

an incentive to innovation

e) evolution in economics

Harvard school 1950-1970 : importance of structure of the market and of the concentration with use of indexes

Chicago School in the 70th : more liberal approach so that any market is peculiar ; use of the concept of market contest

f) Competition and regulation

Regulation is the intervention of a state upstream of (amont) the exercise of an activity in order to create the best conditions within the sector

Competition is part of the regulation, as regulation uses competition law .

Regulation is used in order to reorganize the activity after the abolition of states' monopolies

2 From competition to competition law

2.1 Reasons for competition law

competition leads to monopoly

regulation : necessity for the states in case of liberalization to regulate the market

2.2 Main breaches of competition law

-cartel

- abuse of dominant position

- merger

- state 'interventions :

. states aids

. public undertakings

.law and practices leading to undertakings to breach of competition

2.3 Characteristics of competition law

a) workable competition and not perfect competition

The analysis has to take into account the characteristics of any market.

The nature and the intensity of competition differs from a product to another , from a market to another

Competition through invention and not only through the price has to be taken into account

b) free competition and unfair competition

- free competition on the basis of the observation of the market : the main concern of competition law
- unfair competition, a way to punish the behaviour of an agent who was unfair to a competitor ;
an analysis based on civil liability and not on the observation of the market

EEC competition law only deals with free competition

c) potential and present competition

Present competition is the present structure of the market.

Potential competition is the structure of the market as it could become

d) intrabrand competition/interbrand competition

e) competition between the parties / competition in relation to third parties

f) competition in horizontal relations/vertical relations

3 History of competition law

3.1 revolution in Europe in 18th century (the enlightenment period)

The idée of free trade (against the guild in the various jobs as butchers, bakers,...) related to individual freedom for any person

3.2 American competition law end of 19th century

Sherman Act 1890 ; section 1 which prohibits every contract or conspiracy in restraint of trade between the states or with foreign countries ; section 2 every person who shall monopolize or try to monopolize any part of the trade shall be guilty

Clayton Act 1914 prohibits some behaviours in relation to prices, exclusivity and mergers

3.3 Some provisions in national laws of European countries in the middle of 20th century

Example in France Ordonance 1st December 1986 and now articles L 410-1 to L 470-8 of the code de commerce

3.4 Clear expansion of competition law with the creation of Europe

a) competition law is basic in EEC

- goal or means ?
- main principle as free movement

b) influence of EEC competition law

- influence on the national laws of the Member States

- influence through the agreements between EEC and third countries

4 Functions of competition law in the EEC

4.1 Classical functions

to enhance efficiency in order to maximize consumer welfare

to achieve the optimal allocation of resources

to protect consumers and to protect smaller firms against economic power in form of monopolistic dominance by an undertaking or by the coordination of several undertakings

4.2 Specific function

creation of the single market : to prevent the undertakings to partition the market along national lines

Example : exclusivity of control on a national market

4.3 3 periods in European competition policy

- competition rules of the Treaty as private counterpart to rules in relation to free movements to prohibit the states obstacles to free movement

- competition policy with the block exemption agreements as a way to establish the accepted agreements and prohibited agreements, as a way to establish an industrial policy ; merger control is added to competition policy in 1991

- creation of the market is no more the exclusive aim of competition policy ; other aims of article 2 are taken into account but case by case.

5 Sources of EEC competition law

5.1 Treaty provisions

European Coal and Steel Community Treaty signed in 1951 (expiration in 2001)

Rome Treaty

5.2 Other instruments

a) regulations

b) directives

c) decisions of the Commission

d) judgements of the Tribunal and the Court

e) notices, communications, guidelines,

6 Scope of EEC competition law

6.1 In relation to space

Restriction to competition within the territory of the EU : territory principle

Criteria : place of the effect

Whatever the nationality of undertakings

Whatever the place where the agreement was made

Examples :

6.2 In relation to matter

Any sector but some specific rules for agriculture and transportation

The criteria has to be an economic activity

(even sport)

6.3 In relation to persons

Undertakings and states

Public or private undertaking

State and any body of the state

7 Conflict of laws and jurisdictions

6.1 The conflicts in EEC

a) elements in conflict

Law : national law and EEC law

Judges : national judges, European Court of Justice

Authorities : national authorities of competition law and Commission

b) conflict of laws

- EEC law only applicable in case of an effect on trade between the member States

- merger , state aids : EEC law exclusively applicable

- cartel and abuse of dominant position : primacy of European law so that national law cannot be different

c) conflict of authorities

network between national authorities and Commission for the implementation of article 81 and 82

jurisdiction based on conveniens

exclusive jurisdiction of commission unless exception for merger and states' aids

d) conflict of judges

- European Court of Justice has jurisdiction only in case of preliminary ruling or in case of an appeal on a decision of the Commission

- National judges are the judges of EEC law : they apply national competition law and EEC competition law in parallel
Between the national judges not really a network to discuss the jurisdiction

7.2 The conflicts within the world

- example of merger with effects in various countries
- solutions : one law ? one court ? harmonization of the laws ? cooperation between the judges and national authorities ?

8 Main concepts in EEC competition law

8.1 Undertaking

The Eec has taken a broad view on undertaking. The term is not confined to those entities which possess legal personality.

The criteria is the entity engaged in economic activity and acting independently

a) economic activity

- economic activity

CJE Höfner : economic activity regardless of its legal status and the way it is financed : corporation, partnership, trade association, liberal professions, state-owned undertakings, cooperatives

- limit of the public law power

- limit of the social activity

b) an entity acting independently

- even legally distinct firms having a close economic link have to be treated as a single unit : the criteria is the autonomy of the unit or the existence of a unit which merely carries out the instructions of a parent

- case for agreements made between parent and subsidiary : the agreement is regarded as an internal allocation of functions

- an employee is not an undertaking

- an agreement between a firm and an agent is not an agreement between undertakings

c) changing the legal form of the entity

the changing does not allow the new legal entity to , escape liability for acts done by its predecessor if there is a functional and economic continuity between the original undertaking and that into which it has merged

8.2 Market

case 27/76 United Brands Company and United Brands Continenta BV points 22 to 35

case 322/81 Nederlandsche Banden Industrie Michelin NV v Commission

case 27/76 United Brands Company and United Brands Continenta BV points 44 to 53

commission notice on market definition

- The existence of a market power is the abstract has always to be in the context of the supply of particular goods and services. Dominance can only be assessed in relation to 3 essential variables : product market, geographical market, temporal market
- The commission notice on the definition of the relevant market for the purpose of community competition law

a) function of the market : observation of the market power of the undertakings

See the commission notice

- part of the definition of the dominant position for art 82
- threshold for the determination of automatic exemption for art 81, for the determination of non application of article 81 in case of de minimis case
- element in the analysis of the compatibility of the merger in case of creation or reinforcement of dominant position : the analysis is prospective

b) product market

Criteria of interchangeability of the product with other product : if it is interchangeable, the other products will be added within the market.

The analysis is addressed by looking at both the demand and supply sides of the market

- from the demand side the criteria requires investigations on cross-elasticity of the product through the criteria of increase of price and characteristics : if an increase of price leads to turn to other products the cross-elasticity is high (SSNIP test originally developed in USA)

. United Brands : the taste softness, seedlessness of banana by contrast with other fruits in United Brands case

. Michelin :

Elements taken into account : the Court held the criteria of characteristics of goods, competitive conditions, structure of supply and demand but the Commission in its notice emphasized the criteria of increase of price
new original tyre equipment does not belong to the same market because of the structure of the demand which is different

car and van tires on one hand and heavy vehicles tires on the other hand are not interchangeable from the consumer point of view and from the supplier point of view

- from the supply side, the question is whether an undertaking may relatively easily adapt its machinery to manufacture goods produced by a competitor

The narrower the definition, the easier it is to conclude that an undertaking has a market power

Hugin case : the market is spare parts for Hugin machines needed by independent repairers and not the cash registers (caisse enregistreuse)

c) geographical market

- The issue is whether the goods and services can be supplied without differentiation on the same area which constitutes the geographical market. Technical and practical reasons have to be considered as transport costs, particular trading conditions

- The criteria is the homogeneity of the areas

- The relevant geographical market may be wide (the internal market in EEC, a member state) or narrow

II CARTELS

The structure of article 81

- principle of prohibition
- legal consequences of prohibition
- exemption
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1 Principle of prohibition

Document : art 81

4 conditions have to be met :

1.1 Agreement, decisions and concerted practices

Choice for non legal terms

Choice for catching all practices even if not a formal agreement as gentlemen's , agreement (the Quinine case 41, 4, 54/69 ACF Chemiefarma NV v. Commission)

a) agreement

- choice for no legal definition to avoid the issues on legal qualification even gentlemen's agreement (see Quinine case)
- criteria : concurrence of will as distinct from unilateral measures
- it could be a general agreement covering the whole period, event if the participation of the undertakings is different : it would be artificial to split up
- it could be in case of long period and a complex operation an agreement and/or concerted practice and the commission does not have to prove the existence of an agreement and of concerted practices throughout the whole period of the cartel (ECJ ANIC case 49/92 P

- even oral, even without sanction in case of breach, even if not legally binding a continuous conduct into a number of separate infringements

b)decision of association

c)concerted practices

Case 48/69 ICI v. Commission points 64 to 113

- definition : "form of coordination between undertakings which, without having reach the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition
- case of collusion without any written agreement because the parties were astute enough not to write anything

- conditions to be met : burden on the Commission in case of parallel behaviour and the parties may explain that there is another reason for the parallel behaviour
- problem of making the difference between such an oral collusion and parallel pricing due to the market (parallel prices is normal in case of oligopoly , namely few sellers, barriers to entry, little product differentiation so that there is a kind of interdependency between the undertakings)

1.2 Plurality of undertakings

- necessity of plurality
- horizontal or vertical agreement

1.3 The object or effect , of preventing, restricting or distorting competition within EEC market

- examples of restrictions : fix prices (purchase or selling), limit or control of production, share market, share sources of supply, dissimilar conditions, supplementary obligations without connection with the subject of contracts.
- object or effect : the intention of the parties does not have any importance
- effect in the EEC territory : whatever the nationality of the undertakings, whatever the place of agreement
- de minimis doctrine

Commission notice on Agreements of minor importance

An agreement is not caught under article 81 if it does not have appreciable impact on competition ; the criteria used is the market share and the threshold of the market share is different whether it is an agreement between competitors (10%) not competitors (15%) ; the benefit of the notice is excluded in case of

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1.4 The effect on trade between the member states

Commission notice on effect on trade between member states

If the condition is not met, the matter is only under national competition law.

The condition has been broadly interpreted : it has to be proven that the effect is not only direct but also indirect, actual but also potential
The fact that the agreement is made between parties established in the same member state does not mean anything and it may increase the compartmentalization of the Community along national lines

2 Exemption

Commission notice on article 81 par 3

If an agreement meets the conditions of article 81 par 1 , it can gain exemption under article 81 par 3

2.1 Conditions for exemptions

4 conditions have to be met :

- improvement of production, distribution, progress
- benefit for the consumers
- proportionality test : the restraint is necessary to achieve the improvement and the restraint is indispensable to the objective
- no elimination of competition

The four conditions are explained in the notice

2.2 Individual exemptions

Before 1st of may 2004, the commission hold the sole power to grant exemption. Since this date national courts and authorities got the power to grant exemption by considering the 4 conditions.

2.3 Block exemptions

- function : the block exemption regulations made by the commission under delegation from the Council exclude a generic type of agreement from the prohibition of article 81 par 1, without the individual analysis of the individual exemption

the technique is similar to the per se rule except that it leads to the authorization

the block exemption also does guidance to undertakings and lawyers

- structure of the block exemption : definitions, core of regulation (type of agreements covered), economic threshold, hardcore restrictions having effect on the agreement, hardcore restrictions having effect on the sole clause, withdrawal of exemption

- various block exemption regulations specialization, research and development in common, vertical restraints, technology transfer,

-vertical restraints

regulation 2790/99 on vertical restraints

. definition : agreement between parties at different levels of production

. evolution : from many block exemption regulations (exclusive distribution and exclusive purchase, franchising, nothing for selective distribution) to a single one in relation to distribution (except the case of car distribution)

. economic debate : different views on the effect of vertical agreement, for some people, they are not harmful at all because the supplier will select the most efficient way, or may bring anticompetitive effect, (particularly market foreclosure, harm to consumer through resale price maintenance, mask for cartels between suppliers or distributors, barriers within the EEC market) or exclusively in case of important market share

. various organizations :

exclusive distribution : the producer agrees to supply only to a distributor on a specific territory ; it might be added that the distributors are

prevented to sell into the other territories through contract terms, a trademark

selective distribution : the supplier chooses to distribute the goods only through certain selected distributors who fulfil certain criteria concerning expertise (case 26/76 Metro : if the conditions elaborated are fulfilled, the agreement is held not to be within article 81 par 1 under certain conditions : the product justifies such a choice, qualitative criteria, no discrimination in the application of the conditions

franchising : the franchisor allows the franchisee to use certain intellectual property rights (trademarks, logo), gives assistance and commercial know how in counterpart of the payment of royalties

exclusive purchase : one party agrees to buy all it needs for a particular product from the supplier (for instance petrol stations and public houses for beer

. the new blocj exemption regulation

- Transfer of technology agreements

regulation 772/2004 on transfer of technology agreements

3 Rule of reason in article 81 ?

- the debate on the hardcore restrictions rule of reason and the per se rules : the problem is that in any agreement there are pro and anti competition effects. In the US, the problem was how to interpret the Sherman act which prohibit any restraint. One of the responses was the ancillary restraints (ancillary restraints are not prohibited), another response was the rule of reason (in Standard Oil case the Court stated that a standard of reason has to be applied and that only undue and unreasonable restraints should be condemned : it has to be analyzed whether the restraints increase or decrease competition as a whole, in that respect the pro and anti competitive effects . There are however debates about the criteria to be taken into account, only economic or not, about the effect of some particular agreements.

In order to gain time, the court held that certain types of agreement are presumed to have anti-competitive effects so that there is no need to further inquiry : this is the per se rule (example : horizontal price fixing, market division).

In EEC the debate on the rule of reason is different : is article 81 par 3 a kind of rule of reason ? could it be a rule of reason on article 81 par 1 ? The ECJ however refused the idea of a rule of reason in EEC law because of the difference of the mechanism. It is clear however that the court looks under article 81 par 1 for the pro and anti-competitive effects (case 161/84 Pronuptia about franchising agreement ; case 258/78 Nungesser about total territorial protection which distinguishes the open exclusive licence and the exclusive licence).

III Abuse of dominant position

Art 82

2 cumulative conditions have to be met : dominant position, abuse, effect on the trade

no exemption as in article 81 (different to French competition law) as classical monopolistic behaviour is felt inexcusable ; there is however the concept of objective justification and proportionality in the application of article 82 which provides some flexibility (example in case of refusal to supply)

1 Dominant position

1.1 definition :

article 82 does not provide any definition which was given by the ECJ. In order to conclude about a dominant position it is necessary to define the relevant market as there is no dominant position in the abstract. The United Brand case provides a definition :

“the dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, suppliers and, ultimately of its customers”.

In the Hoffmann-Laroche case (case 85/76), it added that without being necessarily a monopoly, it is an economic power which enables to have an appreciable influence on the conditions under which that competition will develop and in any case to act largely in disregard of it.

1.2 the criteria's used :

. market share as a first criteria (in United Brand case 40 t 45 % was held to be sufficient but there were other criterias ; in Akzo case the ECJ held that 50% could be said sufficient (case C-62/86)

. other criteria's used so that even in case of a low market share, it could be of dominant position (Hoffmann -Laroche case, United Brand) on the basis of the existence of barriers to entry (many controversies in relation to interpretation of the condition, whether broad or narrow)

position of the undertaking , absence of competitors, position of the next largest undertakings

highly developed sales network,

capital strength ,

technological lead of an undertaking over its competitors,

vertical integration,

superior technology (debate on this criteria)

economies of scale : increase of efficiency of the undertaking due to the increase of its dimension

legal provisions within a Member state which renders it more difficult for other firms to enter the market (intellectual property for example)

conduct of the undertaking even if this criteria is already part of the analysis on abuse (price discrimination) (Michelin case 322/81)

1.3 joint dominance or collective dominant position

cases T-68,77,78/89 Re Italian Flat Glass : Societa Italiana Vetro v. Commission

cases C-395,396/96P Compagnie Maritime Belge transports SA, Compagnie Maritime Belge SA and Dafa Lines A/S v/ Commission

The dominance may be held by 2 or more undertakings

The problem is in case of monopoly when undertakings acting independently act in a parallel manner

Definition in the Compagnie maritime belge Transport case (C-395, 396/96P)

: the undertakings have to be economically linked in such a way that they adopt the same conduct on the market and may act independently

The fact that there is an agreement, decision or concerted practice is not sufficient but its implementation may be the basis if it allows the undertakings to present themselves as a collective entity vis a vis their competitors, trading partners and consumers

The link is not necessary a legal one through agreements, it may derive from an economic assessment and in particular on an assessment of the structure of the market

In Gencor case (case T-102/96) related to mergers the Tribunal held again that a structural link is not necessary for collective dominance : kind of tacit coordination

1.4 Special responsibility for the undertaking

No offence in itself but a risk of breach of competition law

Discrimination between the undertakings

2 Abuse

2.1 General principles

-Dominance per se is not an offence

- Injury to the competitor or the consumer : some authors make a distinction between exploitation which injures the consumer and anti-competitiveness which injures the competitors but the same behaviour may be exploitative and anti-competitive

Abuse of a dominant position in one market may have effects on a different market when the dominant undertaking controls access to another market : in Aéroport de Paris, the Aeroport controls access to the

supply of catering services and abused its dominant position by discriminatory pricing (case 128/98).

2.2 Examples of abuse

see article 82

2.1 abuse and refusal to supply

2.1.1 General meaning

cases 6 and 7/73 ICI and commercial Solvents

case when the refusal to supply is based on the desire by the dominant firm to integrate vertically into the finished product ; case harmful for competitors but not for consumers

2.1.2 The essential facilities doctrine

case T-69, 70, 76/89 RTE, ITP, BBC v. Commission

case C-7/97 Oscar Bronner GmbH CO v. Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co.KG

General meaning : The owner of a facility which is not replicable and if competition on the market is not possible without access to the facility has to share it even with competitor

London European Airways/Sabena Decision 88/589 : an airline cannot refuse to allow access to its computer reservation system without a tie-in (lien)

Sealink case : Sealink was both the owner of a port and also operated a service of ferries to Ireland but organized the sailing schedule from the port in a way most inconvenient for the rival companies

RTE : RTE refusal to supply information on its programs by reserving the exclusive right to publish its own weekly program listings for its channel in Ireland and prevented Magill, an Irish company, to publish a new TV program which would have an information on all available channels

Ladbroke : the supply of TV broadcasts concerning horseracing is not essential for the business of running betting shops

Oscar Bronner : a product or a service could not be held necessary or essential unless there was no real or potential substitute for it

2.2 abuse and price discrimination

case 85/76 Hoffmann-LaRoche & Co AG V. Commission

There is price discrimination when goods or services are sold or purchased at prices which are not related to differences of costs but are a way to tie customers and to limit the access to the market

Injury to competitor but also to purchaser

In EEC price discrimination through national lines are seen with great hostility

Loyalty rebates are usually condemned

2.3 abuse and predatory pricing

case C-62/86 AkzoChemie BV v. Commission

The dominant firm seeks to protect its dominance by dropping its prices below a certain level in order to prevent the entrance of a competitor

2.4 Selective pricing

Case Compagnie maritime belge de transport

Undertaking cutting its pricing in order to match those of a competitor by a conference having only one competitor so that the objective was to eliminate the competitor

2.4 abuse and mergers

case 6/72 Europemballage Corp. and Continental Canv/ Commission

- use of article 82 on a teleological approach : use of article 82 to avoid the gap made by the lack of merger control
- structural abuse (action which weakens the competitive market structure which the primary injury is made to competitors and not to customers) and not only abuse by behaviour

IV Enforcement and procedure (cartels and abuse of dominant position)

Regulation 1/2003

1 The new organization

1.1 Principles before 1st of May 2004

- Part Decentralization in the implementation of article 81 and 82 but the commission had the monopoly of the application of article 81 par 3
- Ex ante regime : no exemption without any decision

1.2 Principles after 1st May 2004

- Complete decentralization (art 5 and 6) : National authorities and judges are entitled to implement art 81 and 82

- Ex post regime (art 1) :

if condition to art 81 par 1 , (and not to art 81 par 3) the behaviour is prohibited

if conditions to 82 are met, the behaviour is prohibited without any decision ;

if conditions of art 81 par 3 are met , the behaviour is allowed without any decision

The burden of the proof (art 3) : it is on the party which alleges the infringement of art 81 par 1 or 82, or which claims the benefit of art 81 par 3

2 Enforcement by the commission

2.1 Various decisions

- finding and termination of infringement (art 7)
- interim measures (art 8)
- Commitments (art 9)
- Finding of inapplicability (art 10)

2.2 Powers of investigation

- investigation into sectors (art 17)
- request for information (art 18), or take statements (art 19)
- power of inspection of undertaking (art 20) or of other premises , including homes (art 21)

2.3 Power to impose fines (art 23) or periodic penalty payment (art 24)

Fines of 1% (art 23 par 1) or 10% (art 23 par 2)

Way to determine the fine : gravity and duration (art 23 par 3)

Limitation periods for imposing penalties (art 25) and for enforcing penalties (art 26)

2.4 regime of hearing, complaints and the fundamental rights (art 27)

- professional secrecy art 28)

3 Enforcement by national bodies

3.1 By the national authorities

3.1.1 General principles

art 5 :

- they may act on their initiative or on a complaint
- power : requirement that an infringement be brought to an end, interim sentence, accepting commitments, imposing fines or other penalty under national law, decisions that there is no ground for an action
- national rules apply as far as proceedings are concerned

3.1.2 General organization : cooperation with the Commission

Commission notice on the network

Vertical relations : Art 11 to 12

- the Commission transfers documents to authorities (art 11 par 2)
- the authorities inform the commission when acting on a case and before the decision (art 11 par 3 and 4)
- the authorities may consult the Commission (art 11 par 5)
- suspension of a case when an initiation by the Commission of proceedings for the adoption of a decision (art 11 par 6)
- exchange of information (art 12)
- obligation to follow the decisions made by the commission (art 16 par 2)

Horizontal relations (art 13)

- suspension or termination if the case is dealt with by a national authority

3.1.3 Power to investigate on its own territory (art 22)

3.2 By the national judges

National rules apply as far as proceedings are concerned

3.2.1 Cooperation with the Commission (art 15)

- National judge may ask the Commission for information or opinions in general (art 15 par 1)
- member State have to send any judgement made by national judges to the Commission (art 15 par 2)
- Commission may submit observations to the courts (art 15 par 3 last sentence) and ask for document in that respect (art 15 par 3 point 2)

Cooperation with national authorities

(art 15 par 3 point 1 first sentence) : National authorities may submit observations to the national courts (art 15 par 3 point 2)

art 15 par 4 other power may be given to national authorities under national law

- Obligation to follow the Commission decisions (art 16 par 1 :
 - no conflict with previous decision
- in case of decision contemplated by the Commission, it may use the preliminary ruling or assess the opportunity of staying its proceedings
Commission notice on

3.2.2 Cooperation with other national authorities

- the question of jurisdiction is debated within the network (see below)
- exchange of documents (art 12 par 1)

4 Conflict of laws, conflict of authorities

4.1 Conflict of laws : art 3

Application of EEC law if effect on the trade between the member states
No possibility for a member state to prohibit a behaviour not prohibited under EEC law in relation to cartels

Possibility for the Member state to adopt a stricter national law in relation to unilateral conduct, or to adopt a national law having a different objective than art 81 and 82.

4.2 Conflict of authorities

They are solved within the network

See Notice on cooperation within the Network points 5 to 9 :

Jurisdiction or an authority is based on the forum conveniens doctrine :
there is a conveniens forum if the behaviour has effect within the territory or is implemented within or originated from the territory

The authority is able to effectively bring an end

The authority can gather the evidence

V Mergers

Regulation 139/2004

1 The reasons for merger control

2 Definition of the EEC merger

- concentration

- community dimension

3 Obligation to notify

4 Test of compatibility

5 Procedure

6 Community and national control

7 Joint ventures

VI The states and competition policy

1 Public undertakings

article 86

Case C-179/90 Merzi Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA

2 States and cartels and abuse of dominant position (articles 10, 81;82, 28)

3 States aids

Reasons for the prohibition

article 87

3.1 Importance of the power of the Commission

to implement art 87 case by case

to establish a policy through formal legislation under delgated power.

(substantive regulations exempting types of state aids from the requirement of notification and establishg the compatibility : small and medium sized enterprises, deminimis aid , training aid ; regulation in relation to procedure)

to use unformal legislation through guidelines under article 87 par 3 and the problem of crossing the Council regulation under art 89

3.2 Principle of prohibition

article 87 par 1

Field : public and private undertakings

Criteria given by the ECJ:

3.2.1 substance rather than form :

- various forms :direct subsidies, tax exemptions, exemption from parafiscal charges, preferential interest rates,, favourable loans guarantees,, free provision of land or builing on special terms, indemnities against losses , preferenatiol terms for public ordering, deferment of the collection of fiscal or social contributions, guarantees,
- even the taking of shares in a company by the state but only in case it would not be the normal reaction of an investor whose first investment was at risk ; it has to be seen wether the undertaking could have obtained the amounts on the capital market : would a private investor be induced under normal economy conditions to enter into the financial transaction ?
- positive benefit but also actions which mitigate the charges (reduction of charges or contributions)
- a difference has to be made between general measures of economic policy and state aid even if the dividing line is not clear.

3.2.2 granted by a member state or through member state resources,

- from regional or central government
- even from a public or private body established by the state (gas provided by Gasunie at a preferential price is aid because by fixing prices the private company partly held by the government has to take into account the requirement of the public body, case 67, 68 and 70/85 *Kwerkerij Gebroeders Van der Kooy BV v. Commission*)

3.2.3 distortion or competition

case C-142/87 Re Tubemeus: : Belgium v. Commission

distortion or threat to distortion of competition by favoring certain undertakings or the production of certain goods

the fact that the cost in that sector are higher is no defence for the state

3.2.4 effect on inter-state trade

the trade is affected or may be affected

3.3 Exceptions

2 types : aids that will be deemed to be compatible with the common market (art 87 par 2) and aids that will be deemed to be compatible with the common market

3.3.1 Automatic exceptions art 87 par 2

3 types of aids

- aid having social character granted to individual consumers provided there is no discrimination as to the origin of the goods
- aid to good damage caused by natural disasters or exceptional occurrences (problem of the concept of exceptional occurrences)
- aid for Germany resulting from the division of the country

3.3.2 particular categories under discretionary power

art 87 par 3

case 323/82 Intermills SA v. Commission

- regional development (87 par 3 a) and c) : the average development has to be made by comparison with the average in Europe and not in the Member state
- execution of an important project of European interest (common standard for high definition television) or to remedy a serious disturbance in the economy of a member state (87 par 3 b)
- aid to promote culture and heritage conservation (art 87 par 3 d)
- other categories specified the decision of Council acting by a qualified majority on a proposal from the Commission (art 87 par 3 e)

3.4 procedure (art 88 and 89 and regulation 659/99)

art 88 and 89

regulation 659/99

3.4.1 Review of existing state aids

- existing aids : existing before the entry into force of the Treaty, aids to which the commission has given green light under art 87 par 3, aid notified to the commission under art 88 but for which the Commission has taken no action within the requisite time period, aid not recoverable because of expiration of period, aid which previously did not constitute an aid
- the commission proposes the appropriate measures

3.4.2 New state aids

- 2 stages procedure : notification by the member state to the Commission and if it thinks, within a 2 months period, that there is a doubt, it initiates the procedure and the measure is suspended till the decision of the Commission
 - the 2 months preliminary review (art 88 par 3) allows the Commission to approve the aid or to decide to initiate the procedure and at this stage to consult other parties (art 88 par 2)
 - the second stage apply to existing aids as per art 88 par 1 and non existing aids : in case of no compatibility , the existing aid will be unlawfull from the date set for compliance with the decision, if it is a new aid the prohibition is permanent
- decision of the Commission at the end of the second stage
- decision of Commission may be challenged before the Court by the states, the undertaking (beneficiary or competitors) within 2 months

3.4.3 Consequence of failure to notify

- before the commission : the aid is not per se unlawful but the Commission has the power to issue an interim decision requiring the state to suspend
- before the national court : even it has not the power to evaluate the aid, it has the power to say that the aid was illegal

3.4.4 Recovery of unlawful aid

The ECJ held that illegal aid should be repaid except when recovery is absolutely impossible (winding up) and obligation for the state to enter into a serious dialogue with the Commission

The concept of legitimate expectation does not work to avoid repayment

3.4.5 Aid and other provisions of the Treaty

article 90, taxation

article 28, restriction to freedom : same object but no way to use a social balance of art 87 par 3 if restriction to freedom predominates
article 16 public services of general economic interest

Documents

- articles 1CE to 4 CE
- articles 28 CE to 31CE
- article 81CE to 89CE
- COMMISSION REGULATION (EC) No 2790/1999
of 22 December 1999
on the application of Article 81(3) of the Treaty to categories of vertical
agreements and concerted practices

PRINCIPLES*Article 1*

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN COMMUNITY.

Article 2

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Article 3

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

- (a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- (b) a common commercial policy;
- (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
- (d) measures concerning the entry and movement of persons as provided for in Title IV;
- (e) a common policy in the sphere of agriculture and fisheries;
- (f) a common policy in the sphere of transport;
- (g) a system ensuring that competition in the internal market is not distorted;
- (h) the approximation of the laws of Member States to the extent required for

- the functioning of the common market;
- (i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;
 - (j) a policy in the social sphere comprising a European Social Fund;
 - (k) the strengthening of economic and social cohesion;
 - (l) a policy in the sphere of the environment;
 - (m) the strengthening of the competitiveness of Community industry;
 - (n) the promotion of research and technological development;
 - (o) encouragement for the establishment and development of trans-European networks;
 - (p) a contribution to the attainment of a high level of health protection;
 - (q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
 - (r) a policy in the sphere of development cooperation;
 - (s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
 - (t) a contribution to the strengthening of consumer protection;
 - (u) measures in the spheres of energy, civil protection and tourism.

2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

<i>Article 4</i>

1. For the purposes set out in Article 2, the activities of the Member States and the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in this Treaty and in accordance with the timetable and the procedures set out therein, these activities shall include the irrevocable fixing of exchange rates leading to the introduction of a single currency, the ecu, and the definition and conduct of a single monetary

policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Community, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Community shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

Articles 28 to 31 CE**PROHIBITION OF QUANTITATIVE RESTRICTIONS BETWEEN
MEMBER STATES***Article 28*

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 29

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 30

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 31

1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in

this article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

Article 81CE to 89 CE

TITLE VI

**COMMON RULES ON COMPETITION, TAXATION AND
APPROXIMATION OF LAWS***CHAPTER 1*

RULES ON COMPETITION

SECTION 1

RULES APPLYING TO UNDERTAKINGS*Article 81*

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

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

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

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

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

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

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

<i>Article 82</i>

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

Such abuse may, in particular, consist in:

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

<i>Article 83</i>

1. The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

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

- (a) to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments;
- (b) to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

- (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 81 and 82;
- (d) to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph;
- (e) to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this article.

Article 84

Until the entry into force of the provisions adopted in pursuance of Article 83, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3, and of Article 82.

Article 85

1. Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.
2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

Article 86

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The

development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

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

SECTION 2

AIDS GRANTED BY STATES

Article 87

1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

2. The following shall be compatible with the common market:

- (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the common market:

- (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not

affect trading conditions and competition in the Community to an extent that is contrary to the common interest;

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

Article 88

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 226 and 227, refer the matter to the Court of Justice direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

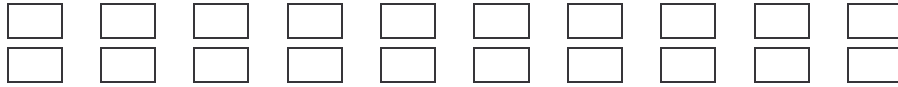
3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

Article 89

The Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 87 and 88 and may in particular determine the conditions in which Article 88(3) shall apply and the categories of aid exempted from this procedure.

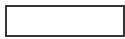
Commission Regulation (EC) No 2790/1999

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Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Text with EEA relevance)
Official Journal L 336 , 29/12/1999 P. 0021 - 0025



COMMISSION REGULATION (EC) No 2790/1999
of 22 December 1999
on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices
(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,
Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices(1), as last amended by Regulation (EC) No 1215/1999(2), and in particular Article 1 thereof,
Having published a draft of this Regulation(3),
Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,
Whereas:

- (1) Regulation No 19/65/EEC empowers the Commission to apply Article 81(3) of the Treaty (formerly Article 85(3)) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 81(1).
- (2) Experience acquired to date makes it possible to define a category of vertical agreements which can be regarded as normally satisfying the conditions laid down in Article 81(3).
- (3) This category includes vertical agreements for the purchase or sale of goods or services where these agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods; it also includes vertical agreements

containing ancillary provisions on the assignment or use of intellectual property rights; for the purposes of this Regulation, the term "vertical agreements" includes the corresponding concerted practices.

(4) For the application of Article 81(3) by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 81(1); in the individual assessment of agreements under Article 81(1), account has to be taken of several factors, and in particular the market structure on the supply and purchase side.

(5) The benefit of the block exemption should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).

(6) Vertical agreements of the category defined in this Regulation can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings; in particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.

(7) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by the buyer as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended use.

(8) It can be presumed that, where the share of the relevant market accounted for by the supplier does not exceed 30 %, vertical agreements which do not contain certain types of severely anti-competitive restraints generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits; in the case of vertical agreements containing exclusive supply obligations, it is the market share of the buyer which is relevant in determining the overall effects of such vertical agreements on the market.

(9) Above the market share threshold of 30 %, there can be no presumption that vertical agreements falling within the scope of Article 81(1) will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition.

(10) This Regulation should not exempt vertical agreements containing restrictions which are not indispensable to the attainment of the positive effects mentioned above; in particular, vertical agreements containing certain types of severely anti-competitive restraints such as minimum and fixed resale-prices, as well as certain types of territorial protection,

should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.

(11) In order to ensure access to or to prevent collusion on the relevant market, certain conditions are to be attached to the block exemption; to this end, the exemption of non-compete obligations should be limited to obligations which do not exceed a definite duration; for the same reasons, any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers should be excluded from the benefit of this Regulation.

(12) The market-share limitation, the non-exemption of certain vertical agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.

(13) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3), the Commission may withdraw the benefit of the block exemption; this may occur in particular where the buyer has significant market power in the relevant market in which it resells the goods or provides the services or where parallel networks of vertical agreements have similar effects which significantly restrict access to a relevant market or competition therein; such cumulative effects may for example arise in the case of selective distribution or non-compete obligations.

(14) Regulation No 19/65/EEC empowers the competent authorities of Member States to withdraw the benefit of the block exemption in respect of vertical agreements having effects incompatible with the conditions laid down in Article 81(3), where such effects are felt in their respective territory, or in a part thereof, and where such territory has the characteristics of a distinct geographic market; Member States should ensure that the exercise of this power of withdrawal does not prejudice the uniform application throughout the common market of the Community competition rules or the full effect of the measures adopted in implementation of those rules.

(15) In order to strengthen supervision of parallel networks of vertical agreements which have similar restrictive effects and which cover more than 50 % of a given market, the Commission may declare this Regulation inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 81 to such agreements.

(16) This Regulation is without prejudice to the application of Article 82.

(17) In accordance with the principle of the primacy of Community law, no measure taken pursuant to national laws on competition should prejudice the uniform application throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including this Regulation,
HAS ADOPTED THIS REGULATION:

Article 1

For the purposes of this Regulation:

- (a) "competing undertakings" means actual or potential suppliers in the same product market; the product market includes goods or services which are regarded by the buyer as interchangeable with or substitutable for the contract goods or services, by reason of the products' characteristics, their prices and their intended use;
- (b) "non-compete obligation" means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year;
- (c) "exclusive supply obligation" means any direct or indirect obligation causing the supplier to sell the goods or services specified in the agreement only to one buyer inside the Community for the purposes of a specific use or for resale;
- (d) "Selective distribution system" means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors;
- (e) "intellectual property rights" includes industrial property rights, copyright and neighbouring rights;
- (f) "know-how" means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, "secret" means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; "substantial" means that the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract goods or services; "identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

(g) "buyer" includes an undertaking which, under an agreement falling within Article 81(1) of the Treaty, sells goods or services on behalf of another undertaking.

Article 2

1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) shall not apply to agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services ("vertical agreements").

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 81(1) ("vertical restraints").

2. The exemption provided for in paragraph 1 shall apply to vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million; vertical agreements entered into by such associations shall be covered by this Regulation without prejudice to the application of Article 81 to horizontal agreements concluded between the members of the association or decisions adopted by the association.

3. The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object or effect as vertical restraints which are not exempted under this Regulation.

4. The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings; however, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:

(a) the buyer has a total annual turnover not exceeding EUR 100 million, or

(b) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the

contract goods, or

(c) the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services.

5. This Regulation shall not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation.

Article 3

1. Subject to paragraph 2 of this Article, the exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services.

2. In the case of vertical agreements containing exclusive supply obligations, the exemption provided for in Article 2 shall apply on condition that the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.

Article 4

The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except:
- the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
 - the restriction of sales to end users by a buyer operating at the wholesale level of trade,
 - the restriction of sales to unauthorised distributors by the members of a selective distribution system, and
 - the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- (c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade,

without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;

(d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;

(e) the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier to selling the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

Article 5

The exemption provided for in Article 2 shall not apply to any of the following obligations contained in vertical agreements:

(a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years. A non-compete obligation which is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration. However, the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer;

(b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services, unless such obligation:

- relates to goods or services which compete with the contract goods or services, and
- is limited to the premises and land from which the buyer has operated during the contract period, and
- is indispensable to protect know-how transferred by the supplier to the buyer,

and provided that the duration of such non-compete obligation is limited to a period of one year after termination of the agreement; this obligation is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain;

(c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

Article 6

The Commission may withdraw the benefit of this Regulation, pursuant

to Article 7(1) of Regulation No 19/65/EEC, where it finds in any particular case that vertical agreements to which this Regulation applies nevertheless have effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular where access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers.

Article 7

Where in any particular case vertical agreements to which the exemption provided for in Article 2 applies have effects incompatible with the conditions laid down in Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competent authority of that Member State may withdraw the benefit of application of this Regulation in respect of that territory, under the same conditions as provided in Article 6.

Article 8

1. Pursuant to Article 1 a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50 % of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.
2. A regulation pursuant to paragraph 1 shall not become applicable earlier than six months following its adoption.

Article 9

1. The market share of 30 % provided for in Article 3(1) shall be calculated on the basis of the market sales value of the contract goods or services and other goods or services sold by the supplier, which are regarded as interchangeable or substitutable by the buyer, by reason of the products' characteristics, their prices and their intended use; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned. For the purposes of Article 3(2), it is either the market purchase value or estimates thereof which shall be used to calculate the market share.
2. For the purposes of applying the market share, threshold provided for in Article 3 the following rules shall apply:
 - (a) the market share shall be calculated on the basis of data relating to the preceding calendar year;
 - (b) the market share shall include any goods or services supplied to

integrated distributors for the purposes of sale;

(c) if the market share is initially not more than 30 % but subsequently rises above that level without exceeding 35 %, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 30 % market share threshold was first exceeded;

(d) if the market share is initially not more than 30 % but subsequently rises above 35 %, the exemption provided for in Article 2 shall continue to apply for one calendar year following the year in which the level of 35 % was first exceeded;

(e) the benefit of points (c) and (d) may not be combined so as to exceed a period of two calendar years.

Article 10

1. For the purpose of calculating total annual turnover within the meaning of Article 2(2) and (4), the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.

2. The exemption provided for in Article 2 shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10 %.

Article 11

1. For the purposes of this Regulation, the terms "undertaking", "supplier" and "buyer" shall include their respective connected undertakings.

2. "Connected undertakings" are:

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

- has the power to exercise more than half the voting rights, or
- has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
- has the right to manage the undertaking's affairs;

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

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

(d) undertakings in which a party to the agreement together with one or

more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:

- parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
- one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

3. For the purposes of Article 3, the market share held by the undertakings referred to in paragraph 2(e) of this Article shall be apportioned equally to each undertaking having the rights or the powers listed in paragraph 2(a).

Article 12

1. The exemptions provided for in Commission Regulations (EEC) No 1983/83(4), (EEC) No 1984/83(5) and (EEC) No 4087/88(6) shall continue to apply until 31 May 2000.

2. The prohibition laid down in Article 81(1) of the EC Treaty shall not apply during the period from 1 June 2000 to 31 December 2001 in respect of agreements already in force on 31 May 2000 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulations (EEC) No 1983/83, (EEC) No 1984/83 or (EEC) No 4087/88.

Article 13

This Regulation shall enter into force on 1 January 2000.

It shall apply from 1 June 2000, except for Article 12(1) which shall apply from 1 January 2000.

This Regulation shall expire on 31 May 2010.

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

Done at Brussels, 22 December 1999.

For the Commission

Mario MONTI

Member of the Commission

(1) OJ 36, 6.3.1965, p. 533/65.

(2) OJ L 148, 15.6.1999, p. 1.

(3) OJ C 270, 24.9.1999, p. 7.

- (4) OJ L 173, 30.6.1983, p. 1.
- (5) OJ L 173, 30.6.1983, p. 5.
- (6) OJ L 359, 28.12.1988, p. 46.

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II CARTELS