II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 13 December 1974

relating to a proceeding under Article 85 of the EEC Treaty (IV/14.650 — Bayerische Motoren Werke AG)

(Only the German text is authentic)

(75/73/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof ;

Having regard to Council Regulation No 17 (1) of 6 February 1962, and in particular Articles 4 and 5 thereof ;

Having regard to the notification which the Bayerische Motoren Werke Aktiengesellschaft, Munich, submitted on 31 January 1963, pursuant to Regulation No 17, concerning the standard forms of contract in use for the sale of their products in Germany ;

Having regard to the publication of the essential content of that notification pursuant to Article 19 (3) of Regulation No 17, in *Official Journal of the European Communities* No C 98 of 16 November 1973 ;

Having regard to the Opinion delivered on 26 September 1974 by the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17 ;

Whereas :

I

1. The Bayerische Motoren Werke Aktiengesellschaft (BMW) had entered into distribution agreements with selected German wholesalers and main dealers who buy directly from BMW, which conform to the standard form of contract notified to the Commission. BMW had obliged such wholesalers and main dealers to base their agreements with BMW retail dealers on standard forms which BMW had also notified to the Commission. The purpose of these agreements was to promote sales of BMW motor vehicles and motor cycles, spare parts, accessories, and after-sales service in respect thereof, and to concentrate efforts in the fields of sales and after-sales service on the goods covered by the agreements, in the particular territory within Germany assigned under the agreements. Within such territories, dealers, whether wholesalers, main dealers or retail dealers, were given some protection against sales of BMW products by BMW or a third party. BMW dealers in Germany, as was the case with all BMW dealers in other countries, were prohibited from delivering new BMW vehicles to countries other than their own. On 3 March 1972, BMW was sent a statement of the Commission's objections in respect of this prohibition on exports within the common market and has no longer practised such a prohibition.

2. BMW is in the course of revising all its distribution agreements throughout the common market. In Germany revised distribution agreements for German BMW dealers came into force on 1 January 1973. At that time BMW introduced one standard form of agreement for main dealers and in turn required these main dealers to use a new standard form of agreement when appointing retail dealers (see clause 12 of the standard main dealer's agreement). These agreements are worded almost identically. Following the publication of the essential content of the notification on 16

(1) OJ No 13, 21. 2. 1962, p. 204/62.

November 1973 (1) pursuant to Article 19 (3) of Regulation No 17, observations on these standard agreements were submitted to the Commission (see 9 below). On the basis of these observations and the related intervention by the Commission, BMW made statements supplementing the notification with regard to the interpretation and application of certain clauses in the standard agreements and informed all BMW main dealers and retail dealers in Germany of the content of these statements by circular letter.

The following provisions containing obligations are to be found in the new agreements concluded with German dealers :

3. Each BMW dealer (main dealer or retail dealer) is to represent the interests of BMW within the territory assigned to him under his agreement, but conducts business under his own name, on his own account and at his own risk (see clauses 2 and 3.1, and the first sentence of clause 3.2 of the standard agreements ; save where otherwise stated, further references are references to the standard agreements).

Each dealer undertakes *vis-à-vis* the other party to the contract (the principal, i.e. BMW or a BMW main dealer) :

i. to endeavour, within the territory covered by the agreement, to sell at least such quantity of the goods covered by the agreement as is specified by BMW in agreement with the main dealer on the basis of an estimate of demand and sales potential in the territory and of after-service potential (annual sales targets — clauses 1, 3.1 and 6) ; and further to place his orders monthly and give an estimate of his requirements for the following months (clause 5.1) ;

ii. not to sell goods covered by the agreement to dealers not authorized by BMW, unless such sales are of genuine BMW parts for repair (second sentence of clause 1.1) ;

iii. not to operate branches or distribution depots or use intermediaries outside his own territory, nor to advertise or canvass in any other way, outside his territory, unless the principal obligation under the agreement is fulfilled, namely the diligent promotion of sales and after-sales service within his territory (clauses 1, 3.1 and 6) ; in any event he is free to advertise in publications having a circulation outside his territory and to sell goods covered by the agreement in territories outside his own (second sentence of clause 3.2) ;

iv. not without the consent of BMW, to sell, directly or indirectly, products of competing makes as specified below :

— new vehicles of another make ;

— spare parts, exchange parts and accessories of other makes to other dealers ;

— parts of other makes, which are not of the BMW standard of quality, to the customer for repair purposes ; this does not apply to parts which are of no particular importance for the safety of BMW vehicles ;

the consent of BMW may not be withheld if reasonable cause is shown, and in this respect the economic circumstances of the BMW dealer are to be taken into consideration ; and

not, without the consent of BMW, to become an agent in any way for any other motor vehicle manufacturer or to have any direct or indirect interest in such an agency ; such consent may not be withheld if reasonable cause is shown, and the grounds for the decision to withhold consent must be set out in writing and state the extent to which the attainment of the commercial objectives of BMW is hindered by the acceptance of another agency (clauses 3.6 and 13 (c) of the main dealer's agreement, 3.6 and 12 (c) of the retail dealer's agreement, and the BMW circular) ;

v. to follow instructions given by BMW regarding advertising and to discontinue immediately any advertising to which BMW objects ; in this respect BMW's authority extends only to advertising designed to draw attention to BMW products and their properties, but not to the advertising by BMW dealers of prices and conditions of sale (clause 3 (v) and the BMW circular) ;

vi. to obtain the consent of BMW before participating in exhibitions or fairs ; BMW may withhold its consent if such participation :

— were to jeopardize the success of BMW's participation in the exhibition or fair, or

— is in breach of obligations undertaken by BMW under the rules of the Bureau permanent international des constructeurs d'automobiles (B.P.I.C.A.) (clauses 6.3.2 and 13 (c) or 12 (e) and the BMW circular) ;

(1) OJ No 98, 16. 11. 1973, pp. 5 and 6.

vii. to operate a business the layout of whose premises, equipment and technical and commercial management satisfy BMW's requirements (clauses 9 to 11, 13 and 12 (a) (b) and (d) respectively; instructions relating to spare parts service under the BMW dealer's agreement and the after-sales service instructions under BMW agreements);

viii. to operate a service department and workshop in accordance with BMW's requirements, to employ properly qualified staff and to ensure that they receive further training as required (clauses 6.2 and 7.2 and the servicing instructions referred to in vii above);

ix. to provide after-sales service in accordance with the instructions laid down by BMW (clauses 1.2 and 7), including taking delivery of BMW vehicles from car delivery firms, storage and delivery to customers, servicing and maintenance, repair, modifications, work under guarantee and extended free service (clause 7.1; after-sales service instructions under BMW agreements); to carry out the free pre-delivery check on the supply of a new BMW vehicle to a customer (clause 3.3 of the after-sales service instructions);

x. to maintain a stock of goods sufficient to satisfy expected demand in the territory (clauses 6.1 and 7.1 and the after-sales service instructions);

xi. to grant, on sale to the customer, a guarantee in the terms of the guarantee granted by BMW (clauses 5.3, 5.3.1 and 5.3.2; clause 4 of the after-sales service instructions for BMW dealers); to carry out work under guarantee for the customer free of charge, whether or not the customer has purchased the BMW product from a different BMW dealer whether in Germany or abroad (clause 4.6 of the guarantee instructions for BMW dealers);

xii. to use BMW trade marks without additions or alterations and only in such manner as is justified by the method and scope of business (clause 6.4);

xiii. to supply BMW with any information required on his trading situation and sales trends, market situation, stocks and expected demand (second sentence of clause 8, clauses 8.1 and 8.2; after-sales service instructions for BMW dealers).

4. Every main dealer further undertakes *vis-à-vis* BMW:

i. not to conclude any standard agreements with BMW retail sellers or to modify or terminate existing agreements with BMW retail dealers without the consent of BMW (first sentence of clause 12 and second sentence of clause 12.3 of the main dealer's agreement);

ii. to conclude agreements at BMW's request with retail dealers selected by BMW (second sentence of clause 12) and to determine their field of activity (clause 12.1);

iii. to terminate at BMW's request any standard agreements concluded with appointed retail dealers (first sentence of clause 12.3);

iv. to ensure that appointed retail dealers keep adequate stocks and provide proper after-sales service (clause 12.2 (a) and (b));

v. to see that appointed retail dealers have the plant, equipment and staff required to cope with the volume of business (clause 12.2 (c)).

5. BMW undertakes *vis-à-vis* BMW main dealers and the latter *vis-à-vis* BMW retail dealers:

i. to deliver goods in accordance with the conditions of sale and delivery published by BMW and under the terms and conditions of delivery as regards the sales of parts (clause 5);

ii. to set up no branches and appoint no further dealers in the territory and not to change the territory without giving the BMW main dealer or retail dealer at least 60 days' notice and giving him the opportunity of commenting on the planned reorganization (clause 3.3).

6. BMW undertakes *vis-à-vis* BMW main dealers:

i. not to sell or deliver goods whether directly or indirectly to persons other than fleet operators, public authorities, racing drivers, foreign tourists, and staff of BMW or its subsidiaries (clause 3.4);

ii. to guarantee goods both towards main dealers and retail dealers in accordance with the conditions of sale and delivery (clause 5.3); to give effect to the guarantee by repairing or replacing defective parts (clause 6.2 of the conditions of sale and delivery) and to bear the reasonable costs of dismantling and fitting and the costs of the cheapest means of delivery (clause 6.3 of the conditions of sale and delivery); to reimburse BMW dealers for their expenditure on services provided under guarantee and extended free service, broken down into expenditure on labour, BMW replacement parts and goods and services supplied by third parties (clauses 4.7 to 4.9 of the guarantee instructions for BMW dealers).

7. The standard agreements are of five years' duration but may be terminated on six months' notice at any time by the party other than the principal; the principal (BMW or the main dealer) may terminate the agreements immediately, but only for a substantial breach; for less substantial breaches the agreements may be terminated on three months' notice, such notice to run from a date six months after a warning is given (clauses 14 to 17).

8. The rules governing selective distribution (clauses 3 (ii), (v) to (viii), 4 and 5 (ii) appear to have the following application in practice. BMW's qualitative requirements of BMW dealers for their selection and retention for the duration of the agreement are applied uniformly. Furthermore, in making the quantitative decision whether to increase the number of dealers in the German network or to conclude a new agreement to replace one that has expired, BMW will in each case need to consider whether turnover and service will be improved. Particular factors to be taken into account are whether the applicant has sufficient personnel and equipment to fulfil BMW's requirements as to sales promotion, and whether, having regard to sales expectations and the presence of existing BMW dealers, he can achieve the minimum income necessary to fulfil his obligations.

BMW further stated that its right under the agreement to obtain information from dealers (see 3 (xiii) above) would not be used to prevent goods being sold outside their territory.

9. After publication of the essential content of the notification pursuant to Article 19 (3) of Regulation No 17 (see 2 above), the Commission received observations from two national associations of wholesalers, from an international association of motor vehicle traders, from a national motoring association and from a BMW general importer. The observations may be summarized as follows :

Wholesale trade in spare parts and accessories is in competition with BMW, so that a restriction on dealing in competing products imposed on BMW dealers which was too extensive would limit excessively a wholesaler's selling outlets, to the disadvantage of both the consumer and the supplier of such a wholesaler. Moreover many suppliers, since they also supply vehicle manufacturers with original equipment and spare parts, are often in a position of considerable economic dependence. Dealers appointed by BMW should at least be allowed to deal in competing products through subsidiaries ; their obligation to supply BMW with information should not be too extensive ; advertising and participation in fairs or exhibitions should be a matter for cooperation between the two parties to the agreement, and not depend merely upon the wishes of BMW ; the discretion enjoyed by BMW in selecting BMW main dealers and retail dealers is too wide. As far as the sale of BMW products in other countries of the Community is concerned, many of the clauses cannot be enforced in the way that BMW applies them in Germany, this is particularly true of the prohibition on dealing in competing products.

10. Agreements affecting BMW dealers in the other countries of the common market outside Germany are not the subject of these proceedings. In some countries of the common market, in which BMW distributes its products through its own subsidiaries and not through independent importers, standard agreements similar to those in Germany are applied as far as market and regional conditions and national law permit.

II

11. The agreements notified to the Commission by BMW (which were applied until 1972) between BMW and German BMW-wholesalers and main dealers (who bought direct from BMW) and between the latter and appointed BMW retail dealers (see 1 and 2 above) were agreements falling within Article 85 (1) of the EEC Treaty. The prohibition contained in those agreements on the export of new BMW vehicles by BMW dealers to other Member States was one of the principal measures which had as its object and effect the restriction and distortion of competition within the common market, and was likely to affect trade between Member States.

12. The condition laid down in Article 85 (3) of the EEC Treaty, under which the provisions of Article 85 (1) may be declared inapplicable, were not satisfied in the case of these agreements. Because of the export prohibition, consumers were not guaranteed a fair share of the benefits which might otherwise result from exclusive dealing agreements, as the export prohibitions led to a form of territorial protection enabling different retail prices to be charged in the various countries of the common market. The export prohibitions were not indispensable to the improvement of distribution and protection of the goods. Such improvements are possible with less restrictive provisions.

III

The use by BMW of the new forms of both main dealer and retail dealer agreements (see 2 to 8 above) leads to agreements between undertakings, produces several forms of restriction and distortion of competition within the common market, and is likely to affect trade between Member States.

13. The obligations imposed on BMW dealers to operate a business of a certain scale (see 3 (vii) and (viii) above), to provide an after-sale service complying with instructions laid down by BMW (see 3 (ix) above), to maintain a certain stock of goods (see 3 (x) above) and to provide a guarantee on sale to a customer in the terms of the guarantee granted by BMW (see 3 (xi) above) specify objective criteria and constitute minimum requirements which BMW applies

uniformly to the selection of BMW main dealers and retail dealers in Germany. These criteria and requirements do not preclude the offer of more extensive services of greater advantage to the customer. They do, however, lead to the exclusion of those undertakings which are prepared to sell BMW products but which are not prepared to provide the additional service required by BMW for the distribution of its products or to provide the service depots mentioned above. The combined effect of the objective criteria and obligations is to prevent, to an appreciable extent, the appointment of undertakings as BMW dealers and their admission to the trade in BMW products.

As in any particular case BMW can exclude from recognition as a BMW dealer even those undertakings which satisfy all the objective criteria and are prepared to fulfil the minimum obligations (see 8 above), the BMW distribution system has an even more restrictive effect on competition in BMW products, and leads to the quantitative selection of dealers.

The obligations of BMW main dealers *vis-à-vis* BMW as regards selecting BMW retail dealers, placing them under contract, terminating or modifying their standard form of agreement and determining and supervising their activities (see 4 above) result in main dealers having little scope, when appointing retail dealers to follow their own views on sales policy where these differ from those of BMW. Selection depends, not on varous individual decisions by BMW main dealers based on their respective sales policies, but on the wishes of BMW.

The result is to enable BMW to restrict access to trade in BMW products at all levels of distribution.

14. Since neitner BMW main dealers nor BMW retail dealers are allowed to sell goods other than original BMW parts for repair purposes to dealers not authorized by BMW (see 3 (ii) above), all independent dealers who are not part of the BMW distribution system are denied the opportunity of selling new BMW vehicles, and similarly denied the opportunity of trading in BMW parts except where they themselves use such parts in repairs rather than reselling them. This exclusion affects all independent dealers throughout the common market.

15. In so far as BMW has undertaken *vis-à-vis* its main dealers, and the latter *vis-à-vis* their retail dealers, to appoint further dealers in the territory and to change the territory only on certain conditions (prior notification and opportunity of commenting) (see 5 (ii) (above), potential dealers of BMW products are prevented from concluding standard agreements for the acquisition and sale of BMW products without first consulting the authorized BMW dealer in that territory ; it is also made difficult for BMW simply to establish subsidiaries (see 5 (ii) above) through which to deliver products directly to customers and to provide them with service.

16. Because of BMW's undertaking to sell only in specified cases, whether by itself or through its subsidiaries, to consumers (see 6 (i) above), direct sources of supply are denied to the consumer in that he may not approach the manufacturer or its subsidiaries in the common market, except in the abovementioned cases.

17. The prohibitions, affecting all BMW dealers, on operating branches or distribution depots or using intermediaries in any other territory, and on advertising and otherwise canvassing in another territory, unless they fulfil their obligation under the agreement to promote diligently sales and after-sales service in their own territory (see 3 (iii) above), restrict their freedom to promote sales outside their territory, even in respect of customers and BMW dealers appointed in countries other than Germany.

18. Since BMW dealers may not, without the consent of BMW, become the agents for any other motor vehicle manufacturers nor sell competing products for resale, and since they are allowed to use and to sell to the customers parts of other makes which are of particular importance for the safety of BMW vehicles only where they satisfy BMW standards of quality (see 3 (iv) above), other manufacturers and suppliers of motor vehicles and parts cannot to that extent use these German dealers as sales intermediaries.

19. All the clauses mentioned (13 to 18) are also likely to have an appreciable effect on trade between Member States. Owing to the selective system (see 13 to 15 above), those German undertakings which are prepared to deliver BMW products to other Member States but have not been authorized by BMW are thereby prevented from delivering to purchasers in such countries. As BMW is also to ensure that its own subsidiaries in other Member States will deliver only in the agreed exceptional cases to consumers in Germany (see 16 above), trade between Member States is to that extent affected. The intensity of trade with

Member States is also diminished in that BMW dealers are prevented from promoting sales outside their territory to consumers or selected BMW dealers in other Member States (see 17 above). Finally, even the restricted scope of the prohibition on dealing in competing products (see 18 above) has a diminishing effect on the exchange of goods between Member States, because German BMW dealers are largely excluded from becoming distributors of competing products emanating from other Member States and from selling such parts as are essential to safety and do not satisfy BMW standards of quality.

Article 85 (1) is therefore applicable to the BMW standard forms of agreement.

IV

The standard forms of agreement contain further obligations which, normally applied, place no restrictions on competition within the meaning of Article 85 (1) (see also Article 2 (2) of Commission Regulation No 67/67/EEC (1).

20. The obligation undertaken by BMW dealers to follow instructions given by BMW regarding advertising does not amount to an appreciable restriction of competition, provided it is confined only to advertising designed to draw attention to BMW products and their properties. The Commission has no evidence which might suggest that BMW is operating these provisions in a restrictive manner, especially as BMW expressly stated in the circular to BMW dealers that its authority did not extend to advertising by BMW dealers concerning prices and conditions of sale (see 3 (v) above).

In so far as BMW is entitled to refuse to consent to BMW dealers participating in an exhibition or fair under the conditions mentioned in the circular (see 3 (vi) above), the Commission's decision on the scope of this clause remains subject to the proceedings concerning decisions on the participation at exhibitions and fairs notified by the 'Bureau permanent international des constructeurs d'automobiles' (IV/417).

21. The obligation to use BMW trade marks in a specified manner (see 3 (xii) above) does not come within the scope of Article 85 (1), as the resulting prohibition on using these trade marks in any other way is an incident of the protection under the law of trade marks to which BMW is entitled.

22. Furthermore it is not to be assumed that the obligation undertaken by BMW dealers to supply BMW with information on their trading position, sales trends, the market situation, stocks and expected demand (see 3 (xiii) above) amounts to a restriction of competition simply because BMW thereby learns of all the ways in which BMW dealers compete among themselves, and in which competing products are sold. A final question to be considered was whether the power possessed by BMW or the BMW main dealer as principal to terminate a BMW contract for substantial breach (see 7 above), or their power to alter the territory or instal further dealers in such a territory (see 4 and 5 (ii) above), amounted to an economic sanction which could be used to impose more extensive restrictions of competition on BMW dealers than those apparent from the wording of the agreement. Provided BMW does not recommend BMW dealers not to sell BMW products outside the territory or not to sell competing products, or does not maintain resale prices, and offers neither incentives nor disincentives in order to attain these objectives, it cannot be assumed that the opportunities afforded to the principal to collect information, to terminate the agreement and to alter the territory have a restrictive effect on competition (see 8 above). At the present time, the Commission has no evidence to suggest that the BMW distribution system would be operated in such a manner.

V

23. The Commission has to decide whether the selective distribution system operated by BMW, containing a partial prohibition on dealing in competing products, can be exempted under Article 85 (3) from the prohibition contained in Article 85 (1) of the EEC Treaty.

In considering the selective distribution system operated by BMW in Germany, the Commission is prepared to accept that such a system may contribute both to improving the production and distribution of goods and to promoting technical progress.

24. Limiting the number of dealers can be regarded as more beneficial, so far as it is based on the requirement by BMW of minimum standards for selection and continued employment of dealers. By such means the following can in particular be ensured:

— that BMW motor vehicles are received and stored in technically perfect condition and are delivered to customers after a pre-delivery check carried out in accordance with BMW's instructions (see 3 (vii) to (ix) and 13 above);

— that both maintenance and preparation and also services carried out under guarantee and extended free service are not only sufficiently available but

(1) OJ No 57, 25. 3. 1967, p. 849/67.

are also of an adequate quality for the consumer (see 3 (ix) and (xi) and 13 above);

— that any modifications to vehicles which become necessary may be carried out (see 3 (ix) and 13 above);

— that sufficient plant, equipment and BMW-trained personnel are available for the provision of the above services (see 3 (vii) and (viii) and 13 above);

— that the store of spare parts is adequate in range and quality (see 3 (x) and 13 above); and

— that BMW may rapidly and fully inform its appointed dealers of technical problems as they arise (see 3 (xiii) and 22 above).

BMW has in addition reserved the right to make individual appointments from those applicants satisfying the objective requirements for BMW dealers, on the basis of considerations for which there are no universally predictable and objective criteria (see 8 and 13 above). The reservation of such a right is to be accepted in the present case, in so far as it relates to the selection by BMW of its main dealers. The restrictive influence which BMW has over the selection of BMW retail dealers by BMW main dealers facilitates rationalization, because BMW also cooperates directly with BMW retail dealers with the aim of improving service. The cooperation between BMW and its dealers, which goes beyond the mere marketing of products, provides, in the view of the Commission in this particular case, a major factor justifying the BMW selective distribution system. It can be considered to be a method of rationalizing the sale and servicing of BMW vehicles and parts and thereby provides a better service to the consumer than a system of free marketing to which such cooperation is not attached. Motor vehicles, being products of limited life, high cost and complex technology, require regular maintenance by specially equipped garages or service depots, because their use can be dangerous to life, health and property and can have a harmful effect on the environment. It is therefore of importance that those responsible for the maintenance of vehicles are made aware of the latest technical knowledge which the manufacturer has acquired in the development and construction of the vehicle. Moreover, continual cooperation between BMW and its main dealers and retail dealers may assist BMW in the preparation of its maintenance instructions and training programmes, and may also lead indirectly to improvements in the design of vehicles.

25. The restrictions imposed by BMW on its main dealers and by the latter on retail dealers as regards the appointment of further dealers or changing the territory (see 5) (ii) and 15 above) do not preclude the conclusion of main dealer or retail dealer agreements, but only delay the conclusion of such agreements in the interests of main dealers or retail dealers already appointed. The latter are thus given an opportunity to remedy any poor performance which has become apparent, so that BMW or a main dealer may consider whether the addition of further main dealers or retail dealers to the group already selected, or a change in the territory covered remains necessary. The above provision is closely connected with the clauses on selection and finds its justification in the same considerations as justify the latter (see 24 above).

26. The obligation undertaken by BMW not to sell vehicles directly to consumers (see 6 (i) and 16 above) provides a line of demarcation between the activities of BMW and its dealers, allows BMW to concentrate its marketing activity, and relieves BMW of the need to maintain a multitude of business relationships. It is accepted that the obligation leads to an improvement of sales promotion by the appointed dealers and thus rationalizes distribution.

27. The restrictions imposed on BMW dealers from taking certain measures to promote sales outside their territory (see 3 (i), 3 (iii) and 17 above) may be similarly conducive to concentration of efforts in selling BMW products and to rationalization in that they channel dealers' activities primarily towards potential purchasers in their own territory without impeding sales to consumers and other BMW dealers outside the territory.

28. The fact that BMW dealers may not deal in competing products, should BMW withhold its consent, does mean that suppliers of motor vehicles, parts and accessories of makes other than BMW cannot normally use BMW dealers as sales intermediaries (see 3 (iv) and 18 above). Nevertheless the advantages of this clause outweigh its disadvantages. Since in principle appointed BMW dealers have to concentrate their efforts in selling vehicles and parts on BMW products, it may be expected that technical expertise and advice are provided for BMW vehicles and parts and that competition between the products of the different manufacturers of motor vehicles and parts is strengthened at the different levels of distribution.

29. In the present case it can also be accepted that consumers receive a fair share of the benefit resulting from the improvements and progress achieved through the standard forms of agreement used by BMW. The measures which are restrictive of competition (see 24 to 28 above) not only have direct advantages for the consumer in the form of improved service, but also allow adequate competition at the distribution level, so that there remains a pressure to pass on to consumers the benefits resulting from rationalization. Such competition is assured by the fact that not only are consumers free to purchase goods and request service wherever they wish within the common market, but also that BMW dealers are free to purchase BMW products not only from the BMW dealer for their territory but also from any other BMW dealer anywhere in the common market (see 27 above). A corresponding freedom is enjoyed by the consumer, who may choose parts of other makes from BMW dealers, unless they are such as are of particular importance for the safety of BMW vehicles and do not satisfy the standards of quality of BMW parts (see 28 above).

30. The restrictions imposed on parties to the standard agreements are considered to be indispensable to the attainment of the improvements and technical progress mentioned.

The provisions on selective distribution (see 24 and 25 above) are indispensable, because on economic grounds a continuing cooperation between BMW and dealers would be subject to a limitation if BMW had to cooperate with all dealers prepared to sell BMW goods and provide pre- and after-sales service to customers. The minimum requirements placed by BMW on the provision of service could not be met if BMW were only to issue service instructions to each main dealer or retail dealer on delivery of its products. Moreover, BMW has left untouched the option of every customer to have his vehicle serviced at an independent establishment, the latter being able to purchase all its requirements of BMW parts from any BMW main dealer or retail dealer.

The creation by BMW, with the assistance of appointed dealers, of a BMW service network does not prevent third parties from servicing BMW vehicles. In operating the selective system, BMW is doing no more than ensure that, in addition and parallel to servicing by third parties, there is a service network which, because of the cooperation between BMW, BMW main dealers and BMW retail dealers, can provide the kind of service which BMW considers necessary for the maintenance and safety of its vehicles. Since consumers have complete freedom in purchasing BMW products within the common market and can take delivery from any undertaking they wish to act on their behalf, the restrictions concerned with selective distribution are in this respect limited to their essential content.

The obligation undertaken by BMW not to sell to consumers (see 26 above) and the restrictions imposed on BMW dealers on taking certain measures to promote sales outside their territory (see 27 above) are similarly indispensable; for only restrictions of this nature can provide a more effective encouragement to promote sales within the territory. The obligation undertaken by BMW dealers to sell minimum quantities within their territories, such minimum quantities being agreed by BMW with the main dealer on the basis of estimates (see 3 (i), 17 and 27 above), is also no more restrictive than is essential. By comparing the estimated and actual sales figures, an account can be taken of goods covered by the agreement which the BMW dealer did not obtain from his principal. Figures for goods required and for which payment is due, must be declared to the principal at monthly intervals and at the same time an estimate given of requirements for the following month (see 3 (i) above). In giving such estimates, the BMW dealer can provide for those quantities of goods which he expects to sell outside his territory.

The prohibition against dealing in competing products (see 28 above) is also confined to its essential content. BMW dealers are indeed prohibited, where BMW withholds consent, from selling new motor vehicles of other makes, from selling parts of other makes to dealers, and from selling to consumers such parts as are particularly important for the safety of BMW vehicles and which do not comply with the standard of quality of BMW parts. But BMW dealers may ask their principal to relax this prohibition against dealing in competing products, where they can show reasonable cause (see 3 (iv) above). In such cases they are entitled to be allowed to sell such competing products as least interfere with the sale of BMW products. Moreover, the prohibition against dealing in competing products does not apply to the sale to the consumer of accessories of other makes which are of no particular importance for the safety of BMW vehicles. Furthermore, the sale to the consumer of parts of other makes and their use for repair purposes is in any case not restricted where they comply with the standard of quality of BMW parts. A prohibition against dealing in competing products which is restricted in this way allows sellers of accessories and parts of other makes

adequate sales opportunities without impairing the quality of the BMW dealer's service.

31. The BMW standard agreements provide the parties with no opportunity to eliminate competition in respect of a substantial part of the goods concerned. In the first instance, they concern BMW vehicles, which compete with a range of other vehicles throughout the common market; in the second, as has already been stated (see 29 and 30 above) competition between BMW and competing products is maintained at the various levels of distribution within the BMW network.

For none of its motor cars — even with a narrow definition of the market — does BMW have a share of the German market which would exclude competition in respect of a substantial part of the products concerned. In that respect the Commission had to consider whether the fact that in Germany BMW has a considerable share of the market in motor cycles of 250 cc capacity and above militated against the granting of an exemption. The BMW share of motor cycles of 250 cc capacity and above registered in Germany in 1972 was approximately 32 %. In 1973 BMW produced 197 446 cars and 20 856 motor cycles and sold 193 378 cars and 19 918 motor cycles; its turnover for motor cars was DM 1 040 000 000 and for motor cycles DM 79 035 000. Bearing in mind the lesser importance of the trade in motor cycles when compared with that in motor cars and the great similarity in sales and service methods for the two products, it would be unreasonable to impose on BMW a different method of distribution for motor cycles; moreover, BMW is subject to effective competition in the motor cycle market in Germany and even more so in the other countries of the common market.

All the conditions laid down in Article 85 (3) have therefore been fulfilled.

VI

32. Pursuant to Article 6 (1) of Regulation No 17, the date of operation of the exemption under Article 85 (3) is to be 1 January 1973, since it was on that date that BMW began to use their new standard forms of agreement, which were covered by the previous notification.

33. The new standard forms of agreement are valid until 31 December 1977. It is considered appropriate to limit the period of validity of the exemption under Article 85 (3) in accordance with Article 8 (1) of Regulation No 17 to 31 December 1977, so that the Commission may thereafter reexamine the operation of the BMW distribution system.

34. BMW had notified the Commission of the earlier agreements, pursuant to the second sentence of Article 5 (1) of Regulation No 17, before 1 February 1963. These agreements did not satisfy the conditions laid down in Article 85 (3) (see 11 and 12 above). However, BMW has amended the new standard forms of agreement (see 1 and 2 above) in such a way that they do now satisfy the conditions laid down in Article 85 (3). Under Article 7 (1) of Regulation No 17, the Commission may fix the period during which the prohibition contained in Article 85 (1) shall apply. As BMW ended the export prohibition when it became clear that an exemption for such restriction could not be granted in the automobile sector, the necessary conditions prevail for the Commission to state that the prohibition shall not apply from 13 March 1962, the date of entry into force of Regulation No 17, to 1 January 1973, the date on which the old standard agreements were replaced by the new.

35. Conditions are to be attached to the Decision so that the Commission may be in a position to examine whether access to trade in motor vehicles, spare parts and accessories is being unreasonably restricted by the BMW distribution system, and whether the cooperation between BMW and its dealers is being used to restrict competition to an extent greater than is apparent from the content of the distribution agreements. Annual reports are to be submitted to the Commission giving details of any cases where BMW has refused to conclude distribution agreements or has terminated or amended such agreements, or where BMW has refused permission to its dealers to sell competing products. These requirements are based on Article 8 (1) of Regulation No 17,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of Article 85 (1) of the Treaty establishing the European Economic Community are, pursuant to Article 85 (3), declared inapplicable to the standard forms of main and retail dealership agreement made by the Bayerische Motoren Werke Aktiengesellschaft and used by them in Germany since 1 January 1973.

This Decision shall have effect from 1 January 1973 to 31 December 1977.

Article 2

The prohibition contained in Article 85 (1) shall not be applicable to the standard forms of wholesaler, main dealer and retail dealer agreement made and used in Germany by the Bayerische Motoren Werke

Aktiengesellschaft during the period 13 March 1962 to 1 January 1973.

Article 3

The Bayerische Motoren Werke Aktiengesellschaft is hereby required to submit an annual report to the Commission, the first to be prepared by 31 December 1975, setting out :

— any cases of refusal to conclude distribution agreements in Germany, and any termination or modification of such agreements,

— any cases where BMW dealers in Germany are refused permission to sell competing products.

Article 4

This Decision is addressed to the Bayerische Motoren Werke Aktiengesellschaft, 8 München 40, Petuelring 130.

Done at Brussels, 13 December 1974.

For the Commission

The President

François-Xavier ORTOLI