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(Acts whose publication is obligatory)

COMMISSION REGULATION (EEC) No 1983/83

of 22 June 1983

on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof,

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 the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation (2),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

(1) Whereas Regulation No 19/65/EEC empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of bilateral exclusive distribution agreements and analogous concerted practices falling within Article 85 (1);

(2) Whereas experience to date makes it possible to define a category of agreements and concerted practices which can be regarded as normally satisfying the conditions laid down in Article 85 (3);

(3) Whereas exclusive distribution agreements of the category defined in Article 1 of this Regulation may fall within the prohibition contained in Article 85 (1) of the Treaty; whereas this will apply only in exceptional cases to exclusive agreements of this kind to which only undertakings from one Member State are party and which concern the resale of goods within that Member State; whereas, however, to the extent that such agreements may affect trade between Member States and also satisfy all the requirements set out in this Regulation there is no reason to withhold from them the benefit of the exemption by category;

(4) Whereas it is not necessary expressly to exclude from the defined category those agreements which do not fulfil the conditions of Article 85 (1) of the Treaty;

(5) Whereas exclusive distribution agreements lead in general to an improvement in distribution because the undertaking is able to concentrate its sales activities, does not need to maintain numerous business relations with a larger number of dealers and is able, by dealing with only one dealer, to overcome more easily distribution difficulties in international trade resulting from linguistic, legal and other differences;

(6) Whereas exclusive distribution agreements facilitate the promotion of sales of a product and lead to intensive marketing and to continuity of supplies while at the same time rationalizing distribution; whereas they stimulate competition between the products of different manufacturers; whereas the appointment of an exclusive distributor who will take over sales promotion, customer services and carrying of stocks is often the most effective way, and sometimes indeed the only way, for the manufacturer to enter a market and compete with other manufacturers already present; whereas this is particularly so in the case of small and medium-sized undertakings; whereas it must be left to the contracting parties to decide whether and to what extent they consider it desirable to incorporate in the agreements terms providing for the promotion of sales;

(7) Whereas, as a rule, such exclusive distribution agreements also allow consumers a fair share of

(1) OJ No 36, 6. 3. 1965, p. 533/65.
(2) OJ No C 172, 10. 7. 1982, p. 3.

the resulting benefit as they gain directly from the improvement in distribution, and their economic and supply position is improved as they can obtain products manufactured in particular in other countries more quickly and more easily;

(8) Whereas this Regulation must define the obligations restricting competition which may be included in exclusive distribution agreements; whereas the other restrictions on competition allowed under this Regulation in addition to the exclusive supply obligation produce a clear division of functions between the parties and compel the exclusive distributor to concentrate his sales efforts on the contract goods and the contract territory; whereas they are, where they are agreed only for the duration of the agreement, generally necessary in order to attain the improvement in the distribution of goods sought through exclusive distribution; whereas it may be left to the contracting parties to decide which of these obligations they include in their agreements; whereas further restrictive obligations and in particular those which limit the exclusive distributor's choice of customers or his freedom to determine his prices and conditions of sale cannot be exempted under this Regulation;

(9) Whereas the exemption by category should be reserved for agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 85 (3) of the Treaty;

(10) Whereas it is not possible, in the absence of a case-by-case examination, to consider that adequate improvements in distribution occur where a manufacturer entrusts the distribution of his goods to another manufacturer with whom he is in competition; whereas such agreements should, therefore, be excluded from the exemption by category; whereas certain derogations from this rule in favour of small and medium-sized undertakings can be allowed;

(11) Whereas consumers will be assured of a fair share of the benefits resulting from exclusive distribution only if parallel imports remain possible; whereas agreements relating to goods which the user can obtain only from the exclusive distributor should therefore be excluded from the exemption by category; whereas the parties cannot be allowed to abuse industrial property rights or other rights in order to create absolute territorial protection; whereas this does not prejudice the relationship between competition law and industrial property rights, since the sole object here is to determine the conditions for exemption by category;

(12) Whereas, since competition at the distribution stage is ensured by the possibility of parallel imports, the exclusive distribution agreements covered by this Regulation will not normally afford any possibility of eliminating competition in respect of a substantial part of the products in question; whereas this is also true of agreements that allot to the exclusive distributor a contract territory covering the whole of the common market;

(13) Whereas, in particular cases in which agreements or concerted practices satisfying the requirements of this Regulation nevertheless have effects incompatible with Article 85 (3) of the Treaty, the Commission may withdraw the benefit of the exemption by category from the undertakings party to them;

(14) Whereas agreements and concerted practices which satisfy the conditions set out in this Regulation need not be notified; whereas an undertaking may nonetheless in a particular case where real doubt exists, request the Commission to declare whether its agreements comply with this Regulation;

(15) Whereas this Regulation does not affect the applicability of Commission Regulation (EEC) No 3604/82 of 23 December 1982 on the application of Article 85 (3) of the Treaty to categories of specialization agreements [1]; whereas it does not exclude the application of Article 86 of the Treaty,

HAS ADOPTED THIS REGULATION:

Article 1

Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements to which only two untertakings are party and whereby one party agrees with the other to supply certain goods for resale within the whole or a defined area of the common market only to that other.

Article 2

1. Apart from the obligation referred to in Article 1 no restriction on competition shall be imposed on

[1] OJ No L 376, 31. 12. 1982, p. 33.

the supplier other than the obligation not to supply the contract goods to users in the contract territory.

2. No restriction on competition shall be imposed on the exclusive distributor other than:

(a) the obligation not to manufacture or distribute goods which compete with the contract goods;

(b) the obligation to obtain the contract goods for resale only from the other party;

(c) the obligation to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch, and from maintaining any distribution depot.

3. Article 1 shall apply notwithstanding that the exclusive distributor undertakes all or any of the following obligations:

(a) to purchase complete ranges of goods or minimum quantities;

(b) to sell the contract goods under trademarks, or packed and presented as specified by the other party;

(c) to take measures for promotion of sales, in particular:
- to advertise,
- to maintain a sales network or stock of goods,
- to provide customer and guarantee services,
- to employ staff having specialized or technical training.

Article 3

Article 1 shall not apply where:

(a) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into reciprocal exclusive distribution agreements between themselves in respect of such goods;

(b) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into a non-reciprocal exclusive distribution agreement between themselves in respect of such goods unless at least one of them has a total annual turnover of no more than 100 million ECU;

(c) users can obtain the contract goods in the contract territory only from the exclusive distributor and have no alternative source of supply outside the contract territory;

(d) one or both of the parties makes it difficult for intermediaries or users to obtain the contract goods from other dealers inside the common market or, in so far as no alternative source of supply is available there, from outside the common market, in particular where one or both of them:
1. exercises industrial property rights so as to prevent dealers or users from obtaining outside, or from selling in, the contract territory properly marked or otherwise properly marketed contract goods;
2. exercises other rights or take other measures so as to prevent dealers or users from obtaining outside, or from selling in, the contract territory contract goods.

Article 4

1. Article 3 (a) and (b) shall also apply where the goods there referred to are manufactured by an undertaking connected with a party to the agreement.

2. Connected undertakings are:

(a) undertakings in which a party to the agreement, directly or indirectly:
- owns more than half the capital or business assets, or
- 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 directors or bodies legally representing the undertaking, or
- has the right to manage the affairs;

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

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

3. Undertakings in which the parties to the agreement or undertakings connected with them jointly have the rights or powers set out in paragraph 2 (a) shall be considered to be connected with each of the parties to the agreement.

Article 5

1. For the purpose of Article 3 (b), the ECU is the unit of account used for drawing up the budget of the Community pursuant to Articles 207 and 209 of the Treaty.

2. Article 1 shall remain applicable where during any period of two consecutive financial years the total turnover referred to in Article 3 (b) is exceeded by no more than 10 %.

3. For the purpose of calculating total turnover within the meaning of Article 3 (b), the turnovers achieved during the last financial year by the party to the agreement and 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 parties to the agreement or between these undertakings and undertakings connected with them or between the connected undertakings.

Article 6

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, when it finds in a particular case that an agreement which is exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions set out in Article 85 (3) of the Treaty, and in particular where:

(a) the contract goods are not subject, in the contract territory, to effective competition from identical goods or goods considered by users as equivalent in view of their characteristics, price and intended use;

(b) access by other suppliers to the different stages of distribution within the contract territory is made difficult to a significant extent;

(c) for reasons other than those referred to in Article 3 (c) and (d) it is not possible for intermediaries or users to obtain supplies of the contract goods from dealers outside the contract territory on the terms there customary;

(d) the exclusive distributor:

1. without any objectively justified reason refuses to supply in the contract territory categories of purchasers who cannot obtain contract goods elsewhere on suitable terms or applies to them differing prices or conditions of sale;
2. sells the contract goods at excessively high prices.

Article 7

In the period 1 July 1983 to 31 December 1986, the prohibition in Article 85 (1) of the Treaty shall not apply to agreements which were in force on 1 July 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions of Regulation No 67/67/EEC (1).

Article 8

This Regulation shall not apply to agreements entered into for the resale of drinks in premises used for the sale and consumption of beer or for the resale of petroleum products in service stations.

Article 9

This Regulation shall apply *mutatis mutandis* to concerted practices of the type defined in Article 1.

Article 10

This Regulation shall enter into force on 1 July 1983.

It shall expire on 31 December 1997.

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

Done at Brussels, 22 June 1983.

For the Commission

Frans ANDRIESSEN

Member of the Commission

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