COMMISSION REGULATION (EEC) No 151/93

of 23 December 1992

amending Regulations (EEC) No 417/85, (EEC) No 418/85, (EEC) No 2349/84 and (EEC) No 556/89 on the application of Article 85 (3) of the Treaty to certain categories of specialization agreements, research and development agreements, patent licensing agreements and know-how licensing agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices (1), as last amended by the Act of Accession of Spain and Portugal, and in particular Article 1 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 (2), as last amended by the Act of Accession of Spain and Portugal, and in particular to Article 1 thereof,

Having published a draft of this Regulation (3),

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 85 (1) which have as their object specialization, including agreements necessary for achieving it, or the research and development of products or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding industrial property rights and confidential technical knowledge ;

(2) It has made use of this power by adopting Regulations 417/85 of 19 December 1984 on the application of Article 85 (3) of the Treaty to categories of specialization agreements (4), and (EEC) No 418/85 of 19 December 1984 on the application of Article 85 (3) of the Treaty to categories of research and development agreements (5), respectively, as amended by the Act of Accession of Spain and Portugal ;

(3) Regulation No 19/65/EEC empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements to which only two undertakings are party and which include restrictions imposed in relation to the acquisition or use of industrial property rights — in particular patents, utility models, designs or trade marks — or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or application of industrial processes ;

(4) It has made use of this power by adopting Regulations (EEC) No 2349/84 of 23 July 1984 on the application of Article 85 (3) of the Treaty to certain categories of patent licensing agreements (6), as amended by the Act of Accession of Spain and Portugal, and (EEC) No 556/89 of 30 November 1988 on the application of Article 85 (3) of the Treaty to certain categories of know-how licensing agreements (7), respectively, as amended in the case of the former by the Act of Accession of Spain and Portugal ;

(5) It is appropriate to extend the scope of application of the abovementioned group exemption Regulations in order to facilitate the rationalization of production, the exploitation of results of joint research and development and the transfer of technical knowledge ;

(6) To that end, Regulations (EEC) No 417/85 and (EEC) No 418/85 must be amended so as to extend cover to joint distribution of specialized products or products resulting from joint research and development, provided that the market share of the participating undertakings does not exceed a certain limit. The market share should be limited to 10 % for agreements establishing cooperation which extends to distribution, by reason of the more restrictive effects of such agreements on competi-

(1) OJ No L 285, 29. 12. 1971, p. 46.
(2) OJ No 36, 6. 3. 1965, p. 533/65.
(3) OJ No C 207, 14. 8. 1992, p. 11.
(4) OJ No L 53, 22. 2. 1985, p. 1.
(5) OJ No L 53, 22. 2. 1985, p. 5.
(6) OJ No L 219, 16. 8. 1984, p. 15. Corrigendum : OJ No L 280, 22. 10. 1985, p. 32.
(7) OJ No L 61, 4. 3. 1989, p. 1.

tion compared with other cooperation agreements; whereas the market share threshold should be maintained at 20 % for such other cooperation agreements. Under the same conditions, Regulations (EEC) No 2349/84 and (EEC) No 556/89 should no longer exclude exemption agreements by which the parent companies of a joint venture grant the joint venture patent or know-how licences, even where the parent companies are competitors;

(7) In addition, it is appropriate to enlarge the legal framework for cooperation between undertakings in the areas of production and distribution. The turnover limit laid down for specialization agreements by Regulation (EEC) No 417/85 should therefore be increased to ECU 1 000 million,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 417/85 is hereby amended as follows:

1. in Article 2 (1), the introductory sentence is replaced by the following:

'Article 1 shall also apply to the following restrictions of competition:';

2. in Article 2 (1), point (c) is replaced by the following:

'(c) an obligation to grant other parties the exclusive right, within the whole or a defined area of the common market, to distribute products which are the subject of the specialization, provided that intermediaries and users can also obtain the products from other suppliers and the parties do not render it difficult for intermediaries and users to thus obtain the products;'

3. In Article 2 (1), the following points (d), (e) and (f) are added:

'(d) an obligation to grant one of the parties the exclusive right to distribute products which are the subject of the specialization provided that that party does not distribute products of a third undertaking which compete with the contract products;

(e) an obligation to grant the exclusive right to distribute products which are the subject of the specialization to a joint undertaking or to a third undertaking, provided that the joint undertaking or third undertaking does not manufacture or distribute products which compete with the contract products;

(f) an obligation to grant the exclusive right to distribute within the whole or a defined area of the common market the products which are the subject of the specialization to joint undertakings or third undertakings which do not manufacture or distribute products which compete with the contract products, provided that users and intermediaries can also obtain the contract products from other suppliers and that neither the parties nor the joint undertakings or third undertakings entrusted with the exclusive distribution of the contract products render it difficult for users and intermediaries to thus obtain the contract products.';

4. in Article 2, the following paragraph 2a is inserted:

'2a. Article 1 shall not apply if restrictions of competition other than those set out in paragraphs 1 and 2 are imposed upon the parties by agreement, decision or concerted practice.';

5. Article 3 is replaced by the following:

'Article 3

1. Article 1 shall apply only if

(a) the products which are the subject of the specialization together with the participating undertakings' other products which are considered by users to be equivalent in view of their characteristics, price and intended use do not represent more than 20 % of the market for all such products in the common market or a substantial part thereof; and

(b) the aggregate turnover of all the participating undertakings does not exceed ECU 1 000 million.

2. If pursuant to point (d), (e) or (f) of Article 2 (1), one of the parties, a joint undertaking, a third undertaking or more than one joint undertaking or third undertaking are entrusted with the distribution of the products which are the subject of the specialization, Article 1 shall apply only if:

(a) the products which are the subject of the specialization together with the participating undertakings' other products which are considered by users to be equivalent in view of their characteristics, price and intended use do not represent more than 10 % of the market for all such products in the common market or a substantial part thereof; and

(b) the aggregate annual turnover of all the participating undertakings does not exceed ECU 1 000 million.

3. Article 1 shall continue to apply if the market shares and turnover referred to in paragraphs 1 and 2 are exceeded during any period of two consecutive financial years by not more than one-tenth.

4. Where the limits laid down in paragraph 3 are also exceeded, Article 1 shall continue to apply for a period of six months following the end of the financial year during which they were exceeded.';

6. in Article 4 (1), 'Article 3 (1) (b) and (2)' is replaced by 'Article 3 (1) (b), (2) (b) and (3)';

7. in the first sentence of Article 6, 'and (2) (b)' is inserted after 'Article 3 (1) (b)';

8. in the second sentence 'or sale' is inserted after 'manufacture';

9. the introductory sentence of Article 7 (1) is replaced by the following:

'For the purposes of Article 3 (1) and (2), and Article 6, participating undertakings are:'.

Article 2

Regulation (EEC) No 418/85 is hereby amended as follows:

1. in Article 2, point (e) is deleted;

2. in Article 3, the following paragraph 3a is inserted:

'3a. Where one of the parties, a joint undertaking, a third undertaking or more than one joint undertaking or third undertaking are entrusted with the distribution of the products which are the subject of the agreement under Article 4 (1) (fa), (fb) or (fc), the exemption provided for in Article 1 shall apply only if the parties production of the products referred to in paragraphs 2 and 3 does not exceed 10 % of the mrket for all such products in the common market or a substantial part thereof.';

3. in Article 3, paragraphs 4 and 5 are replaced by the following:

'4. The exemption provided for in Article 1 shall continue to apply where the market shares referred to in paragraphs 3 and 4 are exceeded during any period of two consecutive financial years by not more than one-tenth.

5. Where the limits laid down in paragraph 5 are also exceeded, the exemption provided for in Article 1 shall continue to apply for a period of six months following the end of the financial year during which they were exceeded.';

4. in Article 4 (1), the following points (fa), (fb) and (fc) are inserted:

'(fa) an obligation to grant one of the parties the exclusive right to distribute the contract products, provided that that party does not distribute products manufactured by a third producer which compete with the contract products;

(fb) an obligation to grant the exclusive right to distribute the contract products to a joint undertaking or a third undertaking, provided that the join undertaking or third undertaking does not manufacture or distribute products which compete with the contract products;

(fc) an obligation to grant the exclusive right to distribute the contract products in the whole or a defined area of the common market to joint undertakings or third undertakings which do not manufacture or distribute products which compete with the contract products, provided that users and intermediaries are also able to obtain the contract products from other suppliers and neither the parties nor the joint undertakings or third undertakings entrusted with the exclusive distribution of the contract products render it difficult for users and intermediaries to thus obtain the contract products.';

5. Article 6 (g) is replaced by the following:

'(g) are required not to grant licences to third parties to manufacture the contract products or to apply the contract processes even though the exploitation by the parties themselves of the results of the joint research and development is not provided for or does not take place.'

Article 3

Regulation (EEC) No 2349/84 is hereby amended as follows:

1. in Article 5, paragraph 2 is replaced by the following:

'2. This Regulation shall nevertheless apply:

(a) to agreements to which paragraph 1 (2) applies, under which a parent undertaking grants the joint venture a patent licence, provided that the contract products and the other products of the participating undertakings which are considered by users to be equivalent in view of their characteristics, price and intended use represent:

— in case of a licence limited to production not more than 20 %,

— in case of a licence covering production and distribution not more than 10 %,

of the market for all such products in the common market or a substantial part thereof;

(b) to reciprocal licences within the meaning of point 3 of paragraph 1, provided that the parties are not subject to any territorial restriction within the common market with regard to the manufacture, use or putting on the market of the contract products or on the use of the licensed processes.';

2. in Article 5, the following paragraph 3 is added:

'3. This Regulation shall continue to apply where the market shares referred to in point (a) of paragraph 2 are exceeded during any period of two consecutive financial years by not more than one-tenth.

Where this latter limit is also exceeded, this Regulation shall continue to apply for a period of six months following the end of the financial year during which it was exceeded.'

Article 4

Regulation (EEC) No 556/89 is hereby amended as follows:

1. in Article 5, paragraph 2 is replaced by the following:

'2. This Regulation shall nevertheless apply:

(a) to agreements to which paragraph 1 (2) applies, under which a parent undertaking grants the joint venture a know-how licence, provided that the contract products and the other products of the participating undertakings which are considered by users to be equivalent in view of their characteristics, price and intended use represent:

— in case of an exploitation licence limited to production not more than 20 %,

— in case of an exploitation licence covering production and distribution not more than 10 %,

of the market for all such products in the common market or a substantial part thereof;

(b) to reciprocal licences within the meaning of point 3 of paragraph 1, provided that the parties are not subject to any territorial restriction within the common market with regard to the manufacture, use or putting on the market of the contract products or on the use of the licensed processes.';

2. in Article 5, the following paragraph 3 is added:

'3. This Regulation shall continue to apply where the market shares referred to in point (a) of paragraph 2 are exceeded during any period of two consecutive financial years by not more than one-tenth. Where this latter limit is also exceeded, this Regulation shall continue to apply for a period of six months following the end of the financial year during which it was exceeded.'

Article 5

1. This Regulation shall enter into force on 1 April 1993.

2. Regulations (EEC) No 417/85, (EEC) No 418/85, (EEC) No 2349/84 and (EEC) No 556/89, as amended by this Regulation, shall apply with retroactive effect from the time at which the conditions for the application of the group exemption were fulfilled.

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

Done at Brussels, 23 December 1992.

For the Commission

Leon BRITTAN

Vice-President