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Group Exemptions for Exclusive Distribution Agreements in the Common Market

by William T. McGrath*

A United States company that has decided to expand its sales base by marketing goods in the European Economic Community (EEC) has a variety of means by which it can set up sales operations.¹ It can integrate vertically, either by setting up its own sales branches throughout the countries in the EEC or by acquiring a company already possessing wholesale or retail sales capabilities, or it can market its goods through commercial agents, which are individuals or entities that act as sales representatives for manufacturers, without taking title to the goods they sell.² The most frequently used marketing method in the Common Market is selling through a distributor. A distributor differs from a commercial agent in that a distributor buys the goods at a discount and resells them at his own risk.³ This article deals with "exclusive distribution agreements," in which a supplier allots to a single distributor a defined territory in which the distributor concentrates his sales efforts. In return for the efforts of the distributor, the supplier agrees not to supply any other distributor in the contract territory. The article also deals, to a lesser extent, with "exclusive purchasing agreements," in which the purchaser agrees to obtain certain goods exclusively from a single supplier.

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¹ See Jones, *Practical Aspect of Commercial Agency and Distribution Agreements in the European Community*, 6 INT'L LAW. 107 (1973).

² Contracts with commercial agents normally do not fall within the scope of the Common Market laws regulating competition. See European Commission Notice on Exclusive Dealing Contracts with Commercial Agents, December 24, 1962, 1 COMMON MKT. REP. (CCH) ¶ 2697.

³ The European Commission distinguishes between "commercial agents" and "independent traders" such as distributors, essentially on the presence or absence of risk.

The Commission regards as the decisive criterion, which distinguishes the commercial agent from the independent trader, the agreement — express or implied — which deals with responsibility for the financial risks bound up with the sale or performance of the contract [A] commercial agent must not by the nature of his functions assume any risk resulting from the transaction. If he does assume such risks, his function becomes economically akin to that of an independent trader and he must therefore be treated as such for purposes of the rules of competition.

Id. See also Puelinckx & Tielemans, *The Termination of Agency and Distributorship Agreements: A Comparative Study*, 3 NW. J. INT'L L. & BUS. 452 (1981); W. VAN GERVEN & F. LUKOFF, *COMMERCIAL AGENCY AND DISTRIBUTION AGREEMENTS AND RELATED PROBLEMS OF LICENSING IN THE LAW OF THE EEC COUNTRIES AND OF THE EUROPEAN COMMUNITIES* (1970).

Exclusive distribution agreements have been a matter of considerable interest in the Common Market,⁴ particularly because there is a certain degree of tension between the types of restraints present in an exclusive distribution agreement and basic principles of the Common Market which call for the elimination of territorial barriers and the prohibition of restrictions on competition.⁵ These agreements tend to restrict intrabrand competition in a distributor's territory by limiting or precluding sales by other distributors in the territory. In addition, exclusive agreements may deprive competing distributors of a source of supply.⁶ On the other hand, exclusivity creates certain efficiencies in the marketing of goods, and is essential to distributors to protect their capital investments and to justify promotional expenditures.

This article reviews the treatment of exclusive distribution agreements under the competition laws of the Common Market. Because exclusive distribution agreements usually contain restrictions on competition which are incompatible with Article 85(1) of the Treaty of Rome,⁷ these agreements are permissible only if they qualify for an "exemption" under Article 85(3)⁸ of the Treaty. In 1967, the EEC Commis-

⁴ See Champaud, *The Group Exemptions of EEC Regulation 67/67*, 5 Common Mkt. L. R. 23 (1967) ("the exclusive agreement has been the centre of theoretical jousting in the Community, both in the judicial and administrative field, so that it has become a star subject of Community law").

⁵ Ets. Consten and Grundig-Verkaufs G.m.b.H. v. EEC Commission, 196 E. Comm. Ct. J. Rep. 299, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046; HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 576 (1979).

⁶ HAWK, *supra* note 4, at 595.

⁷ Treaty of Rome (EEC) Article 85(1) states:

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.

⁸ Treaty of Rome (EEC) Article 85(3) states:

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 pro-

sion (Commission) issued Regulation 67/67,⁹ which created a "group exemption" or "block exemption" for exclusive distribution agreements meeting certain conditions. Recently, in June 1983, the Commission issued two new regulations to replace Regulation 67/67, which expired on June 30, 1983. Regulation 1983/83¹⁰ deals with exclusive distribution agreements and Regulation 1984/83¹¹ deals with exclusive purchasing agreements.

Although much has been retained from Regulation 67/67, the new regulations contain some significant changes. A thorough understanding of the new regulations requires familiarity with the provisions of Regulation 67/67 and its interpretation by the Commission and the European Court of Justice. Accordingly, this article will review the past application of the group exemption for exclusive distribution agreements and will discuss the changes brought about by regulations 1983/83 and 1984/83. It is hoped that the article will provide United States lawyers with a basis for auditing existing agreements for exclusive distribution in the EEC to determine whether they are in conformity with the new regulations. It will also provide guidance for those who will be drafting these agreements or counselling clients on the subject.

I. Treatment of Exclusive Distribution Agreements Under EEC Competition Law

The legality of exclusive distribution agreements was tested early in the history of the Common Market. Some of the Commission's first decisions concerning competition law involved these agreements.¹² The most important decision was the decision of the Commission on the *Grundig-Consten* agreement,¹³ in which the Commission ruled on an exclusive dis-

moting 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.

⁹ Regulation 67/67, 57 O.J. EUR. COMM. 894 (1967), 1 COMMON MKT. REP. (CCH) ¶ 2727.

¹⁰ Regulation 1983/83, 25 O.J. EUR. COMM. (Supp.) 10 (1983), 1 COMMON MKT. REP. (CCH) ¶ 2733.

¹¹ Regulation 1984/83, 25 O.J. EUR. COMM. 7 (1982), 1 COMMON MKT. REP. (CCH) ¶ 2733.

¹² See, e.g., Decision of the Commission on D.R.U.-Blondel Agreement, [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9049 (exclusive distribution agreement granted an exemption under Article 85(3)); Decision of the Commission on Hummel-Isbecque Agreement, [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9063 (same); Decision of Commission on Jalatte Agreements, [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9083 (same). For discussion of these and other early Commission decisions, see Cohen, *The Application of Article 85 of The Treaty Establishing the European Economic Community to Exclusive Dealing Agreements*, 18 W. RESERVE L. REV. 826 (1967) and Hahn, *Exclusive Distributorship Agreements in the European Common Market, Antitrust Laws on the Move*, 16 AM. U. L. REV. 367 (1967).

¹³ Decision of the Commission on Grundig-Consten Agreement, 7 J. O. COMMON EUR. 2545, 3 Common Mkt. L. R. 489 (1964). The importance of the case is indicated by the fact

tribution arrangement between Grundig, a German manufacturer of electronic appliances, and Consten, a distributor in France. The distribution agreement provided that Consten would act as the exclusive representative of Grundig in France. Consten agreed not to sell any articles that would compete with the Grundig products and also agreed not to make, directly or indirectly, any deliveries to other countries. In turn, Grundig agreed not to deliver its goods to any other persons in France and also prohibited its distributors in other countries from shipping Grundig equipment into France. In addition, Grundig authorized Consten to use Grundig's "GINT" trademark, and Consten registered that mark under its own name in France. Grundig registered the distribution agreement with the Commission, and the Commission ruled that the agreement violated Article 85 of the Treaty. Grundig and Consten then brought actions in the Court of Justice to annul the Commission decision. The Court of Justice affirmed the Commission's decision, in major part, and held that the restrictive provisions of the agreement fell within the prohibition of Article 85(1) and did not satisfy the conditions for an exemption under Article 85(3).¹⁴

The Court of Justice announced several principles that have become cornerstones of Common Market competition law. First, rejecting the argument that Article 85 applies only to horizontal agreements, the Court of Justice held that it applies to all agreements which distort competition, regardless of whether the parties are at different levels in the chain of distribution.¹⁵ The Court also rejected arguments that Article 85 should be interpreted under a "rule of reason" and that restrictions on intrabrand competition should escape the prohibition of Article 85(1) when they have the effect of increasing interbrand competition.¹⁶ The

that the Commission held a press conference to discuss the significance of the decision. See Ladas, *Exclusive Distribution Agreements and the Common Market Antitrust Law*, 9 ANTITRUST BULL. 761 (1964). The *Grundig* case was the subject of a substantial amount of legal commentary in the mid-1960's. See, e.g., Hahn, *Exclusive Distributorship Agreements in the European Common Market*, 16 AM. U. L. REV. 367, 378-83 (1967); Ellis, *The Legality of Exclusive Distributorships Under Common Market Antitrust Law*, 9 ANTITRUST BULL. 775 (1964); Fulda, *The Exclusive Distributor and the Antitrust Laws of the Common Market of Europe and the United States*, 3 TEX. INT'L LAW FORUM 209 (1967); 80 HARV. L. REV. 1594 (1967).

¹⁴ Ets. Consten and Grundig-Verkaufs G.m.b.H. v. EEC Commission, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046. The Court of Justice, while agreeing with the Commission that certain provisions in the agreement violated Article 85(1), annulled the Commission's decision insofar as it held the entire contract to be nullified. The Court found the objectionable provisions to be severable and permitted the balance of the agreement to remain in effect. *Id.* at 7653-54.

¹⁵ The Court stated:

An agreement between producer and distributor that is designed to restore the national partitions in trade between Member States could conflict with the basic objectives of the Community. The EEC Treaty, whose preamble and text are designed to remove the barriers between the States and which, in a number of its provisions, strongly combats their reappearance, cannot permit enterprises to create new barriers of this type. Article 85, paragraph 1, pursues this goal, even in the case of agreements between enterprises that are at different economic levels.

Id. at 7650-51.

¹⁶ *Id.* at 7652.

Court noted that under Article 85, when the purpose of the agreement is to prevent, restrict, or distort competition, it is not necessary to consider the actual effects of the agreement. Because the agreement between Grundig and Consten was designed to maintain separate national markets, it distorted competition within the Common Market. Consequently, the Court of Justice ruled that the Commission did not err by refusing to consider the effects of the agreement on interbrand competition.¹⁷

The most important precept enunciated in the Court's decision is the doctrine of "absolute territorial protection." When the relationship between the parties contains features that make imports into the contract territory from other sources impossible, absolute territorial protection has been established. Grundig's export prohibition on each of its exclusive dealers, in combination with Consten's enforcement of its trademark rights to prevent other Grundig dealers from exporting to France, removed any possibility of parallel imports. The effect of this absolute territorial protection was to create separate national markets within the EEC and to insulate the French market for Grundig products from intrabrand competition. The Court held that this constituted a distortion of competition and thus violated Article 85(1).¹⁸

Further aspects of the Common Market law on exclusive distribution agreements are to be found in *Societe Technique Miniere v. Maschinenbau Ulm G.m.b.H.*¹⁹ In that case, the Court of Justice provided a methodology for analyzing the legality of these agreements, stating that exclusive distribution agreements "do . . . not automatically come under the prohibition of Article 85, paragraph 1."²⁰ An analysis of each of the elements of Article 85(1) is necessary to determine whether an agreement violates that Article. A distribution agreement between enterprises falls within the prohibition of Article 85(1) if it meets two criteria. First, it must be "liable to affect trade between Member States."²¹ This provision requires that before there can be liability under Article 85(1) there must be "a possibility that the realization of a single market between Member States may be hindered."²² The agreement must contain provisions that create a "partitioning" of the market and thus frustrate "economic interpenetration," which is the goal of the Common Market.²³

¹⁷ *Id.*

¹⁸ *Id.* at 7653.

¹⁹ 1966 E. Comm. Ct. J. Rep. 235, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8047.

²⁰ *Id.* at 7695.

²¹ Treaty of Rome (EEC) Article 85(1), *supra* note 7.

²² *Societe Technique Miniere*, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) at 7695. See also *S.A. Cadillon v. Hoss*, 1971 E. Comm. Ct. J. Rep. 351, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8135; *Beguelin Import Co. v. G.L. Import Export S.A.*, 1971 E. Comm. Ct. J. Rep. 949, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8149.

²³ *Societe Technique Miniere*, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) at 7696.

Second, there is a violation of 85(1) only if the agreement has either the object or the effect of impairing competition within the Common Market.²⁴ Whether there is an impairment of competition depends on several market factors, including the nature and availability of the products, the size of the parties and their ability to have an impact on the market, the extent to which the contract is isolated, and the degree to which the exclusivity restrictions provide territorial protection.²⁵

Clearly, restrictions on competition that appear in the text of the agreement fall within the prohibitions of Article 85(1).²⁶ The Court or the Commission, however, may look beyond the agreement itself to the factual circumstances surrounding the agreement. The existence of similar agreements between the same producer and distributors in other Member States may be probative.²⁷ Similarly, an impairment to competition may arise from the combined effect of the exclusive agreement and the operation of certain national laws.²⁸

These principles apply to exclusive purchasing agreements as well as exclusive supply agreements. The typical exclusive purchasing agreement requires the purchaser to obtain the contract goods exclusively from one supplier for a certain period of time. One obvious anticompetitive effect of such agreements is that they foreclose the supplier's competitors from selling to that purchaser for the duration of the agreement.²⁹ Nevertheless, the Commission has recognized that these agreements provide an important business function by assuring a market for sales by the supplier and assuring a source of supply for the purchaser.³⁰ Purchasing agreements should be analyzed within the legal and economic context in which they occur. Thus, if a single purchasing agreement is part of an entire network of agreements that have a cumulative effect on competition, the existence of the other contracts will be taken into consideration in determining whether the single contract violates Article 85(1).³¹

²⁴ *Id.*; *Cadillon*, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) at 7542; *Beguelin*, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) at 7704.

²⁵ *Societe Technique Miniere*, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) at 7696. It has been noted that these market analysis tests are "not unlike those used . . . under the Rule of Reason." RAHL, COMMON MARKET AND AMERICAN ANTITRUST 213 (1970).

²⁶ *Beguelin*, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) at 7704-06.

²⁷ *Societe Technique Miniere* [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) at 7696; *Public Prosecutor v. Dassonville*, 1974 E. Comm. Ct. J. Rep. 838, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8276.

²⁸ In *Dassonville*, the Court of Justice held that an exclusive distribution agreement in combination with a national law concerning proof of authenticity in the designation of origin of certain products could fall within the prohibition of Article 85(1) if used to prevent parallel imports. The Court added that a provision in an agreement that merely authorizes a distributor from exploiting a national rule, or does not prohibit him from doing so, does not suffice, in itself, to render the agreement null and void.

²⁹ HAWK, *supra* note 5, at 597.

³⁰ EEC Seventh Report on Competition Policy 23 (1978).

³¹ *S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen*, 1967 E. Comm. Ct. J. Rep. 407, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8053; *Alexis de Norre v. Brouwerij Concordia*, 1977 E. Comm. Ct. J. Rep. 295 [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8386.

American and other non-EEC exporters should be aware that the fact that they are domiciled outside the Common Market does not insulate them from the application of Article 85(1) if they are party to a distribution agreement under which their goods are distributed within the Common Market.³²

There is one situation in which an exclusive distribution agreement does not fall within the ambit of Article 85(1), even though the agreement may provide for absolute territorial protection. The Court of Justice announced in *Volk v. Vervaecke*³³ that if the parties to the agreement are small, and the effect on the market would be imperceptible, the agreement is not "likely to affect trade between Member States" and thus does not violate Article 85(1).³⁴ These agreements in no way jeopardize the goal of market integration in the EEC. Though the Court of Justice provided no concrete criteria for determining when an agreement is too small to be of concern under the competition laws of the EEC, the Commission has since provided guidelines in its Notice Concerning Minor Agreements.³⁵

II. Origin and Development of the Group Exemption for Exclusive Distribution Agreements

Article 85(3)³⁶ of the Rome Treaty provides that any "agreement" or "concerted practice" or any "category" of agreements or concerted practices can be declared exempt from the application of Article 85(1) if certain conditions are met. To be eligible for an exemption, an agreement or concerted practice must meet four conditions: 1) it must improve the production or distribution of goods or promote technical or economic progress; 2) it must allow consumers a fair share of the resulting benefit; 3) it can contain only those restrictions that are indispensable to the attainment of these objectives; and 4) it must not afford the parties the possibility of eliminating competition with respect to a substantial part of the products in question.³⁷ The same conditions must be met in order for a category of agreements or concerted practices to obtain an exemption.

In 1962, the Council of the EEC issued Regulation 17/62 (Regula-

³² *Beguelin*, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) at 7704.

³³ 1969 E. Comm. Ct. J. Rep. 295, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8074.

³⁴ See also *Cadillon*, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8135.

³⁵ Commission Notice of December 19, 1977 Concerning Agreements of Minor Importance Which Do Not Fall Under Article 85(1) of the Treaty Establishing The European Economic Community, 1 COMMON MKT. REP. (CCH) ¶ 2700. The Notice is not binding on the Court of Justice, and the Commission itself has stated that the Notice is "for guidance purposes only." Commission Decision of July 24, 1974 (*Advocaat Zwarte Kip*), [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9669. See Osterweil, *Developing EEC Antitrust Law in the Field of Distribution under Article 85 of the Treaty of Rome*, 8 LAW & POL. INT'L BUS. 77, 81-82 (1976).

³⁶ Treaty of Rome Article 85(3), *supra* note 7.

³⁷ *Id.*

tion 17),³⁸ the first Regulation implementing Articles 85 and 86 of the Treaty. Although Regulation 17 established a procedure for parties applying to the Commission for an exemption under Article 85(3), it provided no means for the Commission to issue group exemptions. Shortly after Regulation 17 came into force, the Commission was inundated with applications for exemptions under Article 85(3), a large percentage of which were distribution agreements.³⁹ The Commission attempted to establish certain group exemptions as one means of dealing with some of the more than 34,000 agreements notified in 1962.⁴⁰ The Commission, however, held off when the Advisory Committee on Restrictive Practices and Monopolies expressed the opinion that Regulation 17 did not give the Commission any legal basis for issuing group exemptions.⁴¹ Representatives of the Member States on the Council argued that only the Council, not the Commission, had the authority to grant group exemptions.⁴² In response to this limitation on its authority, the Commission issued a regulation creating a simplified form for notifying exclusive distribution agreements.⁴³ The Commission received approximately 12,000 notifications on the simplified form.⁴⁴

Finally, in 1965, the Council of Ministers issued Regulation 19/65,⁴⁵ which authorized the Commission to grant group exemptions for exclusive supply and purchasing agreements and for agreements involving the assignment or licensing of industrial property rights. Regulation 19/65 merely establishes a framework for issuing group exemptions and leaves to the Commission the function of specifying the particular conditions an agreement must fulfill to qualify for a group exemption.⁴⁶

The Commission did not immediately issue a group exemption for exclusive distribution agreements. Rather, in accordance with Regulation 19/65, it waited until "sufficient experience ha[d] been gained in the light of individual decisions."⁴⁷ It granted individual exemptions to sev-

³⁸ Regulation 17/62 of February 6, 1962, 1 COMMON MKT. REP. (CCH) ¶¶ 2401-2634.

³⁹ Hahn, *Exclusive Distributorship Agreements in the European Common Market*, 16 AM. U. L. REV. 367, 371 (1967).

⁴⁰ See Dam, *Exclusive Distributorships in the United States and the European Economic Community*, 16 ANTITRUST BULL. 111, 125 (1971); Note, *Emergence of Group Exemptions Within the EEC Policy on Competition*, 6 VA. J. INT'L L. 128, 135 (1965); Cohen, *The Application of Article 85(3) of the Treaty Establishing the European Economic Community to Exclusive Dealing Agreements*, 54 CORNELL L. REV. 379, 389 (1969).

⁴¹ 1 COMMON MKT. REP. (CCH) ¶ 2726 at 1875.

⁴² See Note, *supra* note 40, at 135; Cohen, *supra* note 40, at 390.

⁴³ Regulation 153/62, 5 J. Off. Com. Eur. 2918 (1962). See Note, *supra* note 40, at 136.

⁴⁴ Hahn, *supra* note 39, at 372; Cohen, *supra* note 40, at 3.

⁴⁵ Regulation 19/65, 1 COMMON MKT. REP. (CCH) ¶ 2717.

⁴⁶ Republic of Italy v. Council and Commission of the EEC, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8048 at 7718. The Government of Italy brought a suit seeking the annulment of Regulation 19/65. The Court of Justice upheld the Regulation, holding that the Council could exempt by Regulation specific groups of agreements without violating Article 87 of the Treaty and without derogating from the principles of Article 85(1).

⁴⁷ Preamble to Regulation 19/65, 1 COMMON MKT. REP. (CCH) ¶ 2717 at 1871.

eral distribution agreements⁴⁸ and waited until the Court of Justice ruled on *Grundig-Consten*, since that case would have a major impact on Common Market competition law.

In 1967, the long-awaited group exemption for exclusive distribution agreements arrived when the Commission issued Regulation 67/67. The Commission felt that it had gained sufficient experience to be able "to define a first category of agreements and concerted practices, which can be accepted as normally satisfying the conditions laid down in Article 85(3)."⁴⁹

Although Regulation 67/67 was "designed to promote legal certainty,"⁵⁰ there were shortcomings in the drafting that were not recognized immediately. When the Regulation was scheduled to expire after having been in force for five years, the Commission extended it for another ten years,⁵¹ finding it to be "satisfactory" and effective in promoting trade and preventing the creation of economic barriers by means of absolute territorial protection.⁵² Within four years after extending it, however, the Commission began to consider amending the Regulation.⁵³

Amendments were needed in several respects. Regulation 67/67 contained certain gaps, particularly concerning exclusive purchasing arrangements and distribution agreements between competitors. Certain terms in the Regulation were too imprecise, thus permitting misuse of the block exemption and failing to provide the guidance that the Regulation was designed to provide. In addition, amendments to some provisions were necessary to effectuate policy changes, to strengthen certain points, and to conform the language of the Regulation to rulings of the European Court of Justice.

The amendment process took almost seven years. What began as an effort to quickly enact some narrow amendments evolved into a complete recasting of the Regulation.⁵⁴ In 1980, four years after Regulation 67/67 amendments were initially considered, the Commission began referring to the "replacement,"⁵⁵ rather than the amendment of the regulation, which was to expire at the end of 1982. The Commission published several drafts of the proposed Regulation and entertained comments from the business and legal communities. By the end of 1982, consideration of the new block exemption was still not complete, so Regulation 67/67 was extended for six more months.⁵⁶ In June, 1983, the Commission published Regulations 1983/83 and 1984/83, both of which became effective

⁴⁸ See *supra* note 12 and accompanying text.

⁴⁹ Regulation 67/67, *supra* note 9.

⁵⁰ *Alexis de Norre v. N.V. Brouwerij Concordia*, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8386 at 7942.

⁵¹ Regulation 2591/72, O. J. EUR. COMM. (No. L 276) (1972).

⁵² EEC Second Report on Competition Policy 18 (1973).

⁵³ EEC Sixth Report on Competition Policy 19 (1977).

⁵⁴ EEC Ninth Report on Competition Policy 16 (1980).

⁵⁵ EEC Tenth Report on Competition Policy 15 (1981).

⁵⁶ Regulation 3577/82, 25 O. J. EUR. COMM. (No. L 373) 58 (1982).

July 1, 1983. Six months later, the Commission issued a "Notice Concerning Regulations No. 1983/83 and No. 1984/83" in order to provide "interpretive guidance" on the new regulations and to assist companies in "bringing their agreements into line with the new legal requirements."⁵⁷

III. Operation of the New Group Exemptions for Exclusive Dealing

A. *Legal Basis for the Group Exemptions*

In the recitals accompanying Regulations 1983/83 and 1984/83, which were largely carried over from the recitals in Regulation 67/67, the Commission explained why it considers certain exclusive distribution agreements to fulfill the conditions of Article 85(3).⁵⁸ The Commission stated several reasons why these agreements improve distribution. Exclusive arrangements allow manufacturers to concentrate sales activities by reducing the number of dealers with whom the manufacturers must do business. This reduces problems arising out of "linguistic, legal, and other differences," which could be substantial among the several countries of the Common Market.⁵⁹ In addition, exclusive distribution agreements permit more intensive and orderly marketing and customer service.⁶⁰ The Commission noted that exclusive distribution agreements "stimulate competition between the products of different manufacturers," *i.e.*, interbrand competition.⁶¹ It also noted that these agreements are often the sole means by which small and medium-sized companies can enter a market,⁶² implicitly recognizing the reality that absent a guarantee of exclusivity for a defined area, a distributor will be reluctant to undertake the expense of marketing, promoting, and servicing a product. Small manufacturers may not have sufficient assets to perform these functions on a broad scale and may be foreclosed from certain geographic markets unless they can be assured of some degree of exclusivity.

The Commission also maintains that consumers will benefit directly from these improvements in distribution⁶³ and that exclusive distribution agreements will not prevent competition in a substantial part of the market due to the availability of parallel imports.⁶⁴ The restrictive provisions permitted by the new Regulation are necessary to attain the improvements in distribution mentioned above, since the restrictions have

⁵⁷ 3 COMMON MKT. REP. (CCH) ¶ 10,548 at 11,268.

⁵⁸ The recitals have often been relied upon by the Court of Justice in its interpretation of Regulation 67/67. *See, e.g.*, Van Vliet v. Fratelli Dalle Crode, 1975 E. Comm. Ct. J. Rep. 1103, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8314 at 7664; S.A. Fonderies Roubaix Watrelos v. Societe Nouvelle des Fonderies A. Roux, 1976 E. Comm. Ct. J. 111 [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8341 at 7212.

⁵⁹ Regulation 1983/83, 25 O. J. EUR. COMM. (Supp.) 10 (1983).

⁶⁰ *Id.* at 11.

⁶¹ *Id.* This point was not contained in the recitals in Regulation 67/67.

⁶² *Id.*

⁶³ *Id.* at 12.

⁶⁴ *Id.* at 16.

the beneficial effects of producing a clear division of functions between the manufacturers and the distributor, and of forcing the distributor to concentrate his efforts on the contract goods in the contract territory.⁶⁵ Exclusive purchasing agreements improve distribution by enabling the supplier to plan more effectively the sales of his goods, and by insuring the reseller a reliable source of supply.⁶⁶

B. Scope of the Exemptions

Regulation 67/67 covered both exclusive distribution agreements and exclusive purchasing agreements, but that coverage has now been separated into two regulations. Regulation 1983/83 covers distribution agreements, and Regulation 1984/83 covers purchasing agreements, which raise quite different issues than distribution agreements.

The basic scope of the group exemption for exclusive distribution agreements is set forth in Article 1 of Regulation 1983/83,⁶⁷ which provides that Article 85(1) does not apply to agreements in which one party agrees to supply exclusively to another party goods for resale within a defined area of the Common Market, or within the whole Common Market. Agreements for the supply of goods which the purchaser transforms or processes into other goods are not considered to be agreements for resale.⁶⁸ The exemption covers only the resale of goods and does not extend to services.⁶⁹ The agreement must be bilateral, not multilateral, and the distribution arrangement must be exclusive. If more than one distributor is authorized for a single defined area, the exemption does not apply.⁷⁰

Regulation 1983/83 contains two important departures from Regulation 67/67 concerning the basic coverage of the exemption. The first is that under Regulation 1983/83, an exclusive distribution agreement may designate the entire Common Market as the exclusive territory of the sole distributor.⁷¹ Regulation 67/67 permitted the agreements to cover only

⁶⁵ *Id.* at 13.

⁶⁶ *Id.* at 20.

⁶⁷ *Id.* at 1. Article 1 of Regulation 1983/83 provides: "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 undertakings 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.

⁶⁸ Notice Concerning Regulations No. 1983/83 and 1984/83, 3 COMMON MKT. REP. (CCH) ¶ 10,548 at 11,269. The Commission has also indicated that when a distributor performs additional operations to add value to the goods, the determination on whether the agreement continues to be one for resale will depend upon the amount of value added and whether the "economic identity" of the goods has been changed. *Id.*

⁶⁹ Commission Decision of May 26, 1978, [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9912.

⁷⁰ Commission Decision of December 21, 1976 (Junghans), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9912.

⁷¹ Regulation 1983/83, *supra* note 67.

"a defined area of the common market."⁷² Manufacturers abused the block exemption by appointing sole distributors for the entire Common Market with the exception of one small country.⁷³ The Commission felt that although the agreement came within the literal application of Regulation 67/67, it violated the spirit of the Regulation, which was intended to permit group exemptions only for agreements covering a part of the Common Market.⁷⁴ The Commission has expressed the view that exclusive distribution agreements covering all or almost all of the Common Market would reduce the possibility of parallel imports and thereby impair intrabrand competition.⁷⁵ In 1977, in one of its draft amendments to Regulation 67/67, the Commission proposed that the territory covered by the agreement could not exceed 100 million in population unless parallel imports were available from at least three alternative sources within the Common Market.⁷⁶ This approach of defining the territory in terms of population was subsequently abandoned, and the Commission ultimately changed its position on the issue completely. By 1981, the Commission was of the view that agreements covering the entire market should be within the scope of the group exemption.⁷⁷ The Commission does not elaborate on this change of policy in its Reports on Competition Policy, but may have felt that other provisions of Regulation 1983/83 insure the possibility of parallel imports sufficiently to permit the broader scope for the group exemption.

The second change in the scope of the group exemption is that it may apply to purely domestic agreements, which are agreements involving the resale of goods within a Member State between parties from the same state. Article 1(2) of Regulation 67/67 expressly provided that the group exemption did not apply under those circumstances. This led to the anomalous situation that a domestic agreement, even if it did affect trade between Member States, could not qualify for the group exemption, but the same agreement entered into between parties from different Member States would be exempt.⁷⁸ The Court of Justice rectified this anomaly in *Roubaix v. Roux*,⁷⁹ in which it held that Article 1(2) of Regulation 67/67 was not intended to deprive domestic agreements of the benefit of the group exemption as long as all the other conditions of the

⁷² Regulation 67/67, *supra* note 9. See, Commission Decision of December 19, 1974, [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9708A.

⁷³ EEC Sixth Report on Competition Policy 20 (1977). See also U.P. TOEPKE, EEC COMPETITION LAW 315 (1982) ("It would seem sufficient for securing the benefits of Regulation 67/67 for the parties to exclude from their agreement the territory of one Member State, for example Luxembourg").

⁷⁴ EEC Sixth Report on Competition Policy 20 (1977).

⁷⁵ EEC Ninth Report on Competition Policy 16 (1980).

⁷⁶ EEC Seventh Report on Competition Policy 55 (1978).

⁷⁷ EEC Eleventh Report on Competition Policy 23 (1982).

⁷⁸ Commission Decision of December 19, 1974 (Goodyear Italiana-Euran) [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9708 at 9570. See EEC Fourth Report on Competition Policy 61 (1975).

⁷⁹ [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8341.

Regulation were satisfied.⁸⁰ To conform the new Regulation to the principle laid down in *Roubaix*, the Commission simply deleted the provision that the exemption was not applicable to purely domestic transactions.⁸¹ This change in the Regulation will enhance the certainty of the parties concerning the exemption, and will, in some situations, dispense with the necessity of resolving the difficult question whether a domestic agreement significantly affects trade with Member States.

C. *Permissible Restrictions in Exclusive Distribution Agreements*

Article 2 of Regulation 1983/83 identifies several restrictive clauses that an exclusive distribution agreement can contain and still qualify for the group exemption. To be eligible for the exemption, however, a distribution agreement can contain no restrictions other than the restrictions specified in Article 2.⁸² Although Article 2 of the new Regulation covers basically the same concepts as those covered in its predecessor, it adds a measure of precision that should clarify the applicability of the exemption.

Unlike Regulation 67/67, which only dealt with restrictions imposed on the distributor, Regulation 1983/83 recognizes that anticompetitive restrictions on the manufacturer sometimes appear in distribution agreements. Thus, Article 2(1) of Regulation 1983/83 provides that "no restriction on competition shall be imposed on the supplier other than the obligation not to supply the contract goods to users in the contract territory." This permits the exclusive distribution agreement to contain a clause prohibiting the manufacturer from supplying directly to con-

⁸⁰ See also *Alexis de Norre v. N.V. Brouwerij Concordia*, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8386.

⁸¹ See Regulation 1983/83, *supra*, note 59, at 8, where the Commission states that where such agreements affect trade Member States "there is no reason to withhold from them the benefit of the exemption by category."

⁸² *Id.* at 3. Regulation 1983/83, Article 2 provides:

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

sumers in the contract area and thus competing with the exclusive distributor in that area. This type of clause contributes to the "division of functions" referred to in the recitals in the preamble of the regulation.⁸³

Article 2(2) describes a series of restrictions that can be imposed on the exclusive distributor, and Article 2(3) discusses certain permissible obligations by the distributor that do not constitute restrictions on competition. These paragraphs constitute the heart of the group exemption in that they define for the parties exactly which provisions circumscribing the conduct of the distributor can be included in the agreement. Under Article 2(2), the distributor can be prohibited from manufacturing or distributing goods that compete with the manufacturer's goods being distributed under the contract. This paragraph eliminates a provision of Regulation 67/67⁸⁴ that allowed this prohibition not only for the duration of the contract, but also for one year after its expiration. The effect of this change is that a noncompetition clause that extends beyond the duration of the distribution agreement will not be eligible for the group exemption.⁸⁵ The agreement can also restrict the distributor's source of supply by requiring the distributor to obtain goods for resale only from the manufacturer rather than from another distributor.⁸⁶

Article 2(2)(c) of Regulation 1983/83 permits a restriction of great practical importance. Although any prohibition of sales outside the contract territory would be strictly forbidden under Article 85(1)⁸⁷ and would not normally qualify for an exemption under Article 85(3), Article 2(2)(c) sanctions certain limitations that have the effect of discouraging sales outside the designated territory. This provision, carried over from Regulation 67/67, allows a contract clause that requires the distributor to refrain from actively seeking customers outside the contract territory, or from setting up a branch or distribution depot outside the territory. This affords the possibility of some degree of territorial protection without going so far as to permit absolute protection. Neither the Commission nor the Court of Justice has been called upon to provide an interpretation of this provision. The permissibility of a "profit passover" clause, under which a distributor pays a certain amount on sales outside his territory to the distributor in whose territory the sale has been made

⁸³ See *supra* text accompanying note 65.

⁸⁴ Regulation 67/67, art. 2(1)(a), *supra* note 9.

⁸⁵ See 8th Recital of Regulation 1983/83, 25 O. J. EUR. COMM. (Supp.) 13 (1967), which indicates that the restrictions of Article 2 are permissible only when they are limited to the duration of the agreement.

⁸⁶ The 1982 draft of this provision limited this exclusive supply obligation to a period of three years. 3 COMMON MKT. REP. (CCH) ¶ 10,406, Article 2(2)(b). This provision was dropped from the final version of the Regulation, so this obligation may presumably extend for the entire duration of the distribution agreement.

⁸⁷ See, e.g., Ets. Consten and Grundig-Verkaufs G.m.b.H. v. EEC Commission, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046; Miller International Schallplatten v. EEC Commission, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8439; Commission Decision of July 11, 1983 (Windsurfing International), 3 COMMON MKT. REP. (CCH) ¶ 10,515.

has also been left unaddressed. The purpose of the clauses is to compensate the nonselling distributor for expenses of advertising and after-sale service. If the clauses are used fairly and not for purposes of penalizing extraterritorial sales, they would not appear to preclude application of the group exemption.⁸⁸

Under Article 2(3) of Regulation 1983/83, a manufacturer can require a distributor to purchase the manufacturer's full line, or minimum quantities of goods. It can also specify how the distributor must mark or package the goods. Finally, the manufacturer can require the distributor to engage in certain promotional efforts such as advertising, maintaining an inventory, maintaining a trained sales force, and providing customer and guarantee services in the contract territory.

It is important to understand that the restrictions specified in Article 2 are the only restrictions that can be contained in an exclusive distribution agreement if it is to qualify for the group exemption.⁸⁹ Numerous agreements have been rendered invalid because they impose additional anticompetitive restrictions, such as export bans or clauses fixing resale prices.⁹⁰

D. Restrictions Expressly Prohibited

The permissible restrictions of Article 2 are counterbalanced by several limitations itemized in Article 3 of Regulation 1983/83.⁹¹ Article 3

⁸⁸ See HAWK, *supra* note 5, at 138-39 (Supp. 1980).

⁸⁹ The Commission has emphasized this point by adding language to the recitals that did not appear in the recitals for Regulation 67/67. The 8th recital now states "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." 1 COMMON MKT. REP. (CCH) ¶ 2730 at 1892.

⁹⁰ See, e.g., *Beguelin*, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8149 (re-export prohibition); Commission Decision of July 11, 1983 (*Windsurfing International*), 3 COMMON MKT. REP. (CCH) ¶ 10,515 (resale restrictions); Commission Decision of December 11, 1980 (*Hennessy-Henkel*), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,283 (resale price fixing); Commission Decision of December 21, 1977 (*Spice Distribution*), [1976-1977 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,017 (resale price fixing).

⁹¹ Regulation 1983/83, art. 3, 25 O.J. EUR. COMM. (Supp.) 10 (1983) provides:

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

contains much that is new and fills some gaps that existed in Regulation 67/67.

1. *Agreements Between Competitors*

One matter that is more carefully controlled under the new Regulation is the problem of agreements between competing manufacturers. Regulation 67/67 provided that exclusive agreements between competitors could not qualify for the group exemption, but the prohibition, by its terms, extended only to reciprocal horizontal agreements.⁹² In addition, nothing in Regulation 67/67 prohibited an exclusive distribution agreement between a manufacturer and a subsidiary of a competing manufacturer, nor did the Regulation define exactly what was meant by "competing goods." These defects have all been addressed by Regulation 1983/83.

The new Regulation draws a distinction between reciprocal and nonreciprocal exclusive distribution agreements between competitors.⁹³ Reciprocal agreements are excluded from the group exemption.⁹⁴ Their anticompetitive characteristics are obvious — they present a risk of horizontal market division, which is expressly prohibited by Article 85(1).⁹⁵ A nonreciprocal agreement by a manufacturer to distribute its goods through a competitor, a situation not addressed in Regulation 67/67, can be equally anticompetitive⁹⁶ and is now expressly prohibited for larger companies.⁹⁷ The Commission, however, has recognized that in some industries a competing manufacturer may be the only available outlet for small or medium-sized companies. Thus, the new Regulation permits competing manufacturers to enter reciprocal exclusive distribution agreements if one or both of the parties has an annual turnover of no more than 100 million E.C.U.⁹⁸

The new Regulation also forecloses the possibility of circumventing, through the use of subsidiaries, the prohibition on horizontal agreements. Article 4 of Regulation 1983/83 provides that the limitations on distribu-

obtaining outside, or from selling in, the contract territory properly marked or otherwise properly marketed contract goods:

2. exercises other rights or takes other measures so as to prevent dealers or users from obtaining outside, or from selling in, the contract territory contract goods.

⁹² Regulation 67/67, art. 3(a), *supra* note 9, provides that the exemption does not apply where "manufacturers of competing goods entrust each other with exclusive dealing in those goods."

⁹³ One commentator noted the failure of Regulation 67/67 to make this distinction shortly after its issuance. *See* Champaud, *supra* note 4, at 33.

⁹⁴ Regulation 1983/83, art. 3(a), *supra* note 91.

⁹⁵ *See supra* note 7.

⁹⁶ *See* Champaud, *supra* note 4, at 33.

⁹⁷ Regulation 1983/83, art. 3(b), *supra* note 91. Of course, such companies are still free to seek an exemption under Article 85(3).

⁹⁸ *Id.* An ECU (European Currency Unit) is a unit of account whose equivalent in national currencies is regularly determined by the Commission and published in the Official Journal of the European Communities.

tion through a competitor also apply when the competing goods are manufactured not by the party to the distribution agreement but by a "connected undertaking."⁹⁹ Thus, if a large manufacturer enters an agreement with a distributor whose parent company is also a large manufacturer of competing goods, the agreement would not qualify for the group exemption.

The Commission has also defined more precisely the concept of "competing goods," replacing that term with the phrase "identical goods or . . . goods which are considered by users as equivalent in view of their characteristics, price and intended use."¹⁰⁰ Although the attempt at greater specificity is to be commended, the new term will probably not markedly increase the certainty as to which goods come within the meaning of Article 3 of the Regulation.

2. *Absolute Territorial Protection*

The new Regulation has strengthened the prohibition against absolute territorial protection. Regulation 67/67 recognized in its recitals the importance of parallel imports and the problem of absolute territorial protection,¹⁰¹ but the body of the Regulation did not expressly state that the exemption would be inapplicable in situations when there was absolute territorial protection. The Commission has now attempted to fortify the prohibition against absolute territorial protection by adding an express prohibition to Article 3 of Regulation 1983/83. Article 3(c) provides that the group exemption does not apply when the exclusive distributor is the sole source of supply of the contract goods in the territory and there is no alternative source of the goods outside the territory.¹⁰² If, because of the specialized nature of the contract goods, competing distributors in the territory are unable to obtain the goods through parallel imports, and the user is unable to obtain the goods

⁹⁹ The language of Article 4 is tortuous at best and verges on the incomprehensible. It states:

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 of 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.

¹⁰⁰ Regulation 1983/83, *supra* note 91.

¹⁰¹ 10 O. J. EUR. COMM. 645 (1967).

¹⁰² Regulation 1983/83, *supra* note 91.

through sources outside the territory, then the exclusive distribution agreement will have to be individually submitted to the Commission to obtain an exemption. Questions will arise whether the phrase "no alternative source of supply outside the contract territory"¹⁰³ means that importation must be literally impossible, or whether this phrase would cover situations when importation is impracticable due to the nature of the product or the costs of shipment. If the latter interpretation is adopted, it could seriously undercut the new provision in Article 1 that permits exclusive distribution agreements to cover the entire Common Market, since the alternative of importing from non-Common Market countries may be unduly expensive. The Commission has provided some guidance on the interpretation of this clause by noting that the supplier itself may constitute an alternative source of supply if the supplier is prepared to sell to end-users in the contract territory.¹⁰⁴

3. *Agreements Impairing the Distribution of Goods*

Regulation 67/67 contained a catch-all prohibition¹⁰⁵ on which the Commission and the Court of Justice frequently relied to exclude agreements from the exemption when the parties took actions designed to protect the contract territory or otherwise prohibit parallel imports.¹⁰⁶ The provision extended to conduct that was outside the written terms of the distribution agreements and applied to unilateral as well as concerted activity.¹⁰⁷ This provision has now been carried over into Article 3(d) of Regulation 1983/83,¹⁰⁸ which reflects essentially the same concepts as contained in its predecessor, but adds a provision with respect to restrictions on goods from dealers outside the Common Market.

Article 3(d) provides that the group exemption is not applicable when the parties to the exclusive distribution agreement "make it difficult" for users to obtain the goods from other dealers. In Regulation 67/67 this provision related only to difficulty in obtaining goods from other dealers "within the common market."¹⁰⁹ Regulation 1983/83 expands the prohibition to cover situations involving difficulty in obtaining

¹⁰³ *Id.*

¹⁰⁴ Notice Concerning Regulations No. 1983/83 and 1984/83, 3 COMMON MKT. REP. (CCH) ¶ 10,548 at 11,272.

¹⁰⁵ Regulation 67/67, art. 3(b), *supra* note 9.

¹⁰⁶ See *Beguelin*, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8135; *Van Vliet v. Fratelli Dalle Crode*, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8314; Commission Decision of December 2, 1981 (Hasselblad), 3 COMMON MKT. REP. (CCH) ¶ 10,401; Commission Decision of December 11, 1980 (Hennessy-Henkel), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,283; Commission Decision of December 21, 1976 (Theal/Watts), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9913.

¹⁰⁷ Commission Decision of November 16, 1983 (Ford Werke AG), 3 COMMON MKT. REP. (CCH) ¶ 10,539; Commission Decision of December 2, 1981 (Hasselblad), 3 COMMON MKT. REP. (CCH) ¶ 10,401.

¹⁰⁸ Regulation 1983/83, *supra* note 91; Regulation 67/67, *supra* note 9.

¹⁰⁹ Regulation 1983/83, art. 3(b), *supra* note 91.

goods from outside the Common Market when no alternative source of supply is available within the Common Market.

In addition to the general prohibition on actions that make distribution difficult, Article 3(d) recites two types of conduct that will deprive the parties of the benefit of an exemption. First, industrial property rights cannot be used to create territorial barriers.¹¹⁰ Second, in an extremely open-ended provision, the parties are prohibited from exercising "other rights" or taking "other measures" that would prevent dealers from selling, or consumers from using, the contract goods in the territory.¹¹¹

Inherent in these provisions is a degree of tension between EEC competition law and national laws protecting industrial property rights or prohibiting unfair competition. A balance was struck in *Beguelin Import Co. v. G.L. Import Export S.A.*,¹¹² in which the Court of Justice held that an exclusive distribution agreement, used in combination with national laws on unfair competition to prevent parallel imports, cannot benefit from the protection of the group exemption. The Court stated that a party to an exclusive distribution agreement can exercise its rights under national law "only if the allegedly unfair conduct of his competition results from circumstances other than the mere fact that they engaged in parallel imports."¹¹³

E. Exclusive Purchasing Agreements

Exclusive purchasing arrangements are now covered by Regulation 1984/83. The concepts covered in this Regulation differ greatly from the coverage of exclusive purchasing agreements in Regulation 67/67. Regulation 67/67 was seriously deficient in addressing the issues raised by exclusive purchasing agreements because, as the Commission has recognized, Regulation 67/67 was "tailored for exclusive distribution agreements."¹¹⁴

Most exclusive purchasing agreements in the Common Market are between parties within the same Member State, and the Commission initially did not consider these agreements to be covered by Regulation 67/67. The Commission also felt that Regulation 67/67 was inapplicable to purchasing agreements that did not define an area of the Common Market within which resale was to take place.¹¹⁵ Exclusive purchasing

¹¹⁰ *Id.* at art. 3(d)(1).

¹¹¹ *Id.* at art. 3(d)(2).

¹¹² [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8135.

¹¹³ *Id.* at 7704. *See also* *Sirena v. Eda*, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8101.

¹¹⁴ EEC Seventh Report on Competition Policy 54 (1978). *See also* Commission's Response to Written Question No. 1764/82, 3 COMMON MKT. REP. (CCH) ¶ 10,478 at 11,069 ("There is no provision whatsoever in the regulation [67/67] dealing with the problems specific to exclusive purchasing agreements").

¹¹⁵ *Alexis de Norre v. N.V. Brouwerij Concordia*, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8386.

agreements are most often part of a network of agreements found in distinct industries (*e.g.*, the brewing industry and the petroleum products industry), and frequently contain provisions concerning the extension of credit and the leasing of premises.¹¹⁶ Regulation 67/67 was not designed with any of these peculiarities in mind. Nevertheless, in 1977 the Court of Justice, in *Alexis de Norre v. Brouwerij Concordia*,¹¹⁷ held that the group exemption provided in Regulation 67/67 extended to these types of agreements.

The new Regulation defines three categories of purchasing agreements that are eligible for a group exemption. The first consists of exclusive purchasing agreements of short and medium duration in all sectors of the economy.¹¹⁸ The other two categories are related to exclusive purchasing in specific sectors, *e.g.*, beer purchase agreements and petroleum products purchase agreements, which are typically long-term contracts.¹¹⁹ This discussion focuses on the more general type of exclusive purchasing agreement, since the beer and petroleum products agreements are not likely to occur frequently in U.S. export trade.¹²⁰

Under Regulation 1984/83, an agreement between two parties whereby one party agrees to purchase certain goods for resale exclusively from the other party, is exempt from the prohibition of Article 85(1) if certain conditions are met.¹²¹ These conditions include limits on the range of goods that can be covered by an exclusive purchasing agreement and limits on duration of the arrangement. No such limitations existed in Regulation 67/67. Regulation 1984/83 prohibits the group exemption for purchasing agreements containing tie-ins. It excludes from the exemption any agreements covering "more than one type of goods" unless they are related either "by their nature" or "according to commercial usage."¹²² To be eligible for the exemption, an agreement must have a duration of five years or less.¹²³ Agreements of indefinite duration are not eligible for the group exemption.¹²⁴ Like 1983/83, the group exemption is not available to reciprocal exclusive purchasing agreements between competitors, and nonreciprocal agreements are sanctioned only for

¹¹⁶ S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8053.

¹¹⁷ [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8053.

¹¹⁸ Regulation 1984/83, arts. 1-5, *supra* note 11.

¹¹⁹ *Id.* arts. 6-13. The Commission has defended its approach to brewery supply contracts in its Response to Written Question No. 1764/82, 3 COMMON MKT. REP. (CCH) ¶ 10,478.

¹²⁰ For a further explanation of the provisions concerning the beer and petroleum products agreements, see Notice Concerning Regulations No. 1983/83 and 1984/83, 3 COMMON MKT. REP. (CCH) ¶ 10,548 at 11,273-276.

¹²¹ Regulation 1984/83, arts. 1-3, *supra* note 11.

¹²² *Id.* art. 3(c).

¹²³ *Id.* art. 3(d).

¹²⁴ *Id.* Agreements that specify a fixed term but are automatically renewable unless one of the parties gives notice to terminate are considered to be agreements for an indefinite period. Notice Concerning Regulations No. 1983/83 and 1984/83, 3 COMMON MKT. REP. (CCH) ¶ 10,548 at 11,273.

small and medium-sized companies.¹²⁵ The permissible restrictions are essentially the same as those included in 1983/83.¹²⁶

It should be noted that 1984/83 exempts only exclusive purchasing for purposes of resale.¹²⁷ Consequently, it does not cover requirements contracts when one party commits to purchase from a single supplier its entire requirement of a product for its own use.

F. Withdrawal of the Exemption

When the Council of the EEC, in Regulation 19/65, endowed the Commission with the power to grant group exemptions, it also gave the Commission the power to take those exemptions away when agreements have effects that are incompatible with Article 85(3).¹²⁸ Like Regulation 67/67,¹²⁹ Regulation 1983/83 contains an Article that sets forth the conditions under which the Commission may withdraw the exemption.¹³⁰ The new Regulation, however, increases the Commission's withdrawal authority since it contains certain grounds for withdrawal which did not appear in Regulation 67/67. Article 6 of Regulation 1983/83 provides that the Commission can withdraw the benefit of the Regulation when it finds that a particular exempt agreement is incompatible with Article 85(3).¹³¹ The Regulation specifies several situations in which a withdrawal would be appropriate. The Commission can exercise its power to withdraw the exemption when the contract goods are not subject to "effective competition"¹³² in the contract territory, or when distribution by

¹²⁵ *Id.* art. 3(a), (b).

¹²⁶ *Id.* art. 2.

¹²⁷ *Id.* art. 1.

¹²⁸ Regulation 19/65, art. 7, *supra* note 45.

¹²⁹ Regulation 67/67, art. 6, *supra* note 9.

¹³⁰ Regulation 1983/83, art. 6, *supra* note 10, provides:

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.

Regulation 1984/83 contains a provision for withdrawal of the exemption which is essentially the same as Article 6 of 1983/83.

¹³¹ Regulation 1983/83, *supra* note 130.

¹³² *Id.* art. 6(a). Regulation 67/67, Article 6(a) permitted withdrawal when the goods were not subject to "competition," as distinguished from "effective competition" in Regulation

other suppliers is made "difficult to a significant extent."¹³³ In addition, withdrawal is warranted when, even absent a restriction of the type prohibited by Article 3, it is still not possible for consumers to obtain the goods by way of parallel imports.¹³⁴ Finally, the Regulation takes aim at specific types of distribution misconduct by sanctioning withdrawal for refusals to deal when the distributor has no "objectively justified reason"¹³⁵ for refusing to supply, or when the distributor sells at "excessively high prices."¹³⁶ In a provision not contained in Regulation 67/67, the Commission is authorized to withdraw the exemption when the distributor engages in price discrimination.¹³⁷

The Commission's power to withdraw the exemption under this Article is extremely broad. The conditions that must be met to justify withdrawal are largely subjective, and the terminology is not well defined. The Article contains no guidelines as to what constitutes an "excessively high price," what constitutes a "significant extent" of difficulty in distribution, or what constitutes "effective competition," as opposed to some other type of competition. Even the determination whether a distributor has an "objectively justified reason" for refusing to deal appears to be completely subjective, since we are given no touchstones as to what types of reasons are justified. It is important that the Commission have the power to withdraw exemptions in order to ensure that the group exemption format is not abused, but Article 6 goes too far. Its lack of meaningful standards will undermine the goal of legal certainty in determining whether a distribution agreement is safely insulated from the applicability of Article 85(1).

G. *Effect of the New Regulation on Existing Agreements*

Distribution agreements entered into after December 31, 1983 will have to comply with the provisions of Regulation 1983/83 in order to qualify for the group exemption.¹³⁸ Parties who have entered into agreements before that time will have until December 31, 1986 to bring their agreements into conformity with Regulation 1983/83. Until that time they will be governed by the conditions of Regulation 67/67.¹³⁹ The same schedule applies to exclusive purchasing agreements under Regula-

1983/83. The addition of the requirement that the competition be "effective" presumably broadens the Commission's withdrawal powers.

¹³³ Regulation 1983/83, art. 6(b), *supra* note 130. In contrast, Regulation 67/67, art. 6(b) required that distribution by other suppliers be "not possible" before withdrawal was justified.

¹³⁴ Regulation 1983/83, art. 6(c), *supra* note 130.

¹³⁵ *Id.* art. 6(d)1. The 1982 draft Regulation eliminated the "objectively valid reasons" standard which appeared in Regulation 67/67, thereby authorizing withdrawal for *any* refusal to supply, regardless of the reason. The final version of the Regulation, however, returned to the "objectively justified reason" standard, thereby recognizing that a distributor may have some voice in deciding with whom it will deal.

¹³⁶ Regulation 1983/83, art. 6(d)2, *supra* note 130.

¹³⁷ *Id.* art. 6(d)1.

¹³⁸ Regulation 1983/83, art. 7, *supra* note 10.

¹³⁹ *Id.*

tion 1984/83, except that brewery and petroleum products agreements have until the end of 1988 to be brought into line with the new Regulation. This schedule will provide companies a reasonable period of time in which to audit their existing agreements, obtain appropriate counseling, and make whatever revisions may be necessary in the agreements.

IV. Conclusion

Because U.S. exporters frequently use exclusive distribution arrangements to market goods in the Common Market, the EEC Regulation permitting a group exemption for such arrangements is a matter of great practical importance. The new Regulation has added some flexibility to exclusive distribution agreements by permitting these agreements to cover the entire Common Market rather than merely some portion of the Common Market. It has also sanctioned nonreciprocal exclusive distribution agreements between competitors in a small business setting. On the other hand, the new Regulation constitutes an effort by the Commission to foreclose other types of arrangements between larger competitors, and blocks any effort to use subsidiaries to circumvent the provisions of the Regulation. Regulation 1983/83 also makes explicit the prohibition on absolute territorial protection in any form. In Regulation 1983/84, the Commission, for the first time, specifically addresses issues which are unique to exclusive purchasing agreements.

The Commission has brought the regulations on group exemptions into conformity with the decisions of the Court of Justice, and has solved many of the technical problems of Regulation 67/67. Some parts of Regulation 1983/83, however, are still plagued by the absence of clear standards, especially the provision empowering the Commission to withdraw the benefit of the group exemption from particular agreements. On the whole, however, the Commission has balanced adequately the competing interests involved in exclusive distribution agreements, fairly accommodating the practical necessity of these agreements while upholding the goal of the EEC to create a unified market.

