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EEC Regulation of Exclusive Dealing Arrangements

by

Nicolai J. Sarad†

INTRODUCTION

European Economic Community (EEC) policy encourages total competition\(^1\) in trade under the regime of the Treaty of Rome (hereinafter the Treaty).\(^2\) Article 85 of the Treaty prohibits all agreements between undertakings,\(^3\) decisions between associations of undertakings, and concerted practices which have as their object or effect the prevention, restriction, or distortion of competition within the Common Market. Article 85(2) automatically voids all restrictive agreements. Paragraph 3 of the article, however, provides an exception for agreements that, despite violating paragraph 1, in some other

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1. Free competition does not, however, imply that EEC competition policy is completely laissez-faire. Rather, EEC policy uses a regime of "free-trade" rules to obtain the goals established in the Treaty. See particularly Treaty Establishing the European Economic Community, Mar. 25, 1957, 294-297 U.N.T.S. 2 (French, German, Italian, and Dutch), reprinted in 1979 Gr. Brit. T.S. No. 15 (Cmd. 7460) (official English version), art. 3 [hereinafter cited as the Treaty]. Article 3 provides that, in realizing the goal of creating the Common Market the community will institute "a system ensuring that competition in the common market is not distorted." See also B. Goldman & A. Lyon-caen, Droit Commercial Européen 489 (4th ed. 1983), explaining that the member states "considered . . . that the technical development, expansion of capital markets and the improvement of the standard of living should result from the activities of businesses (including nationalized firms)."

2. Article 85 of the Treaty provides, in pertinent part:

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 . . .

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

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of [agreements] . . . which [contribute] to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit . . .

3. "Undertaking" is the English term more commonly known in American usage as company, business, or firm. The French text of the Treaty uses the term "entreprise", the German text "Unternehmen".

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way promote competition and are therefore justifiable. Exclusive dealing arrangements exemplify the article 85(3) loophole.

This Article will examine the June 1983 regulations of the Commission of the European Communities (hereinafter the Commission) that permit exclusive dealing arrangements between two undertakings for the resale of goods within the Communities. Before analyzing the new legislation, however, this Article will review the status of exclusive dealing agreements under Commission Regulation 67/67 of 1967, the original regulation granting a block exemption for certain exclusive dealing agreements. Next, this Article will discuss the new regulations in light of the development of EEC case law, and search for a rational basis for the amendments. Finally, this Article will analyze the effectiveness of the Commission in formulating competition policy.

I

THE ORIGINAL BLOCK EXEMPTION: REGULATION 67/67

In the early years of the EEC, it was not clear whether article 85 was to be applied to vertical agreements. After the first antitrust decisions of the Commission and the European Court of Justice (hereinafter the Court), however, it became evident that article 85 did apply to vertical arrangements. Nevertheless, the adoption by the Council of the European Communities (hereinafter the Council) of Regulation 17/62 of 1962 made it necessary to establish procedures for exempting certain agreements from automatic review.

Article 2 of Regulation 17/62 provides that, upon application by undertakings or associations of undertakings, the Commission may certify that no grounds exist for taking any action regarding a given agreement. This certification procedure is known as negative clearance, or permission by failure to prohibit a proposed agreement. Regulation 17/62 further sets forth notification procedures required to gain approval of negative clearance for


8. 5 J.O. COMM. EUR. (No. 13) 204 (1962), COMMON MKT. RPTR. (CCH) ¶ 2401 (English translation).

9. Id. at art. 2.
certain agreements. 10

Because of the notification requirements, the Commission was soon inundated with applications for clearance. 11 Since it became unwieldy to administer the regulation, a group exemption for a specific kind of agreement became useful. The first step was Council Regulation 19/65 of 1965,12 which authorized the Commission to promulgate regulations granting group exemptions to certain categories of bilateral exclusive distribution and industrial property rights agreements. Regulation 19/65 is extremely important in delegating powers to the Commission to promulgate legislation concerning competition policy without seeking the formal approval of the Council. 13

Pursuant to Regulation 17/62, the Commission also passed Regulation 67/67, the first block exemption for exclusive dealing agreements. 14 Regulation 67/67 reveals the Commission’s readiness to isolate those practices, which although prima facie violative of article 85, have the overall effect of promoting competition. 15 In passing Regulation 67/67, the Commission indicated that experience gained from previous individual decisions would allow it to define the category of agreements which would promote competition. 16

The Preamble to Regulation 67/67 explains its origins and purposes:
Whereas in the present state of trade exclusive dealing agreements relating to international trade lead in general to an improvement in distribution because the entrepreneur is able to consolidate his sales activities; . . . whereas the fact of maintaining contacts with only one dealer makes it easier to overcome sales difficulties resulting from the linguistic, legal, and other differences; whereas exclusive dealing agreements facilitate the promotion of the sale of a product and make it possible to carry out more intensive marketing and to ensure continuity of supplies, while at the same time rationalizing distribution; whereas, moreover, the appointment of an exclusive distributor or of an exclusive purchaser who will take over, in place of the manufacturer, sales promotion, after-sales service and carrying of stocks, is often the sole means whereby small and medium-sized undertakings can compete in the market . . . .

10. Id. at art. 5.
12. 8 J.O. COMM. EUR. 533 (1965), COMMON MKT. RPRTR. (CCH) ¶ 2718 (English translation).
13. Regulation 19/65, art. 1 provides, in pertinent part:
1. . . . the Commission may by regulation declare that Article 85(1) shall not apply to categories of agreements . . . .
2. The regulation shall define categories of agreements to which it applies . . . .
According to the regulation, Commission regulations must state which clauses will be acceptable, and which clauses are mandatory. See COMMON MKT. RPRTR. (CCH) ¶ 2718.
14. See supra note 5.
15. Entrepreneurs clearly believed such arrangements were useful; during the first years of application of article 85, nearly three-fourths of the notifications received by the Commission concerned exclusive dealing agreements. See PREMIER RAPPORT GÉNÉRAL SUR L’ACTIVITÉ DES COMMUNAUTÉS EN 1967 at 60 (1968).
16. Id.
The Preamble continues to explain that exclusive dealing arrangements also give consumers their proper share of the resulting benefits through increased access to supplies. Most importantly, however, the Preamble states the key to ensuring that the exemption of such agreements will not restrict trade: trade will remain unrestricted by guaranteeing the flow of parallel imports, or the flow of imports into an exclusive distributor's territory, by a party other than the licensed distributor.

Regulation 67/67 views exclusive dealing agreements from a qualitative standpoint. Article 1 of Regulation 67/67 limits the exemptions to agreements between two undertakings from different States through which goods are to be exclusively supplied or purchased for resale. Article 3 denies exemption for agreements between competing manufacturers which guarantee cross supplies (or "horizontal" agreements) and agreements through which the contracting parties make it difficult for intermediaries or consumers to obtain the goods from other dealers in the common market (as through the abusive use of industrial property rights). Article 6 permits the withdrawal of the exemption granted pursuant to article 7 of Regulation 19/65 when the Commission determines that: (a) the contract goods are not subject to competition in the territory of the contract; (b) other manufacturers are in some way restricted from selling goods in the contract territory at the same level as the exclusive distributor; or (c) the exclusive dealer has abused the exemption by charging excessive prices for the goods or denying sales to certain categories of purchasers. Regulation 67/67, which was enacted in March 1967 for an initial period of five years, was twice amended to remain in force until December 31, 1982.

Implementation of Regulation 67/67 revealed that the block exemption contained weaknesses. The Commission found that the "experience of the application of the Regulation has revealed that the wording of several of its provisions allows for an interpretation which is inconsistent with its purpose." The Commission began the process of amending the scope of the regulation to ameliorate these "inconsistencies," but despite the preparation of several revised drafts of the block exemption, no action was taken until the adoption of Regulations 1983/83 and 1984/83 in June 1983.

Regulation 67/67 was adopted, as were the regulations of 1983, after an analysis by the Commission of decisions by the Court. The Seventh Report on Competition Policy states that the proposed amendments were designed to

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20. EEC COMMISSION, SIXTH REPORT ON COMPETITION POLICY, point 10 (1976).
bring the laws on exclusive dealing "into line with the continuing development of Community law and the case law of the Court of Justice."\textsuperscript{22} The \textit{Grundig}\textsuperscript{23} and \textit{La Technique Minière}\textsuperscript{24} cases were among the first to test the scope and enforceability of the Treaty's competition provisions.\textsuperscript{25} The cases led not only to the promulgation of Regulation 67/67, but also to codification of the rule, found in \textit{Grundig}, that prohibits industrial property right abuse as a means of restricting parallel imports.\textsuperscript{26}

The \textit{Grundig} decision stands for the principle that all agreements restricting trade between the EEC Member States which curtail parallel imports are void as violations of the Preamble and article 85 of the Treaty. In \textit{Grundig},\textsuperscript{27} the German television-electronics firm Grundig granted Consten an exclusive distributorship for France.\textsuperscript{28} Under the agreement, Grundig forbade Grundig dealers in other States from exporting Grundig products as parallel imports to France, and further restricted the possibility of parallel imports by granting Consten the Grundig international trademark (GINT) for France. The Court stated that "an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States could be such as to thwart the most basic [objectives] of the Community."\textsuperscript{29} The Court, however, only ruled on the parts of the agreement which restricted trade by preventing parallel imports, and found the use of industrial property rights particularly reprehensible.\textsuperscript{30}

While holding that the Commission "properly took into account the whole [distribution] system," and stating that "in order to classify the situation created by the contract, the contract should be placed in the economic and legal context in the light of which it has been concluded by the parties,"\textsuperscript{31} the Court rejected the Advocate General's pleas to make a more thorough examination of the market conditions surrounding the exclusive

\textsuperscript{22.} EEC COMMISSION, SEVENTH REPORT ON COMPETITION POLICY, point 38 (1977).
\textsuperscript{24.} 1966 C.J. Comm. E. Rec. 337, [1966] Comm. Mkt. L.R. 357 (English translation). The Court held that an exclusive dealing agreement does not constitute a \textit{prima facie} violation of article 85(1) of the Treaty. Rather, all factors of the case, both legal and factual, must be considered in making a determination of any adverse effects on trade. The exclusivity contract in this case was upheld because the French distributor was not receiving territorial protection from the contracting manufacturer. \textit{Id.} at 361-62, [1966] Comm. Mkt. L.R. at 376-77 (English translation).
\textsuperscript{26.} See Reg. No. 67/67, supra note 5, art. 3.
distributorship agreement.\textsuperscript{32} Although no pernicious aspects of the case escaped the Court, it is still noteworthy that the Court, which the Commission has since relied upon to be the authoritative interpreter of economic legislation, established an early precedent not to engage in thorough economic analysis in EEC antitrust cases.\textsuperscript{33}

It is important to note the significance of the Commission’s reliance on the existing case law. It seems peculiar that the Commission, while serving as the legislative body on most matters of competition policy, would need to defer to the judiciary for economic advice regarding trade legislation. Although the Commission frequently has diverging views from those of the Court on specific issues relating to exclusive dealing, the Commission’s deference to the judiciary determined that the Court’s views are definitive for purposes of amending the block exemption.\textsuperscript{34} Some commentators have argued that such reliance on the Court threatens the separation of powers of Community organs.\textsuperscript{35} It is also true, however, that as a young affiliation of States, the EEC is inexperienced in making policy decisions in some areas. The Commission’s language suggests that the various organs of the EEC may be able to rely on each other in the development of policies.

The Commission stated that, in addition to its reliance on the Court’s decisions, it also relied on business community recommendations as to how to amend the exclusive dealing regulations.\textsuperscript{36} The comments received by the Commission from the private sector, however, have never been fully published nor summarized in the annual reports of the Commission.\textsuperscript{37} Despite the Commission’s claims of seeking broad-based advice and except for strong affirmation for protecting parallel imports, Regulations 67/67, 1983/83, and 1984/83 do not sufficiently reflect the precautions necessary to deter restrictive practices. Concern over the inadequacy of the amendments as well as unexplained radical changes in draft regulations has led the Parliament to seek a broader role in the formation of competition policy.\textsuperscript{38}

\textsuperscript{32} Id. For a complete discussion of the role of the Advocate General in the proceedings, see Fulda, The Exclusive Distributor and the Antitrust Laws of the Common Market and the United States, supra note 27, at 213–15.

\textsuperscript{33} Compare the approach of the United States Supreme Court as expressed by Justice Marshall in United States v. Topco Assoc., Inc., 405 U.S. 596, 609 n.10 (1971) (“Should Congress ultimately determine that predictability is unimportant in this area of the law, it can of course, make per se rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach”).

\textsuperscript{34} EEC COMMISSION, SEVENTH REPORT ON COMPETITION POLICY, point 38 (1977).

\textsuperscript{35} Downes, supra note 17, at 171.

\textsuperscript{36} See EEC COMMISSION, NINTH REPORT ON COMPETITION POLICY, point 2 (1979), which states: “[H]aving regard to comments received following publication both from business circles and from Parliament, the Commission is endeavoring to frame provisions that will offer an adequate, durable solution to the various problems arising here.”


\textsuperscript{38} Id. at 14.
In the draft regulations amending Regulation 67/67, there were originally six proposed amendments: (1) the deletion of article 1(2), under which the block exemption did not cover intrastate agreements; (2) the amendment of article 2(2) to include exclusive purchasing agreements; (3) the clarification of article 3 to exclude both reciprocal and non-reciprocal agreements between competing manufacturers; (4) the addition of a new article 3(c), which would limit the territory of resale covered by an agreement to an area not exceeding one hundred million inhabitants; (5) the addition of a new article 3(d), tying agreements to the condition that a producer entering such an agreement must not account for more than fifteen percent of the total sales of relevant goods or similar goods in a substantial part of the common market; and (6) the amendment of article 6, which provides for withdrawal of the exemption and the amendment of article 2(2), to include exclusive purchasing agreements. Subsequent drafts were presented, culminating in the 1983 versions. Amendments (1), (2), (3), and (6) above were ultimately adopted in some form by Regulation 1983/83 and a separate regulation, Regulation 1984/83, adopted to deal specifically with exclusive purchasing. Regulations 1983/83 and 1984/83 took effect on July 1, 1983, displacing the rules of Regulation 67/67 for all agreements concluded after that date. A discussion of the amendments concerning exclusive distribution will be followed by a discussion of the exclusive purchasing amendments.

A. Exemption for Intrastate Agreements

Article 1(2) of Regulation 67/67 excluded intrastate agreements from the exemption because, as stated in the Preamble, "it is only in exceptional cases that exclusive dealing agreements concluded within a Member State affect trade between Member States." Furthermore, because EEC antitrust law is designed primarily to promote trade between States, intrastate agreements were not seen as the concern of Community-wide regulation, since intrastate agreements are not necessarily immune from national antitrust laws. Decisions of the European Court of Justice, however, revealed the potentially pernicious effect of intrastate agreements on interstate trade.

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40. See Reg. No. 1983/83, supra note 4, art. 10; Reg. No. 1984/83, supra note 4, art. 19. Both regulations provide a grace period for agreements which were in force on July 1, 1983, during which the exemption conditions of Regulation 67/67 will continue to apply. This grace period expires December 31, 1986.
Court expanded its detailed Grundig analysis in Brasserie de Haecht S.A. v. Wilkin, a case concerning a brewery solus agreement. Brasserie de Haecht held that:

[I]n affecting the agreements, decisions or practices on grounds not only of their objects but also of their effects on competition, Article 85(1) implies that it is necessary to observe those effects in the context in which they occur, i.e., in the economic and legal context in which such agreements, decisions or practices are to be found or where they might together with others amount to a cumulative effect on competition. It would be futile to consider an agreement, a decision or a practice as regards its effects if the latter could be separated from the market in which they appear and could only be examined detached from the bundle of effects, convergent or not, in the midst of which they are produced.

The Court found that while individual agreements may not themselves directly affect interstate trade, they might be part of a network of agreements between a producer and different distributors. Such a network of intrastate agreements might affect interstate trade by closing off a national market from importation of goods from other States.

Despite the Brasserie de Haecht Court's perception of the negative effects that intrastate agreements could produce, subsequent Court decisions have stripped article 1(2) of its meaning. In S.A. Fonderies Roubaix-Wattrelos v. Société Nouvelle des Fonderies A. Roux, concerning an agreement to sell iron castings in the northern half of France, the Court upheld the Commission's opinion that intrastate exclusive dealing agreements were similar enough to interstate agreements to merit falling under the block exemption of Regulation 67/67. The Court held that such agreements would normally meet the competitive justification tests of article 85(3) by producing sales concessions.

The Fonderies Roux Court may have misinterpreted the intent behind Regulation 67/67 in holding that article 1(2) of Regulation 67/67 was not meant to exclude those intrastate agreements which "significantly affect trade between Member States." If the Court's reasoning were followed, all intrastate agreements would fall under the penumbra of Regulation 67/67 even though many of them would technically not fit within its scope. As a consequence, agreements potentially injurious to interstate trade would gain the protection of the Regulation 67/67 exemption, despite the risk, as forewarned

44. A "solus" agreement is an agreement in which a retailer agrees to purchase beer and other products solely from one producer.
47. Id.
49. Id. at 120–21.
50. Id. at 117–18.
51. Id. at 120.
by the Grundig court, that such agreements would violate the spirit of the Treaty.

The Fonderies Roux Court's logic seems faulty for the reasons stated in the Brasserie de Haecht decision. As one commentator stated:

[T]he Court appears to have failed to distinguish between the positive and negative aspects of competition policy: inter-State agreements are allowed to continue, and the restraint upon full competition is tolerated, because in the long run they promote the positive interest of trade between Member States; intra-State agreements cannot fulfill this positive role.52

Because intrastate agreements may foreclose national markets from competition, it makes more sense to examine them on a case-by-case basis to see if they pass the test of article 85(3), once it has been determined that they fall under article 85(1). This analysis would be consistent with the notion that the majority of intrastate agreements have no impact on trade between States, and thus should come under the jurisdiction of national courts.

The European Court of Justice continued its line of reasoning in de Norre v. NV Brouwerij Concordia,53 another brewery solus agreement, by confirming its decision in Fonderies Roux. The Brouwerij Concordia Court distinguished Brasserie de Haecht by noting that the question of a possible exemption had not arisen.54 The Court held that it would be contrary to the spirit of Regulation 67/67 to deny an exemption for a network of agreements, as this would deprive the regulation of its purpose.55 Moreover, the Court implied that the impact on interstate trade from the cumulative effect of the network was too speculative. The Court reasoned that the exemption should include agreements:

[W]hich come within the scope of the prohibition contained in Article 85[1] only because of the cumulative effect produced by the existence of one or more networks of similar agreements . . . because of factors unconnected with the agreement[s] in question. . . . [T]he contracting parties would generally have no specific knowledge and an appraisal of which requires the consideration of circumstances so numerous and complicated that a national court would be placed in a position of extreme difficulty.56

The Brouwerij Concordia Court thus appears to have rejected the logic of Brasserie de Haecht.57 Instead, the Court implies that EEC competition laws do not apply, regardless of their intended purpose of protecting free trade, when the parties engaging in the restrictive behavior are not aware, or should not reasonably be aware, that their conduct will affect trade. In Brasserie de Haecht, however, the Court found:

It is more than probable that the contracting parties are not wholly unable to foresee the legal consequences of their undertakings. In reality, it is a matter

52. Downes, supra note 17, at 176.
54. Id. at 91–94.
55. Id. at 94.
56. Id. at 95.
57. For discussion of Brasserie de Haecht, see text accompanying notes 43–47.
for them not of knowing all the details of the different agreements but simply of
having an idea of the general size of the injurious effects which their combined
force would have on trade and competition.\textsuperscript{58}

Furthermore, knowledge of the contracting parties, whether actual or reason-
ably expected, should be unnecessary in light of the holding of \textit{La Technique
Minière}:

[Even if the agreement does not have the object of distorting competition], the
agreement should then be considered with regard to its effect to find either that
it prevents or that it restricts or distorts competition to a noticeable extent.\textsuperscript{59}

Finally, the Court in \textit{Brouwerij Concordia} seemed to underestimate the
abilities of national courts when it stated that consideration of such “com-
plex” circumstances would place those courts in a position of extreme diffi-
culty.\textsuperscript{60} After all, the laws applied through the Treaty and secondary
legislation are merely a combination of the laws promulgated by the various
Member States of the Communities. Certainly national courts have had years
of experience in making antitrust analyses.

The problems presented by article 1(2) of Regulation 67/67 illustrate the
difficulties that arise as the European Communities march toward integra-
tion: the increasingly free flow of goods and capital across state borders and
progressive harmonization of national legislation tend to blur the distinctions
between national and interstate markets. Despite the problems presented by
intrastate agreements, the exclusion found in article 1(2) of Regulation 67/67
is not included in Regulation 1983/83, and the block exemption now covers
intrastate agreements.

\textbf{B. Amendment of Article 3 Regarding Agreements Between Competing
Manufacturers}

Article 3(a) of Regulation 67/67 stated that the block exemption would
not apply where “manufacturers of competing goods entrust each other with
exclusive dealing in those goods.”\textsuperscript{61} Because of its ambiguous wording, it was
unclear whether the restriction applied only to reciprocal exclusive dealing
between competitors, or whether it also applied to non-reciprocal agreements.
Nor did the article define what constituted “competing goods”. To alleviate
this ambiguity, article 3 of Regulation 1983/83 includes new subsections (a)
and (b), which exclude from article 1 both reciprocal and non-reciprocal
agreements between “manufacturers of identical goods or of goods which are
considered by users as equivalent in view of their characteristics, price and
intended use.”\textsuperscript{62}

translation).
\textsuperscript{62} 26 O.J. EUR. COMM. (No. L 173) 3 (1983).
Article 3(b), however, does allow exemptions for non-reciprocal agreements in cases where at least one of the contracting parties has an annual turnover not exceeding one hundred million European Currency Units (ECUs). While the special exemption for agreements in which one party has a small annual turnover was not in the first amended draft, it was added because agreements among competitors of this size are believed to help small manufacturers gain access to the sales distribution network of the larger competitor. This special exemption permits penetration of a product into a new market, thus enhancing rather than reducing competition.

The clarification made by article 3 of Regulation 1983/83 reflects the view, as stated in the Preamble to Regulation 1983/83, that:

[I]t 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 . . . [S]uch agreements should, therefore, be excluded from the exemption by category . . . .

Thus, as with the original block exemption, horizontal agreements are generally prohibited.

The prohibition against horizontal exclusive dealing is further defined in the new article 4, which excludes from the block exemption those agreements between "connected undertakings". Connected undertakings include parent companies and subsidiaries in which the parent companies have more than fifty percent equity or voting control. Excluding such agreements in order to prevent de facto horizontal agreements maintains the objectives of the block exemption.

Given the narrow definition of competing products, manufacturers with different product lines may be able to reach agreements that come under the exemption. As a result, it is possible for manufacturers to enhance distribution of their combined product lines by each agreeing to concentrate on certain products.

Despite the attempt narrowly to define competing products, ambiguities still exist. For example, it is unclear what kinds of products would be considered by users as "equivalent in view of their characteristics, price and

63. Id.
64. See 21 O.J. EUR. COMM. (No. C 31) 2, 3 (1978).
65. 1983-1984 EUR. PAR. DOC. (No. 1-357) 19 (1983). The Commission has not spoken on the justification for drawing the line at one hundred million ECUs.
67. Id. at 1, 3.
68. Id.
69. This exclusion makes the inclusion of intrastate agreements even more extraordinary, however, since intrastate agreements allow even greater trade restriction potential.
70. See Downes, supra note 17, at 172. The amendment to Regulation 67/67 was not intended to include so-called specialization agreements, which are dealt with in Reg. No. 2779/72, 15 J.O. COMM. EUR. (No. L 292) 23 (1972), amended by Reg. No. 2903/77, 20 O.J. EUR. COMM. (No. L 338) 14 (1977). See also Reg. No. 417/85, 28 O.J. EUR. COMM. (No. L.53) 1 (1985).
intended use". Would bourbon and whiskey be equivalent, but not cognac and whiskey? The problem of line-drawing has prompted criticism from the Parliament. In general, however, these amendments add clarity and provide a better framework for review.

C. Amendment to Limit Territory of Resale

The 1978 draft regulation proposed limiting the exclusive resale territory of a product to an area of the Common Market not exceeding a population of one hundred million. Thus, a distributor could not be granted exclusive rights for a resale territory which combined any two of the following countries: United Kingdom (56 million), West Germany (62 million), France (53 million), or Italy (56 million). An agreement under this proposal, however, could encompass any one of these countries and all the other smaller countries of the Common Market. The amendment was proposed because of the increasing practice of drawing up agreements to cover the entire territory of the Communities with the exception of one small country. The Commission stated that such amendments conform to the letter of the exemption but violate its spirit because Regulation 67/67 makes clear that the aim of the block exemption is to permit exclusive dealing agreements covering only a part of the Common Market.

The Commission also relied on the decision in Duro-Dyne/Europair, involving an agreement in which a U.S. company granted a European concern exclusive rights for the whole Common Market. The Commission in Duro-Dyne/Europair stated that the exemption does not extend to agreements covering the entire Common Market, but granted an exemption under the circumstances of the case. The Commission did not, however, explain how such agreements, on their face, would normally violate the spirit of the Treaty. According to the logic of Duro-Dyne/Europair, other similar agreements could be exempted on an individual basis.

The Commission dropped the proposed amendment to limit the resale territory without explanation. Adoption would have been ill-advised, however, due to the variability and the arbitrariness of a criterion such as population. Nonsensically, the amendment would have restricted distributors from gaining exclusive rights from adjacent markets solely because of population, while allowing agreements to cover non-contiguous territories such as the

71. 26 O.J. EUR. COMM. (No. L 173) 1, 3 (1983).
75. Id. at 231-32.
76. EEC COMMISSION, SIXTH REPORT ON COMPETITION POLICY, point 11 (1976).
77. Id. See Reg. No. 67/67, supra note 5, Preamble & art. 1(1).
79. Id.
United Kingdom, Greece, and Denmark. The prohibition might, in fact, have led to greater segmentation of markets which provide stronger potential for price differences. In addition, the Commission held that a specific definition of resale area is unnecessary in the case of most exclusive purchasing contracts, "in particular in the case of brewery contracts . . . since, necessarily, it is only on his own premises that the café owner sells beverages covered by the contract."  

D. Exclusive Purchasing Amendments

The amendments concerning exclusive purchasing were taken out of the draft regulations and ultimately incorporated into a separate Regulation 1984/83. The Commission has never clearly explained its decision to adopt a separate regulation for exclusive purchasing contracts. After adopting the two regulations, the Commission simply stated that separate documents were desirable due to the "different nature of the accords and their different effects on competition within the common market." The Commission stated that exclusive distribution agreements tend to affect intrabrand competition, while exclusive purchasing agreements affect interbrand competition. Both the Economic and Social Committee and the European Parliament have questioned the need for two separate regulations, as the regulations governing exclusive distribution and purchasing are, in fact, substantially similar.

A key distinction between the two regulations, as noted by recitals (5) and (6) to the Preamble to Regulation 1984/83, is the advantages received by the exclusive purchaser in exchange for limiting sources of supply. The supplier confers on the reseller special commercial advantages, such as help in financing, obtaining loans for the reseller on favorable terms, or supplying premises or equipment with which to carry on his business. Thus, through reciprocal agreements, the small operator who would otherwise find it difficult to open a business is guaranteed a source of supply and obtains access to terms that make entry possible.

80. Bellamy and Child generally agree with this criticism, see C. Bellamy & G. Child, supra note 74, at 232. For an alternative view, see Downes, supra note 17, at 173.
84. The Commission was apparently most concerned with the possible exclusionary effects of exclusive purchasing agreements. Id.
88. Id. at 6, ¶ 15.
89. This was exactly the kind of agreement contracted for between Brasserie de Haecht and Wilkin. Wilkin-Janssen obtained three loans from Brasserie de Haecht, in return for which they agreed to purchase their requirements from de Haecht for the duration of the outstanding loan. See supra text accompanying notes 43–47.
Despite the theoretical advantages of exclusive purchasing agreements, these agreements can also have exclusionary effects. Theoretically, by enlisting enough exclusive purchasers, a dominant producer can gain monopoly power by foreclosing opportunities for competition at the purchaser level. A dominant producer can thus construct a substantial barrier to new entrants who cannot gain access to favorable markets for their products. The Commission, however, disposed of this objection to purchasing agreements in its decision in \textit{BP Kemi/DDSF}.\footnote{22 O.J. Eur. Comm. (No. L 286) 32 (1979).} In \textit{BP Kemi/DDSF}, the Commission held that an ethanol marketing contract which covered all of Denmark and which was comprised of a cooperation agreement and an exclusive purchasing agreement constituted a single arrangement.\footnote{Id. at 39.} In defending exclusive purchasing agreements, the Commission said:

It is true that when any agreement concerning the purchase of a given quantity of a product has been concluded, other producers of the product in question are excluded to that extent (but no further) from covering the needs of the purchaser, but such producers are able to compete for each such contract before it is signed. This is the result of the normal role of competition which gives any interested party the possibility of putting forward his offer and which enables the purchaser to decide freely which of the offers is the most attractive when all factors are taken into account.\footnote{Id. at 41.}

The Commission's reasoning does not take into account, however, the possible exclusion of new entrants who may not have existed before the signing of a network of exclusive contracts, nor the exclusion of exclusive purchasers before their products have been tested in the new market. Exclusionary effects, however, tend to occur only in the case of long-term purchase contracts.\footnote{R. POSNER, ANTITRUST: AN ECONOMIC PERSPECTIVE 201 (1976).} As most requirement contracts in the European Communities and in the United States are actually of short duration, there should be little exclusionary effect, since competing manufacturers can line up customers long before expiration of such short-term purchasing agreements.\footnote{Id. at 201-02. See also R. BORK, THE ANTITRUST PARADOX 306 (1978); Chard, The Economics of Exclusive Distributorship Agreements With Special Reference to E.E.C. Competition Policy, 25 ANTITRUST BULL. 405, 419 (1980). The U.S. Supreme Court used similar reasoning in Standard Fashions Co. v. Magrane-Houston Co., 258 U.S. 346 (1921). See also Standard Oil Co. of California v. United States, 337 U.S. 293 (1949).}

The Commission has also tried to address the problem of exclusionary effects where requirements contracts are of long duration. In \textit{BP Kemi/DDSF}, the Commission stated:

\begin{quote}
When a purchasing obligation of a longer duration is entered into, the relationship of supply is frozen and the role of offer and demand is eliminated to the disadvantage of \textit{inter alia} new competitors who are thereby prevented from supplying this customer and old competitors who in the meantime may have become more competitive than the actual supplier. If the conditions of the market are thereby influenced to an appreciable extent, it is possible that
\end{quote}
competition is restricted within the meaning of Article 85(1). To prevent exclusion based on long-term contracts, article 3(d) of Regulation 1984/83 limits the application of the exemption to agreements lasting no more than five years. In theory, this would allow competition from suppliers who attempt to line up customers in advance of the expiration of existing contracts, as discussed above.

Regulation of the market power of suppliers is another method of encouraging competition while allowing exclusive purchasing contracts. Article 3(d) of the 1978 draft regulation would have prohibited producers from entering into exclusive purchasing agreements in a substantial part of the Common Market in which they accounted for more than fifteen percent of the total sales of relevant goods (or goods considered by consumers to be substitutable). The clause was designed to apply primarily to purchasing contracts. Although this provision was dropped from the final draft of Regulation 1984/83, the safeguard was not lost. Article 14 of Regulation 1984/83, which parallels article 6 of the exclusive distribution regulation, allows the Commission to withdraw the benefit of the exemption where: (a) the contract goods are not subject, in a substantial part of the Common Market, to "effective" competition from identical goods or goods considered by users as equivalent; (b) access of other suppliers to the relevant market is made difficult to a "substantial" extent; or (c) the supplier uses discriminatory pricing or unjustifiably refuses to supply resellers who cannot otherwise obtain the contract goods in the area concerned.

Article 14 has two primary deficiencies. First, it is broad and vague. The article empowers the Commission to decide, upon review, whether "effective" competition exists, or whether access is limited to a "significant" extent. While the provision is designed to prevent agreements where there is only a remote possibility of competition, the standard is in reality too subjective. Given the increased breadth of the regulations, it is difficult to know at what point the Commission would decide that an agreement should be prohibited for restricting trade.

Second, because article 14 provides only for withdrawal of agreements already in effect, there is a period during which anticompetitive conduct can take place and thus potentially harm interstate trade. Only after an

95. 22 O.J. EUR. COMM. (No. L 286) at 41 (1979). The agreements in BP Kemi/DDSF were held violative of article 85(1), but primarily on grounds other than the duration of the agreement. For example, the two concerns shared markets, fixed prices and other conditions of payment, and illegally used quotas to restrict trade. Id. at 49.

96. 26 O.J. EUR. COMM. (No. L 173) at 8 (1983). The duration is ten years for brewery and service station agreements. For a general discussion of brewery and service station agreements, see infra Part II.E.

97. See R. POSNER, supra note 93, at 201-02.


101. Id. at 10.
agreement has come into force can the Commission conduct a review to determine the existence of anticompetitive effects. Nevertheless, article 14 creates a disincentive for undertakings to test the withdrawal provision, since the Commission may fine violators of the Treaty pursuant to article 15 of Regulation 17/62.102

Although the withdrawal provision of article 14 causes problems, parties are better off with the provision than if the Commission had adopted a fifteen percent market share limitation. Such a limitation would have been particularly restrictive in market sectors where specialization or product novelty reduces the number of competitors.

E. Separate Provisions for Breweries and Filling Stations

Titles II and III of Regulation 1984/83 set forth separate provisions for exclusive purchasing agreements concerning breweries and filling stations. As with its silence concerning the decision to adopt a separate exclusive purchasing regulation, the Commission has also failed to enunciate its reasons for using these separate titles.103 The Committee on Economic and Monetary Affairs of the European Parliament has criticized the separation of these provisions, arguing that leaving Regulation 67/67 as a block exemption applicable to all sectors would be simpler and more flexible.104

Brewery Agreements. Title II of Regulation 1984/83 delineates the application of the exemption to brewery solus agreements.105 Article 6 extends the exemption to agreements between the reseller and the supplier in which the purchaser agrees, "in consideration for according special commercial or financial advantages," to purchase certain beers or other drinks for resale on the premises of the purchaser, only from the supplier, or from a connected undertaking or authorized distributor of the supplier. The main distinction between article 6 and the more general articles of the regulation is that it specifically ties exclusive purchasing by the reseller to commercial concessions by the supplier. This specific concessions consideration is also listed in the recitals to Regulation 1984/83 as a general reason for exempting exclusive purchasing contracts, but in article 6 the concessions are a condition precedent to exemption.

The exemption for beer agreements is very controversial. The controversy centers primarily on articles 7 and 8, which limit the restrictions

102. 5 J.O. COMM. EUR. (No. 13) 204, 209 (1962), COMMON Mkt. RPTR. (CCH) ¶ 2541 (English translation).
103. The Commission has simply stated that brewery and service station agreements "clearly distinguish themselves" from other exclusive purchasing agreements, and thus merit special rules. EEC COMMISSION, THIRTEENTH REPORT ON COMPETITION POLICY, point 29 (1984).
104. 1983-1984 EUR. PARL. DOC. (No. 1-357) 19 (1983). The Rapporteur found that on balance the brewery title was probably nonetheless justified, but found the reasons given for the filling station title to be less convincing. Id. at 24-25.
imposed on the reseller. Article 7 allows the publican to be restricted from selling competing beers in draught form, "unless the sale of such beers in draught form is customary or necessary to satisfy a sufficient demand from customers." Article 7 further permits the supplier to impose advertising restrictions on the purchaser. The proportion of revenues spent on advertising competing products may not exceed the proportion they hold to the total share of drinks sold on the premises. Pursuant to article 8, the exemption shall not apply to exclusive purchasing contracts for goods other than drinks or services, to agreements of an indefinite duration, to agreements of a duration exceeding five years in the case of other drinks, or exceeding ten years in the case of agreements relating only to specified beers.

Opposition to the provisions comes predominantly from brewers as a result of their reduced advantages vis-à-vis tavern operators. Brewers object to limiting the contracts to beers and similar drinks and services because they have traditionally also controlled leases of "machines for amusement", particularly in the United Kingdom, as well as sales of wine and other spirits. In addition, British brewers tend to own taverns and require their lessee-publicans to purchase all supplies from the lessor-brewer.

Under the new legislation, brewers may contract only for exclusive purchases of drinks they manufacture and their services. Brewers, however, are not restricted from selling other drinks. They are merely restrained from tying the exclusive purchase of those drinks to other concessions. They are thus forced to compete with other distributors for sales of these additional beverages. Brewers complain that their marginal profits will be severely reduced as a result of the looser tying arrangements. The effect, they say, will be an increase of free riders since the brewer can no longer regulate the operator's non-beer purchases even though it owns the tavern. Thus, the brewer would be helping to finance a tenant to sell other drinks. In addition, brewers argue that the altered balance of power will increase the number of owner operators, which will in turn reduce brewer profits from lease arrangements. Brewers have threatened to increase existing rents to accommodate these prospective losses.

Publicans, on the other hand, welcome the legislation. Because they are free to obtain supplies of wine and other spirits from different suppliers, they

106. *Id* at 9.
110. *Id*.
111. *Id*.
113. Green, *supra* note 107, at 694.
feel that they will be able to obtain products at lower cost. They assert that the savings will be passed on to customers and that consumer choice will be increased through greater variety on the premises of resale. As expected, manufacturers and distributors of other drinks also favor the legislation.

Although the bulk of the articles governing brewery agreements improve the position of the tavern operators in relation to brewers, some provisions are ambiguous and will require negotiation between the contracting parties. This may result in review by the Commission of brewer agreements or, ultimately, in litigation before the Court. For example, article 7(b) provides that the brewer may restrict the exclusive purchaser from selling competing beers, unless such beers are in bottles, cans, or other small packages or "unless the sale of such beers in draught form is customary or is necessary." The provision was designed to help publicans increase package sales while protecting the brewer's tie on the house through the exclusive draught beer contract. The difficulty arises in determining when the sale of competing beers in draught form is "customary or necessary" from the standpoint of consumers. Does consumer preference for Brand X in draught form fulfill this requirement or must the beer be unavailable in any other form? Does consumer preference constitute custom by tavern, town, or national market? It is possible that brewers who offer individual packages will be penalized while brewers limiting their sales to kegs will profit. Conflicts may be minor because it is predominantly small, local brewers who sell beer only in draught form. Thus, consumer preferences for local draught beers are addressed, while larger-volume, often distant brewers are limited to selling bottled or canned drinks in tied houses, at prices exceeding those of the house brand.

The European Parliament has criticized this legislation. It argues that if the purpose is increased market access, the Commission has failed to address a number of relevant factors in drafting these special brewery provisions. First, European beer markets are highly segmented, primarily due to different regional and national tastes. Second, national legislation often increases market segmentation. Examples of such national legislation include the Danish packing laws and the German Reinheitsbegot (pure beer law), as well as national fiscal regulations on alcoholic beverages. These criticisms are sound because all relevant factors should be considered before drafting

116. Id.
117. Id.
119. See supra note 107, at 694.
121. Id.
122. Id.
123. National fiscal policies which favor domestic production or otherwise protect national markets from foreign market penetration violate article 95 of the Treaty. See U.K. v. Commission, (No. 170/78), [1983] 1 E.C.R. 226, COMMON MKT. RPTR. (CCH) ¶ 8943, holding that
legislation with such broad impact. Yet, some of the problems cited by the critics are better addressed through other provisions of the Treaty, such as article 30 which proscribes measures having the equivalent effect of a tariff.

*Filling Station Agreements.* Title III of Regulation 1984/83 extends the block exemption to contracts for the exclusive purchase of "certain petroleum-based motor-vehicle fuels or certain petroleum-based motor-vehicle and other fuels specified in the agreement." Lengthy discussion of these provisions is not necessary since the provisions of the exemption are similar to the provisions on brewery agreements.

The Parliament's Committee on Economic and Monetary Affairs has more severely attacked this portion of Regulation 1984/83 than the section on beer agreements. The adoption of these specific exemptions for filling station ties is, in fact, a prime example of unilateral action by the Commission in a sector of strong dispute between Member States, in which the Commission has insufficiently justified its actions. As the Committee stated:

So uncertain has the Commission been as to whether its proposals are practicable that it has stated very recently that it is still prepared to consider renunciation of any block exemption for filling station agreements. This is an extraordinary admission by the Commission at such a late stage in the proceedings.

Nevertheless, shortly after this critique was issued, the Commission adopted Regulation 1984/83, including Title III on filling station agreements.

*Criticisms.* The Commission's reasoning in and of itself obviates the need to include in the exemption special provisions for exclusive purchasing agreements concerning the petroleum or beer sectors. In most other sectors, the Commission continues to cite its earlier holdings in cases regarding exclusive purchasing agreements. For example, in *Deutsche Castrol* (in which an agreement was granted for a twenty-year purchase contract for certain motor lubricants), the Commission cited *Brasserie de Haecht* and *Brouwerij Concordia* in support of the importance of viewing an agreement in its entirety to understand its effect within the larger network of agreements. If the same factors can apply to a variety of different sectors which routinely employ exclusivity contracts, then the need for special provisions in individual

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British taxes on Italian wines were designed to protect the British beer industry and thus violated article 95.


125. *See supra* text accompanying notes 104–123.


127. *Id.* at 25.

sectors seems superfluous.\textsuperscript{129} Moreover, the variety of problems contributing to individual national policies in different sectors favors dealing with the problem from an integrated, multilateral perspective, enlisting the help of different EEC and national organs.

\section*{CONCLUSION}

Commission Regulations 1983/83 and 1984/83 are clear examples of the progressive legislative development of the European Communities. The increasing experience of Community organs has resulted in greater awareness of the need for fine-tuning legislation in step with Community needs. Yet, as a young affiliation of States, the EEC sometimes has failed to undertake independent economic analysis before adopting legislation, instead relying heavily on the analysis expounded by the European Court of Justice.

Criticism of the new block exemption for exclusive dealing agreements does not, however, arise from attempts by the Commission to reach hasty decisions. On the contrary, the Commission began proposing amendments to Regulation 67/67 shortly after it took effect in 1967. Due to problems such as lack of agreement between the Member States, the block exemption remained unchanged until July 1983, sixteen years after its inception and more than five years after the promulgation of draft amendments. Successive drafts differed greatly over the five-year period, as the Commission groped with the problems presented by the breadth and vagueness of Regulation 67/67. The product of these efforts is two regulations that are at some times overinclusive and at other times underinclusive.

Whatever the reasons behind the particular development of competition policy in the area of exclusive dealing, the result is a frustration of the purpose of the original block exemption: approving as a group only those potentially restrictive agreements which, on balance, have a greater competitive than anticompetitive effect. The block exemption was designed to decrease the administrative burden of the Commission by lowering the number of required notifications of agreements. Unfortunately, the Commission has chosen administrative convenience over the need to weigh, in greater depth, the possible economic consequences of certain commercial activities.

The new regulations do present some welcome changes, including greater freedom for tavern operators in negotiating supply contracts and better definitions of important terms for the benefit of prospective contracting parties. Perhaps the answers to the remaining questions, such as the rationale

behind the Commission's apparently divergent views regarding sectoral restrictions, will be voiced in the near future. Undertakings may also find their own answers as they put the regulations to the test. These answers, however, may result in disputes which might ultimately land before the Commission and the Court. In the long run, if the Commission fails to recognize the remaining weaknesses in its exclusive-dealing laws, competition policy in the EEC may suffer some adverse consequences, the brunt of which will likely be borne by consumers.