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Valentine Koran\*

# The New EC Vertical Restraint Block Exemption

From the early 1960s the Commission adopted a wide view of the prohibition laid down in article 81(1) of the EC Treaty, but granted, first, individual exemption to various exclusive distribution agreements and, later, group exemptions.

There are significant advantages to placing an agreement within a group exemption. There will be no competition problems when suing to enforce it, or persuading the other party to perform. It is strongly arguable that national competition law cannot override a group exemption.<sup>1</sup> The problem has been that the exemptions were drawn narrowly and formalistically.

Partly as a result of trenchant criticism,<sup>2</sup> the EC Commission came to realise that its system of narrow block exemptions for different ways of bringing products to the market was unnecessarily formalistic. Where the firm protected from competition had market power, anti-competitive agreements might be made legal *per se*, at least until the block exemption was withdrawn from an individual agreement, whereas harmless agreements had to be modified so as to fit into the strait-jacket prescribed by a particular regulation.

## Green Paper and the Ensuing Debate

The Commission set in motion a long internal and external consulting process including economic studies which led to the green paper.<sup>3</sup> It claims that its views are based more on economic considerations

than formerly. Eventually it decided to grant a single, wider exemption for the distribution of goods and services, but to limit its application by imposing a ceiling on market share. Where the firm protected from competition enjoys more than 30% of the relevant market, the group exemption does not apply, although the agreement will not necessarily infringe article 81(1) and require exemption.

From the beginning of this exercise, the Commission decided not to revisit the problems it had encountered before adopting the technology transfer regulation. The new regulation applies to agreements containing "conditions under which the parties may purchase, sell or resell certain goods or services".<sup>4</sup>

## Group Exemption for Vertical Restrictions

The Commission adopted Regulation 2790/99<sup>5</sup> and guidelines on its interpretation and on its views about agreements above the thresholds.<sup>6</sup> These guidelines do not bind anyone, but may well be taken into

<sup>1</sup> Tesaro A.G. in *BMW v. Aid*, (C-70/93), (1995) E.C.R. I-3459. The ECJ did not address the question which remains open.

<sup>2</sup> E.g., Barry Hawk: *System Failure: Vertical Restraints and EC Competition Law*, 1995, 32 C.M.L.Rev. 973-989.

<sup>3</sup> Green paper on vertical restraints in EC Competition Policy, COM(96) 721 final, (1997) 4 C.M.L.Rev. 519, internet [http://europa.eu.int/comm/competition/antitrust/96721en\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/96721en_en.pdf). This was followed by the Commission's communication on the application of the EC Competition rules to vertical restraints - follow-up to the green paper on vertical restraints - OJ 1998, C365/3.

<sup>4</sup> The exemption is broader than the Commission had power to adopt, so on its proposal, the Council adopted Regulation 1215/1999 extending its *vires*: OJ 1999, L140/21.

<sup>5</sup> OJ 1999, L336/21.

<sup>6</sup> OJ2000, C291/1.

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account by courts or national competition authorities trying to interpret the regulation. They bind the Commission only when they arouse legitimate expectations as to the exercise of the Commission's discretion, not when they state the Commission's view of the law. Construction of the regulation is the function of the CFI and ECJ.

## Qualifying Agreements

### Article 2

"1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation it is hereby declared that Article 81(1) shall not apply to agreements or concerted practices entered into between two or more undertakings each of which operates for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services ('vertical restraints')."

This is broader than the definition of vertical used by the US agencies. They treat an agreement as vertical only if the parties did not and could not easily have competed at either level without the agreement. So, article 2(4) excludes from the exemption agreements between competing suppliers unless the agreement is not reciprocal and the buyer is small or the supplier is a manufacturer and distributor of goods while the buyer does not manufacture goods competing with the contract goods.

The definition of "competing undertakings" in article 1(b) includes actual or potential suppliers in the same product market. So the exclusion may be rather wide and unclear in application.

The single regulation applies to exclusive distribution, exclusive purchasing, franchising and selective distribution. For the first time in decades one chapter of a book on EC competition law can be shortened, although there are some differences between the different categories of contract. Franchising is not specifically mentioned in the regulation, but franchise agreements outside the regulation are considered generally in guidelines 119 - 201 and the application of the regulation to franchising is also considered in various other guidelines, such as 42 - 44. They may come within the definition of article 2. Since the word is not used in the regulation, it is not defined there, nor is it defined in the guidelines.

Unlike its predecessors, the group exemption now applies to the supply of goods, such as components,

for incorporation in other products, and to the supply of services. There is no need to consider whether goods are supplied for resale when the final stage of production takes place at the retail level.

Also, unlike its predecessors, the new regulation applies where there are more than two parties. It is often sensible to have registered user agreements between a brand owner, a manufacturer and a distributor. Additional parties no longer prevent the application of the exemption. As long as none of the parties are actual or potential competitors, there is no reason to exclude multipartite agreements.

The buyer may operate as the agent of another firm, and if the agreement with its supplier infringes article 81(1) it may benefit from the block exemption.<sup>7</sup>

Article 2(2) extends the regulation to agreements made between a retailer and its trade association or between the association and its suppliers, provided that all the members are small retailers. The horizontal agreements by which the retailers joined the association, however, are not exempted. It might have been simpler to have relied on existing case law<sup>8</sup> ruling that small cooperatives and retailers may combine their buying power in order to compete with supermarket and other chains without infringing article 81(1). Where the percentage of the market covered by such agreements is modest such agreements do not have the object or effect of restricting competition, but of enabling small firms to compete with larger ones.

Article 2(5) makes it clear that the group exemption does not apply to agreements, *the subject matter of which* comes within another group exemption - currently Regulation 240/96 for technology licensing,<sup>9</sup> and the one for the selective distribution of vehicles.<sup>10</sup> One cannot avoid article 3 of regulation 240/96 which lists the hard core restraints that prevent the application of that regulation by using regulation 2790/99.

One issue on which I differ from the Commission is whether the vertical regulation can apply to a licence of copyright or trade mark that cannot be brought within a group exemption. It seems to me that a trade

<sup>7</sup> Art. 2(g). For agency, see guidelines 12-20.

<sup>8</sup> SPAR - *Re Intergroup Trading BV*, OJ 1975, L212/23, (1975) 2 C.M.L.Rev. D14, in relation to small grocers; and *Oude Luttikhuis v. Cooperative Melkindustrie Coberco* (C-399/93), (1995) E.C.R. 1-4515 in relation to agricultural cooperatives.

<sup>9</sup> OJ 1996, L31/2, (1996) 4 C.M.L.Rev. 405, (1996) 4 E.I.P.R. Supp. iv.

<sup>10</sup> Commission regulation 1475/95 OJ 1995, L145/25, (1996) 4 C.M.L.Rev. 69. It is due to expire in September 2002. Lobbying for its continuance is currently intense.

mark licence under which the holder agrees not to compete with his licensee within its territory or the licensee not to poach outside it comes within the wording of article 2(1). Guideline 25 states that the purpose of the block exemption is to "cover purchase and distribution agreements", but article 2(1) is not so limited, as long as there are conditions "relating to conditions under which the parties may purchase, sell or resell certain goods or services".

Article 2(3) extends<sup>11</sup> the exemption to

"vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions *do not constitute the primary object of such agreements* and are directly related to the use, sale or resale of goods or services by the buyer or its customers. . . . on condition that, in relation to the contract goods or services, those provisions do not contain restrictions to competition having the same object or effect as vertical restraints which are not exempted under this regulation." (my emphasis)

The qualification about the primary object of the agreement may give rise to the same difficulty as the exclusion of software and trademarks that were not ancillary to a patent or know-how licence under the former know-how regulation.<sup>12</sup> If one needs both a recipe and the trademark under which it is to be sold, which is ancillary? They are complementary. We will have to argue that the primary object was the marketing of the product rather than the trade mark licence, and that article 2(3) could have no application otherwise. Article 2(3) is helpful in the absence of any case law on software, but should have been drafted more broadly. A supplier of applications software may now take advantage of this regulation (guidelines 30 - 34).

There is also a helpful list in guideline 44 of clauses that may be inserted in a trademark license to a franchisee on the ground that they are necessary to protect the franchisor's intellectual property rights:

"(a) an obligation on the franchisee not to engage, directly or indirectly, in any similar business;

(b) an obligation on the franchisee not to acquire financial interests in the capital of a competing under-

taking such as would give the franchisee the power to influence the economic conduct of such an under-taking;

(c) an obligation on the franchisee not to disclose to third parties the know-how provided by the franchisor as long as this know-how is not in the public domain;

(d) an obligation on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise and to grant it, and other franchisees, a non-exclusive licence for the know-how resulting from that experience;

(e) an obligation on the franchisee to inform the franchisor of infringements of licensed industrial or intellectual property rights, to take legal action against infringers or to assist the franchisor in any legal actions against infringers;

(f) an obligation on the franchisee not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise;

(g) an obligation on the franchisee not to assign the rights and obligations under the franchise agreement without the licensor's consent."

### No White List

Contrary to the Commission's earlier practice when drafting block exemptions, there is no limiting white list to this regulation. Everything is permitted in a vertical distribution agreement as defined in article 2 provided that there is no blacklisted clause or condition and provided that the ceiling of market share is not exceeded.

### 30% Ceiling of Market Share

*Article 3, guidelines 21, 22, 88 - 95, 97 - 99*

The Commission has been concerned that where there is market power, vertical agreements should not be legal *per se*. A 30% ceiling has been chosen. Law reform groups and industry have objected. With such a low ceiling, should more provisions be allowed? Article 5 limiting non-compete provisions seems unnecessary.

The obvious problems about defining the relevant market will arise. They seem to me particularly acute when appraising supply agreements to traders, since peas or fish fingers compete with ice cream for space in a trader's freezer cabinet, container or vehicle. In guideline 91, the Commission suggests that an entire portfolio from a single supplier may constitute the relevant market.

<sup>11</sup> In my view, there would be no need for article 2(3) and some scholars argue that article 2(3) limits its application, but the introductory words are those used in article 2(2) which the Commission admits extends.

<sup>12</sup> Regulation 556/89, OJ 1989, L61/1, (1989) 4 C.M.L.Rev. 774. See *Moosehead/Whitebread*, OJ 1990, L100/32.

Officials sometimes allege that the uncertainty is less important, since agreements that are excluded can be notified late and exempted retrospectively,<sup>13</sup> but notification is to be abolished.<sup>14</sup> There is a trade-off between legal certainty and a more economic approach to block exemptions. The former formalistic block exemptions covered some anti-competitive agreements.

Article 9 and guideline 90 provide criteria for defining the relevant market in the concrete terms used by the ECJ - substitution on the demand side "by reason of the products' characteristics, their prices and their intended use", rather than in the abstract S.S.N.I.R test.<sup>15</sup> Guideline 90 also refers to the geographic market being homogeneous. Although the reason for that limitation escapes me, it is mentioned in several judgements. Usually it is the market share of the supplier that is relevant, but that of the buyer when he is promised an exclusive territory for the whole common market (article 3(2)).

Firms with market shares exceeding 30% in some geographic markets may find that their agreements do not infringe article 81(1) or may obtain a retrospective exemption as long as individual exemptions continue, but there will be no safe harbour for the areas where their market share exceeds 30%.

### Hard-core Restrictions

#### *Article 4, guidelines 46-56*

There are two sorts of blacklist. The hard-core restraints are the maintenance of resale prices, territorial restraints and some other post-sales restrictions. Article 4 prevents the exemption applying even to other provisions of the agreement if one of the hard-core restraints is included. Nevertheless, resale price maintenance, territorial restraints and the other provisions listed do not infringe article 81(1) and need no exemption unless they may have an appreciable effect on trade between member states.<sup>16</sup> Now that the block exemption has a ceiling as low as 30% these provisions may well not have appreciable effects on inter-state trade or competition but they prevent the regulation applying to other provisions in the same agreement - a term that may be wider than contract. All the hard-core restraints restrict intra-brand competition and are difficult to reconcile with

guideline 6 that states that the Commission is more concerned about inter-brand competition.

The introductory words are broad:

"The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:"

Guidelines 47 and 49 make it clear that not only do contractual prohibitions prevent the application of the exemption: deterrents and incentives, rebates or refusal to supply may do so too.

The first blacklisted provision is

"(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price provided that they do not amount to a fixed or minimum sale price..."

Minimum and fixed price maintenance are blacklisted by article 4(a), but maximum prices are not. Recommendations are blacklisted only if they operate as fixed or minimum prices. Franchising and other distribution agreements have been saved by a late addition at the end of Article 4(a) which excludes recommended prices from the blacklist if they do not amount to a fixed or minimum price, "as a result of pressure from, or incentives offered by, any of the parties."

Few franchisees are likely to depart from the recommended price which is indicated in advertising by the franchisor, but the franchisor does not have to provide sanctions or incentives. Guideline 47 states that the provision of a list of recommended prices is not in itself treated as resale price maintenance, although printing a recommended price on the product may be. It is hoped that the provision of promotional material, whether on national television or for the retailers' premises, stating a recommended price is not treated as an incentive to abide by it. Otherwise, franchising would seldom come within the

<sup>15</sup> Small but significant non-transitory increase in prices, sometimes called the "hypothetical monopolist" test. Take the obvious product, A, and assume a small increase in its price relative to other products of about 5 or 10% that is expected to last. Then consider whether so many buyers would switch to other products as to make the increase unprofitable and whether so many suppliers would start making or expanding production of A as to make the initial price increase unprofitable. In either case, the possibilities of substitution constrain the market conduct of suppliers of A.

<sup>16</sup> *Javico International v. Yves Saint Laurent Parfums SA* (C306/96), (1998) E.C.R. 1-1983.

<sup>13</sup> Council Regulation 1216, OJ 1999, L148/5.

<sup>14</sup> Proposal of the Commission for a Council regulation to replace regulation 17/62, 2000/0243 (CNS), (2000) 5 C.M.L.Rev. 1148.

group exemption nor would cooperative buying schemes organised by trade associations of small retailers.<sup>17</sup>

The other blacklisted provisions are post-sales restraints. Article 4(b) blacklists territorial and customer protection:

"(b) the restriction of the territory into which, of the customers to whom, the buyer may sell the contract goods or services, except:

- the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer, ..."

Absolute territorial protection has long been a "no-no" under EC competition law.<sup>18</sup> The territorial protection permitted under this regulation is, however, narrower than under its predecessors. Only the supplier or exclusive dealers may be protected from even active sales. A technology licensee cannot be protected although he may have to bear the risky sunk cost of establishing a production line as well as a market - the triumph of doctrine over common sense.

Restrictions on passive sales are never permitted. The terms "active" and "passive" are not defined in the regulation, but are in guidelines 50 and 51. Posting an offer on a web site must be permitted, although unsolicited emails to specific firms or customer groups may be restricted. As electronic commerce increases in Europe, the protection that can be given to an exclusive distributor is becoming very narrow indeed, unless transport costs are high in relation to the delivered value of the product. Despite its claim to adopt more economic approaches than formerly, the Commission does not accord the priority to incentives to investment recognised by economists.

Article 4(b) does however permit a customer restriction. The other three post-sales restrictions not blacklisted are:

- the restriction of sales to end users by a buyer operating at the wholesale level of trade,

- the restriction of sales to unauthorised distributors by the members of a selective distribution system, and

- the restriction of the buyer's ability to sell components supplied for the purposes of incorporation, to customers who would want to use them to manufacture the same type of goods as those produced by the supplier;"

The first exception may be intended to preserve the German distinction between different levels of trade. A wholesaler may be restrained from selling by retail as it would be unfair to earn a double margin. This is hard for common lawyers to understand. Substantial efficiencies have resulted from the fusion of wholesaling and retailing by multiple chain stores that perform both functions.

The second indent is broader than the case law on selective distribution. The ECJ has cleared as not infringing article 81(1) a restriction on a dealer selling to non-approved dealers, provided that the criteria for approval are qualitative, appropriate to the trade, proportionate and applied without discrimination. "Selective distribution" is defined differently in Article 1(d) of the regulation. The criteria for selection must be specified, but may be quantitative as well as qualitative. This is helpful as it is usually expensive to qualify under qualitative criteria and selective distributors may require an incentive to invest.

Article 4(c)<sup>19</sup> blacklists:

"the restriction of active or passive sales to end users by members of a selective distribution system<sup>20</sup> operating at the retail level of trade, without prejudice to the possibility of prohibiting the member of the system from operating out of an unauthorised place of establishment."

Article 4(d) blacklists:

"the restriction of cross-supplies between distributors within a selective distribution system including between distributors operating at different levels of trade."

Excluding restrictions on cross-supplies between dealers makes it difficult for a brand owner to benefit

<sup>17</sup> Expressly allowed by article 2(2).

<sup>18</sup> Re the *Agreement of Grundig Verkaufs-GmbH* J.O. 2545/64, (1964) C.M.L.Rev. 489. Appeal — *Etablissements Consten SA and Grundig-Verkaufs-GmbH v. EEC Commission* (56 & 58/64), (1966) E.C.R. 299; *Miller International Schallplatten GmbH v. Commission* (19/77), (1978) E.C.R. 13; *Nungesser (L.G.) KG and Kurt Eisele v. Commission* (258/78), (1982) E.C.R. 2015.

<sup>19</sup> Guidelines 53 and 54.

<sup>20</sup> The definition of such a system in article 1 (d) is not the same as that used by the case law of the ECJ in the cases following *Metro v. Commission* (26/76) (1977) ECR 1875. The ECJ clears as outside the prohibition of article 81(1) restrictions on each dealer selling to unauthorised dealers, provided that the criteria for authorisation are specified, qualitative, proportionate and applied without discrimination. Under the regulation the criteria need only be specified.

from different prices in different member states, as dealers in the higher priced area must be allowed to buy from dealers where prices are lower.

Both article 4(c) and 4(d) can be avoided by not specifying the criteria on which authorised dealers are selected. On the other hand, if the criteria are not specified, the ECJ's clearance of simple selective distribution systems cannot apply. Legal advisers are on the horns of a dilemma: they will have to decide in advance which rule they wish to apply. The regulation is supposed to be based on economic principles, but the draft was checked by lawyers.

Most franchise systems will involve only selected retailers, so advice will have to be given on whether to specify the criteria for approval. In the absence of absolute territorial protection, however, franchising will escape the prohibition of article 81(1) whether or not the criteria are specified, because franchisors are entitled to choose with whom they deal.<sup>21</sup>

Article 4(e) prevents the application of the regulation where a restriction is:

"agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier to selling the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods."

Guideline 56 makes it clear that firms buying components from independent suppliers may not restrict the latter from supplying end-users or repairers.<sup>22</sup> There is, however, a compromise: the maker of the component may require its own dealers to acquire spares only from it.

The major objection to article 4 is that the black-listed provisions are all restraints on intra-brand competition, which the Commission in its green paper said<sup>23</sup> were less important now that it was applying a more economic approach. Resale price maintenance has raised concern in Europe as being based on national boundaries, with different prices in different member states. Moreover, in the 1960s, the Commission rejected Chicago views that firms at different levels of trade provide complementary products and neither has an incentive to restrict the production of the other at an early stage.

There is now concern that one cannot rely on the supplier's not giving more protection than benefits consumers, because it might want to induce invest-

ments and services that are wanted only by marginal consumers. Moreover, these restraints may delay the success of completely new ways of marketing. Discount stores like Wal-Mart may need to be able to discount the prices of prestige brands.

Territorial restraints have been treated by Commission and ECJ as illegal "by their very nature", but I wonder why a supplier should be able to protect itself or a dealer but not a technology licensee from active sales. Moreover, the distinction between active and passive sales is not particularly sensible. The problem of grey goods deterring investment by dealers in services wanted by consumers will become far greater as the internet reduces the margin on which parallel traders can operate.

It is sad that a hard-core restraint is not merely excluded from the exemption, but prevents it from applying to other provisions. Those well-advised will abstain from inserting them, smaller firms may get caught.

## Conditions

### *Article 5, guidelines 57-61, 66 and 67*

Article 5 provides that the exemption shall not apply to various direct or indirect provisions. Articles 5(a) and (b) specify non-compete clauses lasting over 5 years or continuing after the end of the term of the distribution agreement.

The validity of other terms of the agreement is not affected when there is a contractual provision of the kind listed in article 5. Article 5 prevents the exemption applying to non-compete clauses imposed on buyers for more than 5 years or after the term of the agreement, etc., but the other terms may be exempted.

The possibility of severance is important because in *Delimitis (Stergios) v. Henninger Brau*<sup>24</sup> the ECJ ruled that such provisions do not have the object of restricting competition and have that effect only when they place real and concrete obstacles in the way of the supplier's competitors. This is the case only if there are entry barriers downstream and so many retailers are tied to one or other of the suppliers for so long that a new supplier cannot enter the market or

<sup>21</sup> *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis* (161/84), (1986) E.C.R. 353.

<sup>22</sup> Compare *Hugin — Uptons Cash Registers and Business Equipment Ltd. v. Hugin Kassaregister AB*, OJ 1978, L22/23, (1978) 1 C.M.L.Rev. D19; on appeal, *Hugin Kassaregister AB v. Commission* (22/78), (1979) E.C.R. 1869.

<sup>23</sup> Cf. footnote 3.

<sup>24</sup> (C-234/89), 28 February 1991, (1991) E.C.R. I-935, (1992) 5 C.M.L.Rev. 210, (1992) 2 C.E.C. 530.

existing ones grow to a minimum efficient size. Moreover, the agreements of only those suppliers making a substantial contribution to the foreclosure infringe article 81(1). There is seldom need for an exemption.

Guideline 107, however, lists other objections to what the Commission now calls "single branding restraints". They make the market more rigid, may facilitate collusion and, where the buyer is a retailer, prevent consumers from making comparisons in a single store.

Article 1(b) defines "non-compete" to include a provision requiring a buyer to take 80% or more of its total requirements of the contract goods and their substitutes from the same supplier. Given the ceiling of the buyer's market share at 30%, and the possibility of the Commission or a national authority withdrawing the exemption one wonders why article 5 is necessary.

Tacitly renewable contracts are still treated by the regulation as being excessive, even when the dealer can terminate the contract unilaterally.<sup>25</sup> The contract goods may include more than one group of products.

Where the buyer is operating from premises provided by the supplier, non-compete provisions are permitted for as long as the premises are occupied, as long as they do not last more than a year after the expiry of the agreement.

Franchisors are concerned by article 5. Five years may be too short a period where the buyer gains a reputation through dealing with the products of the supplier and wants to use it to promote competing products. In *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis*,<sup>26</sup> however, the ECJ held that a non-compete clause might continue for a reasonable time after the termination of the contract without infringing article 81(1). Since this blacklist does not affect other provisions in the agreement and non-compete provisions rarely have the effect of restricting competition, the Commission's limitations are not as important as those under article 4.

Article 5(c) excludes from the block exemption:

"any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers."

<sup>25</sup> Single branding restraints may not contribute substantially to any foreclosure if terminable on a reasonably short period of notice. See *Neste Markkinointi Oy v. Ytuuli Ky, and others*, (C-214/99) (2001) 4 C.M.L.Rev. 993, (2001) CEC 54.

<sup>26</sup> (161/84), (1986) E.C.R. 353.

This may be avoided by not specifying the criteria on the basis of which dealers are approved or by a location clause which does not infringe article 81 (1).<sup>27</sup> Guideline 61 states that article 5(c) is intended to prevent competing suppliers from each approving the same dealers and preventing other suppliers from supplying them. Again this would have the effect of restricting competition only in the circumstances specified in *Delimitis*.

## Withdrawal of Exemption

### *Articles 6-8, guidelines 71, 103, 229*

In only one reported case has a group exemption been withdrawn,<sup>28</sup> and with the low ceiling for market share, one might expect fewer withdrawals in future.

Nevertheless, the provisions are complex. Article 6 provides for the Commission to withdraw the benefit of the exemption where the agreement does not merit it. National authorities also have power to withdraw it where there is a distinct geographic market within its territory (article 7 and guideline 76). If the agreement restricts competition in more than one member state, only the Commission can terminate the benefit of the group exemption (guideline 77). National authorities must use the procedures provided by national law and the withdrawal will have no effect outside that country (guideline 78).

The safe harbour of the regulation, even when the relevant market share is below 30%, is not so safe, even when there are no blacklisted provisions. The exemption may be withdrawn by national authorities as well as the Commission and some national authorities are becoming aggressive.

The Commission may also withdraw the benefit by regulation where parallel networks of similar vertical restraints cover over half the relevant market (guidelines 80 - 87). This provision avoids the difficulty faced by the Commission after the appeal in *Langnese*<sup>29</sup> from its decisions on ice creams in Germany. It could condemn existing agreements, but had no power to restrain the firms from taking advantage of the group exemption for the future. Now it has such power.

<sup>27</sup> *Pronuptia* (161/84) (1986) E.C.R. 353.

<sup>28</sup> *Langnese-Iglo GmbH & Co. KG, Mars GmbH v. OJ* 1993, L183/19, (1994) 4 C.M.L.Rev. 51, paras 208 - 9. Usually, if the Commission starts proceedings to withdraw the benefit of a group exemption, the parties negotiate and alter the provisions, that concern, the Commission, as happened in *Tetra Pak* OJ 1988, L272/27, (1990) 4 C.M.L.Rev. 47, Withdrawal cannot date from a period before a decision is made (guideline 75).

<sup>1</sup> *Ibid.*



The institution withdrawing the exemption from an individual agreement bears the onus of proof to show that the agreement infringes article 81(1) and does not merit exemption (guideline 71).

### Transitional Provisions and Entry into Force

*Articles 12 and 13, guidelines 9 and 39*

The regulation came into effect at the beginning of 2000 to extend the life of the former group exemptions, but the new regime started from June 1, 2000. Old agreements, e.g. by manufacturers with large market shares, made before June 2000<sup>30</sup> were to be exempt until the end of 2001 if they complied with the former regulations. It is thought that this also applies to new agreements made on forms no more restrictive than those used before June 2000. A non-compete provision in such an "old agreement" will remain exempt if there are no more than 5 years to run at the end of 2001.

### Agency

*Guidelines 12-20*

The guidelines include a section on agency - our long-awaited notice. An integrated agent whose contract with its principal does not infringe article 81(1) is one which does not bear the financial and commercial risks of the transaction, not only the risk of unsold stocks as previously. An agent will be treated as independent if it contributes to advertising budgets, maintains stocks at its own risk or organises a distribution network with market specific investment in equipment, premises or personnel. This last narrows the exclusion from article 81(1) in the old Christmas Message.<sup>31</sup>

The guidelines deal with agents for negotiation or conclusion of contracts (para. 12). The guidelines differ from the draft notice that circulated in 1990 in that where the agent does not bear risk, its agreement with its principal is entirely outside article 81. Bans on even passive sales may be imposed as the agent is treated as being part of the principal's undertaking and there is no agreement between undertakings. When an agency agreement infringes article 81(1), the block exemption may apply. Article 1 (g) states:

" 'Buyer' includes an undertaking which, under an agreement falling within article 81(1) of the Treaty, sells goods or services on behalf of another undertaking."

After going through the regulation, the guidelines end with a framework for analysing vertical agreements that are excluded from the regulation, much of it culled from the green paper of 1996. It is important to go through these before advising.

### Conclusion

It may be that the ceiling for market share is lower than was necessary to limit *per se* legality given the possibility of the Commission and national authorities withdrawing the exemption. Business complains that it is not easy to ascertain the relevant market with certainty. Moreover, in its notice on market definition the Commission has minimised the relevance of conditions of entry.

Officials reply that the Commission can now grant individual exemptions for vertical distribution agreements retroactive to a date before notification,<sup>32</sup> so if the parties fail to realise that their market share is high, they can still obtain an exemption. This will cease to be true if the proposal to replace regulation 17 is adopted.

Everyone welcomes the wider coverage of the exemption. The old distinctions were based on the Commission's reactions to notifications - where there were too many notifications to monitor it granted a group exemption. They were not based on economic considerations.

The blacklists are doctrinal. Article 4 relates to resale price maintenance, probably because the case law was developed before it was realised that the supplier often had no reason to give more protection than was required to induce investment in favour of the brand as a whole, but also because the dealers of many brands in each member state charged different prices. One might have thought that if forbidding restraints on interstate trade would help to unify the market, it would have been unified by now. Yet fewer restraints on exports can be imposed under this regulation than under its predecessor. The Commission's conversion to a more economic approach is not complete - many officials still perceive problems *ex post*.

<sup>30</sup>*Parfums Marcel Rochas Vertriebs-GmbH v. Bitsch* (1/70), (1970) E.C.R. 515.

<sup>31</sup> Notice on exclusive agency contracts made with commercial agents 1962, JO 1962, 139/62, C.M.R. 2697.

<sup>32</sup> Council Regulation 1216/99 amending reg. 17 - first regulation implementing Articles 81 (ex article 85) and 82 (ex article 86), OJ 1999, L148/5.