

## COMMISSION REGULATION (EEC) No 1984/83

of 22 June 1983

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices <sup>(1)</sup>, as last amended by the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation <sup>(2)</sup>,

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

- (1) Whereas Regulation No 19/65/EEC empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of bilateral exclusive purchasing agreements entered into for the purpose of the resale of goods and corresponding concerted practices falling within Article 85 <sup>(1)</sup>;
- (2) Whereas experience to date makes it possible to define three categories of agreements and concerted practices which can be regarded as normally satisfying the conditions laid down in Article 85 (3); whereas the first category comprises exclusive purchasing agreements of short and medium duration in all sectors of the economy; whereas the other two categories comprise long-term exclusive purchasing agreements entered into for the resale of beer in premises used for the sale and consumption (beer supply agreements) and of petroleum products in filling stations (service-station agreements);
- (3) Whereas exclusive purchasing agreements of the categories defined in this Regulation may fall within the prohibition contained in Article 85 (1) of the Treaty; whereas this will often be the case

with agreements concluded between undertakings from different Member States; whereas an exclusive purchasing agreement to which undertakings from only one Member State are party and which concerns the resale of goods within that Member State may also be caught by the prohibition; whereas this is in particular the case where it is one of a number of similar agreements which together may affect trade between Member States;

- (4) Whereas it is not necessary expressly to exclude from the defined categories those agreements which do not fulfil the conditions of Article 85 (1) of the Treaty;
- (5) Whereas the exclusive purchasing agreements defined in this Regulation lead in general to an improvement in distribution; whereas they enable the supplier to plan the sales of his goods with greater precision and for a longer period and ensure that the reseller's requirements will be met on a regular basis for the duration of the agreement; whereas this allows the parties to limit the risk to them of variations in market conditions and to lower distribution costs;
- (6) Whereas such agreements also facilitate the promotion of the sales of a product and lead to intensive marketing because the supplier, in consideration for the exclusive purchasing obligation, is as a rule under an obligation to contribute to the improvement of the structure of the distribution network, the quality of the promotional effort or the sales success; whereas, at the same time, they stimulate competition between the products of different manufacturers; whereas the appointment of several resellers, who are bound to purchase exclusively from the manufacturer and who take over sales promotion, customer services and carrying of stock, is often the most effective way, and sometimes the only way, for the manufacturer to penetrate a market and compete with other manufacturers already present; whereas this is particularly so in the case of small and medium-sized undertakings; whereas it must be left to the contracting parties to decide whether and to what extent they consider it desirable to incorporate in their agreements terms concerning the promotion of sales;

<sup>(1)</sup> OJ No 36, 6. 3. 1965, p. 533/65.

<sup>(2)</sup> OJ No C 172, 10. 7. 1982, p. 7

- (7) Whereas, as a rule, exclusive purchasing agreements between suppliers and resellers also allow consumers a fair share of the resulting benefit as they gain the advantages of regular supply and are able to obtain the contract goods more quickly and more easily;
- (8) Whereas this Regulation must define the obligations restricting competition which may be included in an exclusive purchasing agreement; whereas the other restrictions of competition allowed under this Regulation in addition to the exclusive purchasing obligation lead to a clear division of functions between the parties and compel the reseller to concentrate his sales efforts on the contract goods; whereas they are, where they are agreed only for the duration of the agreement, generally necessary in order to attain the improvement in the distribution of goods sought through exclusive purchasing; whereas further restrictive obligations and in particular those which limit the reseller's choice of customers or his freedom to determine his prices and conditions of sale cannot be exempted under this Regulation;
- (9) Whereas the exemption by categories should be reserved for agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 85 (3) of the Treaty;
- (10) Whereas it is not possible, in the absence of a case-by-case examination, to consider that adequate improvements in distribution occur where a manufacturer imposes an exclusive purchasing obligation with respect to his goods on a manufacturer with whom he is in competition; whereas such agreements should, therefore, be excluded from the exemption by categories; whereas certain derogations from this rule in favour of small and medium-sized undertakings can be allowed;
- (11) Whereas certain conditions must be attached to the exemption by categories so that access by other undertakings to the different stages of distribution can be ensured; whereas, to this end, limits must be set to the scope and to the duration of the exclusive purchasing obligation; whereas it appears appropriate as a general rule to grant the benefit of a general exemption from the prohibition on restrictive agreements only to exclusive purchasing agreements which are concluded for a specified product or range of products and for not more than five years;
- (12) Whereas, in the case of beer supply agreements and service-station agreements, different rules should be laid down which take account of the particularities of the markets in question;
- (13) Whereas these agreements are generally distinguished by the fact that, on the one hand, the supplier confers on the reseller special commercial or financial advantages by contributing to his financing, granting him or obtaining for him a loan on favourable terms, equipping him with a site or premises for conducting his business, providing him with equipment or fittings, or undertaking other investments for his benefit and that, on the other hand, the reseller enters into a long-term exclusive purchasing obligation which in most cases is accompanied by a ban on dealing in competing products;
- (14) Whereas beer supply and service-station agreements, like the other exclusive purchasing agreements dealt with in this Regulation, normally produce an appreciable improvement in distribution in which consumers are allowed a fair share of the resulting benefit;
- (15) Whereas the commercial and financial advantages conferred by the supplier on the reseller make it significantly easier to establish, modernize, maintain and operate premises used for the sale and consumption of drinks and service stations; whereas the exclusive purchasing obligation and the ban on dealing in competing products imposed on the reseller incite the reseller to devote all the resources at his disposal to the sale of the contract goods; whereas such agreements lead to durable cooperation between the parties allowing them to improve or maintain the quality of the contract goods and of the services to the customer and sales efforts of the reseller; whereas they allow long-term planning of sales and consequently a cost effective organization of production and distribution; whereas the pressure of competition between products of different makes obliges the undertakings involved to determine the number and character of premises used for the sale and consumption of drinks and service stations, in accordance with the wishes of customers;
- (16) Whereas consumers benefit from the improvements described, in particular because they are ensured supplies of goods of satisfactory quality at fair prices and conditions while being able to choose between the products of different manufacturers;
- (17) Whereas the advantages produced by beer supply agreements and service-station agreements cannot otherwise be secured to the

same extent and with the same degree of certainty; whereas the exclusive purchasing obligation on the reseller and the non-competition clause imposed on him are essential components of such agreements and thus usually indispensable for the attainment of these advantages; whereas, however, this is true only as long as the reseller's obligation to purchase from the supplier is confined in the case of premises used for the sale and consumption of drinks to beers and other drinks of the types offered by the supplier, and in the case of service stations to petroleum-based fuel for motor vehicles and other petroleum-based fuels; whereas the exclusive purchasing obligation for lubricants and related petroleum-based products can be accepted only on condition that the supplier provides for the reseller or finances the procurement of specific equipment for the carrying out of lubrication work; whereas this obligation should only relate to products intended for use within the service station;

(18) Whereas, in order to maintain the reseller's commercial freedom and to ensure access to the retail level of distribution on the part of other suppliers, not only the scope but also the duration of the exclusive purchasing obligation must be limited; whereas it appears appropriate to allow drinks suppliers a choice between a medium-term exclusive purchasing agreement covering a range of drinks and a long-term exclusive purchasing agreement for beer; whereas it is necessary to provide special rules for those premises used for the sale and consumption of drinks which the supplier lets to the reseller; whereas, in this case, the reseller must have the right to obtain, under the conditions specified in this Regulation, other drinks, except beer, supplied under the agreement or of the same type but bearing a different trademark; whereas a uniform maximum duration should be provided for service-station agreements, with the exception of tenancy agreements between the supplier and the reseller, which takes account of the long-term character of the relationship between the parties;

(19) Whereas to the extent that Member States provide, by law or administrative measures, for the same upper limit of duration for the exclusive purchasing obligation upon the reseller as in service-station agreements laid down in this Regulation but provide for a permissible duration which varies in proportion to the consideration provided by the supplier or generally provide for a shorter duration than that permitted by this Regulation, such laws or measures are not contrary to the objectives of this Regulation which, in this respect, merely sets an upper limit to the duration of service-

station agreements; whereas the application and enforcement of such national laws or measures must therefore be regarded as compatible with the provisions of this Regulation;

- (20) Whereas the limitations and conditions provided for in this Regulation are such as to guarantee effective competition on the markets in question; whereas, therefore, the agreements to which the exemption by category applies do not normally enable the participating undertakings to eliminate competition for a substantial part of the products in question;
- (21) Whereas, in particular cases in which agreements or concerted practices satisfying the conditions of this Regulation nevertheless have effects incompatible with Article 85 (3) of the Treaty, the Commission may withdraw the benefit of the exemption by category from the undertakings party thereto;
- (22) Whereas agreements and concerted practices which satisfy the conditions set out in this Regulation need not be notified; whereas an undertaking may nonetheless, in a particular case where real doubt exists, request the Commission to declare whether its agreements comply with this Regulation;
- (23) Whereas this Regulation does not affect the applicability of Commission Regulation (EEC) No 3604/82 of 23 December 1982 on the application of Article 85 (3) of the Treaty to categories of specialization agreements<sup>(1)</sup>; whereas it does not exclude the application of Article 86 of the Treaty,

HAS ADOPTED THIS REGULATION:

#### TITLE I

#### General provisions

##### *Article 1*

Pursuant to Article 85 (3) of the Treaty, and subject to the conditions set out in Articles 2 to 5 of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, to purchase certain goods specified in the agreement for resale only from the supplier or from a connected undertaking or from another undertaking which the supplier has entrusted with the sale of his goods.

<sup>(1)</sup> OJ No L 376, 31. 12. 1982, p. 33.

*Article 2*

1. No other restriction of competition shall be imposed on the supplier than the obligation not to distribute the contract goods or goods which compete with the contract goods in the reseller's principal sales area and at the reseller's level of distribution.
2. Apart from the obligation described in Article 1, no other restriction of competition shall be imposed on the reseller than the obligation not to manufacture or distribute goods which compete with the contract goods.
3. Article 1 shall apply notwithstanding that the reseller undertakes any or all of the following obligations;
  - (a) to purchase complete ranges of goods;
  - (b) to purchase minimum quantities of goods which are subject to the exclusive purchasing obligation;
  - (c) to sell the contract goods under trademarks, or packed and presented as specified by the supplier;
  - (d) to take measures for the promotion of sales, in particular:
    - to advertise,
    - to maintain a sales network or stock of goods,
    - to provide customer and guarantee services,
    - to employ staff having specialized or technical training.

*Article 3*

Article 1 shall not apply where:

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

neither by their nature nor according to commercial usage connected to each other;

- (d) the agreement is concluded for an indefinite duration or for a period of more than five years.

*Article 4*

1. Article 3 (a) and (b) shall also apply where the goods there referred to are manufactured by an undertaking connected with a party to the agreement.
2. Connected undertakings are:
  - (a) undertakings in which a party to the agreement, directly or indirectly:
    - owns more than half the capital or business assets, or
    - has the power to exercise more than half the voting rights, or
    - has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or
    - has the right to manage the affairs;
  - (b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a);
  - (c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).

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

*Article 5*

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

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

3. For the purpose of calculating total turnover within the meaning of Article 3 (b), the turnovers achieved during the last financial year by the party to

the agreement and connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the parties to the agreement or between these undertakings and undertakings connected with them or between the connected undertakings.

## TITLE II

### Special provisions for beer supply agreements

#### Article 6

1. Pursuant to Article 85 (3) of the Treaty, and subject to Articles 7 to 9 of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for according special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain beers, or certain beers and certain other drinks, specified in the agreement for resale in premises used for the sale and consumption of drinks and designated in the agreement.

2. The declaration in paragraph 1 shall also apply where exclusive purchasing obligations of the kind described in paragraph 1 are imposed on the reseller in favour of the supplier by another undertaking which is itself not a supplier.

#### Article 7

1. Apart from the obligation referred to in Article 6, no restriction on competition shall be imposed on the reseller other than:

- (a) the obligation not to sell beers and other drinks which are supplied by other undertakings and which are of the same type as the beers or other drinks supplied under the agreement in the premises designated in the agreement;
- (b) the obligation, in the event that the reseller sells in the premises designated in the agreement beers which are supplied by other undertakings and which are of a different type from the beers supplied under the agreement, to sell such beers only in bottles, cans or other small packages, unless the sale of such beers in draught form is customary or is necessary to satisfy a sufficient demand from consumers;
- (c) the obligation to advertise goods supplied by other undertakings within or outside the premises

designated in the agreement only in proportion to the share of these goods in the total turnover realized in the premises.

2. Beers or other drinks of the same type are those which are not clearly distinguishable in view of their composition, appearance and taste.

#### Article 8

1. Article 6 shall not apply where:

- (a) the supplier or a connected undertaking imposes on the reseller exclusive purchasing obligations for goods other than drinks or for services;
- (b) the supplier restricts the freedom of the reseller to obtain from an undertaking of his choice either services or goods for which neither an exclusive purchasing obligation nor a ban on dealing in competing products may be imposed;
- (c) the agreement is concluded for an indefinite duration or for a period of more than five years and the exclusive purchasing obligation relates to specified beers and other drinks;
- (d) the agreement is concluded for an indefinite duration or for a period of more than 10 years and the exclusive purchasing obligation relates only to specified beers;
- (e) the supplier obliges the reseller to impose the exclusive purchasing obligation on his successor for a longer period than the reseller would himself remain tied to the supplier.

2. Where the agreement relates to premises which the supplier lets to the reseller or allows the reseller to occupy on some other basis in law or in fact, the following provisions shall also apply:

- (a) notwithstanding paragraphs (1) (c) and (d), the exclusive purchasing obligations and bans on dealing in competing products specified in this Title may be imposed on the reseller for the whole period for which the reseller in fact operates the premises;
- (b) the agreement must provide for the reseller to have the right to obtain:
  - drinks, except beer, supplied under the agreement from other undertakings where these undertakings offer them on more favourable conditions which the supplier does not meet,
  - drinks, except beer, which are of the same type as those supplied under the agreement but which bear different trade marks, from other undertakings where the supplier does not offer them.

*Article 9*

Articles 2 (1) and (3), 3 (a) and (b), 4 and 5 shall apply *mutatis mutandis*.

## TITLE III

**Special provisions for service-station agreements***Article 10*

Pursuant to Article 85 (3) of the Treaty and subject to Articles 11 to 13 of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain petroleum-based motor-vehicle fuels or certain petroleum-based motor-vehicle and other fuels specified in the agreement for resale in a service station designated in the agreement.

*Article 11*

Apart from the obligation referred to in Article 10, no restriction on competition shall be imposed on the reseller other than:

- (a) the obligation not to sell motor-vehicle fuel and other fuels which are supplied by other undertakings in the service station designated in the agreement;
- (b) the obligation not to use lubricants or related petroleum-based products which are supplied by other undertakings within the service station designated in the agreement where the supplier or a connected undertaking has made available to the reseller, or financed, a lubrication bay or other motor-vehicle lubrication equipment;
- (c) the obligation to advertise goods supplied by other undertakings within or outside the service station designated in the agreement only in proportion to the share of these goods in the total turnover realized in the service station;
- (d) the obligation to have equipment owned by the supplier or a connected undertaking or financed by the supplier or a connected undertaking serviced by the supplier or an undertaking designated by him.

*Article 12*

1. Article 10 shall not apply where:

- (a) the supplier or a connected undertaking imposes on the reseller exclusive purchasing obligations for goods other than motor-vehicle and other fuels or for services, except in the case of the obligations referred to in Article 11 (b) and (d);
- (b) the supplier restricts the freedom of the reseller to obtain, from an undertaking of his choice, goods or services, for which under the provisions of this Title neither an exclusive purchasing obligation nor a ban on dealing in competing products may be imposed;
- (c) the agreement is concluded for an indefinite duration or for a period of more than 10 years;
- (d) the supplier obliges the reseller to impose the exclusive purchasing obligation on his successor for a longer period than the reseller would himself remain tied to the supplier.

2. Where the agreement relates to a service station which the supplier lets to the reseller, or allows the reseller to occupy on some other basis, in law or in fact, exclusive purchasing obligations or prohibitions of competition indicated in this Title may, notwithstanding paragraph 1 (c), be imposed on the reseller for the whole period for which the reseller in fact operates the premises.

*Article 13*

Articles 2 (1) and (3), 3 (a) and (b), 4 and 5 of this Regulation shall apply *mutatis mutandis*.

## TITLE IV

**Miscellaneous provisions***Article 14*

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

- (a) the contract goods are not subject, in a substantial part of the common market, to effective competition from identical goods or goods considered by users as equivalent in view of their characteristics, price and intended use;
- (b) access by of other suppliers to the different stages of distribution in a substantial part of the common market is made difficult to a significant extent;

(c) the supplier without any objectively justified reason:

1. refuses to supply categories of resellers who cannot obtain the contract goods elsewhere on suitable terms or applies to them differing prices or conditions of sale;
2. applies less favourable prices or conditions of sale to resellers bound by an exclusive purchasing obligation as compared with other resellers at the same level of distribution.

*Article 15*

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

2. In the period 1 July 1983 to 31 December 1988, the prohibition in Article 85 (1) of the Treaty shall not apply to agreements of the kinds described in Articles 6 and 10 which either were in force on 1 July 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions of Regulation No 67/67/EEC.

3. In the case of agreements of the kinds described in Articles 6 and 10, which were in force on 1 July 1983 and which expire after 31 December 1988, the prohibition in Article 85 (1) of the Treaty shall not apply in the period from 1 January 1989 to the expiry of the agreement but at the latest to the expiry of this

Regulation to the extent that the supplier releases the reseller, before 1 January 1989, from all obligations which would prevent the application of the exemption under Titles II and III.

*Article 16*

This Regulation shall not apply to agreements by which the supplier undertakes with the reseller to supply only to the reseller certain goods for resale, in the whole or in a defined part of the Community, and the reseller undertakes with the supplier to purchase these goods only from the supplier.

*Article 17*

This Regulation shall not apply where the parties or connected undertakings, for the purpose of resale in one and the same premises used for the sale and consumption of drinks or service station, enter into agreements both of the kind referred to in Title I and of a kind referred to in Title II or III.

*Article 18*

This Regulation shall apply *mutatis mutandis* to the categories of concerted practices defined in Articles 1, 6 and 10.

*Article 19*

This Regulation shall enter into force on 1 July 1983. It shall expire on 31 December 1997.

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

Done at Brussels, 22 June 1983.

*For the Commission*

Frans ANDRIESSEN

*Member of the Commission*

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