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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 1215/1999

of 10 June 1999

amending Regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices (*)

THE COUNCIL OF THE EUROPEAN UNION,

into such obligations with each other in respect of exclusive supply and purchase for resale;

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

- (2) Whereas, pursuant to Regulation No 19/65/EEC, the Commission has in particular adopted Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 81(3) of the Treaty to categories of exclusive distribution agreements (6), Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 81(3) of the Treaty to categories of exclusive purchasing agreements (7) and Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 81(3) of the Treaty to categories of franchise agreements (8) (exemption regulations);

- (1) Whereas by Regulation No 19/65/EEC (4), the Council empowered the Commission, without prejudice to the application of Council Regulation No 17: first Regulation implementing Articles 81 and 82 of the Treaty (5), and in accordance with Article 81(3) of the Treaty, to adopt regulations declaring that Article 81(1) does not apply to certain categories of agreements, and in particular to categories of agreements to which only two undertakings are party and whereby one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common market, or whereby one party agrees with the other to purchase only from that other certain goods for resale, or whereby the two undertakings enter into

- (3) Whereas on 22 January 1997 the Commission published a Green Paper on Vertical Restraints in EC Competition Policy, which generated a wide-ranging public debate on the application of Article 81(1) and (3) of the Treaty to vertical agreements or concerted practices;

- (4) Whereas the response to the Green Paper from the Member States, the European Parliament, the Economic and Social Committee, the Committee of the Regions and interested parties has been generally in favour of reform of Community competition policy on vertical agreements; whereas the block exemption regulations already referred to should accordingly be revised;

(*) Editorial Note: The title of Regulation No 19/65/EEC has been adjusted to take account of the renumbering of the Articles of the Treaty establishing the European Community in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty.

(1) OJ C 365, 26.11.1998, p. 27.

(2) Opinion delivered on 15 April 1999 (not yet published in the Official Journal).

(3) OJ C 116, 28.4.1999.

(4) OJ 36, 6.3.1965, p. 533/65. Regulation as last amended by the 1994 Act of Accession.

(5) OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by the 1994 Act of Accession.

(6) OJ L 173, 30.6.1983, p. 1. Regulation as last amended by Regulation (EC) No 1582/97 (OJ L 214, 6.8.1997, p. 27).

(7) OJ L 173, 30.6.1983, p. 5. Regulation as last amended by Regulation (EC) No 1582/97.

(8) OJ L 359, 28.12.1988, p. 46. Regulation as amended by the 1994 Act of Accession.

- (5) Whereas any such reform must meet the two requirements of ensuring effective protection of competition and providing adequate legal certainty for firms; whereas the pursuit of those objectives should take account of the need as far as possible to simplify administrative supervision and the legislative framework; whereas at the same level of market power vertical restraints are generally considered less harmful to competition than horizontal restraints;
- (6) Whereas the exemption regulations referred to do not confine themselves to defining the categories of agreements to which they apply and to specifying the restrictions or clauses which are not to be contained in the agreements, but they also list the exempted clauses; whereas this legislative approach to contractual relations is generally perceived to be over rigid in an economic context where distribution structures and techniques are rapidly changing;
- (7) Whereas the said exemption regulations cover only those categories of bilateral exclusive agreements entered into with a view to resale which are concerned with the exclusive distribution or purchase of goods, or both, or which include restrictions imposed in relation to the assignment or use of industrial property rights; whereas they exclude from their scope, *inter alia*, vertical agreements between more than two undertakings, selective distribution agreements, agreements concerning services, and agreements concerning the supply or purchase, or both, of goods or services intended for processing or incorporation; whereas a substantial number of vertical agreements consequently cannot qualify for exemption under Article 81(3) of the Treaty until they have been examined individually by the Commission, which may reduce the legal certainty available to the undertakings concerned and make administrative supervision unnecessarily burdensome;
- (8) Whereas the debate which followed the publication of the Green Paper also drew attention to the fact that in determining the manner in which Article 81(1) and (3) are to apply proper account needs to be taken of the economic effects of vertical agreements; whereas any economic criteria limiting the scope of a block exemption by reason of the anti-competitive effects which an agreement may produce should take into account the share of the relevant market accounted for by the undertaking concerned;
- (9) Whereas, therefore, the Commission should be empowered to replace the existing legislation with legislation which is simpler, more flexible and better targeted, and which may cover all types of vertical agreements; whereas if the scope of the exemption regulation covering such agreements is to be broadened in this way, there should be criteria such as market-share thresholds to specify the circumstances where, in view of the possible economic effects of the agreements, the regulation ceases to be applicable; whereas the setting of such market share thresholds should take account of the market power of the undertaking concerned; whereas certain severe anticompetitive vertical restraints like minimum and fixed resale prices and certain types of territorial protection should be excluded from the application of the regulation irrespective of the market share of the undertaking concerned;
- (10) Whereas the powers conferred on the Commission by Regulation No 19/65/EEC do not allow it to conduct a reform of the rules currently in force which would cover all types of vertical agreements; whereas the scope of Article 1(1)(a) and (2)(b) thereof should consequently be broadened to cover all agreements caught by Article 81(1) of the Treaty which are entered into by two or more undertakings, each operating, for the purposes of the agreement, at a different level of the production or distribution chain and which relate to the conditions under which the parties may purchase, sell or resell certain goods or services (vertical agreements), including exclusive distribution agreements, exclusive purchasing agreements, franchising agreements and selective distribution agreements, or any combination of these, and certain non-reciprocal vertical agreements entered into between competing undertakings, as well as vertical agreements between an association of small and medium-sized retailers and its members or between such an association and its suppliers;
- (11) Whereas the exemption regulations referred to empower the Commission, in accordance with Article 7 of Regulation No 19/65/EEC, to withdraw the benefit of application of those regulations wherever, in a particular case, an agreement or a network of similar agreements has certain effects

which are incompatible with the conditions laid down in Article 81(3); whereas in order to ensure effective supervision of markets and greater decentralisation in the application of the Community competition rules, it is appropriate to provide that where the effects of such an agreement are felt in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct market the competent authority in that Member State may withdraw the benefit of the block exemption in its territory and adopt a decision aimed at eliminating those effects; whereas the said Article 7 should accordingly be supplemented so as to specify the circumstances in which the competent authorities in the Member States can withdraw the benefit of application of the block-exemption regulation;

- (12) Whereas, in order to guarantee an effective control of the effects arising in a given market from the existence of parallel networks of similar agreements, a block-exemption regulation may establish the conditions under which those networks of agreements may be excluded from its application by means of regulation; whereas such conditions may be based on criteria such as the market coverage rate of these networks of agreements; whereas the Commission will accordingly be empowered to establish by means of regulation that in a given market the relevant agreements fulfil the said conditions; whereas in such a case, the Commission will have to fix a transitional period of not less than six months, at the expiry of which the block exemption will cease to be applicable to the relevant agreements on that market; whereas this regulation establishing the non-application of the block-exemption regulation for the relevant agreements on a particular market has as effect the application of Article 81 of the Treaty by individual examination; whereas the Commission will consult the Advisory Committee before the adoption of such a regulation and, on request of a Member State, also before the publication of the draft regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation No 19/65/EEC is hereby amended as follows:

1. Article 1 shall be amended as follows:

- (a) paragraph 1 shall be replaced by the following:

‘1. Without prejudice to the application of Regulation No 17 and in accordance with Article 81(3) of the Treaty the Commission may by regulation declare that Article 81(1) shall not apply to:

- (a) categories of agreements which are entered into by two or more undertakings, each operating, for the purposes of the agreement, at a different level of the production or distribution chain, and which relate to the conditions under which the parties may purchase, sell or resell certain goods or services,
- (b) categories of agreements to which only two undertakings are party and which include restrictions imposed in relation to the acquisition or use of industrial property rights, in particular of patents, utility models, designs or trade marks, or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or to the application of industrial processes’;

- (b) in paragraph 2(b), the words ‘the clauses which must be contained in the agreements, or’ shall be deleted;

- (c) paragraph 3 shall be replaced by the following:

‘3. Paragraphs 1 and 2 shall apply by analogy to categories of concerted practices’.

2. The following Article shall be inserted:

Article 1a

A regulation pursuant to Article 1 may stipulate the conditions which may lead to the exclusion from its application of certain parallel networks of similar agreements or concerted practices operating on particular market; when these circumstances are fulfilled the Commission may establish this by means of regulation and fix a period at the expiry of which the Regulation pursuant to Article 1 would no longer be applicable in respect of the relevant agreements or concerted practices on that market; such period must not be shorter than six months’.

3. Article 6(1) shall be replaced by the following:

‘1. The Commission shall consult the Advisory Committee on Restrictive Practices and Monopolies:

- (a) with regard to a regulation pursuant to Article 1 before publishing a draft regulation and before adopting a regulation;
- (b) with regard to a regulation pursuant to Article 1a before publishing a draft regulation if requested by a Member State, and before adopting a regulation'.
4. In Article 7 the existing paragraph shall become paragraph 1 and the following paragraph shall be added:
- '2. When in any particular case agreements or concerted practices to which a regulation adopted pursuant to Article 1 applies have certain effects

which are incompatible with the conditions laid down in Article 81(3) of the Treaty in the territory of a Member State, or in part thereof, which has all the characteristics of a distinct market, the competent authority in that Member State may on its own initiative or at the request of the Commission or of natural or legal persons claiming a legitimate interest withdraw the benefit of application of that regulation'.

Article 2

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

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

Done at Luxembourg, 10 June 1999.

For the Council
The President
K.-H. FUNKE
